

PAYING FOR PIRATES

Background

Attacks by Somali pirates are still commonplace and the fall-out from kidnappings of individuals and seizures of ships by pirates are still being dealt with by insurance companies, P&I clubs, arbitration tribunals, courts of law and national governments.

Once captured, ships can be detained for months. Often these ships are under charter and laden. During the period when a ship is detained by pirates it clearly is not at the full disposal of charterers. At the same time, the ship continues to incur operating expenses insofar as the crew are on board and bunkers and supplies are being consumed. Given this it has been a highly relevant to ask whether hire continues to be payable when a ship is detained by pirates.

This question has now in part been answered by a recent decision of the English High Court in *Cosco Bulk Carrier Co Ltd –v- Team Up Owning Co. Ltd* [2010 EWHC] 1340 Comm, handed down by Mr Justice Gross on 11th June 2010. The case was heard as an appeal from an LMAA Arbitration Award.

The Facts

The *Saldanha* was chartered in June 2008 on an amended NYPE 1946 form with additional clauses. The charter was for a period of 47 to 50 months at a daily rate of US\$ 47,000. On 30th January 2009 the ship loaded a cargo of coal in Indonesia bound for Koper in Slovenia. Charterers ordered the vessel to proceed via the Gulf of Aden and Suez. Prior to complying with this order Owners asked Charterers to reimburse the cost of the additional war risk premium payable as a result of the ship having to transit the Gulf of Aden. Charterers agreed to do so.

On 22nd February 2009 the ship was seized whilst sailing through the transit corridor in the Gulf of Aden. The ship was detained by the pirates until 25th April 2009 when she was released in waters off the coast of the Somali town of Eyl.

The Charterers refused to pay hire for the period when the ship was detained. Owners brought a claim for the hire due together with the cost of the additional war risk premium and war bonuses payable to the crew. The claim was framed as a simple claim for hire under the Charter and in the alternative as a claim for an indemnity resulting from Charterer orders to the ship to proceed via the Gulf of Aden. The Charterers defence was to assert that ship

was off-hire under the standard off hire during the period of its seizure by pirates and that no hire was payable.

The Arbitration Award

Charterers maintained that as they did not have full use of the ship during the time it was seized by pirates that it was off-hire for this time under Clause 15, which is the standard off-hire clause in the NYPE Charter. They also claimed that they had brought themselves within a provision in the Charter which concerned the seizure, arrest, requisition or detention of the ship. The Arbitrators dismissed these arguments and determined that Owners were entitled to claim hire for the full period during which the ship was detained by pirates.

The Charterers appealed and, no doubt on the grounds that this was a case of general public importance, were given permission by the High Court to appeal.

The High Court

On appeal the only issue that Mr Justice Gross was concerned with was whether the detention by pirates entitled Charterers to place the vessel off hire under Clause 15 of the Charter which provided:

“That in the event of the loss of time from default and/or deficiency of men including strike of Officers and/or crew or deficiency of... stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, dry-docking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost....”

What the Judge was looking at was whether Charterers could bring themselves within one or other of the following causes:

- *“detention by average accidents to ship or cargo”*
- *“default or deficiency of men”*
- *“any other cause”*

Average accidents to ship and cargo

The Judge held that seizure of a vessel by pirates was not a detention by an average accident to ship or cargo. The ship had suffered no damage and the deliberate acts of pirates could not properly be described as an accident. The seizure arose from a deliberate act and did not fall into the category of a fortuity.

Default or deficiency of men

The Judge decided that on the facts the seizure of the ship was not as a result of the default or deficiency of the Master and crew. Even if the Master and crew could be criticised for their actions prior to the capture, the expression “*default of men*” requires there to be a refusal by officers or crew of a ship to perform all or part of their duties. Thus it is not sufficient for there to be a negligent or inadvertent performance of those duties. Further “*deficiency of men*” means numerical insufficiency and not deficient performance.

Any other cause

The words “*any other cause preventing the full working of the vessel*” in Clause 15 are often followed by the insertion of the word “*whatsoever*”. This was not an agreed amendment in this Charter. The effect of omitting the word “*whatsoever*” is to limit the type of cause that would fall into the category of “*any other cause*” to those causes of a similar nature to those listed in the clause. The Judge held that a seizure by pirates could not be considered as cause similar to those enumerated in the clause and as such Charterers could not rely upon this provision.

In concluding the Judge stated that the seizure of a ship by external actors is a recognised peril of a voyage. This peril was not covered by clause 15 of the Charter and neither had the parties agreed a bespoke clause dealing with such seizures. The Judge recognised that the result might be considered harsh for Charterer but he also pointed out that it was not for the Court to rewrite the terms of a charter or to impose its own terms where a contract had been negotiated and agreed between two commercial parties.

Comment

It will not come as a surprise that the English Court has now confirmed that a ship captured by pirates is not to be considered to be off hire under clause 15 of the NYPE 1946 form. The case is a useful reminder as to how the Courts adopt a narrow construction to off-hire clauses and will be slow to re-open the construction of standard clauses simply because an event has happened the risks of which were not fully appreciated by the parties or catered for in the Charter.

A considerable amount of work has been done by Intertanko and BIMCO to prepare standard clauses for time charters which are intended to expressly address the issue of obligations, costs and responsibilities in respect of trading to or proceeding through areas where there is a risk of piracy. It is fair to say that in most cases the model clauses that have been put forward provide that the ship is to remain on hire for all time lost and that charterers are to indemnify owners against all liabilities costs and expenses arising out of actual or threatened acts of piracy.

Whilst these model clauses no doubt reflect the particular interests of their authors it is also the case that by imposing the hire burden on charterers during period of detention there is a recognition of the fact that it is the charterer and not the owner who determines where a ship is to trade. Given this it should not be of much surprise that both the market and the law have decided that the risks associated with trading to a particular area should be borne by charterers rather than owners.

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