

*"UNCHARTERED TERRITORY IN CHARTER PARTIES –
LEGAL EFFECT AND CONSEQUENCES OF PIRACY"*

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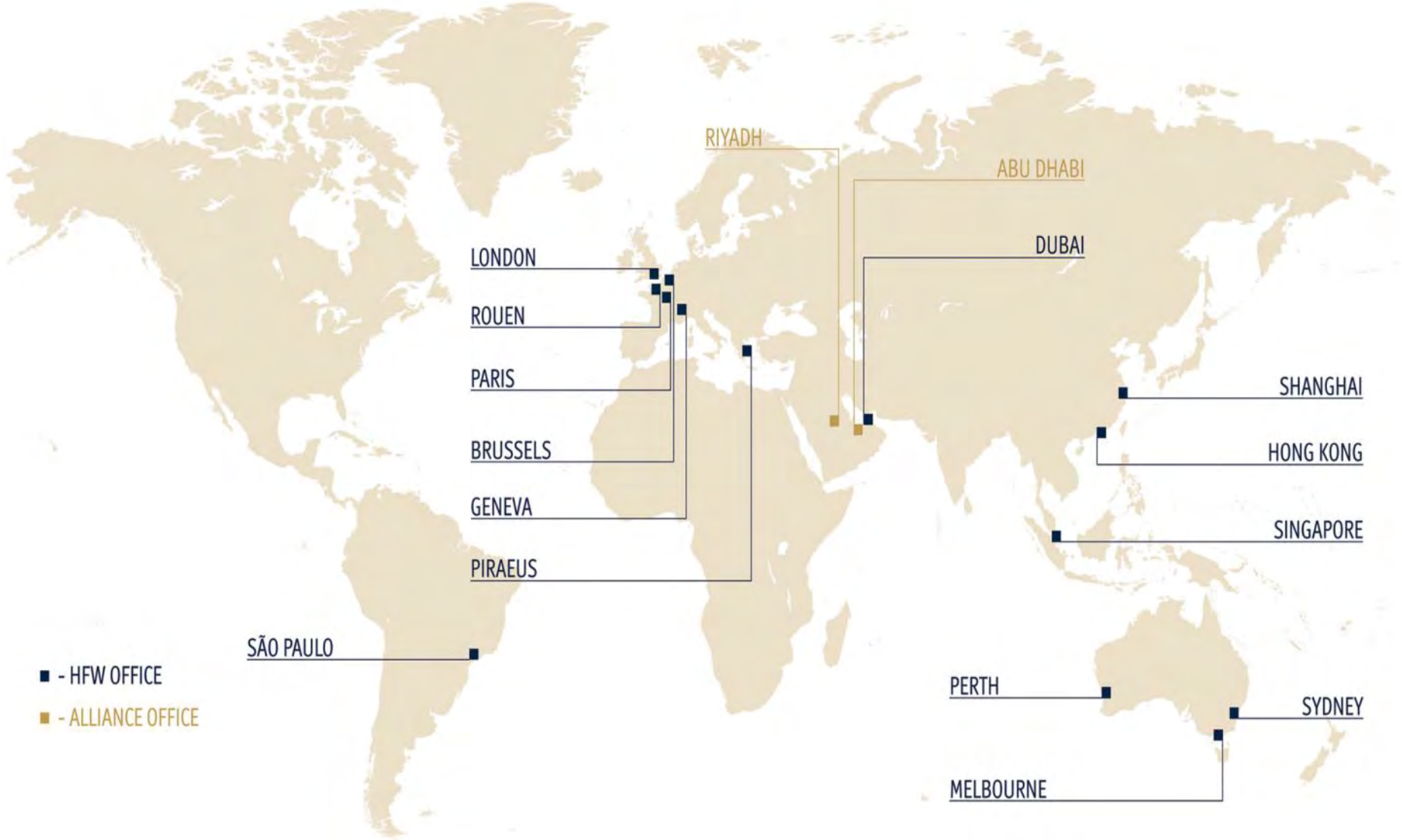
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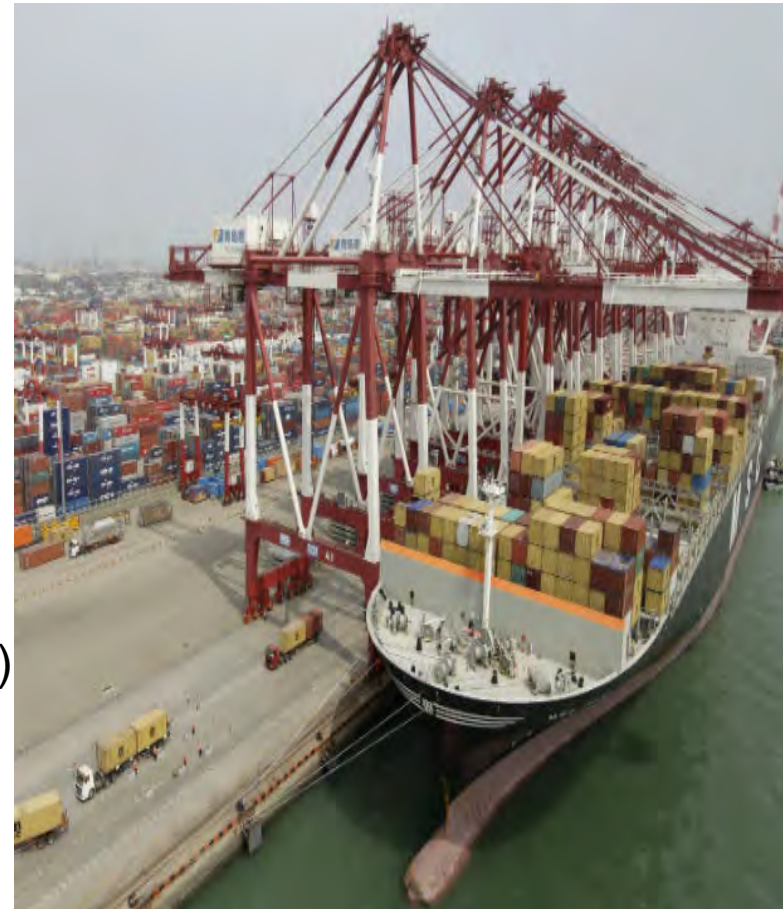
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- Increasingly parties are choosing to arbitrate disputes in Singapore (as reflected in charterparty contracts and commodities contracts).
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What is Piracy?

- The United Nations defines piracy as:

"... illegal acts of violence or detention ... directed ... against another ship ... or against persons or property on board such ship".



Worldwide piracy incidents 2012

= Actual Attack = Attempted Attack = Suspicious vessel



Somali piracy incidents 2012

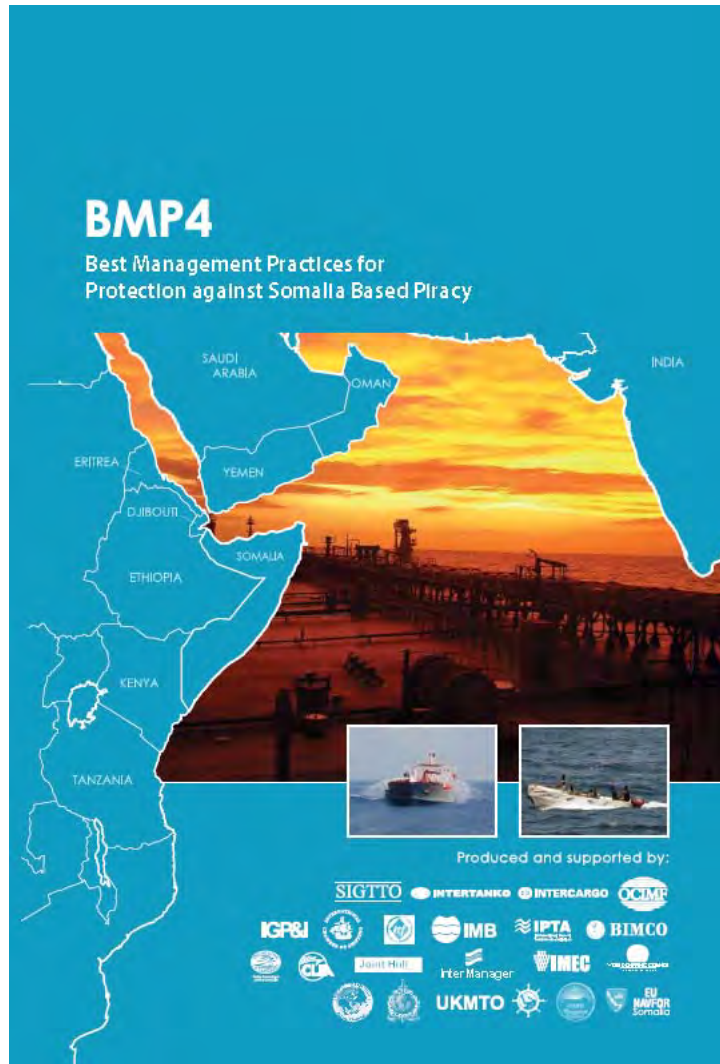
= Actual Attack = Attempted Attack = Suspicious vessel



Close Escort



Best Management Practice



- Number of positive recommended practices in BMP4:
 - Carry out risk assessment for likelihood and consequence of pirate attacks
 - Report and provide updates to UKMTO/MARLO/MSCHOA
 - Review Ship Security Plan/Assessment and ensure resultant training
 - Anti-piracy contingency plan inc. emergency communications and AIS policy
 - Defensive Measures:
 - Increased watch
 - Zig-zag manoeuvres; speed over 15 knots
 - Run additional machinery
 - Minimize external communications
 - Ensure no access to internal spaces (check ladders and outboard equipment)
 - Create citadel; use dummies, use fire hoses; razor wire
 - Use navigation lights only

- Use of armed guards subject to risk assessment (not endorsed or recommended).

Legal considerations arising under charterparties



- Nominating a safe port:
 - Right to nominate a port under a time charter
 - There will usually be an implied/express obligation to nominate safe port
 - The port must be prospectively safe.
 - The threat of piracy at the port itself or on the approach could potentially render it unsafe (**the Saga Cob** [1992] 2 Lloyd's Rep 545). Each case will turn on its own particular circumstances. The level of threat, features of the vessel, whether threat could be avoided by good navigation will all be relevant factors.
- Reasonable dispatch and agreed route:
 - Obligation on master to take the quickest and shortest route to destination port.
 - Unless a master can justify a refusal to take a particular route or proceed with reasonable dispatch, recourse such as hire deductions, claims for extra costs may be available to the charterer
 - Master entitled to refuse orders if to ensure safety of the vessel, crew and cargo (**the Hill Harmony** [2001] 1 LR 147).
 - "If an order is given compliance with which it exposes the owners to a risk which they have not agreed to bear, the master is entitled to refuse it" – All a question of fact (which made the daily change in the past Gulf of Aden cases difficult to advise on)

- General issues relating to hire:
 - In the event that the vessel is detained by pirates, charterers may find themselves in a situation where they are denied the use of the vessel but still expected to pay hire – an obligation they will be keen to avoid.
 - Most time charters include an off-hire clause excusing the charterer from his obligation to pay hire at a time when the ship is prevented from performing the charter service.
 - The question of whether an act of piracy can cause a vessel to be off-hire for these purposes is one of fact and law. Legally, the range of events which will take a vessel off-hire are almost always specified in the clause itself or else contained in different sections throughout the charterparty. It is then a question of fact whether the event in the case to hand is one that is contemplated by the off-hire clause(s).
 - The leading case on piracy/off-hire is the **Saldanha [2011] 1 Lloyd's Rep.** Un-amended NYPE clause 15 and concerned with the expression "*any other cause preventing the full working of the vessel*".
 - That expression had to be construed '*ejusdem generis*' to have a similar meaning to the other causes identified in the clause. The effect of that was it only applied to causes related to the condition or efficiency of the vessel, crew and cargo.
 - Piracy, however, was an extraneous cause and therefore would not act as an off-hire event. Note: damaged equipment (class item) sufficient to render vessel in non efficient state may trigger off-hire. Consider crew hostages and effect of efficiency of vessel.
 - It is arguable that if the clause said "*any cause whatsoever*" that time lost in respect of piracy would constitute an off-hire event.

- **Summary of background facts**

- The MV "KESHI" was voyage chartered on Beepeevoy 3 form from the defendant owners for the carriage of a consignment of premium motor oil.
- The charter contained an in transit loss clause which provided,
 - *"In addition to any other rights which Charterers may have, Owners will be responsible for the full amount of any in transit loss if in transit loss exceeds 0.5% and Charterers shall have the right to deduct from freight claim an amount equal to the FOB port of loading value of such lost cargo plus freight and insurance due with respect thereto. In transit loss is defined as the difference between net vessel volumes after loading at the loading port and before unloading at the discharge port".*
- Clause 46 of the charter provided that Owners were entitled to the protection of the relevant provisions of the Hague Visby Rules in respect of "**any claim**" made under the charter.
- The MV KESHI was ordered by the charterers to load a cargo of premium motor oil from Abidjan, for passage to Lagos, Nigeria for discharge.

Coast of West Africa



Pirates approaching the MV KESHI and boarding MV KESHI

- En route the MV KESHI was overtaken by pirates who transferred some of the cargo to an unknown vessel. The MV KESHI was subsequently released.



- Legal issue:
 - Whether on a true construction of the in transit loss clause, the transferred cargo discharged from the MV KESHI constituted "in transit loss" or "lost cargo" for the purposes of the in transit loss clause in the charter.
- Court ruling:
 - Starting point had to be words and phrases chosen by parties and not attempt to re-write the contract.
 - Charterers argued ITL clause imposed strict liability. Owners' argued that in shipping industry almost unheard of for Owners to accept absolute liability for cargo loss in a charter.
 - On its true construction, the transferred/stolen cargo did not constitute in transit loss within the meaning of the clause.
 - If claimants had been b/l holders, Owners entitled to HVR defences. ITL clause would probably need to spell out types of loss to attribute liability to Owners for piracy loss.
 - Even if it could be argued that the transferred cargo occasioned "in transit loss" within the meaning of the ITL clause, liability imposed on owners remained subject to clause 46 exceptions.
 - Held: owners not liable to charterers for loss of cargo under the in transit loss clause - **Trafigura Beheer v Navigazione Montanari [2014] EWHC 129.**

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