Impact of Piracy on Terms and Conditions of Charterparties

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In the recent years piracy, as the most ancient threat of all seafarers emerged over again. Although most of the pirate attacks take place outside of the port, the question arises whether the nominated route or approaches to the port can be considered as an extension of the port to which safe port/berth warranty applies.

There are several issues that are of the concern to charterers and owners in light of this threat: will the attack away from the port be considered as one breaking safe port warranty which charterers guaranty; whether the vessel can lawfully deviate from the areas affected by pirates attacks and choose a longer, but safe route; whether the owners can transfer the charterers burden to pay additional insurance premium to sail through the areas.

In the context of piracy, it may be difficult to rely on the safe port warranty in a charter. Most time charterparties are for worldwide trading and the charterer does not guarantee the safety of any sea passage the vessel may have to take. An international transit route, such as the Gulf of Aden, cannot be characterized as an "approach" to a port, unless, of course, the vessel is destined for a port in the area. Rejecting to proceed directly through the Gulf can cause not only financial hardships to the charterers as deviation through Cape Horn can add additional thirty days on the voyage, but also not guaranty that the vessel will be safe. Recent attacks demonstrated that the pirates attacked the vessel far from the coast line and their equipment significantly approved over the past years.

The safety of the vessel can be guaranteed by taking some steps before ships starts the voyage. It can include installing barbed wire and employing armed guards. Until now it is only a recommendation issued in the form of Best Management Practice

Guide (BMP4”). This recommendation was prepared by an alliance of international maritime organizations and consists of number of steps before and during the passage aimed to protect the vessel and her crew.

The usual test for the prospective unsafety of a port or the approach to a port is whether whatever has made the port or the approach to the port unsafe can be avoided by good seamanship and navigation. Assuming that the charter party precludes deviation from the customary route ordered by charterers (if re-routing would avoid the risk area), the owners will have to be able to demonstrate that the level of risk from pirates to the vessel in approaching the port would be unacceptable to any reasonable owner or Master. As the risk factor varies depending on factors such as speed and design of vessel, time of transit and actions taken by the owners to minimize the risk, it may be difficult for the owner to establish that the level of risk renders the approach to the port unsafe. If the vessel is not trapped, but merely required to seek an alternative route, courts generally hold that the charterparty is not frustrated.

However, if an order is given, compliance with which exposes the vessel to a risk which the owners have not agreed to bear in the charter party, the master is entitled to refuse to obey it. If we compare with the situation where the charterers order the vessel to proceed through the Gulf of Aden, then in the first place with respect to a worldwide trading time charter you cannot imply that the owners have accepted the risks present all over the world. You will have to consider the actual situation. On the other hand, if a voyage charter has been fixed where the normal route is taking the vessel through the Gulf of Aden, the owners will have difficulties in changing the route unless an escalation of hostilities in the Gulf of Aden has taken place since the charter party was negotiated and fixed.

The odds of being hijacked have increased and owners were dusting off their war risk clauses and focusing on whether they had a right to refuse what would otherwise would be legitimate orders. In order to extend safe port warranty to the route of the

\[2\text{ http://www.mschoa.org/bmp3/Documents/BMP4%20low%20resolution%20(3).pdf}\]
vessel some shipping companies have responded quickly to the need for a model piracy clause. INTERTANKO and BIMCO produced in December 2008 these clauses for both voyage and time charters. They are aimed to protect shipowners and give the Masters exclusive authority on choosing defensive measures to protect the vessel and the crew on the given itinerary against the pirates at the additional expense of the charterer.

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 convoy, using escorts, avoiding day or night navigation, adjusting speed or course, or engaging security personnel or equipment on or about the vessel. Shipowners can nominate an alternative route. The vessel remains on hire for any 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.

Charterers also indemnify ship owners against all liabilities costs and expenses arising out of actual or threatened acts of piracy or any preventive or other measures taken by ship owners additional insurance premiums, additional crew costs and costs of security personnel or equipment.

Considering the fact that safe port warranty cannot be used as a defense of owners financial interest in continuous employment of the vessel recently English courts found a way how to bring vessel back off-hire. Whilst the decision of the English High Court may not come as a total surprise to the wider shipping community, it does illuminate the requirement for parties to address, at the time of negotiating charterparty terms, the issue of delays caused by piracy.  

The judge ruled in *The Saldanha* whether a vessel will be off hire as a consequence of a pirate attack will depend on the charterparty off hire clause. It is for

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8 Cosco Bulk Carrier Co. Ltd. v Team-Up Owning Co. Ltd. (The Saldanha) [2010] EWHC 1340
charterers to bring themselves clearly within an off hire clause. The clause is often amended by the addition of the words “or by any other cause whatsoever” or “or by any other cause”. The word “whatsoever” is a key.

None of the off hire events listed under a typical off hire clause cover pirate attacks. If the off hire clause does not contain the word “whatsoever” but does contain the words “or by any other cause,” off hire events have been construed by the courts to be restricted to the causes listed in the clause, and to any other causes which are similar to those expressly listed and “internal” to the vessel. In a clause of this type, the vessel will probably remain on hire unless or until one or more of the causes.\(^9\)

By incorporating express terms in to the charterparty, the parties can seek to avoid any such disputes. The inclusion of such may have been capable of activating an off-hire event caused by an extraneous factor. However, the provision of a tailored “seizures and detention clause” may prove to be more effective.

Recently many owners in order to protect their financial interest in the vessel sought to claim premium for insurance connected with passing the Gulf of Aden from charterers. There can be three types of insurance in this circumstances. The first one is extra war risk insurance (“EWRI”). It is specifically aimed to cover additional risks while the ship is sailing through war risks zones and payment of the premium is typically on charterers’ account in most standard charter party forms. The second one is loss of hire insurance. It is recommended to agree on payment of the premium on this one, only if the charterparty does not contain “whatsoever” wording in the off-hire clause. Having both will allow owners to have double protection of charter hire payment. Lastly, payment of Kidnap and Ransom insurance (K&R) has to be covered by the owners only. Since navigation of the vessel and crew matters pertain owners sole discretion charterers cannot be responsible for expenses that will benefit only owners.

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