

SUPPLY CHAIN METAMORPHOSIS

SAPICS
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SUPPLY CHAIN MANAGEMENT

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Disruptions to the supply chain on the high seas: knowing and managing the risks

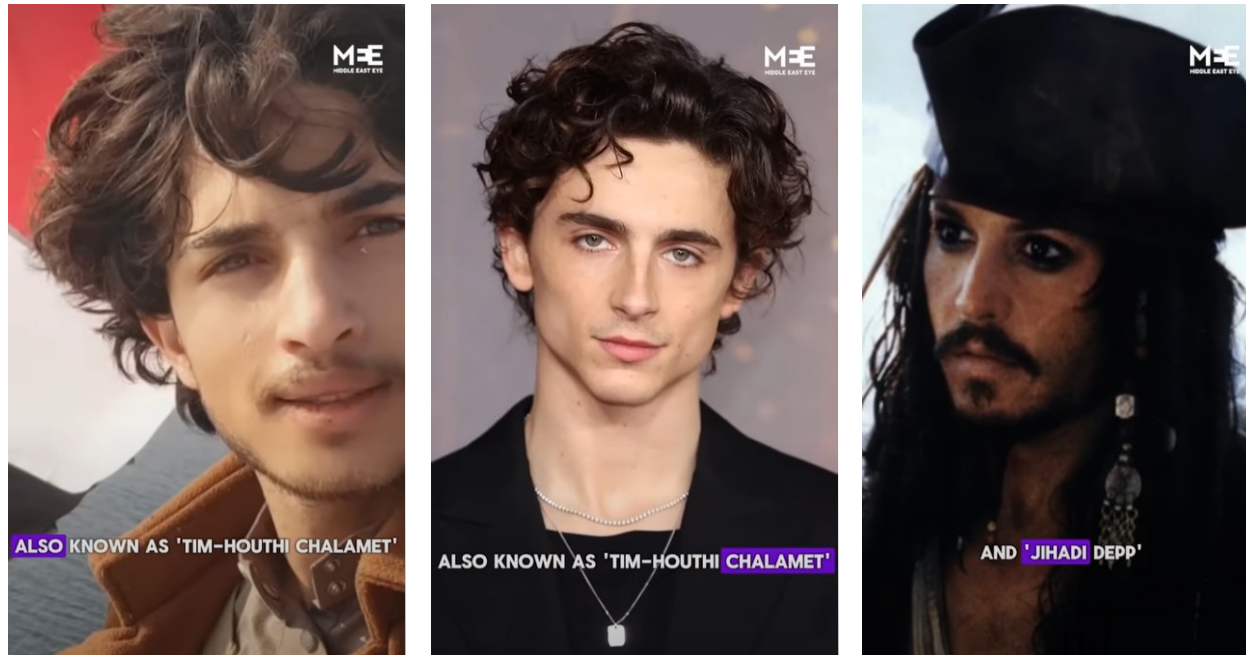
Malcolm Hartwell

Content

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- Risk management to deter piracy and enhance security in the Red Sea
- Key considerations for the supply chain industry
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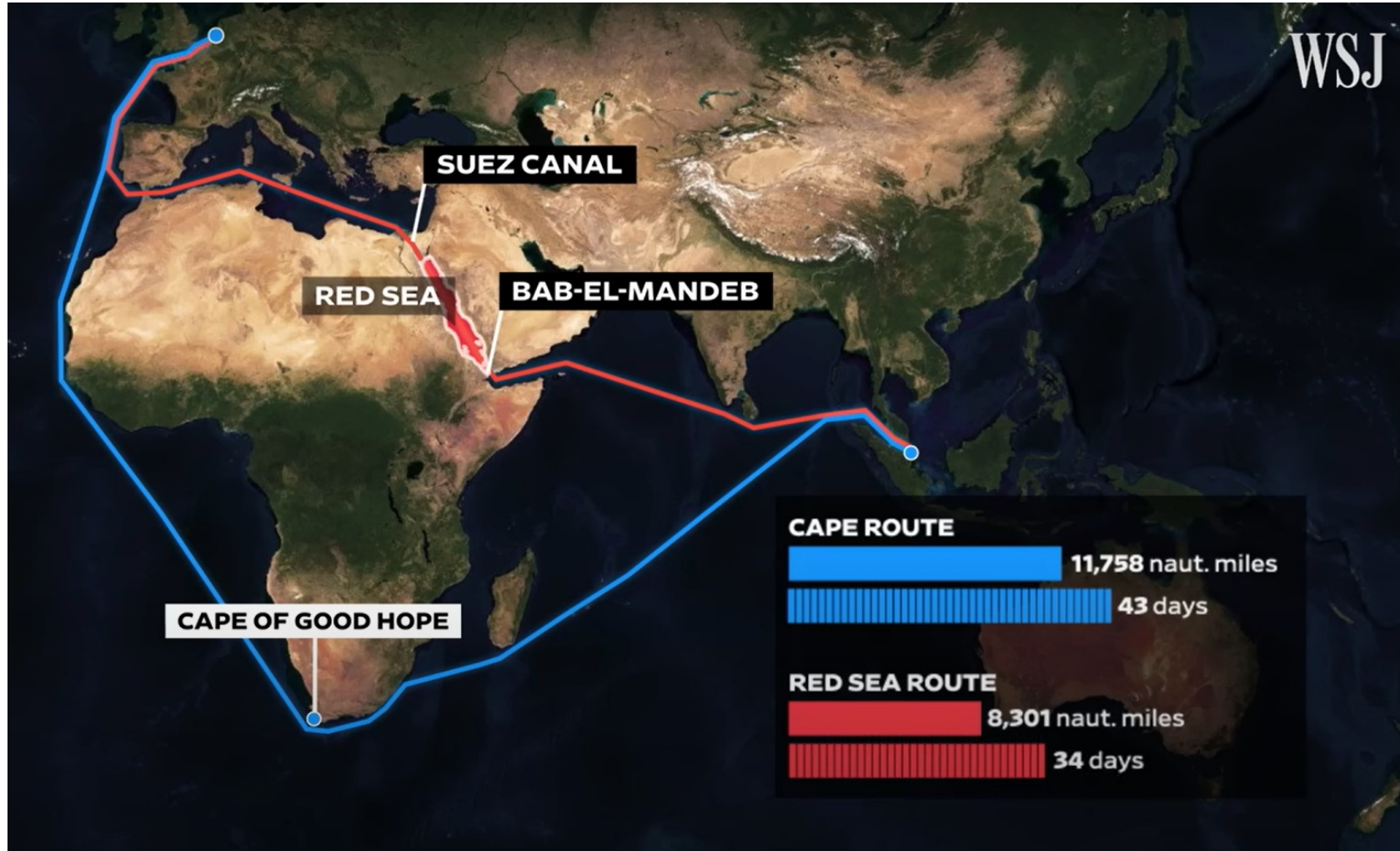
Background

- Geography
- <https://youtu.be/Ve7Yatn4cXA?si=kWunmyxHcuJDTCY5>



['Hot Houthi TikTok pirate' goes viral \(youtube.com\)](https://youtu.be/Ve7Yatn4cXA?si=kWunmyxHcuJDTCY5)

Background



War risks

- Marine Risks Generally (Old Cover under Lloyd's Form)
- War Risks carved out for hull and cargo (war, capture, derelicts)
- Why separate War Risks v Strikes Risks – Waterbourne Agreement
- Strike risks include:
 - riots and civil commotions
 - terrorists and persons acting from a political motive

Impact on chartering: can Owners reroute?

- Where the vessel is under charter, can the shipowner reroute the vessel to avoid transiting through the Red Sea?
 - it depends on the charterparty terms
 - via Suez”?
 - incorporation of eg BIMCO CONWARTIME 2013 or VOYWAR 2013
- VOYWAR 2013 provides:
- “If at any stage of the voyage... it appears that, in the reasonable judgement of the Master and/or the Owners, the Vessel, cargo, crew or other persons on board the Vessel may be exposed to War Risks on any part of the route... which is normally and customarily used in a voyage of the nature contracted for, and there is another longer route to the discharging port, the Owners shall give notice to the Charterers that this route will be taken...”

Impact on chartering: can Owners reroute?

War Risks includes:

War, act of war, civil war or hostilities; revolution; rebellion; civil commotion; warlike operations; laying of mines; acts of piracy and/or violent robbery and/or capture/seizure (hereinafter “Piracy”); acts of terrorists; acts of hostility or malicious damage; blockades (whether imposed against all vessels or imposed selectively against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever), by any person, body, terrorist or political group, or the government of any state or territory whether recognised or not, which, in the reasonable judgement of the Master and/or the Owners, may be dangerous or may become dangerous to the Vessel, cargo, crew or other persons on board the Vessel

- English courts apply a broad test
 - real likelihood of the vessel being exposed to a War Risk based on evidence not speculation
 - fact specific
- In the absence of an express provision?

Can Owners discharge at an alternative port?

- Again, it depends
- Consider charterparty or bill of lading terms
- CONWARTIME and VOYWAR
 - Owner may request Charterers to nominate a safe port of discharge within 48 hours
 - Failing which Owner may discharge the cargo at any safe port including the load port
 - Owner entitled to recover
 - extra expense of discharge
 - Full freight as if cargo carried to discharge port
 - Additional freight proportionate to the additional distance (>100 miles)

Piracy revisited

- *mt Polar* – a 2024 judgment on a 2010 problem
 - vessel seized by Somali pirates in Gulf of Aden in 2010
 - held for 10 months and released after a USD7.7m ransom
 - shipowner claimed general average
 - cargo interests rejected claims for general average: shipowner's only remedy was to recover the ransom payment under the terms of additional insurance cover which had been taken out in relation to such risks pursuant to the terms of the governing voyage charterparty, the premium for which was payable by the charterer.
 - UKSC: Shipowners had not contractually agreed to give up their right to claim general average
- *Masefield AG v Amlin Corporate Member* – ransom payments to pirates are not against public policy

Delay: continuation of insurance cover?

- ICC (A) Clause 8(3) “Delay beyond the control of the insured”
 - Subject to:
 - Transit Clause (clauses 8.1 to 8.1.4)
 - Termination of Contract of Carriage (Clause 9)
 - Clause 8(3)

“This insurance shall remain in force (subject to termination as provided for in Clauses 8.1.1 to 8.1.4 above and to the provision of Clause 9 below) during delay beyond the control of the Assured, any deviation, forced discharge, reshipment or transhipment and during any variation of the adventure arising from the exercise of a liberty granted to carriers under the contract of carriage.”

Delay: continuation of insurance cover? (cont.)

- Clause 9

“Termination of Contract of Carriage

*If owing to circumstances beyond the control of the Assured either the contract of carriage is terminated at a port or place other than the destination named therein or the transit is otherwise terminated before unloading of the subject-matter insured as provided for in Clause 8 above, **then this insurance shall also terminate unless prompt notice is given to the Insurers and continuation of cover is requested when this insurance shall remain in force, subject to an additional premium if required by the Insurers, either***

9.1 *until the subject-matter insured is sold and delivered at such port or place, or, unless otherwise specially agreed, until the expiry of 60 days after arrival of the subject-matter insured at such port or place, whichever shall first occur,*

or

9.2 *if the subject-matter insured is forwarded within the said period of 60 days (or any agreed extension thereof) to the destination names in the contract of insurance or to any other destination, until terminated in accordance with the provisions of Clause 8 above.*

Damage to cargo caused by re-routing or delay

- Claim under the Marine Cargo Policy?
 - Clause 4(5)

“In no case shall this insurance cover

Loss damage or expense caused by delay, even though the delay be caused by a risk insured against (except expenses payable under Clause 2 above)”

Damage to cargo caused by re-routing or delay

- Claim against the Carrier?

- Art 4 of HVR

“Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.”

Legal position: mv MSC Spain: Mediterranean Shipping Company (Pty) Ltd vs Tebe Trading (Pty) Ltd

Main issues : Delay

- Rerouting of vessel causing delay resulting in damage to perishable cargo
- Bill of lading permitting deviation from route
- Consignee claiming damages from agent of carrier and shipping line

- *“Tebe's claim is for the loss it suffered as a result of the delay brought about by the deviation from the initially proposed route. The appellant was not in any way responsible for that deviation. It was furthermore at all times merely acting as agent, either for the carrier or MSC Geneva. By reason of the clauses in the bills of lading previously mentioned, Tebe would have had no claim in contract or delict against the party responsible for the deviation, whether that party was the carrier or MSC Geneva. Unable to recover from the principal, Tebe seeks in effect to circumvent the consequences of the contract by holding the principal's agent personally liable in delict for failing to afford Tebe the opportunity of removing its containers from the vessel on a ground not amounting to a breach of contract on the part of the principal. But agents are contractually bound to protect the interests of their principals. ”*



Extract from judgment

“The legal duty that Tebe contends was owed to it by the appellant would therefore be in conflict with the contractual obligation which the latter had to its principal. Even if it were to be accepted that the appellant was negligent, there can be no good reason in my view, given the contractual setting, for the existence of a legal duty on the appellant to take such steps as may have been reasonable to prevent the harm. It follows that in my judgment the failure on the part of the appellant to advise Tebe of the deviation so as to afford it the opportunity of removing its containers from the vessel was not wrongful and the claim in delict must fail.”

Risk management

- Practical considerations: BMP5 2018
- Legal framework
- Bills of lading
- Charterparties
- Insurance
- Legal position
- <https://www.ics-shipping.org/wp-content/uploads/2020/08/bmp5-hi-res-min.pdf>

BMP5

Best Management Practices to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea



BMP5 2018

- Understand the threat
 - maritime threats are dynamic
 - obtain current threat information for risk assessment
- Conduct risk assessment
 - evaluate
 - identify ship protection measures
 - implement ship protection measures
 - harden the ship
 - brief and train the crew
 - enhanced lookout
 - follow flag state and military guidance

BMP5 2018

- Reporting to authorities and military
 - UK Maritime Trade operations
 - Maritime Security Centre: Horn of Africa
- Cooperation
 - cooperate with other ships and military
 - cooperate with law enforcement to preserve evidence
 - cooperate with attackers

Key considerations

- Evidence
- Notice
- Amendments to contracts
- Indemnities
- Stakeholder liaison
- Insurance
- Traders
- Operations

Legal regime

- Understand legal relationships
- Contract of sale
- Incoterms
- Charterparties
 - VOYWAR 2013
 - CONWARTIME 2013
- Liability is fact sensitive under all contracts

Questions

