

# Piracy and War Risks

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# Piracy and War Risks

- We will look at:
  - “*war*” and “*warlike operations*” contrasted with piracy
  - The common law approach to war risks compared to the standard charter war risk clauses
  - The effect of war risks, particularly piracy, on rights and obligations under a charterparty
  - The issue of deviation



# Piracy and War Risks

- What is meant by war?
- Are acts of piracy war and warlike operations?
  - Requirements
    - A conflict between two sides
    - A political objective to seize territory
    - Nature and scale of operations themselves – what does this mean?



# Piracy and War Risks

- What is meant by warlike operation?
  - Narrow view

Warlike operation must form part of the belligerent act, must have a close connection
  - Wider view

No actual war needed, invasion of country A by country B to put down a rebellion threatening the Government of country B is warlike operation, but not war
  - There is a political motive



# Piracy and War Risks

- What is meant by piracy
  - To be contrasted with war and war like operations.
  - Characteristics
    - (a) The event must take place at sea
    - (b) Violence must be present
    - (c) Personal gain, not political advancement
  - In the Gulf of Aden (a) and (b) likely to be satisfied, necessary to consider (c)



## Piracy and War Risks

- What is the motive?
- Is there a political purpose?
- Pirate attacks clearly not war, war like operations or hostility, war etc. has a political motive, not a criminal motive



# Piracy and War Risks

## Common Law

- Common law approach to war risks
- If Owner not protected by Conwartime, then must look at common law rights under English law

# Piracy and War Risks

- “TEUTONIA”

*“It seems obvious that, if a Master receives credible information that, if he continues in the direct course of his voyage, his ship will be exposed to some imminent peril, as for instance, **that there are Pirates in his course**, or Icebergs, or other dangers to navigation, he must be justified in pausing and deviating from the direct course, and taking any step which a prudent man would take for the purpose of avoiding the danger”.*





## Piracy and War Risks

- Master must assess probability of danger
- Standard is objective not subjective
- Ordinary prudent Master is the standard
- Information regarding danger must be credible and
- Danger posed must be “*imminent*”



## Piracy and War Risks

- Some examples where Owners were held not to be able to refuse orders
- *East Asiatic Co. -v- Toronto* – despite existence of a minefield.
- *Palace Shipping -v- Gans* – Charterers' orders legitimate notwithstanding announcement by German Government that attacks would be made on merchant shipping by submarines.



## Piracy and War Risks

- Risk assessment analysis is quantitative
- Common law and Conwartime tests different
- What is the risk in the Gulf of Aden?
- If risk less than 1%, can Owner refuse orders at common law?



# Piracy and War Risks

## Conwartime clause

- Position different from common law
- Conwartime
- Right to avoid “continuing to or through” any “area or zone .... or any waterway” exposed to war risks.
- Owners and Master entitled to invoke clause
- Master has final say



# Piracy and War Risks

- Two requirements to be met
  - First, Prospective Incidents must fall within definition of war risks
  - Second, Master and/or Owners must form:
    - (a) a reasonable judgment that the vessel
    - (b) may be or
    - (c) is likely to be exposed to war risks
- Standard still objective, “*reasonable*”
- What yardstick do you use?



## Piracy and War Risks

- Look at available evidence and time decision was taken, Master may be correct, even if other Owners had different view
- As more Owners decide not to transit Gulf of Aden, then easier it will be to refuse to proceed.
- Judgment which must be reached is that there is *“likely to be”* or *“may be danger”*
- No test of *“imminent”* only one of probability
- What degree of probability?



## Piracy and War Risks

- Two tests
  - Danger is *“likely”* or
  - it *“may”* occur
- What is meant by likely? Does it mean *“probably”*? Greater than 50%?
- Current situation in Gulf of Aden not of this level, see attitude of war risk underwriters
- Even if danger is not likely, refusal may still be justified if *“may be present”*



# Piracy and War Risks

- What is meant by “may be present”
- Excludes contingent and cannot include purely fanciful
- What is the situation at the moment? How many Owners are refusing to travel?
- Is the conclusion justified that exposure to piracy may occur?
- What does this mean where Conwartime clause in charter?
  - Right to refuse to transit Gulf of Aden
  - Diversion around Cape of Good Hope probably not a breach of charter – vessel remains on hire





## Piracy and War Risks

- The assessment must be made on every occasion. Facts change all the time
- Owners and Masters allowed reasonable time to consider the risk



# Piracy and War Risks

## Convoys

- Does an Owner have a right to wait for a convoy to assemble?
- Under Conwartime and common law
- Owners responsible for safe navigation
- Reasonable for Owners to take advantage of this?
- Could this mean if no group transit, vessel unseaworthy?
- Is the vessel off-hire?



# Piracy and War Risks

## Bill of Lading exposure

- Owners may be protected – what about Charterers?
- Bills of Lading should contain Conwartime or similar clauses
- Owner always has two contracts, charterparty and Bill of Lading
- Bill of Lading holder may have claim against Owner
- What happens if Conwartime not incorporated in the Bill of Lading? Is there a problem for the Charterer?
- Clause 8 of NYPE Charter – Bills of Lading to be signed “*as presented*”
- Express indemnity on Charterer?



## Piracy and War Risks

- Is there a clause obliging Charterer to ensure Conwartime in Bills of Lading
- What is meant by Bills of Lading be signed “*without prejudice to this charterparty*”?
- What happens if greater liabilities imposed on Owner under Bill of Lading, then imposed under charter? Is Charterer liable?
- If charter contains express clause, that Conwartime should be in Bills of Lading, Owners may refuse to sign Bills of Lading.



## Piracy and War Risks

- Otherwise Owner may have no option but to sign *“as presented”*
- Could this expose Owner to a claim for deviation or delay if vessel diverted around the Cape?
- Claim by Receiver under Bill of Lading, not claim under charter
- If Bill of Lading imposed more onerous terms on Owner than under charter, is Charterer liable for damage?



# Piracy and War Risks

## Deviation

- Duty to proceed without deviation in usual or customary course
- Permissible deviation – to avoid danger to ship or cargo
- Threshold high – credible information of imminent risk
- Group transits – customary course?
- Consequence of deviation – strict liability for cargo



# Piracy and War Risks

## Seizure - Hire

- What happens in the event of a seizure?
- Is vessel off-hire? NYPE Clause 15, if not amended, does not cover piracy
- Full working of the vessel still not prevented?
- Is there an arrest clause in the rider clauses? Does this apply to a seizure by pirates or only to a political process?
- Unlikely standard clause enables a Charterer to place vessel off-hire



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