

‘HAVE RECENT OFF-HIRE, WAR RISK AND PIRACY CLAUSES IMPROVED THE POSITION OF TIME CHARTERERS BY DISTRIBUTING THE RISK OF DELAY CAUSED BY PIRATE ATTACKS ON THEIR TIME CHARTERED VESSELS MORE EQUITABLY AS BETWEEN OWNER AND TIME CHARTERER?’

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‘It is difficult to contemplate a more central topic in maritime law than time charter-parties. They occupy a prominent position in commercial shipping with the greater part of the world fleet engaged to some degree under the terms of a time charter-party.’

Professor D. Rhidian Thomas

‘SA dogs of war versus Somali pirates’.

Adverting billboard for the Mail and Guardian Newspaper

Johannesburg, 11 June 2013

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ABBREVIATIONS

BALTIME	The BALTIME 1939 (rev 2001) standard form issued by BIMCO.
BIMCO	The Baltic and International Maritime Council.
BOXTIME	The Baltic and International Maritime Council Uniform Time Charter Party for Container Vessels. This is a standard form issued by BIMCO.
BPTIME 3	The BPTIME 3 standard form, 1st Edition, February 2001, issued by BP Shipping Ltd and BIMCO.
CONWARTIME 93	CONWARTIME is a clause issued by BIMCO.
CONWARTIME 2004	CONWARTIME is a clause issued by BIMCO.
GENEVA CONVENTION	1958 Geneva High Seas Convention done at Geneva on 29 April 1958.
GENTIME	General Time Charter Party issued by BIMCO.
GOA	Gulf of Aden Clause issued by Cargill.
H&M	Hull & Machinery.
INTERTANKO	International Association of Independent Tanker Owners.
IMB	International Maritime Bureau.
K&R	Kidnap & Ransom.
NYPE 46	The New York Produce Exchange (NYPE 46) Charterparty issued by ABSATIME.
NYPE 93	The New York Produce Exchange (NYPE 93) Charterparty issued by ASBATIME.
SHELLTIME 4	Standard Charter Party issued December 1984 and amended December 2003 by the Royal Dutch Shell Company Limited.
UNCLOS	1982 United Nations Convention on the Law of the Sea

CHAPTER I INTRODUCTION

I AIM OF DISSERTATION

The aim of this dissertation is to establish whether recent off-hire,¹ war risk² and piracy³ clauses have improved the position of time charterers by distributing the risk of delay or deviation caused by pirate attacks, or the threat of such attacks on their time chartered vessels, more equitably as between the vessel owner and the time charterer⁴ with a view to alerting particularly South African time charterers to their vulnerability under many standard form charter contracts and therefore the need to incorporate appropriate clauses, as well as cautioning against the indiscriminate adoption of such clauses.

Standard off-hire clauses benefit the charterer by suspending the obligation to pay hire, but usually do not include piracy as an off-hire cause.⁵ The piracy clauses serve to shift some of the risk of piracy away from the charterer, while the war risk clauses consolidate into a single provision the contractual position of the parties in relation to the threat of piracy,

¹ Off-hire clauses suspend the obligation to pay hire in the circumstances and to the extent prescribed by the clause- see Professor D. Rhidian Thomas (ed) *Legal Issues Relating to Time Charterparties* (2008) 135 ('Rhidian Thomas').

² War and war risk clauses (dealt with as one in this dissertation) regulate the position of the parties where the causative occurrence of "war risks" prevents or impedes the ability of the parties operationally to carry out the charter in the terms agreed- see Professor Keith Michel 'War terror, piracy and frustration in a time charter context' in Rhidian Thomas 206 ('Keith Michel').

³ As explained by BIMCO, piracy clauses constitute a 'comprehensive contractual provision dealing with rights, obligations, responsibilities, liabilities and costs related to piracy under a time charter'- see BIMCO Special Circular No 2 November 2009, Version 1.1, 4-10-2011 at 3 available at www.bimco.org/en/Chartering/~media/Chartering/Special_Circulars/SC2009_02.ashx. BIMCO is an acronym for the Baltic and International Maritime Council. It is responsible for drafting standard forms and clauses for the shipping industry- see Grant Hunter *Standard forms – the BIMCO experience* in Rhidian Thomas 1 ('Grant Hunter').

⁴ The terms 'owner' and 'charterer' are used for ease of exposition because similar considerations would apply as between a time charterer and sub-time charterer (respectively 'owner' and 'charterer' in a sub-time charter).

⁵ For example, the NYPE 1946 does not specifically include piracy as an off-hire event. NYPE is an acronym for New York Produce Exchange, issued by the Association of Shipbrokers and Agents (USA) Inc.

sometimes also broadening the scope of piracy.⁶ The incorporation of these piracy and war risk clauses does not remove the time charterer's risk entirely, and time charterers should therefore consider additional measures, such as ensuring the safety of the vessel before departure,⁷ proceeding in convey, providing armed guards,⁸ using escorts, avoiding day or night navigation, and adjusting speed or course.⁹ This dissertation intentionally does not address these additional preventative measures.

II BACKGROUND TO AIM

The ways in which time charterers can limit their risk under the terms of their time charter agreement is worth considering because widespread use is made of standard-form time charter agreements that were drafted before the resurgence of piracy in recent times,¹⁰ and that, in some instances, have not been adapted to deal with the allocation of risks of piracy as

⁶ Sara Cockerill 'Shipowners' and charterers' concerns regarding their contractual obligations. Charterparty Issues: The legal backdrop, CONWARTIME, and the new piracy clauses' in *LSLC event-Piracy II* 15 March 2010 ('Sara Cockerill'). CONWARTIME is the code name for the BIMCO 'Standard War Risks Clause for Time Charters, 1993'. For example, the BIMCO piracy clause introduces a 90 day cap on the payment of hire should the ship be seized by pirates- see BIMCO Special Circular No 2 November 2009, Version 1.1, 4-10-2011 at 3.

⁷ 'It can include installing barbed wire and employing armed guards'- see Andrei Kharchanka (BC Chartering) 'Impact of Piracy on Terms and Conditions of Charterparties' available at http://www.joc.com/sites/default/files/joc_inc/breakbulk/bba2011_presentations/Panel3b+piracy+andreikharchanka.pdf, accessed on 14 November 2012 ('Andrei Kharchanka').

⁸ Ince and Company, in a client briefing, make the following comment on the use of armed guards: 'Companies who provide armed guards to vessels report brisk business in the wake of *The Maersk Alabama* and there is no doubt that this is being increasingly looked at by some shipowners. The incident involving *The MSC Melody* perhaps suggests that the pirates are not deterred from attacking ships with armed guards on board; certainly it is in their character to meet fire with fire. The basic equation therefore remains: use armed guards and decrease the chances of being taken against a risk of escalation and damage to the vessel and injury to crew'- see Ince and Company, available at <http://incelaw.com/whatwedo/shipping/article/shipping-e-brief-may-2009/piracy-an-overview-and-update>, accessed on 15 June 2103.

⁹ BIMCO Special Circular No. 2 November 2009, Version 1.1, 4-10-2011 at 2; referring to the BIMCO Piracy Clause for Time Charter Parties 2009, Clause (c) (i).

¹⁰ 'The NYPE (Appendix G.10) 1993, formulated by the Association of Shipbrokers and Agents (USA) Inc. and recommended by BIMCO and FONASBA, is the current latest draft of the NYPE. But the form that remains in the most common use is the 1946 NYPE (Appendix G.9)'- see Professor John Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 2 ed (2009) 748 ('John Hare'). FONASBA is the Federation of National Associations of Shipbrokers and Agents which also produces standard agreements.

between the parties to the time charter (these will be referred to, for want of a better term, as ‘traditional charters’).¹¹ The use of these traditional charters generally means that under these contracts the risk of delay is carried entirely by the charterer, because the clauses in these traditional charters that generally shift risks of delay, such as off-hire provisions,¹² do not, as formulated, cover pirate attacks or the threat of such attacks.¹³

Provided time charterers are aware of the limitations of such clauses under these traditional charters, they can go some way to limit their exposure by including in their charters appropriate piracy clauses¹⁴ developed in recent times; make use of more recently drafted versions of the widely used standard-form agreements that do contain clauses adapted to balancing the risks of pirate attacks between shipowner and time charterer; or introduce bespoke clauses to achieve that balance.

South African time charterers, who, with the resurgence of piracy on the east coast of Africa are perhaps particularly vulnerable to increased costs and losses occasioned by piracy,¹⁵ would be well-advised to be aware of their weak contractual position under the

¹¹ Professor Hare in his book *Shipping Law & Admiralty Jurisdiction in South Africa* 2 ed mentions piracy only once, and then in the context of the Admiralty Jurisdiction Regulation Act 105 of 1983 and the Admiralty Court Rules, 1997. ‘The Act regards piracy, sabotage or terrorism committed against maritime property or against persons on any ship as giving rise to a maritime claim’: John Hare 70. ‘When Maritime piracy resurfaced as a front-page story, many readers greeted it with surprise and even derision’: Robert Haywood & Roberta Spivak *Maritime Piracy* (2012) 6.

¹² Also referred to as ‘Suspension of Hire’ or ‘Loss of Time’ in some standard charterparties – see for example clause 11 of the BALTIME 1939 (Revised 2001) form which is headed ‘Suspension of Hire etc.’ and clause 8 (e) of the BOXTIME form which is headed ‘Loss of Time’. BALTIME is an abbreviation for The Baltic Time Charter issued by BIMCO, and BOXTIME is an abbreviation for The Baltic and International Maritime Council Uniform Time Charter Party for Container Vessels also issued by BIMCO – see BIMCO Special Circular No 2 November 2009, Version 1.1, 4-10-2011 at 2.

¹³ *Cosco Bulk Carrier Co Ltd v Team-Up Owning Co Ltd (The Saldanha)* [2010] EWHC 1340 (Comm) para 12. Here the court held that an act of piracy was not an event leading to off-hire under the NYPE 46 form.

¹⁴ Piracy provisions are usually incorporated into the war or war risk clauses of standard charterparty forms. But there are some standard charterparty forms which do not allocate piracy risk, such as SHELLTIME 4- see Chapter VIII of this dissertation. SHELLTIME 4 is the standard time charter form issued by the Royal Dutch Shell Company for the tanker trade.

¹⁵ ‘The Economic Cost of Somali Piracy’ Working Paper One, Earth Future Foundation available at <http://www.oceansbeyondpiracy.org>, accessed on 20 November 2012. In this paper, Steven Askins & Co state

traditional charters and to follow suit by including appropriate clauses in their time charter agreements. However care needs to be taken to select the right clause(s) as not all standard-form agreements or clauses advance the charterer's interests in the event of loss of time caused by piracy. This dissertation is intended to provide some guidance to time charterers in this regard and is therefore considered to be a worthwhile endeavour.

The charterer's position (in attempting to more equitably distribute the risk of piracy) is neatly summed up by Andrei Kharchanka as follows¹⁶

'Negotiating right clauses in the charter party will not prevent pirate's attacks, but it can balance owner's and charterer's interests and avoid any legal battles if the vessel is seized.'

III PIRACY AND INSURANCE

Insurance is a key component of the time charterer's contractual management of risk, including mitigating the liability for loss of time due to delay or deviation. A discussion about insurance (which can be traced back to the earliest days of shipping) falls outside the scope of this dissertation. However it is appropriate to make a few comments about the intersection of piracy and insurance. If commercially available, and beneficial, the charterer should consider arranging insurance cover¹⁷ to mitigate the exposure to piracy.¹⁸ Jonathan Webb (a practising shipping lawyer), in a recent article on the Maritime Law Association of South Africa's website, describes the current situation regarding marine insurance as follows:

'On a standard London marine policy written on Institute Time Clauses (Hulls) (1/10/83), piracy is a hull and machinery (H&M) risk and excluded from standard war risks policy under the Institute War and Strikes Clauses 1/10/83. However, nowadays, piracy is almost always expressly excluded from H&M policies and expressly included in war policies. It is generally agreed that the peril of piracy fits best in a war policy, which is much more versatile and allows underwriters to rate the risk of a specific transit

that piracy may result in excess costs of having a ship held hostage for months on end, potentially as large as \$20 million for a \$4 million ransom.

¹⁶ Andrei Kharchanka 4.

¹⁷ Piracy is an insured peril. Professor Michel notes that 'Insurers in late 2005 recommended that "piracy" should no longer be classified as a hull risk...but as a "war risk" under the Institute War and Strikes Clauses 1/11/95 edition': Keith Michel 202.

¹⁸ 'Charterers are routinely required to fund shipowner's insurance premiums, whether through express provision to that effect or simply because the cost of insurance is reflected in the hire rate': Professor Howard Bennett 'Safe port clauses' in Rhidian Thomas 69 ('Howard Bennett').

much more effectively through the use of Additional Premiums. It is rare to see piracy remain in an H&M policy under London Institute wordings, but it does still happen and it is very important to check the peril is properly covered. ... Over the last three years we have seen a large increase in the popularity of bespoke Kidnap & Ransom (K&R) policies designed to provide primary cover for losses arising from a hijack – often including loss of hire.¹⁹

Appropriate clauses equitably distributing the risk of piracy (i.e. improving the charterer's position from the norm) may therefore also have the additional benefit of decreasing insurance premiums paid by time charterers because of the realignment of risk.

IV STRUCTURE OF THE DISSERTATION

First, Chapter II of the dissertation ('Piracy and modern shipping') explains the need for the contractual management of piracy risk, and therefore demonstrates the topicality and usefulness of the dissertation, and provides various definitions of piracy distinguishing it from war, terrorism and violence.

Secondly, Chapter III ('General Time Charter Arrangements') 'sets the scene' by outlining general time charter arrangements, including the contractual nature of the time charterparty, the time charterers obligation to pay hire and right to set-off.

Thirdly, Chapter IV ('Classifying the causes of delay or deviation') looks at a number of events which can cause the vessel to be delayed or deviated, and attempts to classify them into causes internal or extraneous to the ship. This is useful background to the discussion on off-hire clauses which follows.

Fourthly, Chapter V ('Historical development of off-hire, war risk and piracy clauses') provides an overview of the development and maturity of off-hire, war risk and piracy clauses demonstrating the different periods within which relevant changes occurred to the standard charter forms. This shows 'why we are where we are' by providing some context for the clauses and indicates the options available to charterparties.

¹⁹ Jonathan Webb 'Piracy: The Current Position – An overview' available at www.mlisa.co.za/wp-content/uploads/2012/10/jonathan-webb.pdf accessed on 8 August 2013 ('Jonathan Webb').

Fifthly, Chapter VI ('The off-hire clauses in time charterparties') sets out a general overview of the off-hire clauses (including their purpose and operation) and then reviews more specifically the off-hire clauses in the traditional charters and compares the clauses selected.

Sixthly, Chapter VII ('Piracy and the off-hire clauses'), building on the background in the previous chapter, then considers how the risk of delay or deviation resulting from a pirate attack or the threat of a pirate attack would be allocated as between the shipowner and time charterer under clauses in the traditional charters dealing with off-hire. The conclusion is that there is a higher level of risk allocated to the time charterer.

Seventhly, Chapter VIII ('Impact of recent off-hire, war risk and piracy clauses') examines the more recent off-hire clauses as well as recent developments in introducing war risk and piracy clauses into these contractual arrangements to establish whether the risk of delays or deviation have been allocated more equitably as between the shipowner and time charterer and in so doing to provide the time charterer with a greater measure of protection against losses occasioned by delays or deviation due to piracy.

Eighthly, and for completeness, Chapter IX ('Damages due to delay on redelivery') briefly addresses the issue of damages (either contractually or under common law) which owners may claim as a result of a loss of hire or fixture resulting from the vessel's delay due to detention by pirates. The risks of losses being suffered by a time charterer as a result of delay caused by piracy are both liability for hire while the vessel is not 'working' and potential damages for breach of the obligation to redeliver at the stipulated time. The chapter discusses how the latter risk is managed contractually in the standard time charter agreements.

Finally, Chapter X draws conclusions about whether the recent off-hire, war risk, and piracy clauses have improved the time charterer's position. The conclusion is that it is a mixed-bag, and emphasises that the risk of piracy for the charterer has not been entirely removed. Some guidance is provided to time charterers to protect their commercial position.

CHAPTER II PIRACY AND MODERN SHIPPING

This chapter discusses the need for the contractual management of piracy risk in modern shipping, thereby providing the relevance for the dissertation topic, and further explains the rationale for defining piracy and distinguishing it from other causes, such as war, terrorism and violence.

I RISK OF PIRACY

Piracy is a growing global issue in modern times and has even been classified as an ‘epidemic’.²⁰ Pirates impede shipping and maritime transport in a number of locations across the globe ‘such as the coast of Somalia, the Gulf of Nigeria, the South China Sea, the Straits of Malacca and the Americas’.²¹ Given the fact that ‘more than 90 percent of global trade is carried by sea’,²² and the value of cargo carried on board modern vessels, the commercial impact of piracy on the shipping industry is enormous. Niclas Dahlvang quantifies this as follows:

‘The cost of piracy to the world economy has been estimated as high as \$25 billion each year. However, this does not tell the whole story, as under-reporting of pirate attacks has been estimated at anywhere between 20 and 2,000 percent’.²³

Increasing risk of piracy²⁴ is therefore unfortunately an eventuality which South African time charterers must consider.²⁵ Already shipping has had to be diverted elsewhere to

²⁰ Eugene Kontorovich ‘A Guantanamo on the Sea’: The Difficulty of Prosecuting Pirates and Terrorists’ (2010) 98 *Cal LR* 243 at 248.

²¹ Lucas Bento ‘Towards an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish’ (2011) 29 *Berkley Journal of International Law* 399 at 404.

²² Helmut Tuerk ‘The Resurgence of Piracy: A Phenomenon of Modern Time’ (2009) 17 *U Miami Int'l & Comp L Rev* 1 at 3. An estimated 22 000 ships pass through the Gulf of Aden every year- see Gitanjali Bakshi: Blue Gold-Somali pirates in the Gulf of Aden available at http://www.strategicforesight.com/blue_gold.htm, accessed on 11 July 2012 (‘Helmut Tuerk’).

²³ Niclas Dahlvang ‘Thieves, Robbers, & Terrorists: Piracy in the 21st Century’ (2006) 4 *Regent J Int'l L* 17 at 17 (‘Niclas Dahlvang’).

²⁴ The advertising street billboards for the Johannesburg-based *Mail & Guardian* newspaper on 11 June 2013 screamed: ‘SA dogs of war versus Somali pirates’.

²⁵ ‘Damage to ship or cargo incurred in the attack, loss of hire, cargo and operation during the attack and investigation procedures as well as loss of the whole ship as a cause of hijacking, kidnap and ransom money for ship and seafarers, investigation costs, costs of negotiating and delivering the money, contractual penalties due

and from eastern and southern Africa. By way of example, South Africa's profitable coal export market to India has been drastically reduced as 'Indian coal buyers have now started buying coal from Australia and Russia to avoid the Indian Ocean, citing piracy as the reason'.²⁶ Time charterers therefore have a commercial interest in considering whether these recent war risk and piracy clauses on offer may mitigate or partly mitigate their risk of piracy.

II DEFINING AND DISTINGUISHING PIRACY

Having established that piracy is something time charterers' need to be worried about, it is also convenient to briefly distinguish piracy from war, terrorism, violence or robbery. Although the outcome of this dissertation does not hang on this distinction, classifying an event into one or other of the categories mentioned can have insurance and other contractual implications. A few examples will suffice. The hijack of a vessel off the Nigerian coast for political motives may not be covered under a bespoke piracy clause (for loss of hire). An attack on a vessel by Al Shabaab (ie an act of terrorism) off Somalia would probably fall outside the 'War clause' in the NYPE 93 (clause 31(e)), but within the definition of 'War Risks' in the BIMCO CONWARTIME 93 (clause (1)(b) (which includes both 'acts of terrorists' and 'acts of piracy')). Conversely 'civil commotions' leading to violence would be covered under the SHELLTIME 4 'War Risks' clause, but piracy would not.

How then is piracy defined? As Paul Todd explains, 'Piracy has many different legal consequences, but though there is a central concept, there is no single definition of piracy for all purposes'.²⁷ Countries have therefore expanded the concept of piracy to include the broad notion of 'any armed violence at sea which is not a lawful act of war'.²⁸ Jonathan Bruce

to delayed or damaged delivery as well as cargo fraud with phantom - or ghost-ships are just some of the mounting costs South African charters face if confronted with a pirate attack': Leonard Remondus van der Meijden *The Influence of Maritime Piracy on Modern Commercial Transport* (unpublished MSc Thesis, University Rotterdam, 2008) ('Leonard Remondus van der Meijden'). Also see Ademun Odeke 'Somali Piracy – Effects on Oceanborne Commerce and Regional Security and Challenges to International Law and World Order' (2011) 25 *A&NZ Mar LJ* 134 at 139.

²⁶ Editorial on Somalian Piracy 'Escalating threat spurs South Africa into action' available at <http://www.leadershiponline.co.za/articles/politics/1318> accessed on 16 July 2012.

²⁷ Paul Todd *Maritime Fraud and Piracy* 2ed (2010) 3 ('Paul Todd').

²⁸ Helmut Tuerk 17.

refers to the classic definition of a pirate in *Republic of Bolivia v Indemnity Mutual Mar Ass Co Ltd* (1909) 1 K.B. 785 which is:

‘A man who is plundering indiscriminately for his own ends, and not a man who is simply operating against the property of a particular state for a public end, the end of establishing a government, although that act may be illegal and even criminal, and although he may not be acting of behalf of a society which is politically organised’.²⁹

The first internationally accepted attempt to define piracy was in the 1958 Geneva Convention on the High Seas (‘Geneva Convention’).³⁰ This definition was encompassed in the 1982 United Nations Convention on the Law of the Sea (‘UNCLOS’)³¹ which is recognised as ‘the best evidence of international law relating to the maritime regime, and is therefore binding on all nations’.³² Under this convention, to be considered an act of piracy, four criteria must be met, namely: (1) be committed on the high seas, (2) be of a violent

²⁹ Jonathan Bruce ‘Piracy: whose risk is it anyway?’ in *Foremast*, the newsletter of the Elborne Mitchell Marine, Aviation and Energy Group, Elborne Mitchell Solicitors. Edition 2009–22. 1 at 1. The claimants in this case (*Republic of Bolivia v Indemnity Mutual Mar Ass Co Ltd* 1909 1 K.B. 785) tried to bring an act of piracy within the confines of an insurance policy.

³⁰ See Art 1 of the 1958 Geneva High Seas Convention done at Geneva on 29 April 1958. This convention entered into force on 30 September 1962.

³¹ Article 101 of UNCLOS defines piracy as follows:

‘Piracy consists of any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed -
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)’.

Referenced from ‘Piracy and armed Robbery at sea’ available at <http://www.imo.org/knowledgecentre/informationresourcesoncurrenttopics/informationresourcesoncurrenttopicsarchives/documents/piracy.pdf> accessed on 12 July 2012. This definition of piracy has been the subject of much criticism - see Robin Geiß and Anna Petrig *Piracy and Armed Robbery at Sea – The Legal Framework for Counter Piracy Operations in Somalia and the Gulf of Aden* (2011) 59-64.

³² Milena Sterio ‘Fighting Piracy In Somalia (and Elsewhere): Why More Is Needed’ (2010) 33 *Fordham Int'l LJ* 372 at 385 (‘Milena Sterio’).

nature, (3) include at least two vessels, and (4) be committed for solely private aims'.³³ A wider definition can be found in the International Maritime Bureau ('IMB') which defines piracy as 'an act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in furtherance of that act'.³⁴ The UNCLOS definition has not been used extensively in a private and contractual context as its definition is limited due to its restrictive requirements (such as the high seas' requirement).

It is sometimes difficult to classify an attack as one of terrorism or piracy, the lines often becoming blurred. As Professor Michel notes:

'Attacks in recent years on merchant vessels including cruise ships and ferries in international waters or in ill-defined and unpoliced coastal regions have caused concern as to whether such attacks are perpetrated by "pirates" seeking "personal" gain by theft or the taking of hostages or by "terrorists" seeking a political or religious end. Who is to say that the demand for a cash ransom is made by a local warlord, a criminal syndicate or the local cell of a terrorist organisation?'³⁵

Professor Michel goes on to explain that the definition of 'war' has evolved through judicial interpretation, where the courts have adopted a common sense approach, whereas 'terrorism' has evolved through statutory enactment, such as the UK Terrorism Act 2000.³⁶ The ultimate aim of terrorism is usually to advance a political, religious or ideological cause. The South African Terrorism Act adopts a similar approach – 'terrorist activity' is defined (paraphrased) as the use of violence which endangers the life or causes serious risk to the health or safety of the public and which is intended to threaten the unity or territorial integrity of the Republic or to intimidate the public and which is committed for the purpose of advancement of an individual or collective political, religious, ideological or philosophical

³³ Milena Sterio 386.

³⁴ Michael Gagain 'Neglected Waters: Territorial Maritime Piracy and Developing States: Somalia, Nigeria, and Indonesia' (2010) 16 *New Eng J Int'l & Comp L* 169 at 171. This definition of piracy includes acts within a state's territory.

³⁵ Keith Michel 202.

³⁶ Keith Michel 201.

motive, objective, cause or undertaking.³⁷ The common type of hijack of a vessel by pirates would therefore not constitute ‘terrorism’ under South African law.

The more recent trend is for the standard forms and piracy clauses to contain broad definitions, reducing and sometimes eliminating the (legal) distinction between piracy, terrorism, violence and robbery. For example, the CONWARTIME 2004 ‘War Risks’ clause includes ‘acts of piracy by any person, body, terrorist or political group’. Similarly ‘violent robbery’ is deemed to be ‘an act of piracy’ under the BIMCO 2009 piracy clause³⁸ and the GOA clause ‘excludes liability for capture/seizure ... detention or threatened detention by third parties ... not limited to acts of piracy’.

III CONCLUSION

Piracy is a real threat which time charterers need to take into account when considering their risk mitigation strategies. The outcome of this dissertation is to provide time charterers with some commercial guidance in this regard. Categorising a particular event of hijack as piracy can sometimes be difficult, because it is not always clear that it falls within the language of a particular clause, and this can have insurance and contractual implications for the time charterer.

³⁷ Section 1(i) (XXV) of the Protection of Constitutional Democracy against Terrorism and Related Activities Act 33 of 2004 (The Terrorism Act). Published in Government Gazette 27266 dated 11 February 2005.

³⁸ The BIMCO piracy clause (clause (a)) defines “Piracy” as ‘any actual, threatened or reported acts of piracy and/or violent robbery and/or capture/seizure’. This is a superfluity as ‘piracy’ itself is not actually defined. However this definition of piracy is wide enough to include attacks by pirates seeking personal gain as well as terrorists seeking a political aim.

CHAPTER III GENERAL TIME CHARTER ARRANGEMENTS

This chapter outlines the general time charter arrangements, focussing on the nature of the time charter, the time charterer's obligation to pay hire and his right to set-off. This will serve as background context to the following chapters of the dissertation where the allocation of the risk of delay or deviation leading to off-hire is reviewed, both under the traditional charters as well as the more recent war risk and piracy clauses, to show the allocation of risk assumed by the shipowner and time charterer.

I NATURE OF THE CHARTERPARTY

Professor Hare states that by convention the law has categorised charterparties into various types, primarily charters by demise, time charterparties and voyage charterparties (of which the latter two are sometimes grouped together as non-demise charterparties).³⁹ There is a fundamental difference in the nature of the contract between charters by demise and charters not by demise.⁴⁰ There is further a need for various purposes to differentiate within charters not by demise between voyage and time charters. This dissertation intentionally only addresses time charter arrangements as its primary focus. This is considered useful because time charters are the most common arrangement in South African shipping⁴¹ and, with the increasing piracy risk faced by parties, the distribution of the risk of delay or deviation caused by pirate attacks, or the threat of such attacks, is pertinent.

Characterising the nature of a time charter is not an easy matter in South African law. It is clearly a contract of hire. But there is an on-going debate as to whether the charterparty is also a lease or a contract of carriage.⁴² A lease generally transfers the possession and control

³⁹ John Hare 737-8.

⁴⁰ In the demise charter, the demise charterer hires the entire ship, usually without provision of master, officers and crew. The demise charterer takes possession and control of the vessel 'bareboat', and then employs the shipboard personnel as its own servants to operate the vessel- see John Hare 738. As explained in this chapter of the dissertation, the time charterer under the standard forms contracts with the owner for the exclusive use of the cargo carrying spaces on board a ship for a fixed time period- see John Hare 746. The time charterer does not take control of the ship which remains under the control of the ship owner at all times.

⁴¹ John Hare 734.

⁴² In *Montelindo Compania Naviera SA v the Bank of Lisbon & SA Ltd* 1969 (2) SA 127 (W), the Witwatersrand Local Division held that the time charter was a lease (for the purposes of the Insolvency Act, 24 of 1936). Taking a different view, the Cape Provincial Division, in *The Maria K; Frosso Shipping Corporation v*

of the thing leased, which does not occur under a (standard) time charter. Why is this categorisation important? As Professor Hare explains:

‘Categorisation can be more than mere rhetoric. For the law may ascribe differing consequences to differing types of contracts, and, where the parties have not covered themselves adequately in the contractual terms, it may be that the law is required to step in and imply terms or apply interpretations peculiar to that type of agreement.’⁴³

Perhaps Professor Hare’s view that a time charter is a contract *sui generis* is the appropriate conclusion.⁴⁴ He accordingly defines a charterparty as follows:

‘A charterparty is an agreement in terms of which a charterer hires from a shipowner part or the whole of a ship, with or without her non-cargo carrying space, and with or without master and crew, for a limited time or for a voyage, a succession of voyages, or other stated purpose.’⁴⁵

As the definition suggests, there can be a wide range of charterparty agreements.⁴⁶ The main contractual rights and obligations of the parties to the time charterparty are as follows:

Shipowner

- (i) Hires part or the whole of a ship to the charterer.
- (ii) Receives payment for the hire from the charterer.
- (iii) ‘Remains responsible for the navigation of the vessel, acts of pilots and tug boats, insurance, crew and all other matters, same as when trading for their own account’.⁴⁷

Richmond Maritime Corporation (Ideomar SA intervening) 1985 (2) SA 476 (C), held that there was no lease of the vessel under the NYPE 46 time charter agreement. John Hare, in proposing a pragmatic commercial approach, concludes that ‘the apparent divergence of approach between *Montelindo* and *The Maria K* is in fact reconcilable if one accepts as a valid proposition of South African law that a contract for the letting and hiring of services (such as a time charterparty undoubtedly includes) may be a lease in itself. A time charterparty in South African law may therefore incorporate a lease, though it is not usually regarded as a lease of a ship, and it should not necessarily be so regarded’: John Hare 734.

⁴³ John Hare 730.

⁴⁴ John Hare 747.

⁴⁵ John Hare 730.

⁴⁶ ‘Charterparties, at least in modern practice, may take any form which reflects the intention and consensus of the shipowner and the charterer’: John Hare 737.

(iv) Bears the expense of maintaining the ship and the crew.⁴⁸

Time Charterer

- (i) Acquires the right to use the vessel's cargo spaces for the carriage of lawful⁴⁹ cargo.⁵⁰
- (ii) Pays for the hire of part or the whole of the ship (as agreed through negotiation).⁵¹
- (iii) Has the contractual power to require the ship to trade to its own nominated ports of loading and discharge.⁵²
- (iv) Does not employ any of the on-board ship's personnel⁵³

II OBLIGATION TO PAY HIRE IN CHARTERPARTY

The time charterparty gives to the charterer the right to employ the vessel for the charterer's own gain upon payment of a time-based charter hire to the owner.⁵⁴ The time charterer therefore has the obligation to pay hire. As Professor Rhidian Thomas states, 'It is trite that hire is the consideration provided by the charterers for the use of the vessel and her crew made available by the owners'.⁵⁵ The threshold rule is that 'hire shall be payable from the moment the ship is delivered to the charterers until she is again redelivered to the owners at the termination of the charter period'.⁵⁶ Time runs against the charterer⁵⁷ who assumes responsibility for paying hire continuously from delivery to the vessel's re-delivery. If the vessel is delayed beyond the period (term) originally agreed, the charterer is liable for the delay. Thus the court held in the *Hill Harmony* that 'it was true that "time was money" for the

⁴⁷ Clause 26 of the NYPE charterparty, 1993. Professor Hare states that the NYPE charterparty is most commonly used in the trade- see John Hare 734.

⁴⁸ Professor Hare refers to the case of *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd (The Hill Harmony)* [2001] 1 AC 638 at 652 per Lord Hobhouse- see John Hare 747.

⁴⁹ NYPE 46 clauses 4 and 5.

⁵⁰ John Hare 733.

⁵¹ Hire is paid, generally in United States Dollars, calculated on a daily basis and payable monthly in advance: NYPE clauses 10 and 11: John Hare 750.

⁵² John Hare 733.

⁵³ John Hare 733.

⁵⁴ John Hare 733.

⁵⁵ Rhidian Thomas 115.

⁵⁶ Lars Gorton, Patrick Hillenius, Rolf Ihre et al. *Shipbroking and Chartering Practice* 6 ed (2004) 273 ('Lars Gorton').

⁵⁷ John Hare 768.

charterer'.⁵⁸ The liability for such hire accrues during the charter period, generally regardless of whether the ship is actually 'working' or not. This is different to the voyage charter where it is the owner who is at risk from additional time taken.⁵⁹ Professor Rhidian Thomas puts it thus: 'It is well understood that under time charterparties the commercial risk is borne by the charterer.'⁶⁰

In practice a negotiated hire rate is agreed between shipowner and charterer. 'This hire rate is usually a daily rate based on the ship's tonnage'.⁶¹ The hire is usually paid monthly or semi-monthly, but this can be changed by agreement.

The general obligation placed on a charterer to tender payment is absolute, continuous and unconditional. Lord Wright expressed this obligation in *The Petrofina*.⁶²

'The payment of hire was a vital matter because, if there was default of "such payment" (i.e. in cash monthly in advance in London), the owners were entitled to cancel the long and valuable charter. Default in payment, that is, on the due date is not, in my opinion, excused by accident or inadvertence. The duty to pay is unqualified so far as the express terms of the charterparty go. The importance of this advance payment to be made by the charterers is that it is the substance of the consideration given to the shipowner for the use and service of the ship and crew which the shipowner agrees to give. He is entitled to have the periodical payment as stipulated in advance of his performance so long as the charterparty continues. Hence the stringency of his right to cancel.'

Failure to pay hire or the delay in the payment of hire will constitute a breach of contract by the charterer. The shipowner may have a claim for breach of contract and damages, as well as a right to withdraw the vessel from the service of the charterer if payment of hire is delayed.

⁵⁸ *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd (The Hill Harmony)* [1999] 2 AC 219.

⁵⁹ John Hare 768.

⁶⁰ Rhidian Thomas 116.

⁶¹ 'The "prima facie" rule is that hire must be paid in full unless a contractual or legal right of deduction exists': Rhidian Thomas 115.

⁶² *A/S Tankexpress v Compagnie Financiere Belge Des Petroles SA (The Petrofina)* [1948] 2 All ER 939 at 946. Also see *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 2 All ER 767.

III RIGHT TO WITHHOLD PAYMENT AND SET-OFF IN TIME CHARTERPARTIES

The right to withhold payment would generally conflict with the charterer's obligation to 'pay for both the use and hire of the ship from the day of her delivery until the hour of the day of her re-delivery'.⁶³ This proposition is similar to the lease of immovable property where the tenant is usually precluded from withholding payment of rent for any reason. Under the traditional charters, neither the NYPE 46 nor the BALTIME 1939 clauses give the charterer the contractual right to withhold payment.

Set-off in this context can be seen as the right of the charterer to deduct claims against the owner.⁶⁴ Professor Tettenborn remarks that 'A time charterer's scope for set-offs against hire is not insubstantial ...'.⁶⁵ The rule is stated by John Kimball as follows:

'Generally, under both English and American law, deductions from hire are not permitted unless expressly allowed in the charter. Unauthorised deductions, or deductions exceeding the proper amount, may be treated the same as non-payment'.⁶⁶

Professor Hare, after reviewing the legal position, concludes that, in order to set-off, 'there must either be a contractual right to do so'⁶⁷ or the quantum must be agreed or liquidated by court or arbitration ruling'.⁶⁸

A review of the traditional charters shows that there are a number of contractual circumstances where the charterer can set-off additional costs incurred against hire charges. By way of example, clause 15 of the NYPE 46 provides as follows:

⁶³ Clause 4 of the NYPE 46. Clause 6 of the BALTIME 1939 provides that 'The Charterers shall pay as hire the rate stated in Box 19 per 30 days, commencing in accordance with Clause 1 until her re-delivery to the Owners'. The clause goes on to say that 'In default of payment, the Owners shall have the right of withdrawing the vessel from the services of the Charterers...'

⁶⁴ Professor Andrew Tettenborn. 'Assignees of hire: how far can they ignore charterer's claims against owners?' in Rhidian Thomas 155 ('Andrew Tettenborn').

⁶⁵ Andrew Tettenborn 151.

⁶⁶ John D Kimball 'Termination of rights under time charters' in Rhidian Thomas 221. This is similar to the lease of immovable property where the tenant is precluded from setting off the payment of rent against any debt owed by the landlord ('John Kimball').

⁶⁷ Such as contained in the deduction provisions of the off-hire clause in the NYPE 93.

⁶⁸ John Hare 770.

“15. Off Hire

That in the event of the loss of time from ... the payment of hire shall cease from the time thereby lost; and if upon the voyage the speed be reduced by defect in or any breakdown of any part of her hull, machinery or equipment, the time so lost, and the cost of any extra fuel consumed in consequence thereof, and all extra expenses shall be deducted from the hire.”

[Emphasis added]

Therefore in terms of this off-hire clause, charterers can deduct (set-off) extra expenses incurred against the agreed hire under the circumstances reflected in the clause.

Clause 11 of the BALTIME 1939 provides as follows:

“11. Suspension of Hire etc.

(A) In the event of drydocking or other necessary measures ... no hire shall be paid in respect of any time lost thereby during the period in which the Vessel is unable to perform the service immediately required. Any hire paid in advance shall be adjusted accordingly. [Emphasis added]

Under this clause, there is a contractual right to set-off against hire charges paid in advance on the occurrence of the events stipulated.

The position is common under the more recent standard forms. Clause 17 of the NYPE 1993 contains a provision substantially similar to the 1946 version: the word ‘bunkers’ is used instead of ‘fuel’ and interestingly the cost of any bunkers and extra proven expenses ‘may’ (instead of ‘shall’) be deducted from the hire. Nothing however seems to turn on this distinction. The BOXTIME,⁶⁹ GENTIME,⁷⁰ BPTIME 3⁷¹ and SHELLTIME 4 off-hire clauses appear to be silent on the issue of set-off.

IV CONCLUSION

There are a number of different types of charterparties, which have developed over time to serve different shipping needs. While it is difficult to categorise the nature of a time charterparty, the rights and obligations under these contracts are well defined and entrenched.

⁶⁹ BOXTIME is the Uniform Time Charter Party for Container Vessels issued by BIMCO.

⁷⁰ GENTIME is the General Time Charter Party issued by BIMCO.

⁷¹ BPTIME 3 is the standard form issued by BP Shipping Ltd and BIMCO.

The time charterer has the liability to pay hire, and failure to pay such hire will constitute a breach of contract. There must be a contractual right to set-off or this must be ordered by a court or arbitration.

CHAPTER IV CLASSIFYING THE CAUSES OF DELAY OR DEVIATION

This chapter reviews the events which could potentially delay or deviate a voyage as contained in the traditional and standard forms, and attempts to categorise them into causes internal or external to the vessel. As discussed in the following chapters of this dissertation, this is relevant for determining whether the loss of time will take the vessel off-hire, and if so, whether the time charterer's liability to pay hire will be suspended.

I IMPLICATIONS OF DELAY

The loss of time under traditional and standard charter forms may arise from a number of events. These include breach by the owner or the charterer and in some cases without the fault of either party.⁷² Other events which could give rise to delays include:⁷³ failure to perform voyages with due dispatch;⁷⁴ absence of a safe port to load or discharge cargo;⁷⁵ off-hire for any loss of time arising from a deficiency of the vessel;⁷⁶ and deviation due to weather conditions,⁷⁷ navigational issues or other actual or potential risks.⁷⁸

Yvonne Baatz summarises the position thus:

‘Standard forms of time charter provide that hire will cease to be payable on the occurrence of certain events which prevent the full working of the ship such as a breakdown of her engines, or the ship running aground, or detention by average accidents, or default and/or deficiency of men either for the time lost to the charterer as a result of such event or during the period that the event continues’.⁷⁹

⁷² Detention of a vessel by piracy is a classic example.

⁷³ The NYPE Charterparty (Appendix G.10) is referenced as the example. John Hare 748.

⁷⁴ Lord Hobhouse, in *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd (The Hill Harmony)* [2001] 1 AC 638, held that “the scheduling of the vessel is of critical importance so that obligations to others can be fulfilled, employment opportunities not missed and flexibility maintained”- see John Hare 749-50.

⁷⁵ ‘The vessel is to be loaded and discharged at any safe dock or safe berth or safe place at which she can ‘safely enter, lie and depart, always afloat at any time of tide [NYPE clause 12]’: John Hare 750.

⁷⁶ NYPE clause 17: John Hare 751.

⁷⁷ ‘... the charter period can be affected by unforeseen events such as bad weather conditions ...’: Jan – Niklaas Brons *The final leg of a time charter – developments after the Achilleas* (unpublished LLM thesis, University of Cape Town, 2007) 15.

⁷⁸ The vessel will be considered off-hire from the commencement of such deviation: see William V Packard Fairplay Publications Limited, London, England, 1980 from 84–7.

⁷⁹ Yvonne Baatz, Ainhua Campas Velasco et al *Maritime Law* 2 ed (2011) 172 (‘Yvonne Baatz’).

II CLASSIFICATION OF DELAYS

It may be convenient to categorise these main events⁸⁰ into those ‘internal’ or ‘external’ (extraneous) to the ship and/or her crew, as follows:⁸¹

Internal

- (i) Deficiency of crew (insufficient numbers; strikes etc.)⁸²
- (ii) Failure to perform voyage with due dispatch (bad seamanship, bad navigation etc.)⁸³
- (iii) Deficiency of vessel (breakdown of equipment or machinery, fire etc.)⁸⁴
- (iv) Vessel deviates or puts back, contrary to the orders or direction of the charterers

External

- (i) Arrest of vessel
- (ii) Absence of a safe port⁸⁵
- (iii) Adverse weather conditions⁸⁶
- (iv) Detention by average accidents to ship or cargo⁸⁷

⁸⁰ This is not intended to be an exhaustive list of events which could result in the delay or deviation of a vessel, but rather represents the main risks identified in traditional and standard off-hire clauses.

⁸¹ The New York Produce Exchange (NYPE 93) Charterparty (Appendix G.10) is referenced as the example: John Hare 748.

⁸² Professor Hare asserts that ‘deficiency of men’ means ‘a numerical insufficiency of crew members, not mere refusal by some to do work’: John Hare 769.

⁸³ The New York Produce Exchange (NYPE 93) Charterparty (Appendix G.10) is referenced as the example: John Hare 748.

⁸⁴ NYPE 93 clause 17.

⁸⁵ ‘The vessel is to be loaded and discharged at any safe dock or safe berth or safe place at which she can ‘safely enter, lie and depart, always afloat at any time of tide [NYPE clause 12]’: John Hare 750. It is a general requirement of most charterparties that the vessel can only be ordered (by the charterer) to a ‘good and safe port’ - see John Hare 762. This is known as the ‘safe port warranty’.

⁸⁶ The vessel will be considered off-hire from the commencement of such deviation - see William V. Packard Fairplay Publications Limited, London, England, 1980 from 84 – 87.

⁸⁷ NYPE 93 clause 17; John Hare 751. Professor Hare interprets this to mean ‘an accident causing damage, and imposing some ‘physical constraint on the vessel’s movements in relation to her service under the charter’ - see John Hare 769.

The consequence of the causes referred to occurring is usually the delay or deviation (in turn resulting in a delay) of the ship. Generally, under the traditional charters:

- Where delays are caused by causes internal to the ship or her crew, the off-hire clause contained in the traditional charters is triggered and the time charterer is relieved from paying the hire charges for the period the ship is unavailable; and
- Where delays are caused by causes external (extraneous) to the ship, the off-hire clause is generally not triggered, and the time charterer must continue to pay hire.

While the position under the traditional charters is reasonably clear, it has become blurred in some respects as newer clauses have been developed to accommodate new events leading to off-hire. This is explained by Professor Rhidian Thomas as follows:

‘Traditionally off-hire causes relate to the chartered vessel, her efficiency and ability to perform the services contracted for by the charterers. In other words, they are causes that may be regarded as internal to the ship. But in practice the ambit of the causes has over time extended into other categories. In tanker and in some of the modern dry cargo standard forms “deviation” is frequently identified as a generic off-hire cause, with “deviation” given a very wide definition. In general terms, the effect of this development is to extend off-hire causes to include causes relating to navigational misperformance by the vessel, but this extension continues to retain the traditional link with causes internal to the chartered vessel, albeit different in nature.’⁸⁸

By way of example, the BALTIME 1939 was amended in 2001 when outdated standard clauses were replaced with the latest revision published by BIMCO.⁸⁹ These changes introduced ‘Detention by the arrest of the vessel’ and ‘Deviation or putting back (contrary to the orders of the charterers)’ as new causes of off-hire. However, as will be shown, piracy has maintained its status as being an event extraneous to the vessel.

III CONCLUSION

Where the cause of the delay or deviation is due to some internal cause i.e. default, defect or deficiency in the vessel or her crew, then generally under the traditional charters the risk lies

⁸⁸ Rhidian Thomas 136.

⁸⁹ Grant Hunter 1.

with the shipowner. This would include deficiency of men, breakdown, and other causes which prevent the full working of the vessel.

Conversely, where the cause of the delay or deviation under the traditional charters is due to some external (extraneous) cause, the risk generally lies with the time charterer. This would include breach of the safe port warranty, adverse weather conditions and detention by average accident.

This distinction has however become somewhat blurred with more recent clauses extending the ambit to widen causes such as 'deviation' to include 'navigational misperformance of the vessel'.

CHAPTER V HISTORICAL DEVELOPMENT OF OFF-HIRE, WAR RISK AND PIRACY CLAUSES

This chapter provides an historical overview of the development of off-hire, war risk and piracy clauses in time charter agreements to explain ‘why we are where we are’ and to contextualise the current options and range of contractual choices available to time charterers for risk mitigation purposes.

I DEVELOPMENT OF CLAUSES

It is trite that laws evolve as societies develop.⁹⁰ In line with this reality, maritime and shipping law has evolved (albeit sometimes slowly⁹¹ and illogically⁹²) to accommodate changing commercial realities and relationships. These new realities that parties have to deal with in the shipping industry are not always progressive, with piracy and terrorism being recent examples. A review of the development of the off-hire, war risk and piracy clauses shows that there appears to have been distinct periods during which changes have occurred to the standard agreements that to a large extent govern the shipping industry, as set out below.

(a) 1930s and 1940s

This is the period of the traditional charters (as defined in this dissertation), straddling World War II. Standard form charters such as the BALTIME 1939⁹³ and NYPE 46 (1946) were developed during this period. The NYPE 46 in particular is still in widespread use today. The

⁹⁰ Professor Hare, in the preface to his book *Shipping Law and Admiralty Jurisdiction in South Africa (2ed)* notes that ‘...maritime law, which is constantly evolving in a developing country such as South Africa, needs to look further than its immediate socio-legal roots’- see John Hare X.

⁹¹ Grant Hunter notes that ‘BALTIME 1939 has only undergone few changes since it was first published. In 1974 a Part I box layout was introduced and in 2001 the document went through a minor technical revision where outdated standard clauses were replaced with the latest revision published by BIMCO. It is important to note that none of the revision has altered the substance and overall balance of the document.’: Grant Hunter 1.

⁹² Professor Michel notes that ‘War risk insurance cover had evolved in a convoluted way in that such risks were excluded from the hull cover by the FC&S (Free of Capture and Seizure) Clause which listed those risks which were excluded under the standard marine policy (the SG Form) attached as a Schedule to the Marine Insurance Act 1906.’: Keith Michel 199.

⁹³ The first BALTIME Uniform Time Charter was produced by BIMCO in 1909, for the Baltic trades, but found a much wider global audience and was eventually revised in 1939- see Grant Hunter 1.

off-hire clauses in the standard form charters mentioned do not contain any provisions relating to piracy and the traditional charters also do not contain war risk or piracy clauses.⁹⁴

Piracy was not a significant risk during this period and this explains the absence of contractual provisions allocating the risk of piracy in the traditional charters. Explaining the lack of war risk clauses is more difficult. PanBras Logistics (an international participant in the shipping industry) elucidates this as follows:

‘One of the serious shortcomings of the NYPE 1946 is that it contains no war clause in its printed text which, from time to time, has caused serious problems when parties having fixed on the basis of the NYPE 1946 form were confronted with a war or warlike situation. Even worse, in order to rectify this obvious shortcoming, there are many examples of parties having agreed to include as a rider clause to the NYPE 1946, the old Chamber of Shipping War Risks Clauses 1 & 2 which since long have been withdrawn as obsolete clauses and which were drafted way back in 1935 in connection with the Spanish Civil war for use with voyage charter parties only and, therefore, totally unsuitable for time chartering.’⁹⁵

However war risk insurance was also readily available to parties,⁹⁶ and where circumstances dictated, specific rider clauses could in any event be included by parties if piracy was seen as a possible threat.

(b) 1950s to 1990s

This can be called a period of consolidation in the shipping industry internationally. Being a ‘conservative’ industry (in a commercial sense), parties were comfortable to continue to make use of standard forms to which they were accustomed, while only introducing bespoke changes where specific circumstances required. Minor revisions were introduced to the BALTIME 1939 in 1974. The NYPE was updated in 1981.

⁹⁴ Clause 11 of the BALTIME 1939 is the suspension of hire clause and clause 15 of the NYPE 46 is the off-hire clause. Neither includes piracy as suspension of hire or off-hire events.

⁹⁵ PanBras Logistics ‘Explanatory note on Charter Party’, available at <http://panbras.com.br/capacity/Charter%20Party%20Terms1.pdf>, accessed on 26 July 2013.

⁹⁶ Professor Michel quotes Mr Justice Staughton in the *Bamburi* arbitration where in his award he stated: “The political and commercial history of the Western world for the last two hundred years is reflected in the cases on war risk insurance ...”: Keith Michel 200.

Grant Hunter records that:

‘A number of attempts have been made to update the NYPE 46 form – notably in 1981 when the Association of Ship Brokers and Agents (USA) Inc. (ASBA) prepared an updated version in consultation with industry bodies. The updated version, known as ASBATIME, only gained limited acceptance in the market. The 1946 version continued to dominate the dry cargo time charter sector although increasingly the form was accompanied by an ever-growing number of often badly written “home-made” rider clauses.’⁹⁷

Shell also produced its SHELLTIME 4⁹⁸ form for wet cargo (tankers) during this period (December 1984).

(c) 1990s to mid-2000s

With the increasing threat of piracy, shipping bodies began (albeit slowly) to include piracy conditions in their standard charterparty forms, although usually as part of war risk clauses.⁹⁹ While these clauses deal with piracy in relation to additional insurance, deviation and additional expenses (all arising from the charterer’s orders to trade the vessel through an area of risk), they do not provide for the vessel to go off-hire or for the charterer to be relieved of his obligation to pay hire in the event of delay or deviation due to piracy.

Thus, for example, clause 31 (e) of NYPE 1993 provides as follows:

‘31 (e) War Clauses

(i) No contraband of war shall be shipped. The Vessel shall not be required, without the consent of the Owners, which shall not be unreasonably withheld, to enter any port or zone which is involved in a state of war, warlike operations, or hostilities, civil strife, insurrection or piracy whether there be a declaration of war or not, where the Vessel, cargo or crew might reasonably be expected to be subject to capture, seizure or arrest, or to a hostile act by a belligerent power (the term “power” meaning any de jure or de facto

⁹⁷ Grant Hunter 9.

⁹⁸ This is the standard contract used by the Royal Dutch Shell Company for tanker trade.

⁹⁹ Such as in clause 31(e) of NYPE 93.

authority or any purported governmental organization maintaining naval, military or air forces). [Emphasis added]

(ii) If such consent is given by the Owners, the Charterers will pay the provable additional cost of insuring the Vessel against hull war risks in an amount equal to the value under her ordinary hull policy but not exceeding a valuation of [*Blank*]. In addition, the Owners may purchase and the Charterers will pay for war risk insurance on ancilliary risks such as loss of hire, freight disbursements, total loss, blocking and trapping, etc. If such insurance is not obtainable commercially or through a government program, the Vessel shall not be required to enter or remain at any such port or zone.

(iii) In the event of the existence of the conditions described in (i) subsequent to the date of this Charter, or while the Vessel is on hire under this Charter, the Charterers shall, in respect of voyages to any such port or zone assume the provable additional cost of wages and insurance properly incurred in connection with master, officers and crew as a consequence of such war, warlike operations or hostilities.

(iv) Any war bonus to officers and crew due to the Vessel's trading or cargo carried shall be for the Charterer's account.'

Therefore under this clause the vessel cannot be directed by the charterer to enter any piracy zone (where there is the reasonable prospect of hijack) unless with the consent of the owner. In such a case (i.e. where the owner provides consent) charterer will be liable for the additional cost of insurance, including at the owner's election the additional cost of insurance for loss of hire. Where no insurance cover is available the vessel cannot be required to enter the zone of risk. This zone is very extensive and has been declared by the Lloyd's of London Joint War Committee as the Gulf of Aden and almost the entire Indian Ocean.¹⁰⁰

Similarly, the BIMCO Standard War Risks Clause for Time Charters, 1993 (Code Name: "CONWARTIME 1993")¹⁰¹ includes "acts of piracy" in the definition of "War Risks" as follows:

¹⁰⁰ Jonathan Webb 1.

¹⁰¹ CONWARTIME is a clause issued by BIMCO that can be used as a rider clause or simply replace another clause in an existing standard form.

(1) For the purposes of this clause, the words:

(a) ...

(b) "War Risks" shall include any war (whether actual or threatened), act of war, civil war, hostilities, revolution, rebellion, civil commotion, warlike operations, the laying of mines (whether actual or reported), acts of 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 whatsoever, which, in the reasonable judgement of the Master and/or the Owners, may be dangerous or are likely to be or to become dangerous to the Vessel, her cargo, crew or other persons on board the Vessel.' [Emphasis added]

(2) The Vessel, unless the written consent of the Owners be first obtained, shall not be ordered to or required to continue to or through, any port, place, area or zone (whether of land or sea), or any waterway or canal, where it appears that the Vessel, her cargo, crew or other persons on board the Vessel, in the reasonable judgement of the Master and/or the Owners, may be, or are likely to be, exposed to War Risks.'

(3) ...

(4) (a) ...

(b) If the Underwriters of such insurance should require payment of premiums and/or calls because, pursuant to the Charterers' orders, the Vessel is within, or is due to enter and remain within, any area or areas which are specified by such Underwriters as being subject to additional premiums because of War Risks, then such premiums and/or calls shall be reimbursed by the Charterers to the Owners at the same time as the next payment of hire is due'.

As can be seen, while the BIMCO clause is quite similar to the NYPE 1993 clause, it extends the causes (beyond those contained in the NYPE 93) to include 'acts of terrorists' and the protagonists to include any 'political group' or 'the Government of any state whatsoever'. Under this clause, the master (in addition to the owner as in the NYPE 1993) may also exercise reasonable judgement to declare a zone unsafe.

In relation to off-hire, clause (8) of CONWARTIME 1993 provides that:

‘If in compliance with any of the provisions of sub-clauses (2) to (7) of this Clause anything is done or not done, such shall not be deemed a deviation, but shall be considered as due fulfilment of this Charterparty.’

Accordingly, under the terms of this charter form (CONWARTIME 1993), the delay or deviation of the vessel due to an act or potential threat of piracy will not take the vessel off-hire, and the charterer is liable to continue paying hire during that period.

In other cases of the period, there is no allocation of piracy risk at all (e.g. SHELLTIME 4).¹⁰² The SHELLTIME 4 war risks clause reads as follows:

‘35. War Risks

The master shall not be required or bound to sign Bills of Lading for any place which in his or Owners' reasonable opinion is dangerous or impossible for the vessel to enter or reach owing to any blockade, war, hostilities, warlike operations, civil war, civil commotions or revolutions.’

(d) *Post 2009*

Following pressure from the industry to more equitably distribute the risk of delay or deviation caused by pirate attacks between the vessel owner and the time charterer, consequent on increasing incidents of piracy (especially off the coast of east Africa), various shipping bodies then developed and issued separate piracy clauses, which were intended to be added to, or incorporated in, standard charterparty agreements. BIMCO issued its first separate piracy clause in March 2009 (which became seen as too shipowner-friendly), and subsequently updated it in November 2009 to make the clause more charterer-friendly by shifting some of the risk away from the charterer. It did this by providing that the vessel would remain on-hire but hire payments would cease 90 days after seizure (and resume once the vessel is released). Similarly the GOA¹⁰³ piracy clause provided for payment of hire to be suspended after a period of 60 days in the event of detention by pirates. INTERTANKO¹⁰⁴ followed suit with standard piracy clauses for both time and voyage charters, but which did not provide for the vessel to go off-hire, and remained shipowner-friendly.

¹⁰² Maryna Kuzmenko *Allocation of piracy risks in the charterparties* (unpublished LLM Thesis, London Metropolitan University, September 2012). (‘Maryna Kuzmenko’)

¹⁰³ Cargill ‘Gulf of Aden Clause’.

¹⁰⁴ Standard form produced by the International Association of Independent Tanker Owners (INTERTANKO).

Bespoke clauses have also now gained in popularity, in circumstances where charterers may find themselves in the favourable negotiating position to include individualised clauses in their charters.¹⁰⁵ But this is ‘swings and roundabouts’ as the balance of commercial trade ebbs and flows¹⁰⁶ between owners and charterers; charterers would be well advised to make use of standard forms or clauses which balance their interests rather than rely on some perceived ad hoc negotiating advantage.

II CONCLUSION

This development of the clauses, and how the shipping industry responds to change, is neatly summed up by Grant Hunter as follows:

‘Perhaps the greatest challenge that BIMCO faces in terms of the uptake of its modern forms is the challenge of outdated documents. An imprecisely worded and outdated document that has nevertheless been tried and tested by the courts and through arbitration proceedings is often more appealing to users than a comprehensive modern form. This is often simply an issue of familiarity. In many cases, users will adopt some of the thinking behind a new or revised document and incorporate the ideas into older forms as rider clauses. However, the risks of introducing incompatible, and possibly conflicting, rider clauses are obvious. It remains one of BIMCO’s most enduring challenges to encourage the shipping industry to let go of outdated documents and to use modern, clearly written and balanced versions.’¹⁰⁷

¹⁰⁵ It is trite that the fortunes of owners and charterers shift based on the economics of supply and demand. In an article in the *Financial Times* it was stated “The cost of shipping dry bulk commodities such as iron ore, coal and grains plunged to a near 22-year low on Wednesday, as worldwide demand for raw materials continued to decline”: Esther Bintliff ‘Slump in hire rates shifted market power’ *Financial Times* 28 November 2008 available at <http://www.ft.com/cms/s/0/ffd98d28-bb9e-11dd-ae97-0000779fd18c.html#axzz2WSyNZ4CK>, accessed on 14 November 2012. Thus in theory where demand for vessels exceeds supply, contracts are more likely to be concluded which shift risk in favour of the owner. Where the reverse is the case, the charterer, having bargaining power, is more likely to strike a deal which better distributes the risk of piracy.

¹⁰⁶ ‘Between owners and time charterers the balance of contractual power will doubtlessly swing with shifts in market conditions and, accordingly, it may be anticipated that the ambit of off-hire clauses will ebb and flow depending on which party has market power’: Rhidian Thomas 146.

¹⁰⁷ Grant Hunter 6.

The development of the clauses reallocating some of the risk of piracy may not have taken place as quickly or have been as all-encompassing as may have been expected. The more recent clauses (particularly the bespoke piracy clauses) have gone some way to improve the risk position of the charterers as will be more fully explained in the following chapters of this dissertation.

CHAPTER VI THE OFF-HIRE CLAUSES IN TIME CHARTERPARTIES

This chapter gives a general overview of the off-hire clauses in time charters, explaining their purpose and operation, and then discusses off-hire more specifically under the traditional charters.

I BACKGROUND TO OFF-HIRE CLAUSES

Off-hire clauses are relevant for determining who bears the loss resulting from delay or deviation of the vessel under a time charter arrangement. Once the off-hire event occurs and time is lost, the result is that the risk shifts to the owner who will then bear the financial brunt of delay if the charterer discharges the onus of proving that the event does indeed fall within the ambit of the off-hire clause.

The purpose of the off-hire clause is to protect the charterer by giving him an escape route from his payment obligations. This represents an exception to the general rule that the charterer is liable to pay hire continuously. The charterer therefore bears the onus of showing that the vessel goes off-hire. As John Weale states: ‘The off-hire clause being in the nature of an exception is to be construed narrowly against the charterer because it is included for his sole benefit’.¹⁰⁸ In order for a charterer to benefit from the provisions of the off-hire clause, it must be shown by the charterer that the event clearly falls within the language of the specific off-hire provision.

This was confirmed by Phillimore J in *The Ilissos*:¹⁰⁹

‘The cardinal rule, if I may recall is such, in interpreting such a charter-party as this, is that the charterer will pay hire for the ship unless he can bring himself within the exceptions. I think he must bring himself clearly within the exceptions. If there is a doubt as to what the words mean, then I think those words must be read in favour of the owners because the charterer is attempting to cut down the owner’s right to hire.’

¹⁰⁸ John Weale ‘The NYPE Off-hire Clause and Third Party Intervention: Can an Efficient Vessel be Placed Off-hire’ available at http://www.simsl.com/Weale_Off-hirepaper9.pdf, accessed on 29 July 2012 (‘John Weale’). See also *Burton & Co v English* [1877] 6 Ch D 265.

¹⁰⁹ *Royal Greek Government v Minister of Transport (The Ilissos)* (1948) 82 Lloyd’s Rep 199.

This will entail an analysis of the language used in the off-hire clause and whether the event relied on by the charterer falls within the specific exemption in the clause.

‘Off-hire clauses may vary in their nature, conditions and terms. They may be generic or special, and time lost may be measured by reference to the period of the off-hire event or on a net loss of time basis’.¹¹⁰ Each off-hire clause has its own wording but off-hire clauses mainly relate to ‘the chartered vessel, her efficiency and ability to perform the service contracted for by the charterers’.¹¹¹

As Lars Gorton explains:

‘There are circumstances however which are defined in the off-hire or (suspension of hire) clauses which release the charterer from the obligation to pay hire to the owners’.¹¹²

II REALIGNMENT OF THE RISK

‘Off-hire clauses essentially realign the way risk is distributed in time charterparties’,¹¹³ shifting the burden of a vessel going off-hire to the charterer. Professor Rhidian Thomas explains the position as follows:

‘There is clear justification for this redistribution of risk when the loss of time results from an event within the area of responsibility and which adversely affects the full or efficient working of the vessel. This cause and effect appears to represent the philosophy which has underpinned the evolution of off-hire clauses, ...’.¹¹⁴

This philosophy was set out by Kerr J in *The Mariva AS*:¹¹⁵

‘I think that the object is clear. The owners provide the ship and crew to work her. So long as they are fully efficient and able to render to the charterers the services then required, hire is payable continuously. But if the ship is for any reason not in full working order to render the services then required of her, and the charterers suffer loss of time in consequence, then hire is not payable from the time so lost.’

¹¹⁰ Rhidian Thomas 135.

¹¹¹ Rhidian Thomas 136. The causes of off-hire are agreed as between shipowner and charterer.

¹¹² Lars Gorton 272.

¹¹³ Rhidian Thomas 141.

¹¹⁴ Rhidian Thomas 141.

¹¹⁵ Rhidian Thomas 141.

The charterer bears the onus of proving that the off-hire clause has been triggered and falls within a certain named clause in the specific time charter policy. Kerr J, in *The Mareva AS*,¹¹⁶ reinforces this point:

‘It is settled law that *prima facie* hire is payable continuously and that it is for the charterers to bring themselves clearly within an off-hire clause if they contend that hire ceases.’

If the off-hire clause is triggered the payment of hire is suspended. However, the existence and operation of the charterparty is not affected unless the contract specifically states otherwise.

III REQUIREMENT OF LOSS OF TIME

The charterer must not only prove that an off-hire cause has been established but also ‘that there has been a loss of time as a result of a fortuitous off-hire clause’.¹¹⁷ The first enquiry in an off-hire situation is to determine if the full working of the vessel has been prevented. The charterers have the obligation to show this.¹¹⁸ As held in the case of *The Aquacharm*,¹¹⁹ Lord Denning MR said:

‘We are to enquire first whether "the full working of the vessel" has been prevented. Only if it has do we consider the "cause".’

Provided also that there is a loss of time to the charter as well as the cause which the charterer relies upon falls within one of the named clauses hire will be interrupted.

¹¹⁶ *Mareva Navigation Co v Canaria Armadora SA (The Mareva AS)* [1977] 1 Lloyd’s Rep 381-382. Kerr J also refers to the often difficulty in interpretation and tautology involved in the terms of a charterparty – 381. Also see *Leolga Compania de Navigacion S.A v John Glynn & Son Ltd (The Dodecanese)* [1953] 2 Lloyd’s Rep 54, *Sig Bergesen D.Y A/S & al v Mobile Shipping & Transportation Co (The Burge Sund)* [1992] 1 Lloyd’s Rep 463, and *J&J Denholm Ltd v Shipping Controller (The Carronpark)* [1920] 4 Lloyd’s Rep 429.

¹¹⁷ Rhidian Thomas 136.

¹¹⁸ Terence Coghlin, Andrew W Baker and Julian Kenney et al *Time charters* 6ed (2008) para 25.5.

¹¹⁹ *Actis Co Ltd v The Sanko Steamship Co Ltd (The Aquacharm)* [1980] 2 Lloyd’s Rep 237.

IV OFF-HIRE IN THE TRADITIONAL CHARTERS

Time charters are distinctive from other charter arrangements because essentially time runs against the charterer. Any loss of time beyond the fixed time period is usually for the charterer's account unless the off-hire clause is triggered. As John Hare explains:

'The time charterer contracts with the owner (or the demise charterer as "disponent owner") for the exclusive use of the cargo carrying spaces on board a ship for a fixed time period. This period may be related to a contemplated voyage, for a round trip, or may be for whatever period the parties agree'.¹²⁰

The consequence is, as Lord Hobhouse of the English Court of Appeal in *The Hill Harmony* observed: 'The owner of a time chartered vessel does not normally have any interest in saving time'.¹²¹ This was stated by the Court of Appeal in the *The Hill Harmony* as "time was money".¹²²

The off-hire clauses in the traditional charters were developed by various shipping bodies and generally follow a consistent approach. They are substantially similar, and provide for the vessel to go off-hire under a number of different events. The common approach is that under the traditional charters only causes which are inherent to the 'internal workings' of the ship or crew generally take the vessel off-hire, thereby relieving the charterer of the liability to pay hire.

The NYPE 46 is the most widely used traditional charter. Clause 15 of NYPE 46 is the off-hire clause in this standard agreement. The full clause is set out below:

'15. Off Hire

That in the event of the loss of time from deficiency of men or stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, drydocking 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 from the time thereby lost; and if upon the voyage the speed be reduced by defect in or any breakdown of any part of her hull, machinery or equipment, the time so lost, and the

¹²⁰ John Hare 746.

¹²¹ *The Hill Harmony* [2001] 1 AC 638 at 652 per Lord Hobhouse. John Hare 747.

¹²² *The Hill Harmony* [1999] CA Vol. 2 209 at 210.

cost of any extra fuel consumed in consequence thereof, and all extra expenses shall be deducted from the hire.’

The clause provides for loss of time caused by the events mentioned. Piracy is not included as an off-hire event.

As will be seen, many of the more recent off-hire clauses in other standard forms adopted a similar approach, often borrowing the language/terminology of the NYPE 46 clauses.

The other main off-hire clause in the traditional charters is contained in the BALTIME 1939. The off-hire clause (called the ‘Suspension of Hire’ clause in this standard form) in this standard form reads as follows:

“11. Suspension of Hire etc.

- (A) In the event of drydocking or other necessary measures to maintain the efficiency of the Vessel, deficiency of men or Owner’s stores, breakdown of machinery, damage to hull or other accident, either hindering or preventing the full working of the Vessel and continuing for more than twenty-four hour consecutive hours, no hire shall be paid in respect of any time lost thereby during the period in which the Vessel is unable to perform the service immediately required. Any hire paid in advance shall be adjusted accordingly.
- (B) In the event of the Vessel being driven into port or to anchorage through stress of weather, trading to shallow harbours or to rivers or ports with bars or suffering an accident to her cargo, and detention of the Vessel and/or expenses resulting from such detention shall be for the Charterer’s account even if such detention and or/expenses, or the cause by reason of which either is incurred, be due to, or be contributed to by the negligence of the Owner’s servants.”

There are some minor differences between the off-hire clauses in the NYPE 46 and the BALTIME 1939, but they ‘are usually read in the same way’.¹²³ Under the BALTIME 1939 clause, off-hire only starts to run 24 hours after the occurrence of the initial event triggering the delay, whereas under the NYPE 46 off-hire commences immediately. Both clauses

¹²³ ‘However that may be, it is now clear following *The Marika M* and *The Pythia* that, at least under English law, the NYPE form is to be read in exactly the same way as BALTIME 1939’: John Weale 4.

include ‘deficiency of men or stores’¹²⁴ as events leading to off-hire, and contain similar provisions dealing with ‘breakdown’¹²⁵, ‘detention by average accidents to ship or cargo’¹²⁶ and ‘any other cause preventing the full working of the vessel’¹²⁷. In neither case are ‘war’ or ‘piracy’ causes included as an event in the off-hire clause.

V CONCLUSION

Off-hire clauses are intended to benefit the time charterer by sending the vessel off-hire and absolving the charterer from his payment obligations. Because this is an exception to the general rule that the time charterer must pay hire continuously, and is for the benefit of the charterer, the charterer to succeed must bring the event into the causes contained in the off-hire clauses. As has been shown, these off-hire clauses do realign risk if the cause can be brought within the confines of the specific wording used.

¹²⁴ Professor Hare states that this means a numerical insufficiency of crew members, not mere refusal by some to work - see John Hare 769. In *Royal Greek Government v Minister of Transport (The Ilissos)* (1949) 82 Li L Rep 196 (CA) the words ‘deficiency of men’ were held to mean “numerical deficiency”. In *The Saldanha*, the NYPE 46 form had been amended to include the words ‘default and/or deficiency of men’. Here Gross J agreed with the tribunal that the phrase ‘default of men’ should be construed restrictively i.e. as having ‘the limited meaning ... of a refusal ... to perform all or part of their duties as owed to the shipowner and not the negligent or inadvertent performance of those duties’: *Cosco Bulk Carrier Co. Ltd. v Team-Up Owning Co Ltd (The Saldanha)* [2010] EWHC 1340 (Comm) para 21.

¹²⁵ Professor Hare says this includes situations where it is reasonably necessary for the vessel to make for a port of refuge - see John Hare 769. John Livermore states that ‘... a breakdown of the ship’s propulsion will not put the vessel off-hire if it occurs and is remedied during loading or discharge of cargo. Off-hire will arise where the breakdown affects the particular work the ship is required to do at the relevant time. So a ship may be off-hire due to a propulsion breakdown at sea, but on-hire when such a breakdown has no effect on the service required by the charterers, such as unloading’: John Livermore *Transport Law in Australia* (2011) 73 (‘John Livermore’).

¹²⁶ This means an accident causing damage, and imposing some ‘physical constraint on the vessel’s movements in relation to her service under the charter’: John Hare 769. In *The Saldanha*, Gross J agreed that the phrase ‘average accident’ referred to an accident which caused damage to the ship: *Cosco Bulk Carrier Co. Ltd. v Team-Up Owning Co Ltd (The Saldanha)* [2010] EWHC 1340 (Comm) para 15.

¹²⁷ Professor Hare asserts that this applies only if that cause prevents the full working of the vessel- see John Hare 769. In *The Saldanha*, Gross J emphasised that clause 15 contained ‘the wording ‘any other cause’ rather than the wording ‘any other cause whatsoever’’, which would have led to a significantly different result. He agreed with the judgement of Rix J in *The Laconian Confidence* that the phrase “any other cause” should be construed restrictively, i.e. with regard to the other (named) causes listed in clause 15: it would ‘not cover an entirely extraneous cause’. *Cosco Bulk Carrier Co Ltd. v Team-Up Owning Co Ltd (The Saldanha)* [2010] EWHC 1340 (Comm) para 30.

CHAPTER VII IMPLICATIONS OF PIRACY FOR OFF-HIRE CLAUSES IN TRADITIONAL CHARTERS

This chapter considers how the risk of delay or deviation resulting from a pirate attack or the threat of a pirate attack would be allocated as between the shipowner and time charterer under off-hire clauses in traditional charters. As can be expected, law reports often record disputes involving off-hire, where charterers have attempted to persuade the courts that the vessel has gone off-hire, while shipowners – not surprisingly – contend the opposite. Although many of these cases are fairly recent, the courts are called upon to rule on disputes arising from the interpretation of clauses under traditional charters (such as NYPE 46), demonstrating again that these traditional charters remain in widespread use.

I PIRACY CASE LAW ON OFF-HIRE CLAUSES¹²⁸

Under the traditional charters surveyed previously, piracy is not specifically included as a cause leading to the loss of time. The issue then is whether the courts, in interpreting the off-hire clauses in traditional charters, and considering the context of the event, have left the risk of detention due to piracy with the time charterer (as is usually the case with external events) or shifted/partly shifted it to the shipowner.

There have been a number of leading cases where the courts have been called on to decide whether a vessel has gone off-hire as a consequence of piracy under off-hire clauses in traditional charters. In reaching their decisions, the courts have had the job of interpreting the wording of the clauses contained in the specific off-hire clauses. Baris Soyer explains this need for construction as follows:

‘It may be possible that parties fail to make their intentions clear by adopting a word which has more than one ordinary or conventional meaning (linguistic ambiguity).

¹²⁸ Although these are decisions of the English courts, they hold persuasive value in South African courts. The Admiralty Jurisdiction Regulation Act 105 of 1983, which came into operation on 1 November 1983 (Government Gazette No. 8937/19831021) confers admiralty jurisdiction on High Courts- see Gys Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa* 2ed (2012) 20. South African Admiralty law was essentially pegged to the English law system existing as at 1st November 1983. Decisions pre- 1983 remain binding on South African courts and decisions post 1983 hold merely persuasive value- see John Hare 360 (where he refers to collision regulations post 1983 would only be persuasive). Also see Graham Bradfield *The Nature and Scope of the Contemporary Maritime Liens in South African Admiralty Law* (unpublished LLM thesis, University of Cape Town, 1999) para 3.2 in referring to the foreign maritime lien.

Similarly, the linguistic vagueness of the words employed may make it impossible to state the parties' intentions in an unequivocal fashion. It may also be possible that interpretative problems in a contract arise simply because the future is unpredictable and parties fail to provide a contingency for every type of eventuality which may arise under the contract'.¹²⁹

In the cases discussed in the following section the time charterparties continued to use one of the traditional charter forms (the NYPE 46) with minor amendments. Following on Baris Soyer's useful construct, the parties here knew the risks of piracy yet chose to remain with the old NYPE form (although with some modifications), thereby failing to provide for this contingency and therefore had to persuade the courts that the words used supported their interpretation.

NYPE CASE LAW

In *Cosco Bulk Carrier Co Ltd v Team Up Owning Co Ltd (The MV Saldanha)*,¹³⁰ the *MV Saldanha* was chartered in terms of a time charterparty which was concluded on the NYPE 46 form. The vessel was seized by pirates whilst transiting the Gulf of Aden, and held for a period of almost three months. The shipowner claimed loss of hire from the charterers for the days the ship had been held to ransom. The charterers' counterclaimed for damages alleging that the vessel had been unseaworthy as 'the master and crew had not been properly prepared to deal with an attack by pirates'.¹³¹ In the arbitration the tribunal was called upon to determine whether the act of piracy fell within the ambit of Clause 15 of the NYPE 46 (the off-hire clause).

Here the loss of time arising from the detention by pirates was not in dispute; the tribunal held that the "full working" of the vessel had been prevented by the actions of the pirates. The charterers had refused to pay for the time that the vessel was not able to work. The owners claimed the hire, plus the cost of bunkers, plus the additional war risk premium (the charter form contained a war risk clause) and crew war risk bonuses.

¹²⁹ Dr Baris Soyer 'Construing terms in time charterparties – beginning of a new era or business as usual?' in Rhidian Thomas 17 ('Boris Soyer').

¹³⁰ *Cosco Bulk Carrier Co. Ltd. v Team-Up Owning Co. Ltd. (The Saldanha)* [2010] EWHC 1340 (Comm).

¹³¹ *Cosco Bulk Carrier Co Ltd v Team-Up Owning Co Ltd (The Saldanha)* [2010] EWHC 1301 (Comm) para 7.

It was decided by the tribunal that piracy could not be classified as an off-hire event. The charterers however took this decision of the arbitration on appeal to the Commercial Court of the Queen's Bench Division where the charterers attempted to bring themselves within the wording of the exemption clauses.

Gross J dealt with the applicable principles as follows:

'Pausing here, it is worth underlining that the applicable principles are beyond argument. As is hornbook law and was clearly expressed in the award, under a time charterparty, hire is payable continuously unless charterers can bring themselves within any exceptions, the onus being on charterers to do so. Doubt as to the meaning of exceptions is to be resolved in favour of owners. Unless within the ambit of the exceptions, the risk of delay is borne by charterers. The justice of the matter is to be found in the bargain struck by the parties. Mr. Barker QC, for Owners, put it well in his skeleton argument:

"There is no relevant concept of fairness other than the contractual balance struck by the off-hire clause, construed in accordance with well-known orthodoxy".¹³²

The case before the court on appeal was narrowed to three issues i.e. whether the charterers could bring themselves within one or more of the following causes contained in clause 15 of the charterparty (NYPE 46), namely (1) 'Detention by average accidents to ship or cargo'; (2) 'Default and/or deficiency of men'; and (3) 'any other cause'. These are dealt with in turn below.

'Detention by average accident'

The charterers advanced the following argument – '... the reference to an 'average accident' is not intended to require that there be damage to the Vessel i.e., physical loss, nor to require that there be an 'accident' as that term would be understood in an everyday sense, but to enumerate that the Vessel will be off-hire in the event of 'detention' ... due to fortuities which are marine perils. Piracy is a marine peril...'.¹³³ Gross J gave this argument short-shrift. First he held that this (the pirate attack) could not be described as an accident and

¹³² *Cosco Bulk Carrier Co. Ltd. v Team-Up Owning Co. Ltd. (The Saldanha)* [2010] EWHC 1340 (Comm) para 8.

¹³³ *Cosco Bulk Carrier Co. Ltd. v Team-Up Owning Co. Ltd. (The Saldanha)* [2010] EWHC 1340 (Comm) para 10.

upheld the view of the tribunal that ‘an accident requires a lack of intent... an obviously deliberate and violent attack is not described as an accident, no matter how unexpected it may have been to the victim’.¹³⁴ And secondly that if detention through an act of piracy was to be regarded as an accident this would run contrary to the case of *Mareva Navigation Co v Canaria Armadora SA (The Mareva AS)*¹³⁵ where as a firmly established rule it was held that for an ‘average accident’ to have occurred damage was a necessary consequence. In this case (*The Mareva AS*) Kerr J held that the phrase ‘average accident’ referred merely to an accident which caused physical damage (to ship or cargo).

Further dealing with the terminology “average accident” Gross J, after discussing its insurance context, concludes that ‘... in this context, damage to the ship is an essential ingredient for the wording “average accidents ... to ship” to apply.’¹³⁶

‘Default and/or deficiency of men’

At the arbitration the charterers had also contended that the owners (represented by the officers and crew) had failed to take the usual (reasonable) steps to prevent the vessel from being hijacked by pirates and that this failure fell within the exception “default of men”. On appeal, counsel for the owners argued that the ‘natural meaning of “default of men” included a failure to perform or a breach by the Master and crew of their duties’.¹³⁷ Gross J agreed with the tribunal that the words “default of men” had a limited meaning, namely “... 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

¹³⁴ *Cosco Bulk Carrier Co. Ltd. v Team-Up Owning Co. Ltd. (The Saldanha)* [2010] EWHC 1340 (Comm) para 12.

¹³⁵ *Mareva Navigation Co v Canaria Armadora SA (The Mareva AS)* [1977] 1 Lloyd’s Rep 381-82. Kerr J also refers to the often difficulty in interpretation and tautology involved in the terms of a charterparty. Also see *Leolga Compania de Navigacion S.A v John Glynn & Son Ltd (The Dodecanese)* [1953] 2 Lloyd’s Rep 54, *Sig Bergesen DY A/S & al v Mobile Shipping & Transportation Co (The Burge Sund)* [1992] 1 Lloyd’s Rep 463, *J&J Denholm Ltd v Shipping Controller (The Carronpark)* [1920] 4 Lloyd’s Rep 429.

¹³⁶ *Cosco Bulk Carrier Co. Ltd. v Team-Up Owning Co. Ltd. (The Saldanha)* [2010] EWHC 1340 (Comm) para 15.

¹³⁷ *Cosco Bulk Carrier Co. Ltd. v Team-Up Owning Co. Ltd. (The Saldanha)* [2010] EWHC 1340 (Comm) para 20.

of those duties...”¹³⁸ Gross J then proceeded to make four additional comments in support of his views, namely:¹³⁹

- (1) It must be accepted that the natural meaning of “default” ‘is capable of including the negligent or inadvertent performance of the Master and crew’;
- (2) The history (context) of the clause must be considered. Gross J referred to the *Royal Greek Government* case¹⁴⁰ where the court held that the words “deficiency of men” meant “numerical insufficiency”. In this case (i.e. *The Saldanha*) ‘the vessel had a full complement of crew, so the wording did not assist the charterers’. Gross J also went on to hold that “deficiency of men” ‘did not extend to cover a wilful refusal to work’;
- (3) The addition of the words (in the off-hire clause) ‘... including strike of Officers and/or crew’ did not help the charterer’s case as this ‘is a pointer towards a narrow construction of “default of men”, consistent with the history of the clause and the mischief at which it is aimed’.
- (4) The allocation of the risk of delay under a typical time charterparty lies with the charterer. If this were not the case Gross J concludes, then ‘on almost every occasion when Officers or crew negligently or inadvertently fail to perform their duties causing some loss of time, then a vessel would be off-hire under this wording’.

Gross J therefore held that the charterers had failed ‘to satisfy the burden of bringing themselves clearly within the wording of cl. 15 in question’. The charterer’s therefore failed in their bid to persuade the appeal court that the action of the officers and crew, in failing to take the necessary precautions to avoid a pirate attack, constituted ‘default and/or deficiency of men’ within the wording of the off-hire clause.

¹³⁸ *Cosco Bulk Carrier Co. Ltd. v Team-Up Owning Co. Ltd. (The Saldanha)* [2010] EWHC 1340 (Comm) para 21.

¹³⁹ *Cosco Bulk Carrier Co. Ltd. v Team-Up Owning Co. Ltd. (The Saldanha)* [2010] EWHC 1340 (Comm) paras 22 -27.

¹⁴⁰ *Royal Greek Government v Minister of Transport* (1949) 82 LI. L Rep. 196.

'Any other cause'

As the above causes failed to come to the aid of the charterers and bring them within the wording of clause 15, the last string to their bow was to try to rely on the seemingly broad words of the exception 'any other cause'. The appeal court could not fail to notice that the wording was 'any other cause' and not 'any other cause whatsoever' [Emphasis added]. Gross J, in remarking that the difference was significant, referred to the judgement of Rix J in *The Laconian Confidence* (see next case), where it was held that those words (i.e. 'any other cause') 'should be construed either *ejusdem generis* or at any rate in some limited way reflecting the general context of the charter and clause ... A consideration of the named causes indicates that they all relate to the physical condition or efficiency of either vessel (including its crew) or, in one instance, cargo.'¹⁴¹ .

A summary of the charterer's case in the appeal court taken from the judgement is as follows [Paraphrased]: the wording "any other cause" (without the additional word "whatsoever") was a sweeping up provision; the wording was there to prevent "disputes founded on nice distinctions"; that it was not easy to identify any "genus" which included all of the named causes in clause 15; if technically "average accident" did require there to be damage, nevertheless a fortuitous occurrence normally covered by marine insurance but which happened not to have caused damage, would be within the "spirit" of the clause and caught by the wording "any other cause"; even if "default of men" did not cover negligent errors, given the sweeping up wording, such a "fine distinction" should not determine whether or not the vessel was off-hire; that there had been a "refusal to perform" their duties on the part of Officers and crew and no less so because the Officers and crew were under duress from pirates; and lastly it was necessary to consider the effect of piracy as much as piracy itself.¹⁴²

Counsel for the charterer concluded his argument by summarising his client's case as follows:

¹⁴¹ *Andre & Cie SA v Orient Shipping Rotterdam (The Laconian Confidence)* (1997) 1 Lloyd's Rep 139 at 150-1.

¹⁴² *Cosco Bulk Carrier Co. Ltd. v Team-Up Owning Co. Ltd. (The Saldanha)* [2010] EWHC 1340 (Comm) paras 32 - 33.

‘Seizure by pirates is far from being a totally extraneous cause. It operates by disabling the officers and crew, who are just as much unable to work as if struck down with typhus, and by immobilising the ship, just as much as if it were aground or if there were not enough crew to work it. Owners are entitled to hire if they provide a functioning ship and a crew able to work the ship to provide the service required – neither ship nor crew can function if seized by pirates And the basis for the payment of hire is in such circumstances wholly undermined.’¹⁴³

Gross J was wholly unpersuaded by this line of argument, remarking that ‘I think that seizure by pirates is a “classic example” of a totally extraneous cause.’¹⁴⁴ The appeal court therefore held that ‘any other cause’ should be construed restrictively. Gross J accepted the decision in *The Laconian Confidence* that the *ejusdem generis* rule¹⁴⁵ should be used to confine the words ‘any other cause’ to causes relating narrowly to those ‘all related to the physical condition or efficiency of the vessel’.¹⁴⁶ It was also suggested that if the clause had read ‘any other cause whatsoever’ this might have resulted in an entirely different outcome. Since off-hire did not cover the situation where the crew failed to carry out their duties while under the control of the pirates, or that ‘no delay had arisen out of the condition or efficiency of the ship, its crew, or cargo, and thus charterers had not brought themselves within this clause’.¹⁴⁷

An interesting aspect of this case (*The Saldanha*) is that the charterparty also contained a bespoke ‘Seizure and Arrest’ clause. However the court held that this clause also did not

¹⁴³ *Cosco Bulk Carrier Co. Ltd. v Team-Up Owning Co. Ltd. (The Saldanha)* [2010] EWHC 1340 (Comm) para 32.

¹⁴⁴ *Cosco Bulk Carrier Co. Ltd. v Team-Up Owning Co. Ltd. (The Saldanha)* [2010] EWHC 1340 (Comm) para 33.

¹⁴⁵ The *Ejusdem Generis* Rule is an accepted rule of South African contractual interpretation- see *FNB v Rosenblum* 2001 (4) SA 189 (SCA) 196-8, where the court held that the interpretation of *ejusdem generis* is strictly similar to English court’s interpretation. See too *Shooters Fisheries v Incorporated General Insurance* 1984(4) SA 403 (A); *Grobblaar v Van der Vyver* 1954 (1) SA 248(A) 254 G-H.

¹⁴⁶ *Cosco Bulk Carrier Co. Ltd. v Team-Up Owning Co. Ltd. (The Saldanha)* [2010] EWHC (Comm) 1340 para 32.

¹⁴⁷ Michelle Smalley ‘*The Saldanha*’ in *Standard Bulletin*, September 2011 at 11, available at <http://www.standard-club.com/docs/StandardBulletinPiracySpecialEditionSeptember2011V2.pdf>, accessed on 24 July 2012.

come to the assistance of the charterer as, based on its precise wording, the language did not extend to cover detention by pirates.

In the case of *Andre & Cie SA v Orient Shipping Notterdam (The Laconian Confidence)*¹⁴⁸ the owners had let the vessel *The Laconian Confidence* to the charterers on the NYPE 46 form. They used the standard off-hire clause. The vessel was delayed by 18 days in a Bangladeshi port because the authorities refused to let her leave due to ‘residue sweepings’ (old rice which had been left behind in the hold). The charterer’s case was that the vessel was off-hire (in terms of the NYPE 46 clause) while it was in port under detention by the authorities.

It was held that the expression “any other cause” must be construed *ejusdem generis* with the preceding lists of incidents namely; (i) incidents concerning the manning provisions of the vessel; (ii) serious incidents of breakdown or damage and (iii) necessary drydocking.¹⁴⁹

In this case, Rix J stated as follows:

‘The unamended words “any other cause” do not cover an entirely extraneous cause ... if the clause had been amended to contain the word ‘whatsoever’, then the position would probably have been otherwise.’

Although each case is dealt with on its particular facts and the exact wording of the clause in dispute, it seems as if the English courts may find that the inclusion of the words ‘any other cause whatsoever’ may well bring the charterers within the wording of Clause 15 of NYPE 46.

Another recent case of *Osmium Shipping Corporation v Cargill International SA (‘The Captain Stefanos’)*¹⁵⁰ dealt with the off-hire clause under the NYPE 46 form. Here the parties entered into a charterparty on an amended NYPE 46 form. The vessel was to carry coal from Richards Bay (South Africa) to Europe. The intended route was up the east coast of Africa, past Somalia and then on to the Suez Canal to Europe. The vessel was unfortunately hijacked

¹⁴⁸ *Andre & Cie SA v Orient Shipping Notterdam (The Laconian Confidence)* (1997) CLC 314–15.

¹⁴⁹ Baris Soyer 23.

¹⁵⁰ *Osmium Shipping v Cargill International SA (The Captain Stefanos)* [2012] EWHC 571 (Comm).

by pirates off the coast of Somalia and detained for a period of about 2½ months. The charterers contended that the vessel was off-hire during this period.

The terms of the clause however differed somewhat from those in the case of *The Saldanha* as here a capture/seizure clause (see below) was made an additional contractual term of the contract entered into between the parties. The charterer chose not to contest, in view of the ruling in *The Saldanha*, that the vessel was off-hire pursuant to the standard clause 15 of the NYPE form.¹⁵¹ This case shows that different provisions i.e. those provisions which depart from the standard form traditional time charter arrangements may lead to a different outcome. Ultimately the risk in this case was on the owner rather than the charterer who in normal circumstances bears the risk of the vessel going off-hire.

An ad hoc clause (Clause 56) provided as follows:

‘Should the vessel put back whilst on voyage by reason of any accident or breakdown, or in the event of loss of time either in port or at sea or deviation upon the course of the voyage caused by sickness of or accident to the crew or any person on board the vessel (other than supercargo travelling by request of the Charterers) or by reason of the refusal of the master or crew to perform their duties, or oil pollution even if alleged, or capture/seizure, or detention or threat of detention by any authority including arrest, the hire shall be suspended from the time of the inefficiency until the vessel is again efficient in the same or equidistant position in Charterers’ option, and voyage resumed therefrom. All extra directly related expenses incurred including bunkers consumed during period of suspended hire shall be for Owners’ account.’ [Emphasis added]

The court in deciding that the hire was to cease to be payable relied on a number of factors. In addition the charterparty also contained the CONWARTIME 2004 clause upon which the owners sought to rely. Honourable Justice Cooke held however that:

‘The CONWARTIME Clause, upon which owners rely, cannot bear the weight which the Owners wish to give it. It is a clause relating to the performance of the Charterparty and to breach, and not to off-hire. The CONWARTIME Clause does not deal with hire and off-hire but allocates risks for additional costs....’¹⁵²

¹⁵¹ *Andre & Cie SA v Orient Shipping Norderdam (The Laconian Confidence)* (1997) CLC 314–15.

¹⁵² *Osmium Shipping v Cargill International S.A. (The Captain Stefanos)* [2012] EWHC 571 (Comm) para 31.

The court ‘determined that the hijack of a vessel by pirates was an off-hire event pursuant to an additional clause that provided for the vessel to be off-hire for capture/seizure, despite the incorporation of the CONWARTIME 2004 clause.’¹⁵³ The court found that, in the absence of the specially introduced ad hoc clause (ie the capture/seizure clause), the vessel would have remained on-hire (following its detention by pirates off Somalia) under clause 15 of the NYPE 46 form in light of the decision in *The Saldanha*.

It will be useful to review whether the cases referred to above treated the events (causes) which led to the loss of time and resultant off-hire in their particular set of circumstances in the same way:

‘Detention by average accident’ – *The Saldanha* is authority for the proposition that an intentional attack (such as an act of piracy) is not an ‘accident’ and that for an ‘average accident’ to occur damage to the vessel or cargo was necessary. The interpretation of these words did not arise in the other cases discussed.

‘Default and/or deficiency of men’ – *The Saldanha* is authority for the proposition that that the words have a limited meaning, and do not extend to cover the ‘negligent or inadvertent performance of their duties’. Similarly the interpretation of these words did not arise in the other cases discussed.

‘Any other cause’ – *The Saldanha* is authority for the proposition that ‘any other cause’ meant something different to ‘any other cause whatsoever’;¹⁵⁴ and that the words (‘any other cause’) should be construed *eiusdem generis* and therefore relate to the physical condition or efficiency of the vessel. Therefore seizure by pirates is an extraneous cause and does not fall within the parameters of the wording of the off-hire clauses (in the traditional charters). In *The Laconian Confidence* (which was decided before *The Saldanha*) the court held that the

¹⁵³ Holman Fenwick Willan hfw in Shipping Bulletin, March 2012 available at [http:// www. hfw.com/ downloads/Shipping](http://www.hfw.com/downloads/Shipping), accessed on 7 January 2013.

¹⁵⁴ Professor Rhidian Thomas, in contending that the word ‘whatsoever’ must be given its ordinary meaning, says the following: ‘Should the word ‘whatsoever’ not be given this construction, then it is rendered meaningless for it succeeds in contributing nothing. The result would be that there is no difference in meaning between “any other cause” and “any other cause whatsoever”. That just cannot represent the intention of the contracting parties’: Rhidian Thomas 150.

addition of the word ‘whatsoever’ in the circumstances of the case (unlawful detention by port authorities) would ‘probably’ bring it within the off-hire clause in NYPE 46 even though this was an extraneous event. Neither of the parties in *The Laconian Confidence* took the view that the vessel was off-hire under the standard clause, a position supported by the court, demonstrating the persuasive authority of *The Saldanha* judgement.

‘Seizure and arrest’ – In *The Saldanha* the court found that the specific terms of a bespoke ‘seizure and arrest’ clause did not assist the charterer because it did not extend to cover detention by pirates. On the other hand, in *The Captain Stefanos*, the court found that the specific wording of the ‘capture/seizure’ clause introduced into the charterparty in that case did cause the vessel to go off-hire following a pirate attack, and therefore worked in favour of the charterer.

II CONCLUSION

As illustrated in the case of *The Saldanha* those causes which are extraneous to the vessel do not usually trigger off-hire in traditional charters. Generally ‘the financial risk of delay of the vessel due to bad weather, strikes of pilots or stevedores, detention by piracy etc., during the charter period normally rests on the charterer’.¹⁵⁵ Similarly the courts have held that delays due to war conditions do not take the vessel off-hire under the traditional charters.¹⁵⁶ John Weale, in discussing third party intervention, remarks that:

‘Typically, such an event is the one which falls awkwardly in the no-man’s land between the Charterer’s field of responsibility and the risks which must lie with the Owner, a loss of time arising from the intervention of some independent third party. On which side of the contractual fence should this lie?’¹⁵⁷

The courts seemed to have answered this rather conclusively, finding consistently that, under the traditional charters, the vessel does not go off-hire following detention by a piracy event.

¹⁵⁵ Lars Gorton 276.

¹⁵⁶ Deviation can also result from other extraneous causes, such as war conditions. ‘Thus, where a ship was diverted around the Cape following the closure of the Suez Canal, the charterparty was held not frustrated by the ensuing delays and extra expenses’: John Hare 735.

¹⁵⁷ John Weale ‘NYPE off-hire clause and third party intervention: Can an efficient vessel be placed off-hire?’ available at www.steamshipmutual.com/Weale_Offhirepaper9.pdf accessed on 16 January 2013.

Finally, Gross J offers some good advice to charterparties:

‘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.’¹⁵⁸

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¹⁵⁸ *Cosco Bulk Carrier Co Ltd. v Team-Up Owning Co Ltd (The Saldanha)* [2010] EWHC 1340 para 36.

CHAPTER VIII IMPACT OF RECENT OFF-HIRE, WAR RISK AND PIRACY CLAUSES

This chapter examines whether the introduction of recent off-hire, war risk and ‘model’ piracy clauses (the last of which seek to address piracy specifically) have served to allocate the risk of delays or deviation more equitably as between the shipowner and time charterer and in so doing to provide the time charterer with a greater measure of protection against losses occasioned by delays or deviation due to piracy.

I SELECTED RECENT OFF-HIRE, WAR RISK AND PIRACY CLAUSES IN TIME CHARTERS

It has long been recognised (by the courts and practitioners) that under off-hire clauses in traditional charters the risk of piracy is carried by the charterer. It will be worthwhile establishing how industry associations responded to the increasing risk of piracy by adapting or revising contractual terms in charterparty hire. One response could have been to adapt the standard off-hire clauses to cater for piracy as an event triggering off-hire. As will be shown, this is not what happened. Charterers (where having the commercial power to negotiate) began to make use of the wording ‘any other cause *whatsoever*’ [Emphasis added] in the off-hire clauses in the traditional charters in the belief that this would bring piracy into the wording of the off-hire clauses. Standard off-hire clauses were not substantially changed, and the industry associations rather began to include piracy as an event (cause) in war risk clauses, and later in separate ‘piracy clauses’. As will be shown from the analysis which follows, these clauses still allocate risks differently and only a few shift some of the risk of piracy away from the charterer.

For convenience, the clauses are grouped under the following categories, namely: (1) Off-Hire clauses; (2) War Risk clauses; (3) Piracy clauses; and (4) Bespoke clauses.

OFF-HIRE CLAUSES

(a) *NYPE 93*

Clause 17 of the NYPE 93 is the NYPE off-hire clause and is substantially similar to the 1946 off-hire clause (clause 15). Piracy is not specifically provided for in this clause. (The inclusion of piracy as a war risk was included as a different clause – see below under the War Risk Clauses).

(b) *BALTIME 2001*¹⁵⁹

The 1939 BALTIME was revised in 2001, clause 11 of which is the off-hire clause (called the ‘Suspension of Hire’ clause in the standard form). Using language similar to the NYPE 93, where the full working of the vessel is hindering or prevented, and this endures for more than twenty-four consecutive hours, no hire shall be paid in respect of any time lost thereby. Although piracy is not specifically mentioned, the clause does provide that ‘detention of the Vessel and/or expenses resulting from such detention shall be for the Charterer’s account’. Piracy is not included as an off-hire event.

(c) *BOXTIME*

The BOXTIME off-hire clause (used in the container vessel industry) is similar in content to the NYPE 93 clause but takes the approach of providing that the vessel remains on-hire except for the following circumstances, namely (1) Unable to comply with instructions; (2) Deviation; (3) Blocking and trapping; (4) Requisitions; and (5) Loss of time. Loss of time only applies where the owners are responsible, and piracy is not mentioned.

(d) *GENTIME*¹⁶⁰

Consistent with the other standard forms, clause 9 of GENTIME also uses language similar to the NYPE 93. Where the vessel is unable to comply with the instructions of the charterers due to the listed causes, the vessel goes off-hire for the time thereby lost. Where the vessel

¹⁵⁹ BIMCO Special Circular 1.

¹⁶⁰ BIMCO General Time Charter Party GENTIME issued September 1999.

deviates for reasons other than to save life or property the vessel goes off-hire. Where the vessel ‘alters course to avoid bad weather or be driven into port or anchorage by stress of weather, the Vessel shall remain on hire and all costs thereby incurred shall be for the Charterers’ account.’ However no mention is made of piracy as a cause of delay which will therefore not constitute an off-hire event.

(e) ***BPTIME 3***¹⁶¹

Clause 19 is the off-hire clause. The vessel is off-hire where there is a loss of time (exceeding three hours) where the vessel is unable to comply with the Charterers’ instructions on account of various listed causes. Similarly, ‘if the vessel deviates, unless ordered to do so by the Charterers, it shall be off-hire from the commencement of such deviation until the Vessel is again ready to resume its service from a position not less favourable to Charterers than that at which the deviation commenced.’ Where the vessel deviates ‘to avoid bad weather or be driven into port or anchorage by stress of weather, the Vessel shall remain on hire and all port costs hereby incurred and bunkers consumed shall be for Charterers’ account.’ Piracy is not considered an off-hire event.

(f) ***SHELLTIME 4***¹⁶²

Clause 21 is the off-hire clause. Where there is loss of time (exceeding three hours) (whether by way of interruption in the vessel’s service, or from reduction in the vessel’s performance, or in any other manner) due to the listed causes, off-hire is triggered. Similarly, off-hire is triggered when the vessel deviates for the causes listed. Piracy is not considered an off-hire event.

WAR RISK CLAUSES

(g) ***NYPE 93***

Clause 31 (Protective Clauses) contains, in sub-clause 31(e) the War Clauses. Piracy is included as one of the risks under the War Clauses, along with a ‘state of war’, ‘warlike operations’, ‘hostilities’, ‘civil strife’, and ‘insurrection’, which give the clause wide application. If the owner of the vessel consents to enter a war risk zone, the charterer must

¹⁶¹ BPTIME 3 1st Edition, February 2001.

¹⁶² SHELLTIME 4 Standard Charter Party. Issued December 1984 and amended December 2003.

pay for additional insurance, deviation and expenses etc. If consent is given by the owners, and the charterers pay for additional war risk insurance on loss of hire, then, although the vessel does not go off-hire, the owner will be compensated for loss of time due to detention.

(h) BOXTIME

The BOXTIME ‘War’ clause is set out in clause 19 of the standard form. This clause provides that, unless the consent of the owners is obtained, the vessel:

‘... shall not be ordered to nor obliged to :- (i) remain in or pass through any area which is dangerous or is likely to become dangerous as a result of war, ... or piracy, actual or threatened, nor ...’

Clause 19.(b) goes on to provide that, should the owners consent to allowing the vessel to proceed notwithstanding the existence of the threats, then the vessel proceeds at the owner’s risk but the charterer shall be obliged to reimburse the owner for the following insurances, namely: (1) reinstatement of the War Risks cover on Hull and P & I for trading to the required area; (2) any further additional premia necessary to maintain hull cover whilst blocked or trapped; (3) insurance on hire of the vessel for not exceeding 365 days. Clause 19.(f) provides that anything done or not done in compliance with these provisions shall not be deemed a deviation. Piracy will therefore not take the vessel off-hire, but the owner will be covered for hire for a period not exceeding 365 days under the compulsory insurance (if indeed insurance cover was taken).

(i) CONWARTIME 1993 and 2004¹⁶³

The CONWARTIME 2004 War Risk Clause was one of the few standard war risk clauses that actually refers to piracy.¹⁶⁴ The clause is intended to apply only if such risks arose after the charter was concluded and was therefore not contemplated by the parties.¹⁶⁵

The 1993 CONWARTIME clause provided as follows:

¹⁶³ Maryna Kuzmenko’s research shows that, based on a sample of 16 UK shipping lawyers, 12 confirmed that the CONWARTIME Piracy Clause was regularly used in their practices, being slightly less popular than the BIMCO Piracy Clause. Maryna Kuzmenko ‘Allocation of piracy risks in the charterparties’ (unpublished LLM Thesis, London Metropolitan University, September 2012) 8 (‘Maryna Kuzmenko’).

¹⁶⁴ BIMCO Special Circular No. 2 November 2009, Version 1.1, 4-10-2011 at 1.

¹⁶⁵ BIMCO Special Circular No. 2 November 2009, Version 1.1, 4-10-2011 at 2.

‘War Risks shall include ... acts of piracy ... by any person, body, terrorist or political group ... which, in the reasonable judgement of the Master and/or Owners, may be dangerous or are likely to be or to become dangerous to the Vessel, her cargo, crew or other persons on board the vessel’.

The 2004 update (CONWARTIME/Voywar 2004) was changed to extend the definition of piracy as follows:

‘War Risks’ shall include any actual, threatened or reported ... acts of piracy’.

The effect of the CONWARTIME clause is that expenses arising from complying with charterer’s orders to trade the vessel through an area at risk of war risks (including piracy) lie with charterers.¹⁶⁶ Williams puts the position as follows:

‘A number of standard charterparties contain provisions relating to piracy in their war risks clauses. A classic example is BIMCO’s CONWARTIME 2004, which addresses piracy well in respect of insurance and deviation issues, but remains silent in terms of allocation of obligations and responsibilities in relation to hire’.¹⁶⁷

(j) **BPTIME 3**

Clause 30 is the “War Risks” clause in the standard form. The BPTIME 3 form contains wording similar to the CONWARTIME clause and does include piracy as one of the war risks excluded.¹⁶⁸ The vessel, unless with consent of the owner, ‘shall not be ordered to or required to continue or through any port, place area or zone, where, subject to the reasonable judgement of the master, there is a risk of the vessel being exposed to war risks’ (clause 30.2). Where the owners agree to proceed, the owner may take out additional insurance to cover these war risks. If additional premiums are required, these are for the account of the charterer.

¹⁶⁶ Holman Fenwick Willan hfw in Shipping Bulletin, March 2012 available at <http://www.hfw.com/downloads/Shipping>, accessed on 7 January 2013.

¹⁶⁷ David Williams ‘The impact of piracy: on-hire or off-hire?’ in the Standard Bulletin, Special Edition 12 September 2011 available at http://www.standard-club.com/docs/StandardBulletinPiracySpecial_Edition_September_2011V2.pdf, accessed on 12 June 2013.

¹⁶⁸ Jonathan Bruce ‘Piracy: whose risk is it anyway?’ in Foremast, the newsletter of the Elborne Mitchell Marine, Aviation and Energy Group. Elborne Mitchell Solicitors. Edition 2009 – 22 (‘Jonathan Bruce’).

(k) SHELLTIME 4

The SHELLTIME 4 form deals with war risks in clause 35 but, perhaps surprisingly, the war risks do not include piracy amongst those risks.¹⁶⁹

PIRACY CLAUSES*(l) BIMCO¹⁷⁰*

In March 2009 BIMCO published its 'Piracy Clause for Time Charter Parties'. The clause was drafted in response to industry demand for a comprehensive contractual provision dealing with rights, obligations, responsibilities, liabilities and costs related to piracy under a time charter.¹⁷¹ Following industry experience with these new clauses, further refining of the wording took place to more equitably allocate the risk between the parties. BIMCO, in November 2009 published a revision to its earlier piracy clause,¹⁷² providing the following reasons:

'The reaction to the Clause (*the March 2009 BIMCO Piracy Clause*) from the industry was that it was perceived as being slanted in favour of the owners. The perception stemmed from the express provision in the Clause that if the vessel were to be detained by pirates then it remained on hire throughout the period of detention. Many charterers felt that with ships being held by Somalian pirates often for two or three months, this made the Clause too onerous towards them'.¹⁷³

The BIMCO Piracy Clause addressed a number of issues, including the owner's obligation to follow charterers' orders, the owners' right to refuse to proceed with the charter if the risk to the vessel and crew is too high, the allocation of costs for additional security and insurance (for proceeding through risky areas), and the effect on hire if the vessel is detained by pirates.

¹⁶⁹ Jonathan Bruce 22.

¹⁷⁰ Maryna Kuzmenko surveyed a sample of 16 shipping lawyers, and found that 13 confirmed that the BIMCO Piracy Clause was the one which they most often used in their practices- see Maryna Kuzmenko 8.

¹⁷¹ BIMCO Special Circular No. 2 November 2009, Version 1.1, 4-10-2011 at 1.

¹⁷² The full clause is set out in Annexure A.

¹⁷³ BIMCO Special Circular No. 2 November 2009, Version 1.1, 4-10-2011 at 1. As a result the March 2009 clause had not been successfully incorporated into charter parties.

The following key changes (from the March to November 2009 clauses) have been introduced:

- The introduction of a new definition of ‘piracy’ as follows: ‘Any actual, threatened or reported acts of piracy and/or violent robbery and/or capture/seizure (hereinafter “Piracy”).¹⁷⁴ ‘Violent robbery’ is now seen as an event of piracy under the BIMCO clause. As the BIMCO Special Circular states, ‘It is worth noting that this Clause applies whether or not the risk of piracy attack was known at the time the charter was concluded or occurred afterwards.’¹⁷⁵ Sara Cockerill asserts that the scope of the definition of piracy was extended to include violent robbery ‘... so as to cover politically motivated brigands in Nigerian waters who by virtue of political aspect would normally fall outside piracy definition’.¹⁷⁶
- The introduction of a 90 day cap on the payment of hire should the ship be seized by pirates.¹⁷⁷ Clause (e) of the BIMCO Piracy Clause provides as follows: ‘If the vessel is attacked by pirates any time lost¹⁷⁸ shall be for the account of the Charterers and the Vessel shall remain on hire’.¹⁷⁹ Clause (f) provides as follows:

‘If the vessel is seized by pirates the Owners shall keep the Charterers closely informed of the efforts made to have the vessel released. The Vessel shall remain on hire throughout the seizure and the Charterer’s obligations shall remain unaffected, except that hire payments shall cease as of the ninety-first (91st) day after the seizure and shall resume once the Vessel is released. The Charterers shall not be liable for late redelivery under this Charter Party resulting from seizure of the Vessel by pirates.’¹⁸⁰
- Time charters generally oblige the charterer to reimburse the owner for any additional premiums for additional insurance cover required if the ship is going through any dangerous area or an area exposed to the risk of piracy by agreement with the

¹⁷⁴ BIMCO Piracy Clause for Time Charter Parties 2009, Clause (a).

¹⁷⁵ BIMCO Special Circular No. 2 November 2009, Version 1.1, 4-10-2011 at 2.

¹⁷⁶ Sara Cockerill 8.

¹⁷⁷ BIMCO Special Circular No. 2 November 2009, Version 1.1, 4-10-2011 at 2.

¹⁷⁸ ‘The reference to “time lost” if attacked refers to delays that may result due to deviation to avoid the attack or repairs to the vessel following an armed attack’. BIMCO Special Circular No. 2 November 2009. Version 1.1, 4-10-2011 at 3.

¹⁷⁹ BIMCO Piracy Clause for Time Charter Parties 2009, Clause (e).

¹⁸⁰ BIMCO Piracy Clause for Time Charter Parties 2009, Clause (f).

owner.¹⁸¹ The clause has been amended to avoid the risk to charterers of double insurance i.e. where the charterer has to cover not only its own insurance costs but also the costs of the owner.

The incorporation of the BIMCO Piracy Clause into traditional charters brings a number of benefits to the charterer:

- The definition of ‘piracy’ is expanded to include ‘violent robbery’.
- There is now a cap on the obligation to pay hire of 90 days.¹⁸² This represents a sharing of the risk of piracy which is not available under the traditional charters.
- The charterer only pays for piracy and/or war risk insurance once.

In respect of consequential damages flowing from delay caused by an act of piracy, Clause (f) of the BIMCO piracy clause provides that ‘The Charterers shall not be liable for late redelivery under this Charter Party resulting from seizure of the Vessel by pirates’. This also constitutes a benefit to and a shift of the risk away from the charterer – see following chapter of this dissertation.

*(m) INTERTANKO Time and Voyage 2008*¹⁸³

The balance in this clause ‘is very much pro Owners’.¹⁸⁴ Under this clause,¹⁸⁵ the vessel remains on hire if detained by pirates. Andries Kharchanka puts the position as follows:

‘According to new INTERTANKO “piracy clause” for time and voyage charter parties, owners shall not be required to follow charterers orders that the master or owners determine would expose the vessel, her crew or cargo to the risk of acts of piracy. The protective measures include but not limited to proceeding in convey, using escorts, avoiding day or night navigation, adjusting speed or course, or engaging security personel or equipment on or about the vessel. Shipowners can nominate an alternative route. The vessel remains on hire for any

¹⁸¹ BIMCO Piracy Clause for Time Charter Parties 2009, Clause (d)(iii).

¹⁸² As BIMCO states, ‘It is important to note that the vessel does not go off-hire after 90 days. The charterer’s obligations towards the vessel remain intact throughout the period of detention – it is only that the obligation to pay hire is suspended for the period after 90 days in detention has lapsed until the vessel is released’: BIMCO Special Circular No. 2 November 2009, Version 1.1, 4-10-2011 at 3.

¹⁸³ International Association of Independent Tanker Owners (INTERTANKO).

¹⁸⁴ Sara Cockerill 7.

¹⁸⁵ The full clause is set out in Annexure A.

time lost as a result of taking the defensive measures and for any time spent during or as a result of an actual or threatened attack or detention by pirates.¹⁸⁶

Therefore all charterer's obligations including the payment of hire remain in force during a capture by pirates. One significant difference (from the BIMCO clause) is that there is no 90 day cap-on-hire period, and accordingly if a ship is captured, the charterer remains liable for the payment of hire.¹⁸⁷

(n) **GOA**

The Cargill 'Gulf of Aden Clause' (usually referred to as the 'GOA Clause') gives charterers the right to order the vessel to transit via the Suez Canal. The clause excludes liability for:

'... loss, delay or expense arising from the capture/seizure ... detention or threatened detention ... by third parties which shall always include but not be limited to acts of piracy during the performance of lawful voyages'.

The vessel remains on hire, but only for a maximum of 60 days, after which it goes off-hire and after which the obligation for charterers to pay hire will cease.¹⁸⁸ This is different from the BIMCO piracy clause in that under BIMCO the vessel remains on hire even after the obligation to pay hire ceases.

BESPOKE CLAUSES

(o) **Bespoke' clauses**

It is entirely reasonable for parties to incorporate 'bespoke' or ad hoc clauses into their agreements. This is often done to cover specific situations in individual hire. One such case which came before the courts recently was the *The Captain Stefanos*.¹⁸⁹ Clause 56 of the charterparty, which also contained the CONWARTIME 2004 clause (see (i) above), provided as follows:

¹⁸⁶ Andrei Kharchanka 3.

¹⁸⁷ David Williams 'The impact of piracy: on-hire or off-hire?' in the Standard Bulletin, Special Edition 12 September 2011 available at <http://www.standard-club.com/docs/StandardBulletinPiracySpecialEditionSeptember2011V2.pdf>, accessed on 12 June 2013.

¹⁸⁸ Sara Cockerill 8.

¹⁸⁹ *Osmium Shipping v Cargill International S.A. (The Captain Stefanos)* (2012) EWHC 571 (Comm).

‘... in the event of loss of time either in port or at sea or deviation ... or by reason of refusal of the Master or crew to perform their duties, or oil pollution even if alleged, or capture/seizure, or detention or threatened detention by any authority including arrest, the hire shall be suspended...’ [Emphasis added]

The owners asked the court to interpret this clause in the context of the CONWARTIME clause, which placed the risk of piracy on the charterers.¹⁹⁰ The charterers claimed that the words ‘or capture/seizure’ stood alone and should be construed as such.¹⁹¹ The court held that the capture/seizure of the ship by pirates was an off-hire event under the specific terms of this contract.¹⁹² The legal situation is neatly summarised in a note on the case by the Charterers P & I Club:

‘By way of conclusion, we can say that the English courts (not surprisingly) will give full legal value to bespoke clauses dealing with detention by pirates notwithstanding the incorporation of a CONWARTIME 2004 or similar clause. The crux of this case is however whether the words used in the off-hire clause were sufficiently clear to allocate the risk of seizure by pirates with the Owners.’¹⁹³

II SUMMARY OF CLAUSES

It may be useful to summarise the forms/clauses by grouping them into those which do not provide for events of piracy; those which specifically provide for events of piracy; and then those which relieve the charterer of the obligation to pay hire consequent on an event of piracy.

¹⁹⁰ *Osmium Shipping v Cargill International S.A. (The Captain Stefanos)* (2012) EWHC 571 (Comm) at page 6 para. 9.

¹⁹¹ *Osmium Shipping v Cargill International S.A. (The Captain Stefanos)* (2012) EWHC 571 (Comm) at page 3 para 5.

¹⁹² *Osmium Shipping v Cargill International S.A. (The Captain Stefanos)* (2012) EWHC 571 (Comm) at page 12 para 33.

¹⁹³ The Charterers P & I Club, E-Bulletin March 2012 available at www.exclusivelyforcharterers.com, accessed on 13 June 2013.

(a) Forms/clauses which do not provide for events of piracy

The off-hire clauses in the NYPE 93 (clause 17), BALTIME 1939 (revised 2001)¹⁹⁴ (clause 11¹⁹⁵), BOXTIME,¹⁹⁶ GENTIME (clause 19), SHELLTIME 4 (clause 21),¹⁹⁷ and the War Risk clause in SHELLTIME 4 do not contain any reference to acts of piracy. Consequently, under these clauses, the vessel would not go off-hire as a consequence of piracy.

(b) Forms/clauses which do contain references to piracy, vessel remains on-hire, and charterer remains liable to pay hire

The War clause in the NYPE 93 (clause 31 (e)) provides that the vessel cannot enter any port or zone where piracy may exist. If consent is given, charterers will pay the additional cost of insurance (hull war risks and war risk insurance) and additional wages and bonuses (if existence of conditions arise after date of charter). The vessel will not go off-hire. If consent is given by the owners, and the charterers pay for additional war risk insurance on loss of hire, then, although the vessel does not go off-hire, the owner will be compensated for loss of time due to detention. Similarly the BOXTIME war clause also includes piracy as part of this definition. Unless the consent of the owners is obtained, the vessel cannot be ordered or obliged to pass through any piracy area. If the owner consents, vessel proceeds at owner's risk but charterer reimburses owners for costs of war risks cover on hull, further insurance, and insurance on hire. Similarly to the NYPE 93, the vessel under this clause also does not go off-hire; owner will be covered for hire for a period not exceeding 365 days under the compulsory insurance provisions.

The BPTIME 3 war risk clause also includes piracy as a war risk. Under this clause, the vessel, unless with consent of the owner, shall not be ordered to or required to continue or through any port, place area or zone, where, subject to the reasonable judgement of the master, there is a risk of the vessel being exposed to war risks. Where the owners agree to

¹⁹⁴ This clause does make reference to the 'Detention of vessel for charterer's account', but does not refer to piracy specifically.

¹⁹⁵ This is called the 'Suspension of hire' clause in this form.

¹⁹⁶ This clause specifically provides that the vessel remains on-hire except for the following periods, namely (1) Unable to comply with instructions; (2) Deviation; (3) Blocking and trapping; (4) Requisitions; and (5) Loss of time. Loss of time only applies where the owners are responsible.

¹⁹⁷ This clause includes detention by customs and other authorities caused by smuggling or other infraction of local laws.

proceed, the owner may take out additional insurance to cover these war risks. If additional premiums are required, these are for the account of the charterer. The vessel does not go off-hire. CONWARTIME 93 also includes piracy as a war risk. In this case the vessel cannot be ordered to continue to any war risk zone. Charterer pays additional insurance premiums if vessel enters zone as well as crew bonuses or wages. The vessel does not go off-hire. The CONWARTIME 2004 is similar. INTERTANKO also contains a separate piracy clause, here the owner shall not be required to follow the charterer's orders that expose vessel to piracy. If it can take a safe route, the additional costs are for charterer. Vessel remains on hire during actual or threatened attack or detention by pirates. Charterer indemnifies, and pays additional costs.

(c) Forms/clauses where the charterer is relieved of the obligation to pay hire

The BIMCO 2009 is one of the few separately-standing piracy clauses. Under this clause, the vessel is not obliged to proceed through dangerous areas due to piracy. If it proceeds (under the charterer's orders), the charterer indemnifies owner. The charterer pays additional costs (personnel and preventative measures) plus crew bonuses, additional wages and additional insurance premiums. If the vessel is attacked by pirates, it remains on-hire but hire payments shall cease as of 91st day. In such a case, the vessel remains on-hire but the charterer is relieved from paying hire after 90 days. GOA also contains a piracy clause; here the vessel remains on-hire for a maximum of 60 days after detention by piracy.

III CONCLUSION

As can be seen, time charter agreements and their clauses have developed over time to address piracy risks, but the progression has not always benefitted the charterer. The position can be summarised as follows:

Traditional charters – No reference is made to piracy. Courts have held that piracy does not constitute an off-hire event under the off-hire clauses in traditional charters.

Recent off-hire clauses – No reference is made to piracy specifically as an event leading to off-hire under the more recent off-hire clauses.

Recent war risk clauses – Piracy is included as a war risk in the clauses surveyed. The vessel cannot be ordered to continue to any war risk zone. Charterer pays additional

insurance premiums if vessel enters zone (on instruction of charterer) as well as crew bonuses or wages. The war risk clauses generally protect the owner's position, and do not take the vessel off-hire consequent on piracy, therefore providing no benefit to the charterer (in respect of loss of time).

Piracy clauses – The piracy clauses represent a mixed bag for the charterer. The BIMCO piracy clause does more equitably allocate the risk between the parties. It addresses a number of issues, including the owner's obligation to follow charterers' orders, the owners' right to refuse to proceed with the charter if the risk to the vessel and crew is too high, the allocation of costs for additional security and insurance (for proceeding through pirate infested areas), and the effect on hire if the vessel is detained by pirates. Importantly, it introduces a 90 day cap on the payment of hire should the ship be seized by pirates. The vessel remains on hire; it is the payment of hire that is suspended. Similarly the GOA piracy clause provides that the vessel remains on-hire for a maximum of 60 days following detention by pirates, and then goes off-hire. However other piracy clauses, such as that introduced by INTERTANKO, remain 'pro owner' and under this clause, the vessel remains on-hire if detained by pirates.

Bespoke clauses – Bespoke clauses are becoming more popular where the charterer has negotiating power, such as when the shipping industry is in a slump. Such a special clause was upheld in *The Captain Stefanos*¹⁹⁸ where the court held that the capture/seizure of the ship by pirates was an off-hire event under the specific wording of a bespoke capture/seizure clause.

The obligation therefore remains on the charterer to try to find the balance during the commercial negotiations which lead up to the charter. It is obviously in the charterer's interests to push for the incorporation of piracy clauses which offer the most advantage. Alternatively the charterer should propose 'bespoke' clauses which are relevant to the particular hire circumstances to protect his position. Whether the charterer succeeds or not is a function of a complex set of circumstances which exist in each case, and which are beyond the scope of this dissertation.¹⁹⁹

¹⁹⁸ *Osmium Shipping v Cargill International S.A. (The Captain Stefanos)* (2012) EWHC 571 (Comm).

¹⁹⁹ Maryna Kuzmenko identifies a number of factors which influence the outcome of the commercial negotiation, such as the commercial relationship between the parties, the bargaining position of the parties,

II CONTRACTUAL MANAGEMENT OF THE REDELIVERY RISK

As has been shown previously, under a time charter agreement, the charterer hires the vessel from the owner for an agreed rate and period. The contract of charterparty imposes strict obligations on the charterer to pay hire from delivery of the vessel until the vessel is again redelivered to the owner. In general shipping commerce, the owner makes a living by chartering the vessel to numerous charterers and, because ‘time is money’, the owner has an interest in ensuring that there is the minimum turnaround time between receiving the vessel back from one charterer and making it available to the next charterer. What is the charterer’s risk under the time charter agreements if the vessel is redelivered late due to piracy?²⁰⁰

It is considered convenient to distinguish between the express contractual provisions (in the time charter forms) seeking to regulate breaches of contract and or damages for such breach, and the general contractual law principles relating to entitlement to damages for breach of contract and the measure of those damages.

III EXPRESS CONTRACTUAL PROVISIONS

Clause 7 of the BALTIME 1939 (as revised 2001) is the ‘Re-delivery’ clause in this form. This clause provides that the vessel ‘shall be re-delivered on the expiration of the Charter in the same good order as when delivered to the Charterers ...’. Further, the clause provides that ‘should the Vessel be ordered on a voyage by which the Charter period will be exceeded the Charterers shall have the use of the Vessel to enable them to complete the voyage, provided it could be reasonably calculated that the voyage would allow redelivery about the time fixed for the termination of the Charter, but for any time exceeding the termination date the Charterers shall pay the market rate if higher than the rate stipulated herein.’ There is no contractual damages clause. Piracy is included as a ‘War Risk’ under clause 20 (“CONWARTIME 1993”) but does not take the vessel off-hire under the ‘Suspension of Hire’ clause (clause 11 (A)). The owner will therefore have to rely on his common law right to claim damages for breach of the obligation to re-deliver.

The NYPE 46 does not contain a separate re-delivery clause, providing for a time of delivery and re-delivery in the preamble and, in clause 4, providing that ‘Charterers are to give owners not less than [*Blank*] days’ notice of vessels expected date of re-delivery, and

²⁰⁰ The risk of wrongfully redelivering the vessel early is intentionally not addressed in this dissertation.

probable port'. The NYPE 1993 contains similar wording in clause 10 – 'Rate of Hire/Redelivery Areas and Notices'. Piracy is not included as a cause which takes the vessel off-hire under clause 17 ('Off Hire') of the NYPE 1993. The owner will therefore have to rely on his common law right to claim damages for breach of the obligation to re-deliver.

Clause 4 of GENTIME is the 'Redelivery' clause. This provides for the 'Redelivery Place', the 'Acceptance of Redelivery', 'Notice' and 'Last Voyage'. Under the 'Last Voyage' provision (clause 4(d)), the charterers warrant that they will not commence a voyage which cannot reasonably be expected to be completed in the time allowed for redelivery,²⁰¹ and the clause goes on to read as follows:

'If, nevertheless, such an order is given, the Owners shall have the option: (i) to refuse the order and require a substitute order allowing timely redelivery; (ii) to perform the order without prejudice to their rights to claim damages for breach of charter in case of late redelivery. In any event, for the number of days by which the period agreed and declared as per clause 1(a) is exceeded, the Charterers shall pay the market rate if this is higher than the rate stated in Box 24.'

Piracy is included as a 'War Risk ('Appendix A – Protective Clauses') but does not take the vessel off-hire under the 'Off-hire' clause (clause 9). The owner in this case can rely on his contractual right to claim damages for breach of the obligation to re-deliver.

BPTIME 3 also contains a 'Redelivery' clause (clause 3). This provides that the vessel 'must be redelivered to Owners at Place of Redelivery stipulated in Part 1, Section F on the expiry of the Charter period, ...'. There are exceptions made for ballast and laden voyages (clause 3.2). Piracy is included as a 'War Risk' (clause 30.1.2) but does not take the vessel off-hire under clause 19. There is no contractual damages clause. The owner will therefore have to rely on his common law right to claim damages for breach of the obligation to re-deliver.

The SHELLTIME 4 contract does not contain a separate re-delivery clause; rather clause 4(a)(f) provides that '... and Charterers are required to give owners prior notice of redelivery.' Again the owner's claim for damages will have to be found in common law.

²⁰¹ This is better drafting than in the BALTIME clause, which makes for a difficult read.

It was only with the introduction of the BIMCO Piracy Clause for Time Charter Parties 2009 that a realignment of risk in favour of the charterer (in this context) took place. Clause (f) provides as follows:

‘If the Vessel is seized by pirates the Owners shall keep the Charterers closely informed of the efforts made to have the Vessel released. The Vessel shall remain on hire throughout the seizure and the Charterers’ obligations shall remain unaffected, except that hire payments shall cease as of the ninety-first (91st) day after the seizure and shall resume once the Vessel is released. The Charterers shall not be liable for late redelivery under this Charter Party resulting from seizure of the Vessel by pirates.’

The result is that, under the latest BIMCO Piracy Clause, the charterer is not liable for late delivery resulting from detention of the ship by pirates. The owner will therefore not have a claim for damages in such a case.

IV GENERAL CONTRACTUAL LAW PRINCIPLES

The measure of damages is not peculiar to charterparties. It is a general contractual principle that is simply being applied in the instance of charterparties. The cases referred to in this section in support of this proposition are English cases. This is not surprising since most time charterparties have English law as their chosen law.²⁰² Professor Hare in discussing the measure of damages in charterparty claims, comments as follows:

‘South African law has inherited the criteria applied to the measure of damages arising from one party’s breach of contract from English law, espoused in *Hadley v Baxendale*.’²⁰³

Hutchison confirms this position, recording that:

‘The traditional test used in the remoteness enquiry was adopted by the Appellate Division in *Lavery & Co Ltd v Jungheinrich* 1931 AD 156.... In the main judgement given in *Lavery, Curlewis JA* imported the English law approach to remoteness, the so-called ‘rule in *Hadley v Baxendale* (1854) 9 Exch 341.’²⁰⁴

²⁰² John Hare 784.

²⁰³ John Hare 780.

²⁰⁴ Andrew Hutchison ‘Remoteness in contract: Under revision in the House of Lords too?’ (2012) 129 *SALJ* 199 at 199 (‘Andrew Hutchison’).

In general, failure to redeliver timeously will give the owner a right to claim damages resulting from the breach of a contractual term. Taylor sets out the position as follows:

‘Thus, once it has been determined that damage or loss has been caused by the defaulting party, damages will be recoverable save to the extent that they are considered in law to be too remote.’²⁰⁵

As Andrew Taylor asserts, ‘The basic principles governing the recoverability of contractual damages have, for many years, remained intact, and the general thinking supporting those principles, undisturbed’.²⁰⁶ The general rule with regards to damages remains that damages are recoverable provided they are foreseeable and not too remote.²⁰⁷ The rule in *Hadley v Baxendale*²⁰⁸ is that:

‘Whether a claim is too remote or not involves a consideration of what losses would be in the parties’ contemplation as a result of the alleged breach, i.e. what would be reasonably foreseeable. Accordingly, unless special factors are brought to the attention of the contract-breaker, the loss to be recoverable must be such as would be considered, at the time of entering into the charter, as a not unlikely consequence of the breach’.

This principle was explained in *The Achilles*.²⁰⁹ Here the vessel was time chartered for a period of five to seven months on the NYPE 1946 form. An addendum to the charter extended the period of hire for a further five to seven months at a daily rate of US\$16 750. This addendum stated that the latest day for delivery was 2 May 2004.

‘By April 2004, market rates had more than doubled compared with the previous September. On 20 April 2004 the charterers gave notice of redelivery between 30 April and 2 May 2004. On the following day, the owners fixed the vessel for a new four to six month hire to another charterer, following on from the current charter, at a daily rate of US\$39 500. The latest date for delivery to the new charterers, after which they were entitled to cancel, was 8 May 2004.’²¹⁰

²⁰⁵ Andrew Taylor ‘Damages for breach of time charter: some recent developments’ in Rhidian Thomas 257. (‘Andrew Taylor’)

²⁰⁶ Andrew Taylor 257.

²⁰⁷ *Hadley v Baxendale* (1854) 9 Ex Ch 341. Also see Melvin Aron Eisenberg ‘The principle of Hadley v Baxendale’ (1992) 80 *Cal LR* 563 at 569.

²⁰⁸ *Hadley v Baxendale* (1854) 9 Ex Ch 354.

²⁰⁹ *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)* [2008] UKHL 48.

²¹⁰ *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)* [2008] UKHL 48 para 2.

Close to the date of redelivery the charterers entered into a sub-charter with another charterer. The vessel due to delay was re-delivered late and as a result the owners lost the new fixture. Claiming ‘damages for the loss of the difference between the original rate and the reduced rate over the period of the fixture, at US\$8 000 a day, which came to US\$1 364 584.37’.

Charterers countered this by relying on the well-established rule in *Hadley v Baxendale* as arising ‘naturally, i.e. according to the usual course of things, from such breach of contract itself’. The arbitrators, High Court and Court of Appeal all found in the owner’s favour awarding them the full loss of profit for the new fixture. On Appeal to the House of Lords this decision was overturned and the charterers were only liable for those damages which were reasonably foreseeable in the ordinary course i.e. those damages in line with the rule in *Hadley v Baxendale*.

Hutchison, in a recent article in the *South African Law Journal*, makes the point that:

‘A close reading of the rule in *Hadley v Baxendale* reveals that it is in fact two rules, the first dealing with the position where damages ‘arise naturally according to the usual course of things’ and the second from where the damages could ‘reasonably be supposed to have been within the contemplation of both parties at the time they made the contract’.²¹¹

For South African courts the first rule applies to general damages and the second to special damages. To succeed in a claim for special damages, the ‘defendant must also have accepted liability for this type of damage at the time of contracting.... This represents an embellishment of the *Hadley* principle and came to be known as the ‘convention principle’.²¹² Hutchison then proceeds to show that the English law has also developed since the *Hadley* case, and summarises the South African legal position as follows:

‘Thus, in sum, English law is the origin of the current South African position on remoteness in contract with the exception of the convention principle, which appears to have developed locally directly from Pothier.’²¹³

²¹¹ Andrew Hutchison 199.

²¹² Andrew Hutchison 200.

²¹³ Andrew Hutchison 201.

V CONCLUSION

In accordance with general contractual law principles governing damages, the charterer would only be liable for those damages which were reasonably foreseeable in the ordinary course as a result of delay caused by piracy.²¹⁴ Where the owner has an express contractual right to claim damages (such as in BALTIME), the owner would have to show the damages actually suffered were reasonably foreseeable. But there is one case where the owner contractually gives up its right to claim damages, and that is BIMCO 2009. In this case the parties specifically contract (their bargain) that, '[T]he Charterers shall not be liable for late redelivery under this Charter Party resulting from seizure of the Vessel by pirates'. This constitutes a contractual benefit to and a shift of the risk of potentially paying damages away from the charterer, which is not available under the other traditional charters or more recent standard forms. It is likely (i.e. it 'will happen in the majority of cases') that a vessel detained through an act of piracy will result, for example, in an owner missing a sub-fixture. Charterers therefore run the risk of owners' claiming damages in such an eventuality, unless they have adopted clauses similar to the BIMCO piracy clause which excludes such liability.

²¹⁴ *Hadley v Baxendale* (1854) 9 Ex Ch 341.

CHAPTER X CONCLUSION

Under traditional time charter contracts, which are still in common use, South African time charterers, as with time charterers around the world but perhaps more pressingly so given the geographical proximity of the threat of pirate attacks, carry the risk of losses arising out of delays caused by pirate attacks both in the form of liability for hire while the ship is not operating and potentially liability for damages for late redelivery of the chartered vessel.

Traditional off-hire clauses have generally been held by the courts not to include piracy as a ground for off-hire. And the introduction of war risk clauses, which in most cases include piracy, have done little to assist the charterer as, in all cases, they do not take the vessel off-hire. With the adaptation of these traditional charters over time and the generation of a variety of specific clauses to deal with this issue, charterers now have a limited array of contractual mechanisms to choose from to try to ensure a more equitable distribution of these losses as between themselves and owners, provided, of course, they have the bargaining power to negotiate the inclusion of these clauses. In such a case, bespoke piracy or 'seizure and detention' clauses are also possible. And then there is insurance.

The forms/clauses reviewed present a mixed bag of options for the charterer. 'Doing nothing' and going with the traditional charters only results in exposure. Then the charterer may take a chance by adding one word ('any other cause whatsoever') to the standard off-hire clauses which will hopefully (based on precedent) bring piracy into the wording of the particular off-hire clause. Relying on the more recently introduced war risk clauses (which generally serve to protect the owner's position) does not advance the charterer's position unless specific insurance is taken out (and then at the charterer's cost). It is only the (relatively recent) BIMCO and GOA piracy clauses which partly realign the risk of piracy by suspending the payment of hire (albeit after 90 and 60 days respectively have passed) (but in the case of BIMCO also not taking the vessel off-hire); and it is only the BIMCO clause (from amongst the standard forms surveyed) which removes the threat from the charterer from also being sued for damages for late redelivery.

Ince and Co report that, '[W]ith one notable exception (*The Bow Asir*, released after 15 days) the benchmark period for capture remains around two months'.²¹⁵ The likely result is therefore that, even with the inclusion of the recent piracy clauses, the benefit to the charterer in most cases of actual piracy will probably be limited because the vessel is likely to be released before the charterer's liability to pay hire ceases.

Whether the charterer succeeds in introducing clauses to protect its position in the event of piracy therefore depends on a complex number of factors, such as the commercial relationship between the parties, the bargaining position of the parties, external market conditions (i.e. supply and demand at the time), appreciation of the risks, negotiating power and bespoke insurance.²¹⁶ And, lastly and importantly, will charterers look beyond their familiar position of 'doing nothing' and go with the traditional charters or rather insist on new piracy clauses being inserted which (partly) protect their position?

²¹⁵ Ince and Company, available at <http://incelaw.com/whatwedo/shipping/article/shipping-e-brief-may-2009/piracy-an-overview-and-update>, accessed on 15 June 2013.

²¹⁶ Maryna Kuzmenko 12.

ANNEX A - SELECTED PIRACY CLAUSES

BIMCO Piracy Clause for Time Charter Parties 2009

(a) The Vessel shall not be obliged to proceed or required to continue to or through, any port, place, area or zone, or any waterway or canal (hereinafter "Area") which, in the reasonable judgement of the Master and/or the Owners, is dangerous to the Vessel, her cargo, crew or other persons on board the Vessel due to any actual, threatened or reported acts of piracy and/or violent robbery and/or capture/seizure (hereinafter "Piracy"), whether such risk existed at the time of entering into this charter party or occurred thereafter. Should the Vessel be within any such place as aforesaid which only becomes dangerous, or is likely to be or to become dangerous, after her entry into it, she shall be at liberty to leave it.

(b) If in accordance with sub-clause (a) the Owners decide that the Vessel shall not proceed or continue to or through the Area they must immediately inform the Charterers. The Charterers shall be obliged to issue alternative voyage orders and shall indemnify the Owners for any claims from holders of the Bills of Lading caused by waiting for such orders and/or the performance of an alternative voyage. Any time lost as a result of complying with such orders shall not be considered off-hire.

(c) If the Owners consent or if the Vessel proceeds to or through an Area exposed to the risk of Piracy the Owners shall have the liberty:

(i) to take reasonable preventative measures to protect the Vessel, her crew and cargo including but not limited to re-routeing within the Area, proceeding in convoy, using escorts, avoiding day or night navigation, adjusting speed or course, or engaging security personnel or equipment on or about the Vessel;

(ii) to comply with the orders, directions or recommendations of any underwriters who have the authority to give the same under the terms of the insurance;

(iii) to comply with all orders, directions, recommendations or advice given by the Government of the Nation under whose flag the Vessel sails, or other Government to whose laws the Owners are subject, or any other Government, body or group, including military authorities, whatsoever acting with the power to compel compliance with their orders or directions; and

(iv) to comply with the terms of any resolution of the Security Council of the United Nations, the effective orders of any other Supranational body which has the right to issue and give the

same, and with national laws aimed at enforcing the same to which the Owners are subject, and to obey the orders and directions of those who are charged with their enforcement;

and the Charterers shall indemnify the Owners for any claims from holders of Bills of Lading or third parties caused by the Vessel proceeding as aforesaid, save to the extent that such claims are covered by additional insurance as provided in sub-clause (d)(iii).

(d) Costs

(i) If the Vessel proceeds to or through an Area where due to risk of Piracy additional costs will be incurred including but not limited to additional personnel and preventative Measures to avoid Piracy, such reasonable costs shall be for the Charterers' account. Any time lost waiting for convoys, following recommended routeing, timing, or reducing speed or taking measures to minimise risk, shall be for the Charterers' account and the Vessel shall remain on hire;

(ii) If the Owners become liable under the terms of employment to pay to the crew any bonus or additional wages in respect of sailing into an area which is dangerous in the manner defined by the said terms, then the actual bonus or additional wages paid shall be reimbursed to the Owners by the Charterers;

(iii) If the underwriters of the Owners' insurances require additional premiums or additional insurance cover is necessary because the Vessel proceeds to or through an Area exposed to risk of Piracy, then such additional insurance costs shall be reimbursed by the Charterers to the Owners;

(iv) All payments arising under Sub-clause (d) shall be settled within fifteen (15) days of receipt of Owners' supported invoices or on redelivery, whichever occurs first.

(e) If the Vessel is attacked by pirates any time lost shall be for the account of the Charterers and the Vessel shall remain on hire.

(f) If the Vessel is seized by pirates the Owners shall keep the Charterers closely informed of the efforts made to have the Vessel released. The Vessel shall remain on hire throughout the seizure and the Charterers' obligations shall remain unaffected, except that hire payments shall cease as of the ninety-first (91st) day after the seizure and shall resume once the Vessel is released. The Charterers shall not be liable for late redelivery under this Charter Party resulting from seizure of the Vessel by pirates.

(g) If in compliance with this Clause anything is done or not done, such shall not be deemed a deviation, but shall be considered as due fulfilment of this Charter Party. In the event of a conflict between the provisions of this Clause and any implied or express provision of the Charter Party, this Clause shall prevail to the extent of such conflict, but no further.

INTERTANKO Piracy Clause – Time Charterparties

1. Owners shall not be required to follow Charterers' orders that the Master or Owners determine would expose the vessel, her crew or cargo to the risk of acts of piracy.
2. Owners shall be entitled
 - (a) to take reasonable preventive measures to protect the vessel, her crew and cargo including but not limited to proceeding in convoy, using escorts, avoiding day or night navigation, adjusting speed or course, or engaging security personnel or equipment on or about the vessel,
 - (b) to follow any instructions or recommendations given by the flag state, any governmental or supragovernmental organisation and
 - (c) to take a safe and reasonable alternative route in place of the normal, direct or intended route to the next port of call, in which case Owners shall give Charterers prompt notice of the alternative route, an estimate of time and bunker consumption and a revised estimated time of arrival.
3. The vessel shall remain on hire for any time lost as a result of taking the measures referred to in Paragraph 2 of this Clause and for any time spent during or as a result of an actual or threatened attack or detention by pirates.
4. Charterers shall indemnify Owners against all liabilities costs and expenses arising out of actual or threatened acts of piracy or any preventive or other measures taken by Owners whether pursuant to Paragraph 2 of this Clause or otherwise, including but not limited to additional insurance premiums, additional crew costs and costs of security personnel or equipment.
5. Charterers warrant that the terms of this Clause will be incorporated effectively into any bill of lading issued pursuant to this charterparty.

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