

As Yemen's Houthi rebels have increased attacks against vessels sailing through the Red Sea and the Gulf of Aden, global trade stakeholders have responded. It has been announced in the media that oil majors and large global shipping lines are suspending shipping operations in the Red Sea.

In light of the current geopolitical climate, the Federal Maritime Commission (FMC) announced that it will hold an informal public hearing on February 7, 2024, to examine how conditions in the Red Sea and Gulf of Aden regions are impacting commercial shipping and global supply chains. The hearing will allow stakeholders in the supply chain to communicate with the FMC on how operations have been disrupted by attacks on commercial shipping emanating from Yemen, steps taken in response to these events, and the resulting effects.

Pursuant to its statutory mandate, the FMC is closely monitoring rates, charges and rules that common carriers¹ have implemented due to the threats to shipping in the Red Sea and Gulf of Aden regions. Under the FMC regulations, common carriers must provide at least 30 days between the publication and effective date of a change to a tariff that results in an increased cost to shippers.² The regulations outline a process through which a common carrier may submit a special permission (SP) request showing good cause to reduce this 30-day waiting period.³ If the SP request is accepted, the SP approval will show the effective date permitted for the change. A tariff rate, charge or rule must be in effect at the time the carrier or its agent receives cargo.⁴ Failure to comply with the FMC regulations could result in fines or a civil proceeding before the FMC.

The intersection between events at sea and the legal requirements under the shipping laws is highly complex and impacts multiple stakeholders. The February 7, 2024, hearing will allow the FMC to gather information and identify any new issues related to the Red Sea/Gulf of Aden disruptions. The information collected at the hearing could potentially affect decisions with regard to SP requests that are already, or that will soon be, submitted.

Interested parties can request to be considered as a participant, or share information and comments, by a written submission to the FMC at secretary@FMC.gov until January 31, 2024. Panels and participants will be announced at a later date and are intended to include representatives of vessel-operating common carriers and shippers. Participants must be present in person; there will be no virtual option for presenters.

The FMC's announcement comes at a time when stakeholders are faced with significant real-world issues associated the disruptions in the Red Sea, which is a significant global trade lane. Many charterparties contain war-risks clauses, such as BIMCO's CONWARTIME and VOYWAR clauses. Prior to the attacks in the Red Sea, war-risks clauses recently received significant attention in the Black Sea grain trade after Russia invaded Ukraine.

For charters, war-risks clauses should, at least in theory, address such issues as whether the master can refuse a voyage or request alternative orders, where a vessel may be employed when a war risk arises and how the potentially significant costs of rerouting a vessel to avoid a war risk should be allocated. The rerouting of a vessel can add significant cost to a voyage and result in delays that could have a knock-on effect on contracts further down the logistics chain. As state actors, including regulators, consider potential responses to the current geopolitical situation, commercial actors should review how their contracts and insurance cover may be impacted by the current Red Sea environment.

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1 Ocean carriers include vessel operating common carriers and non-vessel operating common carriers (NVOCC).

2 46 C.F.R. § 520.8(a)(1) and (2).

3 46 C.F.R. § 520.14(c).

4 46 C.F.R. § 520.7(c).