

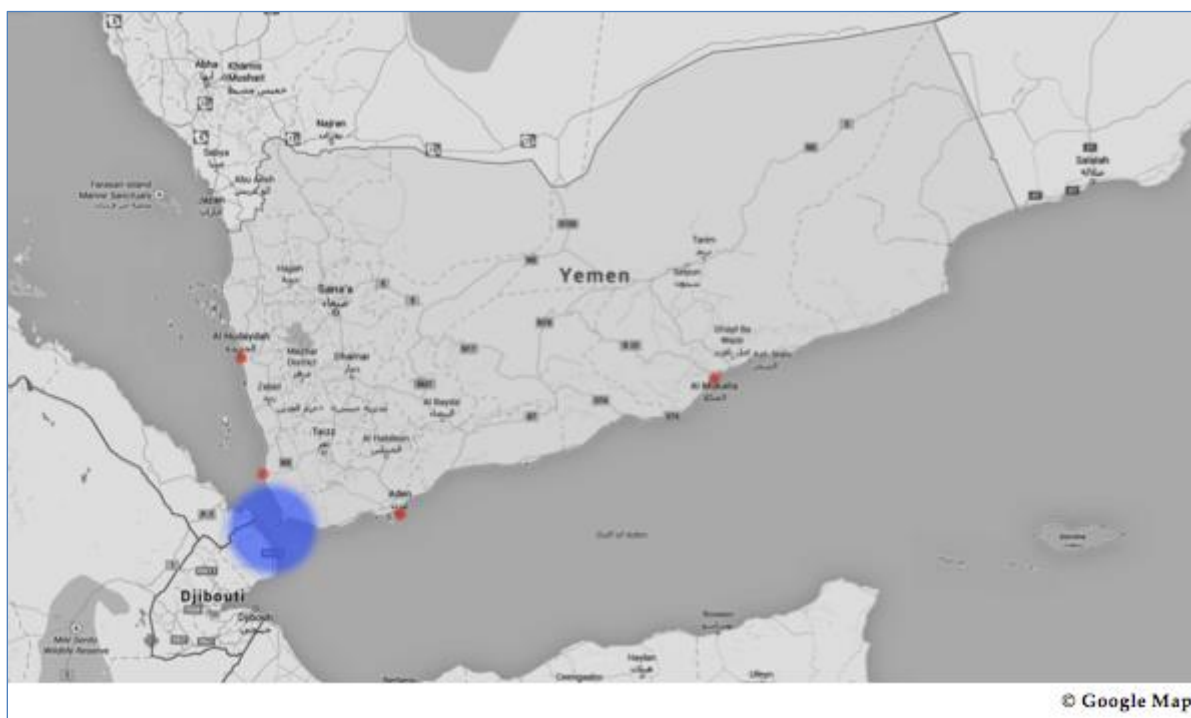
This information is provided by Tatham Macinnes:

## Shipping issues arising out of the Yemen crisis

**This article looks at the events in Yemen and considers the potential legal implications for vessels calling at or transiting the area.**

The situation in Yemen remains fluid and, with events moving quickly, very little is certain. For the maritime industry attention is focused on the south-western tip of Yemen where the Al Houthi rebels are said to have taken over a military base overlooking the strategically important Bab el-Mandeb straits. Further, they are said to have moved weapons to the small island of Perim, which sits between Yemen and Djibouti. Arguably, the rebels now threaten all shipping that seeks to transit one of the busiest bottlenecks in the world. It is unsurprising that the Egyptian government has expressed real concern at the development or that the Saudi-led Sunni coalition has bombed both sites.

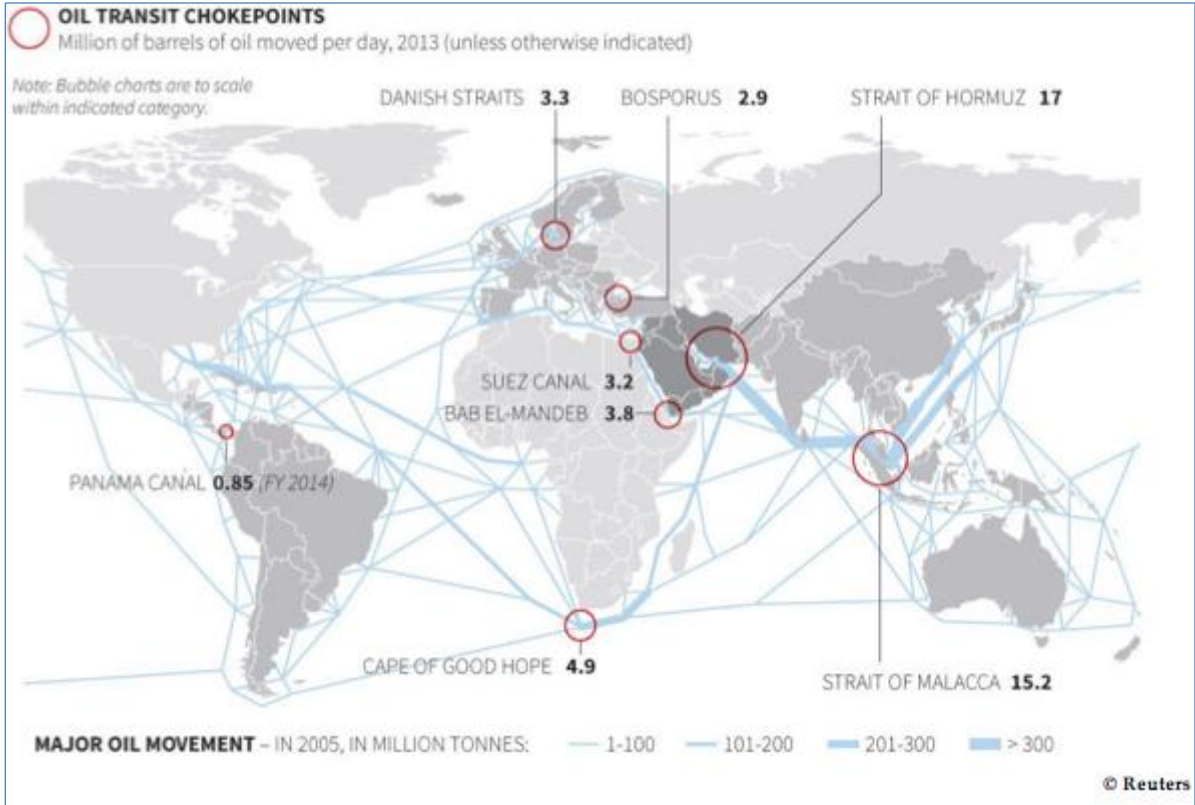
This conflict has already affected ports of Aden, Al Hudaydah, Al Mokha and Al Mukalla (red on the map below) with Yemen Times reporting a governmental ban on all vessels passing into Yemen territorial waters.



Local P & I correspondents report that Al Houthi rebel forces are shelling Aden with tanks and consequentially the port of Aden is virtually closed except for some oil shipments at the Aden Refinery. Dry cargo shipments cannot take place due to a lack of stevedores. Ongoing fierce street battles continue between Al Houthi rebels and local resistance in Aden. Yemeni ports of Al Hudaydah and Al Mokha on the Red Sea continue to function as there are no hostilities in this area. Offshore terminals also continue to operate.

In the past few weeks, Al Houthi have entered Al Mokha port, seized Aden International Airport and are fighting for control of Aden. It seems that at least one ship in Aden cut its ropes and sailed.

Iran have moved warships into the area which may be seen as a provocative move by Saudi Arabia. The Egyptian government has responded by dispatching four naval vessels of their own to secure access to the Gulf of Aden. Escalation in this conflict does cause considerable concern to the shipping community. The Norwegian Shipowners Association has recommended that vessels calling at Yemen ports increase their security to ISPS level 3 and now every ship transiting Yemeni territorial waters is subject to interdiction by the Saudi led coalition.



**An overview of the background**

In late 2014, the Al Houthi movement, originating from North West Yemen, succeeded in a coup d'état and retains control of the Yemeni capital Sana'a including the parliament. After many months physical house arrest by Al Houthi forces, the Yemeni president has fled the country under Saudi protection, leading to a potential power vacuum in Yemen.

The potential disruption for oil markets has already impacted the price of Brent crude (price has increased by 6% at time of writing). It must be noted that the US Navy routinely patrols the Bab el-Mandeb region and, in the last few days, the Egyptian navy have sent ships closer to the region to cover those sent by Iran. The likely escalation of tensions and further military action may have repercussions for ship-owners, charterers, crews and insurers alike.

We outline on the following pages some of the legal issues the shipping industry may face if the situation in Yemen escalates.

## **Charterparties**

### **War Risk clauses**

Charterparties often include specific provisions relating to the outbreak of war or warlike situations. Such clauses generally provide that the contract should be cancelled/terminated in the event of war/hostilities/warlike operations breaking out, either between “two or more” of a list of specified nations, or involving the flag state of the vessel.

What constitutes “war” in this context was the subject of an arbitration in 2002 (Northern Pioneer) where limited German participation in the NATO bombing operations in Kosovo led to charterers purporting to terminate charterparties involving German flagged ships. The Tribunal found that the action was not “war” and that, in any event, Germany was not “involved” (in what was a war between Kosovo and Yugoslavia) for the purposes of the clause. The matter found its way to the Court of Appeal ([2002] EWCA Civ 1878) primarily on points of procedure but the Court confirmed that any right to terminate must be exercised within a reasonable time of war breaking out and doing so a month later was too late.

In the context of a war involving Saudi Arabia and factions within Yemen, then any reliance on a similar termination clause will probably be restricted to charterparties involving vessels flagged in those countries.

In order for war risk clauses to be relied upon, it is generally not necessary for war to be formally declared. Whether a state of war (including “hostilities/warlike operations”) exists for the purposes of these clauses will be a question of fact. The meaning of “hostilities/warlike operations” is, of course, wider in scope than “war”.

One other key question for owners will be whether they have the right to refuse orders to go there. As in other complex environments such as Crimea, Libya and indeed in those areas where piracy remains a problem. In the wake of the Triton Lark ([2012] EWHC 70), BIMCO reissued the War Risks Clause (Conwartime and Conwarvoy 2013) and whilst that case focused on the piracy threat off Somalia, deterioration of the situation in Yemen may see an early test of the principles set out by the Court in the consideration of whether a vessel is exposed to War Risks and whether those War Risks “...may be dangerous or may become dangerous to the vessel, cargo or crew”.

#### ***In this context, War Risks include:***

***“...act of war, civil war or hostilities; ...warlike operations; ... blockades (whether imposed against all vessels or imposed selectively against vessels of certain flags or ownership...) by any person... or the government of any state...”***

What is “dangerous” will depend on the facts and will depend on both quantitative factors (the degree of likelihood that a particular peril may occur) and qualitative factors (the seriousness or otherwise of the consequences of that peril to the vessel). Issues may arise therefore as to whether an owner or master can refuse to go to an area where a War Risk exists and, because of that peril, will be dangerous at the time the vessel arrives there.

It should also be noted that whilst some war risks clauses will operate to exclude the charterers’ safe port warranty, others will not. Furthermore, unless the off-hire clause in the

charterparty expressly provides otherwise, hire will generally continue to run during any periods of delay associated with war risks.

When a war risks clause is invoked and discharge occurs at an alternative port to the one originally nominated, whether the owners will be entitled to additional freight will depend on whether or not the substitute port is within the range specified in the charter. If it is, then freight may be paid as per the charterparty, but, if it is not, then the charterers may be obliged to pay all of the additional costs associated with proceeding to and discharging at the alternative port.

### **Port safety**

Charterparties may contain either express or implied safe port warranties. It is well established in law that a port will be safe where, at the relevant time, the vessel can reach it, use it and leave it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship. The time for assessing the safety of the port is the time at which the charterer nominates the port (i.e. it must be "prospectively" safe). Safety means both physical safety and political safety. A port may, therefore, be unsafe if there is a risk of seizure or attack, or if the vessel may be detained, impounded, blacklisted or confiscated.

Control of a port by Al Houthi forces may not in itself mean that a port is unsafe but the risk is that any ship calling at such a port may be exposed to the risk of being attacked by the coalition aircraft. Indeed this risk has been highlighted by BIMCO. Such confusion is a risk and a similar incident was seen in the port of Derna in Libya in January 2015, when the Greek managed Ararevo was attacked by the Libyan Air Force whilst delivering oil belonging to the National Oil Corporation.

The recent Court of Appeal decision in the *Ocean Victory* (2015 EWCA Civ 16) focused attention on the issue of what constituted an "abnormal occurrence" for the purposes of a safe port warranty albeit in the context of physical characteristics of what the Court found was a modern port. Political risk is more nuanced although this was something the English Courts looked at in the context of the Iran/Iraq war in cases such as *The Evia* (No.2)[1983] 1 AC 736 and *the Lucille* [1984] 1 Lloyd's Rep 83 where the Judge said:

***"...it does not mean that [a port] is unsafe unless shown to be absolutely safe."***

There still remains the question of foreseeability. An event can be abnormal but foreseeable but as the Court said in the *Ocean Victory*, you cannot use minimum foreseeability without more otherwise that will lead to "...wholly unreal and impractical results." Faced with issues over the safety of Yemeni ports, the Court may follow the *Triton Lark* approach by considering the same qualitative and quantitative approach in other words by looking at the potential risk of say an attack against the potential consequences which could be very severe.

Where charterers nominate an unsafe port, owners are entitled to reject that nomination on the basis that it is invalid. In the event that a valid nomination is made but, prior to the arrival of the vessel the port becomes unsafe, a time charterer will be obliged to nominate a new port. Under a voyage charter, the position is less clear and, unless the charterparty

specifically provides for it, the charterer may not be able to change its nomination without the express consent of the owner. That is why voyage charters will often provide for a vessel to proceed to the nominated port "...or so near thereto as she may safely get...". Considerations as to whether a charterparty is frustrated may arise if a vessel cannot get close to the nominated port at all.

### **Frustration**

If the situation escalates, the port workers do not return or if the Al Houthi forces take control of the port and prevent commercial vessels from entering or leaving, ship-owners and/or charterers might seek to argue that their charterparty is frustrated on the basis that the vessel is unable to navigate to Yemeni ports. It must be noted, though, that frustration is difficult to argue successfully under English law. It would require the party claiming frustration to show that the event relied on had fundamentally changed the performance obligations originally contemplated by the parties and had made further performance under the charterparty impossible, illegal or radically different from that which was originally contemplated by the parties.

Whether there is frustration will depend on the nature of the charterparty and the length of the delay caused. Those entering into charterparties that might be affected by the occupation of Yemeni ports should consider incorporating terms that allocate the risks associated with such occurrence e.g. for delays, extra expenses etc. or instead, if there is no clear end in sight for the ongoing disturbances, an express exclusion clause to prevent vessels from calling at Yemeni ports until, for example, a functioning and internationally recognised government is in power.

The fact that contractual obligations become more onerous or expensive to perform is unlikely in itself to frustrate the contract. So if, for example as now seems the case, access to Yemeni ports were blocked or ports were not functioning for a period of time otherwise sufficient to frustrate the charterparty, the charterparty may not be frustrated if another route would be available, i.e. delivery to another Yemeni, Saudi Arabian or Omani port which is not blocked and onward transportation by road/rail/pipeline to the original destination port.

### **Deviation**

Charterparties should be reviewed to see whether they allow deviation to a different port although, absent an express provision, the ship-owner/master has an implied right to deviate to avoid danger to the vessel, cargo and those on board. Parties may wish to vary their charterparties to allow for discharge at other suitable Yemeni, Omani or Saudi Arabian ports. Conwartime for example, expressly provides for this.

### **Bills of lading**

If it has been agreed that cargo is to be delivered at an alternative port, owners and carriers should be aware of the potential problems posed by an issued bill of lading which names a specific discharge port. It may be that a bill of lading incorporates the terms of the charterparty, or permits discharge at a port other than the one named on the bill. If no such provision exists, however, delivery to an alternative port may constitute a breach of the bill of lading contract. The parties should also bear in mind that even where a bill of lading appears to incorporate the charterparty provisions, proceedings might be commenced in a jurisdiction in which different principles may apply.

**Obligation to pay for and arrange insurance**

In the absence of express provisions to the contrary, responsibility for, and the costs associated with, insuring the vessel will fall upon owners rather than charterers. Should charterers wish to order the vessel to, or through, an area of heightened war risk, the vessel's insurers may require the payment of additional premiums to compensate for the additional risk. It is common for insurers to refer to Joint War Committee's listed areas of high risk with the additional premium calculated on transit time through the listed area. In these circumstances, the issue will arise as to who is responsible for any additional premium and it will depend on the charterparty provisions whether the charterers are to reimburse the owners for any additional premium paid.

**Comment**

Yemen has become just the latest country in Africa and the Middle East to find itself riven by civil war where the legitimate government has been challenged by rebel forces and where there has been an immediate apparent threat to commercial shipping and their crews.