

Soundings

“THE ELENI P” – Piracy provisions and principles of construction

The English High Court was recently called on in *Eleni Shipping Limited v Transgrain Shipping BV* (“The Eleni P”) [2019] EWHC 910 (Comm) to consider whether an act of piracy near, but outside, the region generally identified as the Gulf of Aden was sufficient to place the ship off-hire under a time charter. Although the dispute centred round particular rider clauses, this decision is a useful reminder of the process by which charterparties are construed by the courts and arbitral tribunals and the need for clear provisions to put a ship off-hire.

Background

In the course of performing the charterer's instructions, the ship transited the Gulf of Aden, without incident, on a laden voyage but was then captured by pirates in the Arabian Sea. The ship was under the pirates' control for seven months before continuing on its planned laden voyage to the discharge port.

The owner claimed hire for the period when the ship was under the control of the pirates, amounting to about \$4.5 million. By a majority, the tribunal rejected the owner's claim on the basis of either of two clauses inserted into the charter, as follows:

Clause 49 – Capture, Seizure and Arrest

Should the ship be captures [sic] or seized or detained or arrested by any authority or by any legal process during the

currency of this Charter Party, the payment of hire shall be suspended for the actual time lost, unless such capture or seizure or detention or arrest is occasioned by any personal act or omission or default of the Charterers or their agents. Any extra expenses incurred by and/or during the above capture or seizure or detention or arrest shall be for the Owners' account.

Should the ship be arrested during the currency of this Charter Party at the suit of any party having or purporting to have a claim against or any interest in the ship, hire under this Charter Party shall not be payable in respect of any period during which the ship is not fully at Charterers' disposal, and any directly related / proven expenses shall be for Owners' account, unless such arrest is due to action against Charterers or sub-Charterers or their Agents or the Contractors or the cargo Shippers or Consignees, thence

hire is payable and Charterers undertake the responsibility to release the ship by taking appropriate and required measures (issuance of security / etc) as the case maybe or arise.

Clause 101 – Piracy Clause

Charterers are allowed to transit Gulf of Aden any time, all extra war risk premium and/or kidnap and ransom as quoted by ship's Underwriters, if any, will be reimbursed by Charterers. Also any additional crew war bonus, if applicable will be reimbursed by Charterers to Owners against relevant bona-fide vouchers. In case ship should be threatened/kidnapped by reason of piracy, payment of hire shall be suspended. It's remain understood [sic] that during transit of Gulf of Aden the ship will follow all procedures as required for such transit including but not limited the instructions as received by the patrolling squad in the area for safe participating to the convoy west or east bound."

Ruling

The Court of Appeal held that clause 49 did not provide an exception to the obligation to pay hire in this instance, but that clause 101 did do so. Accordingly, despite the owner in part succeeding on appeal, the charterer was still not liable to pay hire.

Clause 49: "captured"

On clause 49, the Judge ruled that this clause did not place the ship off-hire where the ship was captured by pirates. The critical question was whether the requirement that the ship be 'captured' was qualified by the need for it to be "by any authority or any legal process". The charterer (with whom the majority of the tribunal had agreed) argued that these words only applied to arrest, whereas the owner considered the limitation to apply to all of the actions listed previously.

The Judge ruled that the owner was correct. This followed first as a result of the clear wording of the clause, together with the fact that if the charterer was correct then the qualification was irrelevant (as there was no way a ship could be arrested but for by an authority or legal process). Second, it was a better fit with other terms of the charter (which, for example, referred to detentions of the ship in certain circumstances rendering it off-hire – a provision which was again rendered irrelevant on the charterer's construction). Third, on the charterer's construction the provision would render the ship off-hire whenever it is prevented from moving, whatever the cause, which would be a very significant departure from the normal rule in time charters that a charterer is at risk of delay.

Clause 101: Gulf of Aden

By contrast, the Judge upheld the tribunal's conclusion that clause 101 applied, placing the ship off-hire following capture by pirates. This was because the third sentence of clause 101 was not (as the owner had argued) limited to piracy in the Gulf of Aden, but also extended (as the majority had found and the charterer adopted) to piracy as an immediate consequence of the ship transiting the Gulf of Aden.

The Judge noted that the parties were aware that there was no specific area known as the 'Gulf of Aden' and that piracy was expanding in that region. Against this background, the Judge preferred the charterer's construction on the basis that it was the better fit for the plain purpose of the clause and the other sentences therein.

Principles of construction

In the judgement, the following relevant principles on the interpretation of any contract were summarised:

- A tribunal's task is to ascertain the objective meaning of the parties' words, considering what a reasonable person in the position of the parties at time of fixing would have understood them to mean;
- The charter is construed as a whole, bearing in mind the clauses other than those of immediate application to the dispute;
- Where there is ambiguity then the more commercially sensible construction may be preferred;
- The parties have greater scope to apply considerations of business common sense where the contract is poorly drafted – whether because the language used is imprecise, inconsistent, or simply unintelligible: "depending on the nature, formality and quality of drafting of the contract", a tribunal may "give more or less weight to elements of the wider context" in construing the words; and
- When construing time charters, it is relevant that such contracts generally allocate the risk of delay to a charterer and the burden lies on a charterer to bring a particular set of facts within the words of an off-hire exception. Therefore, "all other things being equal, doubts as to the meaning of such exceptions are to be resolved in favour of owners."

Ultimately, construing a charter is a balance between considering its provisions, its commercial context, and its commercial consequences.