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Piracy and Off-hire in Time Charters

M/V "Saldanha" (2010)

In light of the recent Somali piracy attacks there has been much discussion on the construction of charterparty terms. The London Commercial Court has now confirmed that a vessel will not be off-hire during a detention by pirates under the standard NYPE time charter. In confirming the position, the Court (Gross J) followed the arbitration tribunal's unanimous finding.

The appeal to the Court focused solely on the question of off-hire under clause 15 of the charterparty. Charterers argued that they could bring themselves within one of the three exceptions in NYPE clause 15, namely: (i) detention by average accidents to ship or cargo; (ii) default and/or deficiency of men; or (iii) any other cause.

Detention by average accidents to ship or cargo

Gross J held that the concept “average accident” must mean an accident which causes damage. The incident did not result in damage to the vessel. Gross J was also unable to accept that the incident could properly be described as an “accident”. Furthermore, although the wording “average accident” points towards a marine insurance context, Gross J held that the concept did not mean detention due to any peril ordinarily covered by marine insurance and in this context, damage to the ship is an essential ingredient for the wording “average accidents…to ship” to apply.

Default and/or deficiency of men

Charterers asked the court to determine whether, on the factual assumption that the Officers and crew had failed to take recognised anti-piracy precautions, before and during

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the attack, these failures would fall within the exception "default of men".

Gross J felt that the tribunal had correctly summarised the sense of the relevant wording as follows:

> *If the Owners do not provide a workforce in the numbers necessary to perform the chartered services as owed by the Owners to the timecharterers, when required, there is a 'deficiency of men'; if the Owners do provide the numbers necessary, but the workforce refuses to perform the services, there is a 'default'. This is distinct and separate from an individual transient act of negligence by a crew member or officer in the carrying out of the Owners' chartered services.*

Following on from this, charterers failed to satisfy the burden of bringing themselves within this wording. "Default of men" did not include a failure to take recognised anti-piracy precautions; it did not extend to the negligent or inadvertent failure to perform the duties of the master and crew. Rather, it required a refusal by the master and crew to perform the services.

Any other cause

Gross J stated that the starting point was to underline that clause 15 in the charterparty contained the wording "any other cause" rather than the wording "any other cause whatsoever".

Gross J turned to the judgment of Rix J in The Laconian Confidence (1997) which provides the following:

> *….those words [i.e. 'any other cause'], in the absence of 'whatsoever', should be construed either ejusdem generis or at any rate in some limited way reflecting the general context of the charter and clause…*

Gross J declined to distinguish The Laconian Confidence in the manner suggested by the charterers. He felt that whether regard was had to piracy, the effects of piracy or both, the incident remained a totally extraneous cause, falling outside the scope of the sweepup wording. The act of piracy was not eiusdem generis. It did not arise out of the condition or efficiency of the vessel, or the crew, or the cargo, or the trading history, or any reasonable perception of such matters by outside bodies.

In conclusion, Gross J held that the seizure of a ship by external factors is a recognised peril; but no such peril was covered by clause 15 of the charterparty. Accordingly, the charterers' application was dismissed. He went on to suggest that should parties be minded to treat seizures by pirates as an off-hire event, the most straightforward and obvious way of doing so would be by way of an express provision in a "seizures" or "detention" clause. As an alternative "and at the very least" he commented that adding "whatsoever" to "any other cause" would assist but as he accepted that would have less certainty.

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