

BRIEFING

PIRATE SHIP HIJACKINGS – WHO PAYS
FOR THE DELAY?

MAY 2019

- ENGLISH HIGH COURT HOLDS THAT TIME CHARTERPARTY CLAUSE ON CAPTURE/SEIZURE/ARREST DID NOT COVER PIRACY
- BUT VESSEL CAPTURED BY PIRATES WAS OFF-HIRE UNDER TERMS OF PIRACY CLAUSE



“THE ENGLISH HIGH COURT HAS CLARIFIED THE SCOPE OF A TYPICAL TIME CHARTERPARTY CAPTURE/SEIZURE/ARREST CLAUSE IN THE CONTEXT OF SHIP PIRACY.”

In an important decision, which will be of interest across the maritime sector, the English High Court has clarified the scope of a typical time charterparty capture/seizure/arrest clause in the context of ship piracy, and of a specific rider clause addressing this scenario¹.

Facts

The *Eleni P*, a Panamax bulk carrier vessel, was on time charter and was ordered to load a cargo of iron ore in the Ukraine and to discharge it in China, requiring the vessel to sail through the Suez Canal and the Gulf of Aden (the “GoA”).

The vessel sailed through the GoA and into the Arabian Sea. When it was some 230 nautical miles outside of the ‘Gulf of Aden transit area’ designated by the Joint War Committee (the “JWC”) for war risk purposes, it was captured by pirates and remained captured for some seven months before its release.

The parties disagreed about whether the vessel was on or off-hire under the time charterparty.

¹ *Eleni Shipping Ltd v Transgrain Shipping B.V. (The ‘Eleni P’)* [2019] EWHC 910 (Comm)

Tribunal's decision

Two of the three arbitrators held that the vessel was off-hire:

1. Under clause 49 ("Capture, Seizure and Arrest"), which provided that "Should the vessel be captures [it was accepted that this should read 'captured'] or seized or detained or arrested by any authority or by any legal process during the currency of this charterparty, 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...". In the tribunal's view, the word 'captured' was not qualified by the subsequent words "by any authority or by any legal process" (as the Owners had submitted). They considered these words only applied to an 'arrest'; and
2. Under clause 101 ("Piracy Clause"), which provided that: "[1] Charterers are allowed to transit GoA any time, all extra war risk premium and/or kidnap and ransom as quoted by vessel's Underwriters, if any, will be reimbursed by Charterers. [2] Also any additional crew war bonus, if applicable will be reimbursed by Charterers to Owners against relevant bona-fide vouchers. [3] In case vessel should be threatened/kidnapped by reason of piracy, payment of hire shall be suspended. [4] It's remain understood [sic] that during transit of Gulf of Aden the vessel 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...". In their view, the off-hire sentence [3] was not limited to a piracy kidnapping within the GoA (as the Owners had submitted, arguing that sentences [1], [2] and [4] informed the meaning of sentence [3] in this regard), but included a kidnapping by reason of piracy as an immediate consequence of her transiting or being about to transit the GoA.

The Owners appealed to the High Court.

High Court decision

Clause 49

The judge (Popplewell J) held in favour of the Owners on clause 49 – all of the preceding events, including the vessel's 'capture', were limited by the words "by any authority or by any legal process" (which was not the case here as the capture was by pirates). If all of these events were not limited by these words (as the Charterers had argued and the majority arbitrators had held) then:

1. This would be contradicted by the fact that the words "during the currency of this charterparty" which follow straight afterwards do apply to all of those events;
2. The words "by any authority or by any legal process" would be superfluous given that it was difficult to see how there could be an 'arrest' other than in this way;
3. The word 'detention' would be a standalone event placing the vessel off-hire for, say, bad weather or port congestion. This could not be right and would be inconsistent with clause 15's limitation of off-hire for 'detention' to where this was caused by "average accidents to ship or cargo"; and
4. Finally, the majority arbitrators' conclusion that a 'capture' cannot be by an 'authority' other than by way of 'prize' (i.e. confiscation) was incorrect. As a matter of ordinary language, a vessel could be captured by an authority without force, such as in the case of unoccupied land or undefended goods (or the

"ALL OF THE PRECEDING EVENTS, INCLUDING THE VESSEL'S 'CAPTURE', WERE LIMITED BY THE WORDS "BY ANY AUTHORITY OR BY ANY LEGAL PROCESS"."

judge's wife capturing his heart, as he put it). This is also consistent with clause 28 of the Shelltime 4 form and with the decision in *The Captain Stefanos*².

Clause 101

However the judge held that the vessel was off-hire under clause 101, which he considered had the meaning given by the majority arbitrators:

5. The judge read the award as providing that the GoA had no geographical meaning in the context of such a time charterparty. He considered this to be binding on him and conclusive, despite the Owners' argument that the vessel had been kidnapped outside of either of the two potentially applicable GoA areas (i.e. the JWC's definition or the International Hydrographic Organisation's definition);
6. He also considered that the purpose of clause 101 was to enable the Charterers to trade through the Suez Canal, which the Conwartime 2004 clause might otherwise have permitted the Owners to refuse to do on account of the risk of piracy associated with the consequent GoA transit, making her less commercially attractive. In his view clause 101 allocated the risk for a GoA transit such that the Charterers pay the additional insurance premium and crew war bonus and the Owners bear the risk of delay from piracy *as an immediate consequence of the GoA transit* (rather than by reference to a particular geographical area). In this regard, he found no evidence in the award of the insurance premium or crew war bonus being tied to such an area and read the award as showing that the parties would have regarded the risk of piracy as extending beyond what the GoA might be understood to mean; and
7. Finally, the judge was not swayed by the fact that this answer would involve the vessel going off-hire or remaining on-hire for the same piracy kidnapping at the very same geographical point depending on whether it happened to have transited (or was about to transit) the GoA or whether it had come from (or was headed) elsewhere.

Conclusion

The judge's decision on clause 49, on which the Owners were successful, will be welcomed by the shipping community: a contrary decision could have opened the floodgates to vessels being placed off-hire for surprising events such as bad weather or port congestion detaining them in port, which cannot be right.

The decision on clause 101, on the other hand, illustrates two points. First, that a charterparty clause may, as with any contract clause, be given a particular meaning depending on the other charterparty provisions and the factual circumstances that would have been known to people in the parties' shoes at the date of the charterparty. And secondly, that in an appeal from an arbitration award on a point of law, the court will be limited by (and its decision may well be affected by) the evidence of such factual circumstances as is set out in the award.

A copy of the judgment can be found [here](#).

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² [2012] 2 Lloyds Rep 46

FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this briefing, please speak with Evangelos Catsambas, who acted for the vessel owners in this case, or your regular contact at Watson Farley & Williams.



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