

THE IMPACT OF PIRACY: ON-HIRE OR OFF-HIRE?



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The average length of time that ships are held by pirates has increased over the last year. A ship captured today can expect to be held for an average of five months. The hire accrued during this period will be substantial and the off-hire clause of the charterparty will usually determine whether the charterer is obliged to pay hire. In this article, we look at how the off-hire provisions in a typical time charterparty are construed following the capture of a ship by pirates. Reference is made to the recent case of the *Saldhana*.

The question of whether a ship is considered off-hire when captured by pirates will depend in the first instance on the off-hire clause contained in the charterparty. In general, to be considered off-hire, a ship's full working must be prevented as a result of an event either defined or listed in the off-hire clause. It is for the charterer to prove that the circumstances fall within the scope of the off-hire clause.

Popular time charterparty forms such as NYPE and the Shelltime form were drafted before the re-emergence of piracy as a threat to shipping. Accordingly, their wording and apportionment of responsibility in the event of an act of piracy are not clear and can lead to confusion. A number of standard charterparties contain provisions relating to piracy in their war risks clause. 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.

The shipping industry has for a long time suspected that piracy does not constitute an off-hire event under standard contracts. It was recently clarified by the English courts in the *Saldhana* when the court upheld the finding of an arbitration tribunal that charterers, under an amended NYPE 1946 charterparty, failed to prove that an off-hire event had occurred. This judgment, which is analysed further in the following article, highlighted the inability of the old charter form's wording to tackle the modern development of piracy. Mr Justice Gross emphasised this fact and stressed that problems would be avoided if charterers and owners contract on clear terms that give meaning to their intentions.

‘OR BY ANY OTHER CAUSE...WHATSOEVER’

Where the off-hire clause contains the words ‘or by any other cause’ and it then lists various off-hire events, the court will interpret this list as being inclusive, restricting the definition of off-hire events. These clauses are generally not wide enough to include acts of piracy and the ship will remain on-hire until one of the listed events occurs.

However, where the word ‘whatsoever’ is added after ‘or by any other clause’, it is likely that this will be construed widely enough for a piracy event to render the ship off-hire.

Where there is no express reference to a piracy event in the off-hire clause, the charterer will consider whether the circumstances fit with any of the other listed off-hire events. In the *Saldhana*, the charterer argued that ‘default of the crew’ resulted in the capture of the ship and therefore the ship should be considered off-hire. The court found that there had been no default and to construe ‘default of the crew’ this widely would go against the historical drafting/interpretation of the clause and result in a drastic change in the liabilities of the owners.

NEGLIGENCE

Negligence by the ship or the crew in causing the capture of the ship is unlikely to constitute off-hire unless wording to that effect is specifically included in the off-hire clause; for example, ‘failure to follow Best Management Practice, resulting in capture of the ship to count as off-hire’. In the absence of such a clause, claims by the charterer that the crew were negligent may result in damages equating to the amount of hire. However, in reality, the courts may be unlikely to conclude that the crew, who were captured and held captive by pirates, were negligent unless there were very clear and near reckless acts of negligence on their behalf.

PIRACY CLAUSES

Both BIMCO and Intertanko have produced a series of clauses designed to deal with the questions posed by piracy in modern-day charterparties. BIMCO 2009 subclause (e) contains an express statement that a ship will remain on-hire for the first 90 days of a capture with all the obligations of the charterer remaining in force. Following this 90-day period, the hire will be suspended until the ship is released. It is important to emphasise that on expiry of the 90 days, only the obligation to pay hire is suspended. Charterers' other duties remain intact and in full force throughout the period of the capture.

On release it is not clear whether the hire accrues from the ship's release or when it reaches a port of refuge. This point may yet cause confusion, although provision (g) does provide that anything ‘done or not done’ in compliance with the clause will not be deemed a deviation. One would assume that hire is therefore payable from the instant pirates leave the ship.

The Intertanko time charter clause is drafted in the same fashion as the BIMCO clause, that is, all of charterers obligations including the payment of hire remain in force during a capture by pirates. One significant difference is that there is no 90-day period, and accordingly if a ship is captured, it will remain on-hire until release. Considering the length of time ships now spend captured, the Intertanko clause would seemingly protect the owner's hire indefinitely in contrast to the BIMCO clause.

CONCLUSION

It is clear that standard off-hire clauses are frequently insufficient to cover situations involving piracy. The financial impact on a shipowner or charterer is likely to be significant and therefore we would recommend that members consider the inclusion of express wordings when ships could call in or near high-risk areas. Clauses such as those drafted by BIMCO and Intertanko are available, or alternatively bespoke clauses may be added to avoid ambiguity.

For further information and clauses relating to piracy, please consult the BIMCO website at: https://www.bimco.org/Corporate/About/About_BIMCO.aspx or Intertanko's website at: <http://www.intertanko.com/>. Alternatively, please speak to your usual club contact who will be able to assist.