SMC SUN MOBILITY
Insurance and Claims Services Limited

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To: Transport Industry Operators

Somali pirates

The English High Court on 11/6/2010 issued a Judgment holding a vessel's Charterers not entitled to off-hire the vessel (under a NYPE time charterparty) during a period when the vessel was seized by Somali pirates. (2009 FOLIO 1301)

The vessel was a Panamax size bulk carrier. The charter was contained in a recap which provided for a charter period of 47 to 50 months at US$52,500 per day and 'otherwise as per' an earlier charter of a similar vessel 'logically amended' with certain exceptions. The earlier charter was on the NYPE form with additional clauses. The vessel was delivered into the charter on about 5/7/2008. On 30/1/2009 Charterers gave orders to load a cargo of bulk coal in Indonesia for carriage to Koper in Slovenia. On 22/2/2009 the vessel was seized by Somali pirates whilst sailing through the transit corridor in the Gulf of Aden. The pirates compelled the Master to sail the vessel to the waters off the Somali town of Eyl where the vessel remained until 25 April when she was released by the pirates. She reached an equivalent position to the location at which she was seized on 2 May. Charterers refused to pay hire for the period between 22 February and 2 May.

The question was whether detention by pirates, piracy or perhaps the effects of piracy entitled charterers to put the vessel off-hire in reliance upon that version of cl.15 of the NYPE form of charterparty agreed by the parties in the charterparty of 25/6/2008 ("the charterparty"). Cl. 15 of the charterparty provided as follows:

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

By its Award on Preliminary Issues dated 8/9/2009 ("the award"), an arbitration tribunal ("the tribunal") held unanimously that the answer to the question was "no". From that decision Charterers appealed. The only issue on the appeal was whether Charterers could succeed in bringing themselves within one or more of the following three causes contained in cl. 15 of the charterparty on which they sought to rely:

i) "Detention by average accidents to ship or cargo";
ii) "Default and/or deficiency of men";
iii) "Any other cause".

It is worth underlining that the applicable principles are beyond argument. 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.

<u>Detention by average accidents to ship or cargo</u>

For Charterers, the essence of the argument was as follows:

> "…in the context of clause 15, the reference to an 'average accident' is not intended to require that there be damage to the Vessel, i.e., physical loss (that is covered elsewhere in clause 15), 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' (itself a limiting requirement…) due to fortuities which are marine perils. Piracy is a marine peril: see section 3 of the 1906 Act…"

The tribunal rejected Charterers' submissions. The Judge had no hesitation in agreeing with the tribunal. His reasons followed.

First, in commercial law, certainty was of great importance. In The Mareva A.S. [1977] 1 Lloyd's Rep. 368 , at p. 381, Kerr J (as he then was) said of this very wording that "average accident":

> "…merely means an accident which causes damage"

On any view, this incident did not result in damage to the vessel. The Judge agreed entirely with the tribunal that it would only be right to differ from the view expressed by Kerr J if persuaded that it was clearly wrong. To the contrary, that view seemed right to the Judge as it did to the tribunal.

Secondly, the Judge was unable to accept that, however approached, the incident could properly be described as an "accident". Charterers submitted that although the capture of the vessel was planned in advance and deliberate, it was a fortuity so far as the crew and the vessel were concerned. The tribunal rejected this submission:

> "We disagree that 'accident to the ship' is a natural way to describe a seizure by pirates. We cannot imagine a master telephoning or e-mailing his Owners after the seizure and saying 'there has been an accident to the ship'. He would naturally say 'the ship has been seized by pirates' or 'we have been captured by pirates'. Accident requires lack of intent by all protagonists. An obviously deliberate and violent attack is not described as an accident, no matter how unexpected it may have been to the victim. A much more specific word or phrase is put to the incident, to reflect its deliberate and violent nature."

To the Judge's mind, this reasoning of the tribunal was unanswerable. On no view, could this incident properly be termed an "accident". The wording is "accident to" the ship. As the tribunal observed, the preposition suggesteed "an accident physically affecting (and probably causing damage to) the structure or machinery of the ship…". Collision, grounding or an explosion on board, furnished ready examples of when this wording in the clause might be invoked; seizure and detention by pirates was a very different matter.

Thirdly, the Judge agreed with Charterers, that much depended on context and that the wording "average accident" pointed towards an insurance context. But it did not at all follow that "average", in this context was simply to be equated with a peril ordinarily covered by marine insurance. At the least, as it seemed to the Judge, in this context, damage to the ship was an essential ingredient for the wording "average accidents…to ship" to apply. The tribunal said this:

> "…in the insurance context, 'average' tends to be used to mean damage which is less than a constructive total loss: for example 'free of average' or 'particular average'. The word does not mean a maritime peril…. Accordingly, if the issue were free from authority, our view would be that the word, in context, was intended to refer to damage rather than to a peril, so that in clause 15 an average accident to ship or cargo was an accident which caused damage to ship or cargo, but not total loss."

The Judge respectfully agreed.

Fourthly, Charterers pointed to the wording "damages to hull, machinery or equipment" as a separate cause in cl. 15. On the tribunal's construction of "average accident" – and that adopted by Kerr J – there was a significant overlap between these two causes. The tribunal accepted that its construction would lead to surplusage, pointing out that Kerr J had himself acknowledged the problem: The Mareva A.S. (*supra*), at pp. 381-2. The tribunal said this:

> "In truth, the clause is riddled with potential overlap in many of its causes. Indeed it may have been put together long ago as a patchwork of exceptions to hire then in vogue, rather than the draftsman starting from a blank piece of paper. In any event, bearing in mind that the presumption against surplusage is weak in charterparties, we were not impressed by the point."

Again, the Judge agreed. The presumption against surplusage did not at all dissuade him from the construction he otherwise favoured.

Default and/or deficiency of men

The issue under this heading was dealt with by the tribunal on assumed facts. The tribunal was asked to determine whether, on the factual assumption (very much disputed) that the Officers and crew had failed to take recognised anti-piracy precautions, before and during the attack, these failures would fall within the exception "default of men". The tribunal was further asked to assume that this failure on the part of the Officers and crew was a significant cause of the loss of time resulting from the pirates taking over the vessel and consequent loss of full working of the vessel.

Charterers submitted that the natural meaning of " *default* of men" included a failure to perform or a breach by the Master and crew of their duties. If so, then, on the assumed facts, Charterers would bring themselves within cl. 15 of the charterparty.

In essence, the tribunal held that the context presented an insuperable obstacle to adopting Charterers' construction of "default of men". Instead, in context, "default of men" in cl.15 had the limited meaning:

> "…of a refusal by Officers or crew to perform all or part of their duties as owed to the shipowner and not the negligent or inadvertent performance of those duties…"

It followed that, even on the assumed facts, Charterers' case failed. The Judge agreed with the tribunal.

First, it had to be accepted, as the tribunal rightly did accept, that the natural meaning of "default" was capable of including the negligent or inadvertent performance of the duties of Master and crew. Thus far, Charterers' argument was soundly based. Thereafter, however, the submission encountered ever-increasing difficulties.

Secondly and immediately, the history of the clause had to be considered. In the wartime case of Royal Greek Government v Minister of Transport (1949) 82 Ll. L. Rep. 196 , charterers ordered the vessel to sail but her crew refused to do so, except in convoy. A dispute arose as to whether, Charterers' order to sail having been disobeyed, the vessel was off-hire. Upholding the decision of Sellers J, as he then was, the Court of Appeal held that charterers could not bring themselves within the off-hire clause, which contained (so far as relevant) only the printed words "deficiency of men". That wording meant "numerical insufficiency" and resulted in the vessel being off-hire when an adequate complement of officers and crew for working the ship was not available. However, the vessel had a full complement of crew, so that the wording did not assist charterers. "Deficiency of men" did not extend to cover a wilful refusal to work. As the tribunal observed:

> "In consequence of this decision, the printed clause has for many years frequently been amended, as here, by the addition of 'default and/or'. The insertion of that phrase with the additional words '…including strike of Officers and/or crew…' showed, at least, that the parties unmistakeably intended that a refusal to perform duties would be an off-hire cause."

Thirdly, cl. 15 in the case in question contained the additional wording "…including strike of Officers and/or crew". This additional wording might be seen as suggesting that the clause was focussed on a refusal to perform duties, whether or not amounting to a full-scale strike. The Judge thought this additional wording was of limited weight – and certainly not decisive in itself – but was a pointer towards a narrow construction of "default of men", consistent with the history of the clause and the mischief at which it was aimed.

Fourthly and to the Judge's mind decisively, he had regard to the allocation of the risk of delay under a typical time charterparty. If, however, Charterers' case was well-founded, it had to follow that on almost every occasion when Officers or crew negligently or inadvertently failed to perform their duties causing some loss of time, then a vessel would be off-hire under this wording. That would be so whether or not owners were liable in damages for breach of contract. For example, even if owners enjoyed the benefit of familiar exemptions in respect of errors of navigation (cl. 16) or negligent navigation (cl. 76), charterers could claim off-hire. Consider, for instance, delay attributable to bad weather or port congestion which would have been avoided but for an error in navigation. Ordinarily under a time charterparty, such risks were to be borne by charterers; but Charterers' submission resulted in the shifting of these risks to owners. This submission of Charterers would result in a startling alteration in the bargain typically struck in time charterparties as to the risk of delay. In the Judge's judgment, the wording "default of men" was not so clear as to compel the surprising conclusion (and consequences) to which he had referred. The tribunal correctly summarised the sense of the relevant wording as follows:

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

In this manner, proper effect could be given to the wording "default of men" by way of the narrower

construction preferred by the tribunal – a construction consistent with the history of the clause and the mischief at which it was aimed. The Judge was fortified in reaching this conclusion by the further consideration that if Charterers' submission was right, then it was remarkable that Charterers could point to no authority in support. As the tribunal observed:

> "…there does not seem to have been a single case where a default by the crew or a crew member (in the sense of simple negligence) has triggered off-hire under clause 15 as amended."

<u>Any other cause</u>

The starting point here was to underline that cl.15 in the charterparty contained the wording "*any other cause* " rather than the wording "any other cause *whatsoever* ". This difference in wording was significant, a matter best encapsulated in a passage from the judgment of Rix J (as he then was) in The Laconian Confidence [1997] 1 Lloyd's Rep. 139 , at pp. 150 – 151:

> "In my judgment it is well established that those words [i.e., 'any other cause'], in the absence of 'whatsoever', should be construed either *ejusdem generis* or at any rate in some limited way reflecting the general context of the charter and clause…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. There is, moreover, the general context…that it is for the owners to provide an efficient ship and crew. In such circumstances it is to my mind natural to conclude that the unamended words 'any other cause' do not cover an entirely extraneous cause, like the boom in *Court Line* , or the interference of authorities unjustified by the condition (or reasonably suspected condition) of ship or cargo. *Prima facie* it does not seem to me that it can be intended by a standard off-hire clause that an owner takes the risk of delay due to the interference of authorities, at any rate where that interference is something beyond the natural or reasonably foreseeable consequence of some named cause. Where, however, the clause is amended to include the word 'whatsoever', I do not see why the interference of authorities which prevents the vessel performing its intended service should not be regarded as falling within the clause, and I would be inclined to say that that remains so whether or not that interference can be related to some underlying cause internal to the ship, or is merely capricious. That last thought may be controversial, but it seems to me that if an owner wishes to limit the scope of causes of off-hire under a clause which is deliberately amended to include the word 'whatsoever', then he should be cautious to do so."

The decision of Rix J was that Charterers' appeal failed. The arbitrators in that case had been right to decide that the vessel was not off-hire. In the absence of the word "whatsoever", the unexpected and unforeseeable interference by the Chittagong authorities at the conclusion of a normal discharge was, Rix J said (at p.151):

> "…a totally extraneous cause…unconnected with, because too remote from, the merely background circumstance of the cargo residues of 15.75 tonnes. There was no accident to cargo, and there was nothing about the vessel herself, her condition or efficiency, nor even anything about the cargo, which led naturally or in the normal cause of events to any delay. If the authorities had not prevented the vessel from working, she would have been perfectly capable of discharging the residues or of sailing and dumping them without any abnormal delay."

Against this somewhat unpromising background, Charterers' carefully constructed argument proceeded as follows. First, even without the additional word "whatsoever", the wording "any other cause" was a sweeping up provision. That wording was there to prevent "disputes founded on nice distinctions": see, Chandris v Isbrandtsen Moller [1951] 1 KB 240 , at pp. 246-7. Secondly and accepting that the sweeping up provision was to be construed in some limited way reflecting the general context of cl. 15, it was nonetheless not easy to identify any "genus" which included all of the named causes in cl. 15. The most that could be said was that they all related to the physical condition or efficiency of the vessel (including its crew) or, in one instance, cargo and did not include truly extraneous causes. Thirdly, if contrary to Charterers' primary case, "average accident" did "technically" 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". Fourthly, 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. Fifthly, there had here 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. Sixthly, it was necessary to consider the *effect* of piracy as much as piracy itself. The acts of piracy could result in an off-hire event such as grounding; so too, here, they resulted in off-hire by preventing the crew acting as a crew. Thus:

> "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."

The Judge was unable to accept these submissions. He thought that seizure by pirates was a "classic example" of a totally extraneous cause. All in all and whether regard was had to piracy, the effects of piracy or both, to the Judge's mind, the incident remained a totally extraneous cause, falling outside the scope of the sweep up wording. The tribunal put the matter well:

"We cannot accept any of these permutations [i.e., those contained in Charterers' argument.] They all seemed to us to be attempts to avoid the well known consequences of the wording in the form agreed by the parties. This act of piracy was not *eiusdem generis* . It did not arise out of the condition or efficiency of the vessel, or the crew, or the cargo, or the trading history, or any reasonable perception of such matters by outside bodies. Unlike a trading history which gave rise to typhus or a well-grounded suspicion of typhus, it was a truly extraneous cause. The effect of the bargain contained within clause 15, construed in its general context, was that Owners did not take the risk of the full working of the vessel being prevented by an extraneous cause such as piracy. The Charterers…did assume that risk."

The Judge agreed.

Overall Conclusion

The seizure of a ship by external actors was a recognised peril; but no such peril was covered by cl. 15 of the charterparty. Moreover and, to the Judge's mind significantly, there was in the charterparty a "bespoke" clause dealing *inter alia* with seizures; cl. 40 of the charterparty provided as follows:

"Clause 40 – Seizure/Arrest/ Requisition/ Detention

Should the Vessel be seized, arrested, requisitioned or detained during the currency of this Charter Party by any authority or at the suit of any person having or purporting to have a claim against or any interest in the Vessel, the Charterers' liability to pay hire shall cease immediately from the time of her seizure, arrest, requisition or detention and all time so lost shall be treated as off-hire until the time of her release…"

Plainly, however, cl. 40 did not extend to cover seizure by pirates. Perhaps that was Charterers' misfortune but it did not furnish justification for distorting the meaning of cl. 15 of this charterparty. Should parties be minded to treat seizures by pirates as an off-hire event under a time charterparty, they could do so straightforwardly and most obviously by way of an express provision in a "seizures" or "detention" clause. The various submissions advanced by Charterers failed, individually and cumulatively, to satisfy the burden of proof resting on them to come clearly within the wording of the off-hire provisions contained in cl. 15 of the charterparty. The appeal had to therefore be dismissed.

Please feel free to contact us if you have any questions or you would like to have a copy of the Judgment.

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Thanks to the colossal injections by worldwide governments, the fourth quarter of 2009 imparted some hope as we saw both seafreight and airfreight cargo rush in the last quarter created temporary space shortage. Whether the robust trend will continue is uncertain as worldwide governments are not in unison in their fiscal policies. The "visible" hand will still haunt the economy in 2010.

During time of uncertainty, we believe the number of E&O, uncollected cargo and completion of carriage claims will be unabated. If you need a cost effective professional service to defend claims against you, our claim team of five are ready to assist. Feel free to call Carrie Chung / George Cheung at 2299 5539 / 2299 5533.