



Standard Bulletin

November 2008



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PIRACY - Gulf of Aden and Somalia North Coast

2008 has seen a major upsurge of piracy attacks, particularly in the Gulf of Aden and in the coastal waters off Somalia. Since the beginning of the year, more than 60 ships have been attacked, of which 29 were hijacked, and more than 300 seafarers were taken hostage. The ships which have been recently hijacked are not only small coastal ships, which were previously at risk, but large ocean-going ships, including chemical/oil tankers, ro-ro ships and bulk carriers in ballast.

In this Bulletin, we describe the precautionary measures that can be adopted by members in order to minimise the risk of piracy attacks and provide useful information - including links to relevant websites - for ships transiting the Gulf of Aden.

David Semark of Reed Smith also examines whether shipowners can safely refuse charterers orders to transit via the Gulf of Aden because of the piracy risk.

Background

The attacks on merchant shipping have been escalating in the past two months. The issue has been discussed in the world's media, by governments and the IMO. It is reported that the present upsurge of piracy is by unlawful gangs located in the north and east of the country around the small fishing port of Eyl (Ely), adjacent to the Gulf of Aden. It is estimated that there are at least 1,000 active pirates operating in the north of Somalia. These pirates are believed to be operating as well-organised gangs associated to local family groups. The gang members are usually young, ex-fishermen, and more often than not intoxicated on 'qat' - the local drug of choice. They are well armed with automatic small arms (AK47 assault rifles) and rocket propelled grenade launchers (RPG). They also have access to fast boats to facilitate their attacks.

In 2006 and 2007, the majority of the attacks were located in the waters off the Somali east coast. Advising Masters to stay 200 miles off the coast would have been sufficient to avoid the problem. Now, however, these pirates use mother ships, which enable them to operate further off the coast than in previous years. Indeed, pirate attacks have been reported over 250 miles off the eastern Somali coast. Whilst the majority of attacks in 2008 have been located in the Gulf of Aden, members should not consider that the east Somali coast is now immune from attack. During the last two months, a significant number of attacks have been reported 250 miles east of the port of Mogadishu as well.

The UN Security Council adopted resolution UN 1816 (2008) in June, after pressure from the maritime industry in an attempt to confront the escalating problem in the Gulf of Aden. This resolution allows co-operating states to "use all necessary means" to prevent piracy off the Somalia coasts. Ironically, since then, the pirates have been even more active. Keen to address this problem, the international community, including the EC, is now beginning to take some concrete steps to assist the transiting ships.

A large number of private security firms are now operating in the region providing advice and personnel to assist shipowners. One US military contractor is sending a 'private-sector warship' equipped with helicopters to the Gulf of Aden, offering its services to shipowners. This ship is to patrol the commercial vessels route, avoiding any requirement to have security personnel on board and providing effective "top cover" to ward off any potential attack.

As a result of pressure from the Indian families of the crew on the hijacked tanker Stolt Valour, the Indian Navy are reported to be dispatching a naval unit to the Gulf of Aden.

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The information contained in this Bulletin is intended to be a general guide only and not to be comprehensive, nor to provide legal advice. You should not rely on the information contained in this Bulletin as if it were legal or other professional advice.

These are some 20,000 ships transiting the Gulf of Aden each year. Whilst the numbers attacked to date make up only a small proportion of those transiting, the threat is real and present. Whilst governments are now slowly starting to respond to the problem, pirate activity is likely to increase in the short term until an effective and organised deterrent is in place. Fortunately, there are in the meantime practical and sensible measures outlined in this Bulletin that members and Masters can adopt in order to minimise the risk of attack and avoid being just another statistic.

Precautions

All members with ships transiting the Gulf of Aden/Red Sea/Indian Ocean within 300 miles of the Somali coast should be on a high security alert. All crew should be briefed that transiting these waters requires them to be on a heightened security level. Extra lookouts, including a stern watch, should be maintained.

Furthermore, it is recommended that ships should use their ISPS Code training and increase the ship's security level to a minimum of level two. Masters should also ensure that additional drills are carried out.

The IMO has issued a circular called 'Piracy and Armed Robbery against ships'.

Masters must be kept advised by their shore management with updated information, which is available on the internet. The management should provide them with their full support.

Sensible practical measures

- Use the coalition patrolled channel: Maritime Security Patrol Area (MSPA) (<http://www.marad.dot.gov/Headlines/advisories/2008-05.html>)
- Passage planning: keep large-scale charts of the area, keep abreast of weather forecasts and fishing vessel activity. Speak to ships passing that have already transited the area
- ISPS: heighten the level of security to a minimum of level two and inform all crew of the potential threat
- Ensure appropriate ISPS drills are carried out well before transiting the area
- Prepare and provide a response plan on how to react if boarded or approached by suspicious craft. This should include a list of contacts and a policy regarding communication, media control and management of crew and families.
- Ensure all deck officers are provided with appropriate contact numbers and are fully conversant with the ship's satellite communication equipment
- Contact naval units in the area (see below)
- Maintain contact with other ships in the area
- Ensure that a full bridge team is available whilst transiting dangerous areas. Post extra lookouts, including a stern watch

- Maintain a constant radar watch. Be aware that the skiffs used by the pirates are often made of wood, and are small and very fast-moving, and therefore are not an easy radar target
- Evasive manoeuvring can be successful. The small boats being used by the pirates can be vulnerable to heavy stern wash
- Maintain speed, or with the consent of shore management, increase speed during the transit area. Charterers should be advised and/or consulted, as appropriate
- Use of fire hoses is often suggested as a deterrent, although when faced with armed pirates, their value is debatable
- Consider if non-essential personnel should be retained onboard when transiting these areas
- Consider using professional specialist security companies, which can provide equipment and advice. For example, a Long Range Acoustic Devices (LRAD), has been proven to be a successful deterrent in the past. Thermal-imaging devices have also been used to provide an advanced warning, although their range is limited to 1-2 miles
- Ensure that all spaces outside of the accommodation block are locked for the transit. Restrict accommodation access

Additional Precautionary Planning Considerations

Highjackings that have resulted in the ship and crew being taken hostage have to date ended in a successfully negotiated release of ship and crew. However, the negotiations have been protracted and more often than not take two to three months, sometimes more. Ships should be prepared for this eventuality. To date, the pirates have remained onboard, but have allowed the crew to retain their phones and communicate with their offices and families. This is, from their perspective, a sensible approach as it maintains crew morale but can also prompt the families to put pressure on the shipowner and authorities to effect an early release. Companies should be forewarned that being taken hostage is a traumatic event, even if the outcome is the eventual release of the ship. They should also ensure that counselling is provided.

All but one of the highjackings have reportedly occurred in daylight hours. The average speed of ships successfully boarded was approximately 14 knots. As a result, ships are tending to transit during the hours of darkness. In this situation, with the additional traffic density, full bridge teams need to be deployed.

- Ensure that the ship has additional MDO/MGO fuel for operating generators. If the ship is highjacked at least two to three months may pass until a negotiated release is possible
- Ensure that the ship has adequate provisions and fresh water for the same reason. Tinned food is obviously the sensible option

Assistance

After the second Gulf War, the coalition forces organised maritime forces to monitor terrorist activity. Three task forces were designated with separate geographical responsibility and the mandate to assist shipping with the piracy problem whilst transiting Somali and adjacent waters

A 'safe corridor' called the Maritime Security Patrol Area (MSPA) has been designated from the southern exit of the Red Sea along the south coast of Yemen. However, this 'safe corridor' is at times only five miles wide and is reported to be producing increased traffic density. Therefore, full bridge teams should be activated during this period. This corridor is being monitored by Coalition Task Force (CTF) 150, using naval units and aircraft.

The Coalition Task Forces are geographically arranged as follows:

CTF 150: Gulf of Aden, Gulf of Oman, Arabian Sea, Red Sea and parts of the Indian Ocean

CTF 152: Central/Southern Arabian Gulf

CTF 158: Northern Arabian Gulf

All members are advised to ensure their Masters report to CTF 150 through the voluntary reporting system (see details below). According to CTF 150, there are approximately 300 ships reporting to them daily.

CTF 150 also provides recent piracy activity advice.

UKMTO Information Merchant Ship Voluntary Reporting Scheme

The UK Royal Navy's Maritime Trade Organisation (UKMTO) has been established in the Middle East since late 2001 as an extension of Royal Navy operations in the region. Although the MTO focus is to support the UK's shipping interests in the area, it is available to provide support across the entire maritime industry, regardless of flag registry and ownership.

In November 2002, the voluntary reporting scheme for UK shipping interests was extended to cover the Red Sea, the Indian Ocean north of 5S, as well as the Arabian Gulf. On a voluntary basis, ships (of any flag or ownership) are invited to report to the MTO team on passing the following reference points:

- Suez for ships entering or leaving the region via the Red Sea
- 5S for ships entering or leaving the region via the Indian Ocean (South)
- 78E for ships entering or leaving the region via the Indian Ocean (East)

The initial report should contain the following;

1. Ship name
2. IRCS (International Radio Call Sign)
3. Flag
4. IMO number
5. MMSI
6. Inmarsat telephone number, including satellite prefix

7. Telex and fax number
8. Email address
9. Name of company responsible for day-to-day management
10. Type of ship
11. Date/time of current position course and speed
12. Itinerary in the region, with route way points and destination port(s)
13. British personnel onboard (if any)

Subsequently, ships are requested to report their noon positions and speed, actual departure times and estimated arrival times at ports and destination, when outward bound from the defined area. All timings are requested in UTC and the preferred method of communication is e-mail.

The information provided is treated in strict commercial confidence and is only used within coalition military circles. If further advice or guidance is required, please do not hesitate to contact the UKMTO team, which will provide further advice on contacts in the area.

Contact numbers/details for UKMTO:

For more information or to subscribe to the voluntary reporting, please contact:

E-mail: ukmtodubai@eim.ae
Tel: CO +971 50 552 3215
2IC +971 50 552 6007
Fax: +971 4 306 5710
Telex: (51) 210473

Further information is also available from:

IMB Piracy Reporting Centre (PRC)

Tel: +60 3 2028 5763
Fax: +60 3 2078 5769
E-mail: imbkl@icc-ccs.org

Contact: Maritime Liaison Office Bahrain: Tel +97 317 85 3927

Internet Piracy Activity map is available on the IMB website or ICC website: <http://www.icc-ccs.org/extra/display.php?yr=2008> (This is updated weekly)

IMB Piracy Reporting Centre: 24hrs telephone helpline +60 3 2031 0014

Intelligence sources, including the IMB, advise ships to:

- Keep as far away from the Somalia coast as possible, ideally more than 300 nautical miles
- Keep within 35 to 40 nautical miles off the coast of Yemen
- Do not pass between the island of Socotra and Somalia
- Stay at least 50 nautical miles to the north or east of Socotra



Maritime Security Patrol Area

The establishment of the MSPA is part of CTF 150's continuing presence in the Gulf of Aden in order to provide security and support to merchant ships transiting the area.

The extent of the MSPA is contained within the latitude and longitude coordinates listed below:

- 12 15N 045E
- 12 35N 045E
- 13 35N 049E
- 13 40N 049E
- 14 10N 050E
- 14 15N 050E
- 14 35N 053E
- 14 45N 053E

A force of CTF warships is patrolling the area, and there is limited aircraft support.

Lloyd's Joint War Committee statement dated 10 September 2008

"Shipowners should ensure crew have a contact liaison number for use when attacked, preferably posted in the wheelhouse, so they can call for help. This should form part of revised standard operating procedures which should also include emergency drills so the crew know how to react when confronted with a suspicious approach or an attack.

As soon as the ship enters the area, contact should be made with naval units and other ships. The human eye remains the best form of initial defence and so transiting ships should employ a 24 hour standing watch. All available radars should be used and constantly monitored.

Speed should be maintained and evasive manoeuvres used if necessary. Experience has shown that high pressure fire hoses are very effective at repelling boarders.

In a recent attack, the crew of a North Korean ship (Dae Hong Dan) were able to reclaim control of the ship having remained safe in the engineering space. Owners could be asked whether they have made provision for a secure accommodation area, from which the crew could steer and control the ship."

Useful Information and links to Maritime Security Websites

The press, including Lloyd's List (<http://www.lloydslist.com/ll/home/index.htm>) and Tradewinds (<http://www.tradewinds.no/>) are useful sources for piracy activity and news.

ICC Commercial Crime Services website (<http://www.icc-ccs.org/prc/piracyreport.php>) and the IMB website gives an updated/live 'piracy activity' map and also a weekly Piracy Alert (<http://www.icc-ccs.org/extra/display.php>)

Members should ensure that this information is passed to Masters when their ships are transiting the Gulf of Aden.

The following are useful links for security issues and information.

- IMO homepage: <http://www.imo.org>
- BIMCO email: security@bimco.org
- Aegis Defence Services (Security specialists) <http://www.aegisworld.com>
- Drum Cussac (Security specialists): <http://www.drum-cussac.com>
- Council of the European Union http://consilium.europa.eu/cms3_fo/showpage.asp?id=1518&lang=en
- Hart (security specialists): <http://www.hartsecurity.com>
- Hudson: <http://www.hmms-usa.com>
- ICS Maritime Security: <http://www.marisec.org>

- ICS Piracy Guidance and Reports <http://www.marisec.org/piracy/index.htm>
- IMB Piracy Reporting Centre: <http://www.icc-ccs.org/prc/piracyreport.php>
- Sea Sentinel: <http://www.sea-sentinel.co>
- Secure Marine: <http://www.securemarine.com>
- SeaThreat: <http://www.cdlive.lr.org>
- US Coast Guard: <http://www.uscg.mil/default.asp>
- US Council on Foreign Relations, Terrorism Q&A, Ports: <http://www.cfr.org/issue/135>
- Worldwide Threat to Shipping: <http://www.nga.mil/portal/site/maritime>

Industry bodies, including the International Group of P&I Clubs, BIMCO, Intercargo, Intertanko, IPTA, ITF, IUMI, OCIMF, SIGTTO, ICS, together with the IMO have called upon governments to make a commitment to increase the number of naval ships deployed in the Gulf of Aden.

UN Security Council Resolution 1838 (2008), adopted on 7 October 2008, calls on all states interested in the security of maritime activities to deploy naval ships and military aircraft to fight piracy on the seas off the coast of Somalia and to co-operate with Somalia's Transitional Federal Government. It is hoped that this will motivate more countries to provide naval assistance in the area. NATO has stated that it will send its standing naval maritime group to the region, and it is understood that this will assist the CTF 150 naval forces from December 2008 onwards. In the meantime, the EU reportedly commenced military-led convoys, using French corvettes, in the second week of October 2008 across the Gulf of Aden.





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Piracy Risks and Charterers' Orders

Can a shipowner currently refuse his charterer's orders to travel via the Gulf of Aden because of the risk of pirate attack?

This article examines whether shipowners can safely refuse orders to transit via the Gulf of Aden. We have also tried to identify the factors owners ought to take into account when assessing the risks posed by a voyage through the Gulf of Aden. In doing so, we will examine two commonly used "War Risks" clauses: clause 35 of Shelltime 4 and the Conwartime clause.

Shelltime 4

War Risks are dealt with in clause 35 of Shelltime 4:

- (a) They are defined as "any blockade, war, hostilities, warlike operation, civil war, civil commotions or revolutions" (sub-clause 35 (a)).
- (b) The Master or owners have the right to refuse to go to any "place of peril" when, in their reasonable opinion, it is dangerous for the vessel to "reach, or enter or to load or discharge cargo" at such a place because of the existence of War Risks as defined in sub-clause 35 (a).

Conwartime 1993 / 2004

Most dry-cargo fixtures now incorporate Conwartime 1993/2004. Conwartime contains two pertinent features:

- (a) First, the term "War Risks" is defined in sub-clause (1)(b) of Conwartime 1993 and sub-clause (1) (a) (ii) of Conwartime 2004 as including "acts of piracy, acts of terrorists, acts of hostility ... by any person, body, terrorist or political group" which "in the reasonable judgement of the Master and/or the owners, may be dangerous or are likely to become dangerous to the Vessel, her cargo, crew or other persons on board the vessel".
- (b) Secondly, sub-clause 2 of Conwartime 1993 and sub-clause 1(b) of Conwartime 2004 provide that the vessel "shall not be ordered to or required to continue to or through, any ... place, area or zone (whether on land or sea) or any waterway or canal, where it appears that the vessel, her cargo, crew or other persons on board the vessel, in the reasonable judgement of the Master and/or the owners may be, or are likely to be, exposed to War Risks."

Can owners refuse, or elect not to, transit the Gulf of Aden?

At the heart of the question is the conflict between:

- (a) An owner's obligation to both (1) his charterers and (2) the bill of lading holders to prosecute voyages with "due" or even "utmost" despatch (by the usual and most direct route); and
- (b) An owner's right to refuse to enter, or avoid, areas where there is a genuine and real risk of attack.

Not an "unsafe port" question

As a starting point, the express safe port provisions in any charter are unlikely to provide an answer. While under Shelltime 4 this is only an undertaking to exercise due diligence in any event, the maximum scope of any warranty is that the approaches to a port will be safe. Realistically, an international transit route such as the Gulf of Aden cannot be characterised as an "approach" to any port, save, perhaps, to those situated in littoral states. Where a vessel is fixed for worldwide trading, a charterer does not guarantee the safety of any ocean route or sea passage the vessel may have to take.

Clause 35 of Shelltime 4 does not respond to piracy risks

It is often a surprise to owners who fix on the unamended Shelltime 4 form to find that clause 35 does not respond to piracy risks.

First, the reference in clause 35 to excluded areas being places which the vessel can "reach, or enter or to load or discharge cargo" and the reference to the Master being allowed to refuse to sign bills of lading for voyages to such places, strongly suggests that the clause only covers dangerous ports as opposed to dangerous sea passages or routes between ports.

More fundamentally however, clause 35 refers to a very narrow range of War Risks. In particular, there is no express mention of "piracy".

Definition of Piracy

For the purposes of English marine insurance law the following characteristics have to be present before an event can be classed as one of piracy:

- (a) the event must take place at sea, but not necessarily in international waters,
- (b) violence or the threat of violence must be present in the commission of the seizure as opposed to the escape of the assailants, and
- (c) the objective must be that of personal gain not the advancement of a particular cause (typically political).

The pirates' motive is the key issue. While precise intelligence on why the recent surge of attacks has occurred is not available, the consensus view is that the primary goal of the pirates is to secure the payment of ransoms. The gangs concerned appear to be criminal enterprises, although linked in some cases to local warlords. There is no real indication that the attacks are being carried out for any larger political purpose.

As such, they are clearly not "blockades", "war," "civil war," "civil commotions," or "revolutions" within the scope of clause 35. Similarly, both "hostilities" and "warlike operations" have technical meanings in the War Risks context. "Hostilities" are acts or operations of war committed by a party to an existing conflict, "warlike operations" are similar actions taken by a belligerent, but before a formal state of war exists. All of the named events however have this common denominator: they are acts carried out by groups with some sort of political or military agenda. Acts by organisations whose only goal is criminal, fall outside clause 35 of Shelltime 4.

Conwartime 1993 / 2004

Unlike clause 35 of Shelltime, Conwartime 1993 and 2004 clearly apply to the Gulf of Aden. Sub-clause 2 of Conwartime 1993 and sub-clause 1 (b) of Conwartime 2004 give the Master and/or owners the right to avoid “continuing to or through” any “area or zone (whether of land or sea), or any waterway” exposed to War Risks.

In order to invoke Conwartime in the Gulf of Aden, two requirements must be met:

First, the incidents in the Gulf of Aden must fall within “War Risks”. These are defined in sub-clause (1) (b) of Conwartime 1993 and sub-clause 1 (a) (ii) of Conwartime 2004 as events which may, in the owners’ and/or Master’s reasonable judgement, pose a danger to the vessel (to distinguish them from actions which fall within the definition of War Risks but which pose no danger to shipping: for example riots against a local authority).

By any definition, the attacks on and seizure of vessels passing through the Gulf of Aden must fall within “acts of piracy” or, (if there is an Al-Qaeda link as some have speculated) “acts of terrorists” or, if linked to the wider civil war in Somalia, “acts of hostility”. The pirates must also be one or more of “...any person, body, terrorist or political group”. By their nature, an armed attack on, or seizure of, a ship is a “danger” to shipping.

The second criterion, set out in sub-clause 2 of Conwartime 1993 and sub-clause 1 (b) of Conwartime 2004, is that the Master and/or owners must form:

- (a) a “reasonable judgement” that the vessel;
- (b) “may be”; or
- (c) “is likely to be”

exposed to War Risks, as defined.

Conwartime does not therefore give an owner an unfettered discretion to decide whether to proceed into the Gulf of Aden or not. The use of the word “reasonable” imports an objective standard. It is not enough that any judgement be honestly and genuinely held, if a reasonable and prudent Master or owner would not have reached the same conclusion.

However, using the reasonable Master or owner as a yardstick is not the same as taking a cross-section of the opinions of reasonable Masters or owners. The fact that some would consider the situation dangerous and others would not, does not mean that more cautious owners cannot take the benefit of the clause. If there was sufficient evidence available at the time the decision was taken, which would justify a conclusion by a notional reasonable Master that his vessel was genuinely exposed to significant risk, then his judgement will be held to have been reasonable - notwithstanding the fact that others might have had, and did have, a different view.

However, firstly in practical terms, it will be very difficult to justify a deviation from the Gulf of Aden in circumstances where the overwhelming majority of vessels are still prepared to use the route. As always, the first vessel to refuse to enter the area will be taking the biggest risk. Once the first owner has stuck his neck out, there will be safety in numbers.

Secondly, the judgement which the Master or owners must reach, is that there is “likely to be” or “may be” danger if the vessel proceeds. Under Conwartime 1993 or Conwartime 2004, the Master or owners need not prove that actual physical danger exists at the time the decision is made or that the danger is “imminent”. The test is merely one of probability. The question is what degree of probability does the test require?

The sub-clause introduces two alternative “screens” through which owners and the Master will have to sift the available information. First, that danger is “likely”, and secondly that it “may” occur. As to these:

- (a) Both words are capable of various shades of meaning, and it would be wrong to try to give them a spurious degree of precision. What can be said though is this:
 - (i) Giving the word “likely” its ordinary and natural meaning (as being synonymous with “probably,” or “with considerable certainty” or “without much doubt”), it must connote more than a mere possibility. The risk must be more likely than not – i.e. there must be a greater than 50% chance of exposure to pirate attack.
 - (ii) Clearly, worrying though the situation in the Gulf is, we are not there yet. Indeed, were the risks to reach this level, underwriters would be sure to declare it a prohibited area and the vessel could not be compelled to go there in any event.
- (b) If the danger is not “likely” a refusal is still justified if a reasonable Master or owner would consider that it “may” be present. This second screen is further down on the scale of probability. In other contexts, the Courts have said that the phrase “may be”:
 - (i) excludes the contingent and very remote; and
 - (ii) cannot include the purely fanciful.

If shipowners wish to obtain further contractual protection, then, provided their charterers are prepared to accept such a clause at the time of fixing, an additional “Piracy Clause” could be added to supplement the rights conferred by Conwartime.

We have, for example, seen the following wording tucked away in proposed protective clauses in recent tanker charter negotiations:

“Piracy Clause

If piracy activity or the threat thereof requires that owners deviate, slow steam and/or change port rotation in order to ensure the safety of the crew, vessel and/or cargoes, any additional costs for bunkers, heating, nitrogen, inhibitor, war risk premiums, insurance costs to be prorated among the cargoes on board, irrespective of whether the relevant charterer intends to load or discharge in the affected area or transit through the area.

This clause takes effect irrespective of whether the area is classified as a “war risk zone” by insurers, hence it is within owners’ and/or the Master’s sole discretion to impose the measures they deem necessary in order to ensure the safety and integrity of the crew, vessel and cargoes.”



The other drafting solution is to define “any additional war risks premium area” as an excluded area when fixing – provided, once again, that charterers can be persuaded to accept this.

Relevant considerations

Any decision taken by the Master or owners to avoid an area rendered dangerous by pirates must be an objectively reasonable one. That remains equally true under most War Risks clauses, even those which purport to confer a discretion on the Master and owners. Accordingly, below is a “checklist” of the facts which should be considered in the event owners find themselves confronted by this situation.

As a starting point, we would note that “danger” is a strong word. A mere vague apprehension would not qualify to activate any War Risks clause. So in between the very remote and merely fanciful on the one hand and a degree of likelihood less than 50% on the other, there is a wide margin within which owners and the Master have to exercise their judgement.

While it is impossible to produce a definitive list, in our view, owners should consider the following factors when assessing whether the risks of exposure to pirate attack in the Gulf of Aden have moved away from the “fanciful”, “contingent” or “very remote” and further towards “less than 50%”.

- (a) While the Master or owners do not have to assess the risks with a precision of a political or military analyst, the statistical likelihood of attack should be considered. At present the risks of seizure are 1/3 of 1%. While even in a worst case scenario, the number of vessels affected is likely to be a fraction of the total using the passage, any increase in the number of incidents is a relevant consideration.
- (b) Information should be gathered from all publicly available sources, including:
 - (i) The websites of the International Maritime Bureau, the Piracy Reporting Centre and the Joint War Committee.
 - (ii) The shipping press.
 - (iii) Circulars and Alerts from Hull Underwriters and P&I Clubs.
 - (iv) Flag State and other governmental warnings.
- (c) In this regard, headlines do not tell the whole story. For example, the Joint War Committee reports that while more vessels have been hijacked, there have been fewer incidents of ships being fired upon.
- (d) Similarly, any increase in the additional premium charged by War Risk underwriters for transit through the Gulf of Aden would point to a general acceptance that there was an enhanced level of risk.
- (e) Likewise, any restrictions imposed by flag states, or countries which are traditionally a source of crew, on their vessels or nationals being sent through the Gulf of Aden would support a claim that a refusal or deviation was reasonable.
- (f) Also, inquiries should be made of other owners, or relevant Associations of owners (or indeed P&I Clubs) as to whether they consider the Gulf of Aden safe.
- (g) Both the availability and effectiveness of efforts to combat the pirates should also be taken into account.
- (h) In this regard, on 22 August, the US Naval Central Command established a Maritime Security Patrol Area (MSPA) in the Gulf of Aden.
- (i) While this has yet to prove itself, owners will now have to differentiate between the risks inside the coalition-patrolled channel and elsewhere in the Gulf.
- (j) On a related note, owners would also have to show that they had taken all necessary precautions to minimise the risks of attack. For example, charterers might well have cause for complaint if anti-boarding equipment had not been fitted.
- (k) Lastly, before an owner takes any decision not to proceed, he should consult the Master first. Failure to do so may lead to a finding that the rejection was a pretext.

Regardless of which way the decision goes, owners and the Master are allowed a reasonable time to consider and evaluate the risk. The obligation is not one of instant obedience to the charterers’ directions, but of reasonable conduct. Only unreasonable delay constitutes a refusal to obey an order. Owners and the Master have the right to perform the investigations listed above.

Conclusion

At present, absent any bespoke contractual protection, we do not believe that shipowners can safely refuse orders to transit, or deviate from, the Gulf of Aden:

- (a) The risk of seizure is still statistically very small.
- (b) There is little evidence of shipowners in general refusing to do so, nor are we aware of any advice from governments, underwriters, or unions/associations that they should. It is significant that the joint BIMCO, ICS/ISF, INTERCARGO, INTERTANKO and ITF statement issued on 30 September referred to the fact the owners **may**, in the future, refuse to trade via the Gulf of Aden, rather than to any current refusals.
- (c) There has been no significant increase in the Additional War Risks Premium.
- (d) The effectiveness of the MSPA and patrolled corridor has yet to be determined.
- (e) However, on 7 October the IBF Warlike Operations Area Committee agreed that ITF-registered seafarers would have **no** right to refuse to sail on vessels transiting through the patrolled corridor, (albeit against double pay) and would only be entitled to repatriation in the event a vessel’s intended route would take her out of the patrolled area.
- (f) In the event of any refusal by an owner to accept orders to transit the Gulf of Aden, his charterers would be able to point to the IBF agreement as “official” endorsement that the patrolled area at least is sufficiently safe to transit.