Piracy and Off Hire – Another Perspective

In the “Saldanha” the English High Court decided at a ship detained by Somali pirates was not off-hire for the duration of her detention. In that case, the vessel had been chartered on an NYPE charter form but the off hire clause (clause 15) had not been amended by the addition of the word “whatsoever” with reference to the list of off hire causes and the judge considered the seizure of the vessel by pirates as a “classic example of a totally extraneous cause”. This decision was discussed in an earlier website article published in September 2010: “Piracy – an Off Hire Event?”

In Osmium Shipping Corporation v Cargill International SA (the “Captain Stefanos”) [2012] EWHC 571, the English High Court has now decided another case on the same question, whether a ship is on or off hire under a time charter when detained by pirates. However, in this case, different provisions in the time charter lead to a different result.

In the “Saldanha” the dispute turned on the wording of the normal off-hire clause in the standard NYPE charterparty. In order to avoid paying hire, the charterer must clearly bring himself within one of the provisions of the charterparty that allows him to stop paying hire. The arbitrators, and the court on appeal, decided that detention by piracy did not fit within any of those listed events, so that the detention was not an off-hire event and charterers were obliged to continue to pay hire for the period that the ship was detained.

In an obiter comment it was suggested that if the standard clause 15 have been amended with the word “whatsoever” so that the list of off-hire events includes “or by any other cause whatsoever…” then this would probably have been sufficient to cover detention by piracy and the court might have found the ship to be off hire. The charterparty also included a “bespoke” seizure and detention clause (clause 40) which omitted any reference to piracy:

“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 hire so lost shall be treated as off-hire until the time of her release.”

Reinforcing the point the judge said: “Should parties be minded to treat seizures by pirates as an off-hire event under time charterparty, they can do so straightforwardly and most obviously by way of an express provision in a “seizure” 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.”

The charterparty in the “Captain Stefanos” had another off-hire clause amongst the rider clauses, which held that the ship would be off-hire “in the event of loss of time… caused by… capture/seizure, or detention or threatened detention by any authority including arrest.” Owners argued the clause only applied to capture or seizure by an authority. The court considered a number of factors, including the position of the comma after the words “capture/seizure” and held that this rider clause did entitle the charterers to treat the ship as off-hire for the time lost due to her capture by Somali pirates.

The charterparty also included the CONWARTIME clause but the judge held that this was relevant to the performance of the charterparty and to breach, not to off-hire: “The CONWARTIME Clause does not deal with hire and off-hire, but allocates risks for additional costs if the Vessel goes to a War Zone (if the Owners agree) or provides for the Owners’ right to refuse to go and liberty to take various steps in the circumstances referred to.”

It is worth noting that both of these decisions consider charterparties that were made before the BIMCO Piracy Clause for Time Charter Parties 2009 was introduced (see: SPECIAL CIRCULAR No. 1 – March 2009 BIMCO Piracy Clause for Time Charter Parties). That clause has a provision which states that “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” (for a capped period).

However the two cases provide clear law for disputes under charterparties that do not incorporate the BIMCO clause. They also give a useful insight into how English Courts will consider and construe the effect of an off-hire clause, or similar clause, in a charterparty.

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