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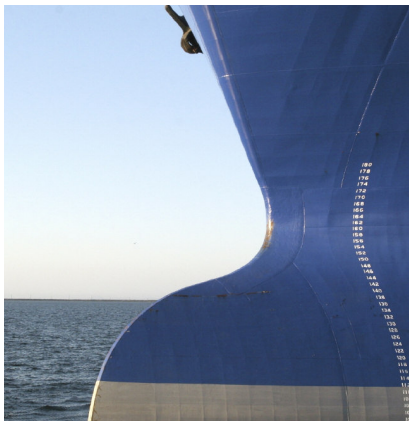

Shipping update
Piracy
Off-hire or not?

July 2010

In Cosco Bulk Carrier Co. Ltd. V Team-Up Owning Co. Ltd. (The "Saldanha") [2010] EWHC 1340, the High Court has ruled on whether detention by pirates entitled charterers to put the vessel off-hire.

The Facts

The bulk carrier "Saldanha" was time chartered on the NYPE form with additional clauses for a charter period of 47 to 50 months at US$52,500 per day. She was delivered into the charter in July 2008.

On 22 February 2009 the vessel was seized by Somali pirates in the Gulf of Aden whilst on a voyage carrying coal from Indonesia to Slovenia. Having been forced to sail to the waters off the Somali town of Eyl, the vessel was detained until 25 April when she was released by the pirates. She reached a position equivalent to the location on which she was seized on 2 May.

The charterers refused to pay hire for the period between 22 February and 2 May. Owners claimed for hire plus the cost of bunkers, additional war risk premium and crew war risk bonuses.

The Issues

Although various preliminary issues were considered at arbitration, the appeal to the High Court focused on clause 15 of the NYPE charterparty which provided as follows:

> *"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…."*
>
> (Emphasis added)

At arbitration it had been held that the "full working" of the vessel had been prevented by the actions of the pirates and this finding was uncontested on appeal. However, the tribunal had also gone on to find that charterers had failed to establish that the full working of the vessel had been prevented by any of the three causes in Clause 15 (indicated in bold above) namely:

- Detention by average accidents to ship or cargo;
- Default and/or deficiency of men;
- Any other cause.

Charterers appealed to the High Court on these three issues.

High Court

Mr Justice Gross first considered the relevant basic principles, which were not in dispute: the starting point under a time charterparty is that hire is payable continuously unless charterers can bring themselves within one of the exceptions, the onus being on charterers to do so. Any doubt as to the meaning of exceptions is to be resolved in favour of owners and the risk of any delay beyond the ambit of the exceptions is to be borne by charterers. With these agreed principles in mind the Judge then turned to consider each of the three issues raised under clause 15:

Issue 1 - Detention by average accidents to ship or cargo

Charterers argued that *'accident'* in this context did not require damage to the vessel or that there is an accident in the everyday sense. Instead it was contended that the vessel would be off-hire in the event of detention caused by fortuities which are marine perils. On the basis that piracy is a marine peril, this would be sufficient to be included within the wording.

The tribunal rejected charterers' submission that '*accident to the ship*' was a natural way to describe a seizure by pirates. They found that an accident required a lack of intent by all protagonists which could not be said of a deliberate violent attack, even if it came as a surprise to the victim. Much clearer language would be required if the clause was intended to cover such cases.

Gross J described the reasoning of the tribunal on this point as '*unanswerable*'. Although the Judge had some sympathy with the charterers' suggestion that the wording '*average accident*' pointed towards an insurance context, he did not accept that it followed that 'average' in this context could be equated with a peril ordinarily covered by marine insurance. At the very least, damage to the ship would be an essential ingredient for the wording '*average accidents...to the ship*' to apply.

Issue 2 - Default and/or deficiency of men

The tribunal had considered this issue on assumed facts, namely the (disputed) assumption that the officers and crew had failed to take recognised anti-piracy measures before and during the attack and that this failure was a significant cause of the consequent loss of full working of the vessel. The charterers argued that in such circumstances the natural meaning of *'default of men'* included a failure to perform or a breach by the Master and crew of their duties.

The tribunal was unimpressed with this argument and had held that, in context, *'default of men'* had the limited meaning of a refusal by officers or crew to perform all or part of their duties as owed to the shipowner and not the negligent or inadvertent performance of those duties. On this basis it followed that, even on the assumed facts, charterers' case failed.

Gross J accepted (as had the tribunal) that the natural meaning of 'default' was capable of including the negligent or inadvertent performance of the duties of Master and crew as contended by charterers. However, he upheld the tribunal's finding on the issue having paid particular regard to the historical development of the clause and to the allocation of risk of delay under a time charterparty. Using the example of delay attributable to bad weather or port congestion, the Judge pointed out that where such delay might be attributable to an error in navigation then, on charterers' case, this would mean that such risks would be borne by owners rather than by charterers as would ordinarily be the case.

Issue 3 - Any other cause

Gross J identified the starting point on this issue as being recognition that the charterparty contained the wording *'any other cause'* rather than '*any other cause whatsoever*'. The significance of this distinction had been highlighted previously by Rix J (as he then was) in *The Laconian Confidence* [1997] 1 Lloyds Rep. 139. In that case it was held that the words '*any other cause*' in the absence of the word 'whatsoever' should be construed *ejusdem generis* so as to reflect the general context of the clause and as such would not cover an entirely extraneous cause. In applying that case Gross J had little hesitation in holding as follows:

> *"All in all and whether regard is had to piracy, the effects of piracy or both, to my mind, the incident remains a totally extraneous cause, falling outside the scope of the sweep up wording."*

Comment

Following on from the decision earlier this year in *Masefield v Amlin* (*The Bunga Melati Dua*) [2010] EWHC 280 in which the issues concerned the effect of piracy in a marine insurance context, this case provides helpful clarification concerning piracy and off-hire under a time charterparty and, in particular, clause 15 of NYPE.

In dismissing charterers' appeal and finding that detention by pirates did not place the vessel off-hire under clause 15, the Judge upheld in full both the findings and reasoning of the original tribunal. Given the topicality of the issue it is helpful that the Judge nevertheless took the trouble to provide detailed reasoning for his decision which is of great interest to owners and charterers alike.

Although the outcome will perhaps surprise few in the market, the decision nevertheless highlights the need for parties to consider how they wish to treat delays caused by pirates when negotiating charterparty terms. As the Judge put it:

> *"Should parties be minded to treat seizures by pirates as an off-hire event under a time charterparty, they can do so straightforwardly and most obviously by way of an express provision in a "seizures" or "detention" clause. Alternatively and at the very least, they can add the word "whatsoever" to the wording "any other cause", although this route will not give quite the same certainty as it presently hinges on obiter dicta, albeit of a most persuasive kind."* [namely the findings of Rix J in The Laconian Confidence referred to above]

By way of reinforcing this point, Gross J was careful to note that the charterparty in this case did indeed contain a bespoke clause dealing with *'Seizure/Arrest/Requisition/ Detention'* but that this did not extend to cover seizure by pirates. This only served to reinforce the view of the Judge that there could be no justification for '*distorting the meaning of clause 15 of this charterparty*'.

So the message for parties is clear: if the intention is for the vessel to be placed off-hire for the duration of any detention by pirates, then unambiguous language should be included in the charterparty to this effect. In the light of this decision, mere reliance on clause 15 of NYPE will be insufficient.

Further information

If you would like further information on any issue raised in this update please speak to your usual Clyde & Co contact or any of the following:

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