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# PIRACY AND ITS EFFECTS ON CHARTERPARTY CONTRACTS

MASTER THESIS

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# Summary

Somalia piracy has its effects on the sea, off the coast of Somalia and in the wider Indian Ocean. However, the source of the problem has its roots on the Somali land. Economic hardship, absence of an effective government and law enforcement are the driving force of piracy. External interference to the Somali land by the colonial powers and some other African states urged the Somaliland into political wilderness and created a failed state. On the other hand, today's pirates are old fishermen and some of them argue that the vessels sailing through Gulf of Aden were taking advantage of the weak government and law enforcement and dumping their waste into the Somalia waters and causing harm to the ecologic life. It is a known fact that some fishermen from other states have also been exploiting their fisheries.

Keeping these facts in mind, Somalia pirates cause great harm directly to maritime transport; also threaten the vital needs of the several countries across the continents, in a wider perspective, the international community. Security of the seafarers should also not be overlooked

In this thesis, piracy is discussed in a private law perspective as an event that effects the contractual relations between the shipowners and the charterers.

Under time charterparties, the risk of any delay is on the charterer while the shipowner bears that risk under voyage charterparties. The concepts of frustration and off-hire may relieve the parties to perform their duties if the circumstances allow them to do so. These issues are discussed in this thesis in the light of standard charterparty forms and the attention is drawn to the additional piracy clauses drafted by Bimco and Intertanko.

# Preface

To my family.

*Lund, 25 May 2011  
Ismail Aydin*

# Abbreviations

<b>BALTIME</b>	The BALTIME 1939 (rev 2001) standard form issued by BIMCO
<b>BIMCO</b>	The Baltic and International Maritime Council
<b>BOXTIME</b>	Uniform Time Charter Party For Container Vessels. Issued by BIMCO.
<b>BPTIME 3</b>	The BPTIME 3 standard form, 1 ed, 2001 Issued by BP Shipping Ltd and BIMCO
<b>EEZ</b>	Exclusive Economic Zone
<b>IMB</b>	International Maritime Bureau
<b>INTERTANCO</b>	International Association of Independent Tanker Owners
<b>NYPE 93</b>	The New York Produce Exchange form as amended 1993. Issued by ASBA
<b>SUA CONVENTION</b>	Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988
<b>UNCLOS I</b>	Geneva Conventions on the High Seas 1958
<b>UNCLOS III</b>	United Nations Convention on the Law of the Sea, 1982

# 1 Introduction

*”A pirate under law of nations, is an enemy of the human race: being the enemy of all, he is liable to be punished by all.”<sup>1</sup>*

The international community, especially the IMO has been combating piracy for some time with the co-operation from the member states and the support of the maritime industry. Such co-operation has helped to reduce piracy in the hot spots of the South China Sea and the Straits of Malacca and Singapore in late 1990s and the early 2000s. However, piracy continues occur in other parts of the world, most notably off the coast of Somalia, in the Gulf of Aden and the wider Indian Ocean. The piratical attacks are mainly targeted towards merchant vessels to collect ransom for release of the vessel and its crew members.

The problem caused by piracy off the coast of Somalia and the Gulf of Aden has many aspects. The presence of Somali pirates in the area threatens the food transiting through the ports of the African countries that need humanitarian help.<sup>2</sup> Somali coasts are laying alongside the Gulf of Aden which is one of the world’s most vital sea lane and attacks on that lane also threatens the vital needs of the several countries across continents. It also has an economic cost, since millions of dollars are being paid to the Somali pirates each year. Beyond that, crew members of the vessels passing the areas frequented by pirates have the risk of being kidnapped. So far in 2011, in the past four months alone, there have been 117 piracy-related incidents off the coast of Somalia. They have resulted in 20 hijacked ships, with 338 seafarers on board, 7 seafarers got killed – whilst, at present, 518 seafarers are being held for ransom on board 26 ships scattered at various points of the country’s extensive coastline.<sup>3</sup>

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<sup>1</sup> *United States v. Smith (1820) 5 Wheat 153.*

<sup>2</sup> Josette Sheeran, Executive Director of the World Food Programme, *Speech at the Launch of World Maritime Day theme 2011 “Piracy: Orchestrating the response”* 3 February 2011

<sup>3</sup> ICC International Maritime Bureau 2011 Piracy Report (updated on 28 April 2011), More info at <http://www.icc-ccs.org/piracy-reporting-centre/piracynewsfigures>

## 1.1 Problem

Piracy had always been a profitable business since time immemorial and still continues to be lucrative. In some varieties of piracy, pirates hijack the ship, kill crew members and keep the ship with its cargoes on board. Such a kind of piracy can still be witnessed in the Malacca straits. However, the acts of piracy off the coast of Somalia can be distinguished from the above mentioned kind of piracy. Somalian pirates are not interested in keeping the ship or cargo. They are interested in collecting ransom in exchange of the release of the ship and its crew along with the cargo.

In the event that a vessel is detained by pirates, charterers of such a vessel may find themselves in a situation where they are denied the use of the vessel but still expected to pay hire, an obligation that they will almost certainly be keen to avoid.<sup>4</sup>

As hijacked vessels are unable to sail, load or discharge, the hijacking by the pirates may cause great harm and costs (economic loss, property damage. etc.) to shipowners, crew members, charterers, undertakers, cargo owners, etc. Piracy may also threaten the marine environment if the hijacked vessel is carrying oil or chemicals that can harm the marine environment in a case of spill or leakage. In a broader perspective, it harms maritime safety and thus, maritime industry and trade.

A charterparty is a contract for the use of the entire vessel. The shipowner agrees to make available the entire capacity of his vessel for either a particular voyage or a specified period of time and the charterer pays hire or freight. In the event of a piracy, can the charterer avoid his obligation to pay hire? Can piracy result in frustration of the charterparty contract? The discussion encompasses on questions such as whether piracy can trigger an off-hire event or not; whether deviation to avoid a piratical attack is reasonable or nor; and whether piracy frustrates the

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<sup>4</sup> Piracy and the Charterer, Marsh's Global Marine Practice, [www.marsh.com](http://www.marsh.com)



contract of carriage. In the context of defining piracy for this discussion, distinction is made between piracy and maritime terrorism.

## **1.2 Purpose**

The purpose of this paper is to shed light on some of the controversial legal issues emanating from Somalia piracy with regard to charterparty contracts, such as off-hire, deviation and frustration. Since charterparty within the realm of freedom of contract, the parties to a charterparty contract can agree on the terms of the contract. Therefore, it is not an easy task to generalize the verdict on the effect of piracy on charterparty contracts. Recent case law emanating from piratical attacks off the coast of Somalia and Malacca Straits has been discussed and analysed to have a better sight of the effects of piracy on charterparties.

## **1.3 Method and disposition**

Following this introduction, in chapter two, a descriptive method is be used to explain piracy with a special focus on Somalia piracy. International conventions, guidelines of related international organizations and court decisions are used.

In chapter three, the effect of piracy on charterparty contracts is discussed in the light of standard form charterparty contracts, published literature and court cases.

In chapter four, the candidate attempts to make a critical analysis of two leading cases on piracy from the UK and Singapore. This is followed by a summary and conclusion in chapter five.

## **1.4 Delimitation**

Piracy is the focal point of this thesis however; the candidate will not discuss how to combat piracy, but rather concentrate on the effects of piracy on the charterparties. Piracy has many effects on the contractual relations between the

shipowners and the charterers such as insurance but this issue is deliberately kept out of the scope of this thesis since it is a profound topic and the length of this thesis is not enough for an indept analysis of the consequences of piracy on insurance law.

Third parties are also affected by acts of piracy such as cargo owners. However, cargo owners interests will not be discussed in this paper.

The candidate would also take the opportunity to underline that only time charterparties and voyage charterparties are discussed in this thesis. Bareboat charterparties, which generally operates more as a lease of a vessel than a carriage contract, is kept out of the scope of this thesis.<sup>5</sup>

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<sup>5</sup> In a bareboat charter, the charterer hires the vessel from the shipowner and engages his own crew and manages the vessel as if it is his own. See: John F. Wilson, *Carriage of Goods by Sea*, p. 7, See also: Paul Todd, *Contracts for the Carriage of Goods by Sea*, BSP Professional Books, 1988, p.10

## 2 Piracy

Attacks causing damage to the merchant vessels as well as death and personal injury of the crew members may be condemned in the words of the early nineteenth century case, *United States v Smith*<sup>6,7</sup>

“... a pirate under law of nations, is an enemy of the human race: being the enemy of all he is liable to be punished by all.”

### 2.1 Legal Definition

Piracy has many different legal aspects and there is no single definition of piracy. There are different definitions for different purposes since piracy may be the subject of public international law, criminal law and private law.<sup>8</sup>

Article 15 of the 1958 Geneva Convention on the High Seas and the article 101 of the 1982 United Nations Convention on the Law of the Sea defines piracy *juris gentium* in the following terms:

“Piracy consists of any one of the following acts:

(a) Any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or passengers of a private ship or a private aircraft, and directed:

(i) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any state...”

It is possible to say that both conventions are declaratory of customary international law.<sup>9</sup> Criminal law description of piracy *juris gentium* presupposes that piracy is a criminal act exercised by passengers or the crew of the vessel

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<sup>6</sup> (1820) 5 Wheat 153.

<sup>7</sup> Keith Michel on *Legal Issues Relating to Time Charter Parties*, edited by Rhidian Thomas, Informa Law, London, 2008, p. 201

<sup>8</sup> Paul Todd, *Maritime Fraud and Piracy*, 2<sup>nd</sup> ed. 2010, Lloyd's List, London, 2010, p. 3

<sup>9</sup> N. Ronzitti (ed.), *Maritime Terrorism and International Law*, 1980 Kluwer Academic Publishers, p.1

against another vessel or persons or property on its board.<sup>10</sup> If we examine the crime of piracy in more detail, the first criterion is the two-vessel requirement. The second criterion is the criminal act should occur in *terra nullius*<sup>11</sup>.<sup>12</sup> Finally, the third criterion is that the act of violence must be committed for “private ends” in order to fall within the category of acts of piracy.<sup>13</sup> In that case an act of violence committed by the crew of a ship (or by passengers on that ship) against foreign persons or property in high seas is to be considered as an act of piracy.<sup>14</sup> In 1958 Geneva Conference on the Law of the Sea, the *animus furandi*<sup>15</sup> was no longer a requirement for the crime of piracy.<sup>16</sup> The criminal act could be carried out for different reasons such as vengeance or hate and still be regarded as piracy.<sup>17</sup> However, violence committed for political ends is not regarded as piracy by the Article 101 of 1982 UNCLOS.<sup>18</sup> Insertation of “private ends clause” seems reasonable when the legislative history of Article 15 of the 1958 Geneva Convention is taken into account.<sup>19</sup> Czechoslovakia criticized the convention on the grounds that the International Law Commission committed a grave omission by excluding the political ends from the definition of piracy.<sup>20</sup> Some scholars recommended the deletion of the private ends clause in order to widen the notion of piracy but the 1982 UNCLOS has kept the “private ends” criterion unaltered.<sup>21</sup>

The intention of the international community to keep the definition of piracy narrow is not to interfere with the jurisdiction of any state. Thus, the international law definition of piracy excludes mutiny, hate, political ends and events that occur within territorial waters of any state.<sup>22</sup>

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<sup>10</sup> N. Ronzitti, p.1

<sup>11</sup> Latin expression deriving from Roman law meaning "land belonging to no one"

<sup>12</sup> Ibid, p.1

<sup>13</sup> Ibid, p.1

<sup>14</sup> Ibid, p.1

<sup>15</sup> Intend to steal

<sup>16</sup> *Yearbook of the International Law Commission (1956,II)* commentary to Article 39 (p.282)

<sup>17</sup> N. Ronzitti, p.2

<sup>18</sup> Ibid, p.2

<sup>19</sup> Ibid, p.2

<sup>20</sup> U.N. DOC. A/CONF. 13/40, 27<sup>th</sup> session, para. 33

<sup>21</sup> Ibid, p.2

<sup>22</sup> Paul Todd, *Maritime Fraud and Piracy*, p, 3

On the other hand, International Maritime Bureau has a wider definition of piracy:<sup>23</sup>

“An act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the intent or capability to use force in the furtherance of that act.”

The wider definition of IMB can be used for contractual purposes. Piracy may have effects on carriage contracts or insurance contracts. This issue will be discussed in more detail in section 2.4 below.

## 2.2 Piracy or Terrorism?

It is not always easy to determine whether an act on high seas is piracy or terrorism since they have some common features. However, there is a fine distinction between piracy and terrorism. At the time of the drafting of the 1988 Rome Convention for the Suppression of Unlawful Acts Against Safety of Maritime Navigation (SUA Convention) in the framework of the International Maritime Organization, piracy and maritime terrorism were considered as two separate crimes.<sup>24</sup>

Throughout history, piracy has been recognized as a crime and again has been defined by the statutes and international conventions.<sup>25</sup> That is why piracy has an acceptable definition in international community, while terrorism has no globally accepted definition.<sup>26</sup> As it is mentioned above, such definition of piracy is found in Article 15 of the 1958 Geneva High Seas Convention which is reproduced in Article 101 of the 1982 UNCLOS.

An incident can be defined as terrorism or a fight for freedom because of the political aspect of the situation and that is why it is difficult to make an objective

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<sup>23</sup> *Piracy and Armed Robbery Against Ships*, Annual Report, ICC IMB, Jan1-Dec 31, 2003, p. 3

<sup>24</sup> *Ibid*, p.2

<sup>25</sup> Keith Michel, p. 201

<sup>26</sup> *Ibid*.

definition of terrorism.<sup>27</sup> As it is mentioned, there is no globally accepted definition of terrorism; however, some common features characterize terrorist acts.<sup>28</sup> There must be an actual or threatened violence and this violence should be made for political ends.<sup>29</sup> Also, such acts should be directed toward and intended to influence a specific audience.<sup>30</sup> With the given characteristics, some authors define terrorism as:

“The threat or use of violence with the intent of causing fear in a target group, in order to achieve political objectives.”<sup>31</sup>

At the opening of the I.M.O. Conference, the Italian Minister of Justice, Vassali, and the Special Representative of the U.N. Secretary General for the Law of the Sea, Nandan, pointed out that the two-vessel requirement and the private ends criterion made rules on piracy inapplicable to maritime terrorism.<sup>32</sup>

Instances such as the *Achille Lauro* hijacking cannot be considered as piracy, for two reasons. The first reason is the absence of the two-vessel requirement. *Achille Lauro* was hijacked by her own crew members. The second reason is that the crew members were acting for political ends.<sup>33</sup> The case of *Santa Maria*<sup>34</sup> was, in some respects, similar to that of the *Achille Lauro*. In that case, as in the *Achille Lauro* case, the hijacking was made by ship passengers who acted for political ends, since they wanted to attract the attention of the world opinion to the dictatorial regime then in power in Portugal.<sup>35</sup> Article 19 of the 1958 Convention on the High Seas and in Article 105 of the 1982 Law of the Sea Convention allows seizure of a piratical ship even though it flies a flag different from that of the capturing vessel, however, those mentioned hijackings do not authorize states to

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<sup>27</sup> Robert J. Beck & Anthony Clark Arend, “Don’t Tread on Us”: *International Law and Forcible State Responses to Terrorism*, 12 WIS. INT’L L.J. 153 (2004), p. 162

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*, p. 163

<sup>32</sup> I.M.O. DOC. SUA/CONF/RD 13.

<sup>33</sup> N. Ronzitti, p.2

<sup>34</sup> On 23<sup>rd</sup> January 1961, a party led by Captain Galvao seized the *Santa Maria*, while it was cruising in the Caribbean. Captain Galvao and his companions, who embarked as ordinary passengers, seized that ship in order to call the attention of the world opinion to the dictatorship then ruling Portugal.

<sup>35</sup> N. Ronzitti, p.2

take action under the customary international law since they cannot be regarded as piracy.<sup>36</sup>

## **2.3 High Seas**

### **2.3.1 Definition**

The high seas were defined in the Article 1 of the 1958 High Seas Convention as “all parts of the sea not included in the territorial sea or in the internal waters of a state”. With the advent of the Exclusive Economic Zone and of the concept of archipelagic waters, this definition is modified by the Article 86 of the 1982 Law of the Sea Convention as:<sup>37</sup>

“All parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a state, or in the archipelagic waters of an archipelagic state.”

### **2.3.2 Legal Status of High Seas**

The high seas are free and open to all states, and no state may validly claim or exercise its sovereignty on any part of them<sup>38</sup> This rule of customary law, codified in the conventions prepared by UNCLOS I and UNCLOS III, is regarded as a cornerstone of modern international law.<sup>39</sup>

### **2.3.3 Freedom of the High Seas**

In principle, states cannot control the activities of other states on the high seas. Except few restrictive rules, states have the freedom to do what they wish to do. Freedom of the high seas was recognized in the 1958 Geneva High Seas Convention, which claimed to be “generally declaratory of established principles

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<sup>36</sup> Ibid, p.2

<sup>37</sup> R.R. Churchill, A.V. Lowe, *The law of the sea*, 3<sup>rd</sup> edition, Manchester University Press, 1999, p. 203

<sup>38</sup> HSC, art. 2, UNCLOS, arts. 87, 89

<sup>39</sup> Ibid, p. 204

of international law”.<sup>40</sup> Article 2 of the 1958 Geneva Convention listed the freedoms of navigation, fishing, laying and maintenance of submarine cables and pipelines, and overflight as examples of high seas freedoms.<sup>41</sup> According to the convention, above mentioned freedoms shall be exercised by all states with reasonable regard to the interest of other states and shall not abuse the rights of these states.

Construction of artificial islands and other installations permitted under international law and freedom of scientific research are added to the list of freedoms on the high seas by the Article 87 of the 1982 UNCLOS.<sup>42</sup>

### **2.3.4 Jurisdiction on the High Seas**

According to the Article 6 of the 1958 Geneva High Seas Convention and the Article 92 of the 1982 UNCLOS, the flag state have the exclusive right to exercise legislative and enforcement jurisdiction over its ships on the high seas. However, the exclusiveness of the flag state’s jurisdiction is not absolute and there are some exceptions of this exclusiveness which third states share the jurisdiction with the flag state.<sup>43</sup>

The first exception is the long established right of every state to act against piracy. This exception is regulated by the Article 14 of the 1958 Geneva High Seas Convention and the Article 100 of the 1982 UNCLOS. Churchill states that the right of every state to act against piracy arises from the common interests of the European powers in protecting the fleets that were the lifelines of their trade.<sup>44</sup> Today, piracy still remains a serious, and increasing, problem, notably off the coast of Somalia, Gulf of Aden, wider Indian Ocean, Malacca Straits and parts of south-east Asia, South America and west coast of Africa, and the Mediterranean Sea.<sup>45</sup>

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<sup>40</sup> Ibid, p. 205

<sup>41</sup> Ibid, p. 205

<sup>42</sup> R.R. Churchill, A.V. Lowe, *The law of the sea*, p. 205

<sup>43</sup> Ibid, p. 209

<sup>44</sup> Ibid, p. 209

<sup>45</sup> Ibid, p.209



## 2.4 Piracy defined for contractual purposes

In the past, piracy has been treated as a war risk. Today, in private law contracts such as marine insurance policies, piracy is usually regarded as a marine risk. Piracy sometimes exempts parties from liability that might arise in a carriage contract. Despite the narrow definition of piracy made by international law, a wider definition is used by the courts for the contractual purposes. The requirements such as two-vessels and high seas would be very restrictive in the contractual context. Rationale behind the narrow definition of piracy in international law such as the jurisdiction of the states or the difference between piracy and mutiny has no place in private law context. The definition of piracy for contractual purposes is wider than that for international law and this wider definition of piracy shall be used in contractual relations between the parties.

Narrow definition of piracy from international law is almost not the intention of the parties who are businessmen and in private law contracts such as charterparties, the courts are concerned to determine the intention of the parties.<sup>46</sup>

Marine Insurance Act 1906 provides that the term pirates include passengers, mutiny and rioters who attack the ship from the shore. This definition includes mutiny and excludes the requirement of two vessels. Marine Insurance Act does not apply to carriage contracts such as charterparties, however an interpretation can be made as this wider definition can also be applied in charterparty contracts which are also the subjects of private law.

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<sup>46</sup> Paul Todd, *Maritime Fraud and Piracy*, p. 12

## 2.5 Conclusion

Piracy includes any illegal act of violence, detention or depredation committed for private ends by the crew or passengers of a private ship (or aircraft) against another ship (or aircraft) or persons or property on board it, on (or over) the high seas.

Acts committed within the territorial waters are not piracy as a matter of international law. Also, acts should be committed for private ends. Attacks in recent years on merchant vessels including cruise ships and ferries in international waters or on ill-defined and unpoliced coastal regions have caused concern as to whether such attacks are perpetrated by pirates seeking personal gain by theft or the taking of hostages or by terrorists seeking a political or religious end.<sup>47</sup>

In *Republic of Bolivia v. Indemnity Mutual Marine Insurance*<sup>48</sup>, Pickford J, referred to several definitions of piracy, some given by writers on international law and some given by writers on criminal law and said that:

“I am not all sure that what might be piracy in international law is necessarily piracy within the meaning of the term in a policy of insurance. One has to look at what is the natural and clear meaning of the word ‘pirate’ in a document used by business men for business purposes; and I think that, looking at it in that way, one must attach to it a more popular meaning, the meaning that would be given to it by ordinary persons, rather than the meaning to which it may be extended by writers on international law.”

In *Republic of Bolivia* the loss was suffered by violent acts of the attacking vessel, which were motivated by a desire to re-establish the Free Republic of El Acre. Besides, the act took place on the Amazon River, hundreds of miles inland. The court held that it was not piracy because the attacking vessel’s aim was public rather than private. Should the aim was private, the attack could be considered as piracy even it did not take place on the sea.

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<sup>47</sup> Keith Michel, p. 202

<sup>48</sup> [1909] 1 KB 785.

In *Athens Maritime v. Hellenic Mutual War Risks (The Andreos Lemos)*<sup>49</sup> Staughton J. held that an armed theft committed against a ship at anchor, which is on territorial waters, can be regarded as piracy for the purposes of a marine insurance contract (and also for the purposes of interpreting a carriage contract)<sup>50</sup>.

As it is mentioned before, international law definition of piracy has kept narrow in order not to interfere the jurisdiction of any state. However, piracy has also consequences on private law contracts such as charterparties. As it is discussed at 2.4, the narrow definition of international law should not be applied on private law contracts. In a private law case, the court will try to find out the intent of the parties while interpreting the terms of the contract. The parties of a charterparty are the shipowner and the charterer and most probably there is no difference for them if the act was committed on high seas or in territorial waters and they will not think of the two-vessel requirement while concluding their contract.

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<sup>49</sup> [1983] QB 647

<sup>50</sup> Paul Todd, *Maritime Fraud and Piracy*, p. 13

### 3 Charterparties

Contracts of carriage are generally of two types: first, where the contract is for the use of a whole ship, and second, where the carrier enters into a number of separate contracts with various owners of cargo.<sup>51</sup>

A charterparty is a contract for the use of an entire vessel, and is typically used either by liner operators or by shippers of large quantities of cargo.<sup>52</sup> The charterparty is the contract as itself.<sup>53</sup> Where a shipper does not need the entire vessel, the carriage contract will be on bill of lading terms. Unlike the charterparty, the bill of lading is a document evidencing the contract of carriage. However, it does not constitute the contract itself.<sup>54</sup>

A charterparty is an agreement between the owner of a vessel and the charterer who wants to charter the vessel to carry his goods or to sub-charter the vessel. There is no statutory interference when it comes to the terms of a charterparty. Thus, the shipowner and the charterer are able to negotiate their own terms in accordance with their needs.

However, in practice shipowners and charterers often use standard forms and attach some additional clauses to meet their own requirements. These standard forms have different origins and developed over a number of years in association with a particular trade, such as grain, coal or ore, while some others have been designed by individual firms with a monopoly in a particular field, such as the transport of oil.<sup>55</sup> Bodies like United Kingdom Chamber of Shipping, The Baltic and International Maritime Council and the Japanese Shipping Exchange also

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<sup>51</sup> Paul Todd, *Contracts for the Carriage of Goods by Sea*, BSP Professional Books, 1988, p.1

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> John F. Wilson, *Carriage of Goods by Sea*, p. 3

produced some standard forms which both shipowners' and charterers' interests are represented.<sup>56</sup>

There are two main types of carriage charter, depending upon whether the vessel is chartered for a period of time or for one or more particular voyages. There is also the demise charter, which is technically a carriage charter but operates as a lease of the vessel. As it is mentioned before, demise charter is out of the scope of this paper.

In both charter forms, the voyage and time charters, the shipowner is responsible for the running of the vessel. The main distinction is, under a voyage charter the shipowner undertakes to carry a specified cargo between designated ports, whereas in time charter he places the vessel for an agreed time at the disposal of the charterer and the charterer is free to employ the vessel for his own purposes within the limits of the contract.<sup>57</sup> Time charterer is responsible for the expenditure directly resulting from compliance with his instructions.

If we compare the voyage charterer and the shipper under a bill of lading contract, the voyage charterer takes little more part of the operation of the vessel.<sup>58</sup> The voyage charterer has the obligation to provide the cargo and to arrange for its reception at the discharging port and also he is responsible for the cost of the loading and discharging the cargo in the excess of the agreed lay time.<sup>59</sup>

Except the two main types of charterparties, there are also varieties of hybrids produced as a result of the principle of the freedom of contract. Most common hybrid form is the trip time charter. In this type of charter, the vessel is chartered for a period of time for a specific voyage. Unlike the obligation to pay a fixed freight under a voyage charter, here the charterer obliged to pay hire for the time spent on the voyage. Trip time charter falls into the category of time charters. A slight variation on this form, designed to protect the shipowner in cases where the

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<sup>56</sup>John F. Wilson, *Carriage of Goods by Sea*, p. 3

<sup>57</sup>Ibid, p. 5

<sup>58</sup>Ibid.

<sup>59</sup>Ibid.

port of discharge is in an isolated area where other cargo are unlikely to be available, is to require payment of hire to continue until the vessel has returned to the normal trade routes.<sup>60</sup>

Another hybrid is the consecutive voyage charter. Under this type of contract, the vessel is chartered for a specific period of time and required to complete a series of voyages between designated ports during that period.<sup>61</sup> Unlike the trip time charter, consecutive voyage charter falls into the category of voyage charters.

### **3.1 Time Charter**

In a time charterparty, the amount of hire paid for the vessel and its crew is calculated on a time basis and it is the charterer who bears the risk of delay, which is different in voyage charter party.<sup>62</sup> It has no direct bearing on the hire how far the ship travels, or how many tons of cargo have been carried.<sup>63</sup> Clearly, therefore, it is the interests of the charterer to hurry, and to load and unload as fast as possible, and effectively bears the cost of any delay.

Time charterparty contracts usually have an off-hire clause to prevent hire continuing to be payable when the ship is unusable to the charterer due, for example, to repairs.

A time charterparty may be restricted to a single route, or even made for single voyage (trip time charter). Generally the master must go where the charterer orders, so although the master and the crew are still appointed and employed by the shipowner, in some extent he loses control of the vessel.

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<sup>60</sup>John F. Wilson, *Carriage of Goods by Sea*, p. 4

<sup>61</sup>Ibid.

<sup>62</sup>Paul Todd, *Contracts for the Carriage of Goods by Sea*, BSP Professional Books, 1988, p.14

<sup>63</sup>Ibid.

A variation on the time charter is what is known as ‘trip time charter’.<sup>64</sup> This is a charterparty in time form but intended to be used for a single voyage. Nevertheless, it is not the same as a voyage charterparty. The intention for using the trip time form is to place the risk of delay on the charterer which is on the on the shipowner in a voyage charter.<sup>65</sup>

In a voyage charter form it is easier for the charterer to calculate his costs, because they are independent of the time the voyage takes on the other hand, it is easier for the shipowner if the charterparty in trip-time form, since now the amount paid is calculated on a time basis and it is charterer who bears the risk of delay.

The master of a vessel can change and take a longer route to avoid piratical attacks. If the pirates are successful and hijack the vessel, she will be unusable to the charterer. In the following sections, the effects of piracy on time charterparties will be discussed.

### **3.1.1 Re-routing**

Re-routing to avoid a danger may amount to a deviation under a time charterparty. In time charterparties, the charterer orders the vessel; however, since the master is responsible for the safety of the vessel, navigation is a matter for the master and it is the master of the vessel who ultimately determines the route and the charterers pay for any additional time.

In the absence of a good reason to depart from route, however, the master is required to prosecute voyages with the utmost dispatch and to take the shortest route. In *The Hill Harmony*<sup>66</sup> the master had decided to follow the Rhumb Line rather than Great Circle route across the Pacific Ocean, a considerably longer route, apparently to avoid heavy weather. The charterers deducted hire in respect of the additional days at sea and the cost of the extra bunkers consumed, and the House of Lords ultimately held that they were so entitled.

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<sup>64</sup> Paul Todd, *Contracts for the Carriage of Goods by Sea*, BSP Professional Books, 1988, p.15

<sup>65</sup> *Ibid*, p.16

<sup>66</sup> *Whistler International Ltd. V. Kawasaki Kisen Kaisha Ltd. (The Hill Harmony)* [2001] 1 AC 638

The decision in *The Hill Harmony* limits the master as to route, but at the same time puts ultimate responsibility on him for the safety of the vessel. The problem in *The Hill Harmony* was that the master could not demonstrate good safety or other reason for departing from the shorter route. If the master were following advice, such as that of IMO or IMB, to avoid piratical attacks, the situation could be different and deviation from the route would be regarded as reasonable.

### 3.1.2 Safe ports obligation

Under a time charterparty, the shipowner is obliged to proceed the chartered vessel to the ports which are nominated by the charterer. On the other hand, most of the charterparty forms include clauses about the obligation of the charterer to order the vessel to safe ports.<sup>67</sup> Related with the subject matter of the thesis, the question of whether piracy in the vicinity of a port can render that port unsafe arises. Piracy is essentially a maritime occupation, but the universally excepted definition of a safe port, taken from Sellers LJ's judgement in *The Eastern City*<sup>68</sup>, states that:

“ . . . a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship . . . ”

The leading authority on the nature of the safe port obligation is the House of Lords decision in *The Evia*<sup>69</sup>. Lord Justice Denning states that;

“What then are the characteristics of a ‘safe port’? what attributes must it possess and retain if the charterer is to fulfill his warranty? To my mind it must be reasonably safe for the vessel to enter, to remain, and to depart without suffering damage so long as she is well and carefully handled. Reasonably safe, that is, in its geographical configuration on the coast or waterway and in the equipment and aids available for her movement and stay. In short, it must be safe in its set-up as a port.”

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<sup>67</sup> See Wilson, *Carriage of Goods by Sea*, at 25-32

<sup>68</sup> Leeds Shipping Co. Ltd. V. Societe Francaise Bunge (The Eastern City) [1958] 2 Lloyd's Rep. 127

<sup>69</sup> Kodros Shipping Corp. v. Empresa Cubana de Fletes (The Evia) (No. 2) [1982] 1 Lloyd's Rep. 334



However, it is not enough that the nominated port is a safe port when there is no physical danger to the ship. Some case law has determined that a port is not safe unless the vessel can enter as a laden vessel without undue delay or danger, and where she can discharge always afloat and from which she can safely depart.<sup>70</sup> Thus, a port which cannot be reached without the risk of hostile capture is not a safe port and piracy in the vicinity of a port could render that port unsafe.

There is no doubt that a shipowner is not obliged to proceed the chartered vessel to the ports which the pirates are settled in. It is also noted by some scholars that charterers who order a vessel to an unsafe port will be in breach of the charterparty. The shipowner can refuse the nomination, and the charterer can also be liable for damages if he proceeds, and loss is occasioned.

The question of whether a port is safe is determined at the date of nomination, but the charterers undertake that it is not merely safe then, but also prospectively safe at the time of nomination. If the designated port becomes unsafe after the date of nomination, the shipowner notifies the charterer to nominate an alternative port. If the charterer does not do so, the shipowner can nominate the vessel himself to the nearest safe port. Terms of the charterparty play the key role in such a situation.

Glancing over some standard safe port clauses would help to have a better understanding about the topic.

### **BALTIME 1939**

“The vessel to be employed in *lawful trades* for the carriage of *lawful merchandise* only between *good and safe ports* or place where she can *safely lie always afloat* within the limits stated in Box 17.”

### **NYPE 93**

“The vessel shall be employed in such *lawful trades between safe ports and safe places* within excluding as the charterers shall direct.”

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<sup>70</sup> Halsbury's Laws of Singapore (Carriers), vol 3, p. 463

## BALTIC CODE 2000

Reachable on her arrival or always accessible – means that the charterer undertakes that an available and accessible loading or discharging berth will be provided to the vessel on her arrival at or off the port which *she can reach safely* without delay proceeding normally. Where the charterer undertakes that the vessel will be able to *depart safely* from the berth without delay at any time during or on completion of loading and discharging.

### 3.1.3 Off-Hire

The general principle in a time charterparty is that hire continues to run unless the contract expressly provides to the opposite.<sup>71</sup> At that point, off-hire clauses operate as an exemption to the charterers' obligation to pay hire continuously during the charter period.<sup>72</sup> Most time charterparties include an off-hire clause, excusing the charterer from his obligation to pay hire at a time when the ship is prevented from performing the charter service. As an example of a commonly used form NYPE 93, clause 17 lists off-hire events as:

“loss of time from deficiency and/or default of officers or crew, or deficiency of stores, fire, breakdown of, or damages to hull, machinery or equipment, grounding, detention by the arrest of the Vessel (unless such arrest is caused by events for which the Charterers, their servants, agents or subcontractors are responsible), or detention by average accidents to the Vessel or cargo unless resulting from inherent vice, quality or defect of the cargo, drydocking for the purpose of examination or painting bottom, or by any other similar cause preventing the full working of the Vessel”

The catchall phrase, such as “or by any other similar cause preventing the full working of the Vessel” is common. However, is this enough for a vessel to go off-hire when she is hijacked by the pirates?

Piracy is normally not an off-hire event. Words such as ‘similar causes’ are likely to be related to the physical condition of the vessel or its crew and thus may

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<sup>71</sup> Paul Todd, *Maritime Fraud and Piracy*, p. 47

<sup>72</sup> M. Wilford, T. Coghlin, J. D. Kimball, *Time Charters*, 3<sup>rd</sup> Edition, Lloyd's of London Press, 1989, p. 295

not extend to piracy.<sup>73</sup> However, where the clause includes ‘any other cause whatsoever’, piracy might well constitute an off-hire event.<sup>74</sup>

The question of whether an act of piracy can cause a vessel to go off-hire for these purposes is one of fact and law. Legally, the range of events which will take a vessel off-hire are always stated in the clause itself or else contained in different sections throughout the charterparty.<sup>75</sup> It is then a question of fact whether the event in the case is one of the events covered by the off-hire clause or clauses of the related charterparty contract.

In *The Saldanha*<sup>76</sup>, NYPE 93 form was used and piracy was not considered as an “average accident” and “any other similar cause”. Gross J suggested that the word “whatsoever” should have been added to the clause to make piracy an off-hire event<sup>77</sup>.

Commenting on NYPE form, Kerr, J., said in *The Mareva A.S.*<sup>78</sup>:

“It is settled law that *prima facie* hire is payable continuously and that is for the charterers to bring themselves clearly within an off-hire clause if they contend that hire ceases. This clause undoubtedly presents difficulties of construction and may well contain some tautology, e.g. in the reference to damage to hull, machinery or equipment followed by ‘average accidents to ship’. But I think that the object is clear. The owners provide the ship and the crew to work her. So long as these are fully efficient and able to render to the charterers the service then required, hire is payable continuously. But if the ship is for any reason not in full working order to render the service then required from her, and the charterers suffer loss of time in consequence, then hire is not payable for the time so lost.”

Thus, the burden is on the charterers to prove that the off-hire clause operates in the relevant circumstances.<sup>79</sup> Bucknill, L. J., said in *Royal Greek Government v. Minister of Transport*<sup>80</sup>:

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<sup>73</sup> Court Line v. Dant (1939) 44 Com Cas 345

<sup>74</sup> The ‘Roachbank’ [1987] 2 Lloyd’s Rep. 200

<sup>75</sup> The NYPE 93 contains a specific Off-Hire clause whereas Baltimore 1939 has a Suspension of Hire Clause and a Loss of Vessel Clause, both contemplating the vessel going off-hire.

<sup>76</sup> [2010] EWHC 1340 (Comm)

<sup>77</sup> [2010] EWHC 1340 (Comm), p. 30

<sup>78</sup> [1977] 1 Lloyd’s Rep. 368, at p. 381

<sup>79</sup> M. Wilford, *Time Charters*, p. 295

<sup>80</sup> (1948) Ll. L. Rep. 196, at p. 199

“the cardinal rule . . . in interpreting such a charterparty as this is that the charterer will pay hire for the use of the ship unless he can bring himself within the exceptions. I think he must bring himself clearly within the exceptions. If there is a doubt as to what the word mean, then I think those words must be read in favour of the owners because the charterer is attempting to cut down the owners’ right to hire.”

### **Off-hire clauses**

The selection of standard forms presented in this section to cover different parts of shipping trade. Baltime 1939 (rev 2001) and NYPE 93 represents dry cargo, while Bovertime represent container and BPTIME 3 represent tanker trade.

#### **3.1.3.1.1 BALTIME 1939 (rev 2001)**

BALTIME 1939 which is revised by BALTIME 2001 is a standard form intended for dry cargo trade but has rather a general scope. Baltime form is produced by the Baltic and International Maritime Council (BIMCO).

Clause 11 of the BALTIME form is a period clause which requires the vessel to be out of order “for more than twenty-four consecutive hours” to go off-hire. Subsection (A) of the clause sets out the events in which the vessel goes off-hire.<sup>81</sup> In subsection (B) the events in which the vessel remains on hire are listed.<sup>82</sup>

#### **3.1.3.1.2 NYPE 93**

NYPE 93 is the abbreviation the New York Produce Exchange form which is revised in 1993 and mainly used in dry cargo trade. The form is a revision of the original NYPE 1946 standard form. It is recommended by BIMCO and some other associations.

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<sup>81</sup> Michael Wilford, *Time Charters*, p. 474

<sup>82</sup> See the appendix.

Clause 17 of the NYPE 93 form is a "net loss of time" clause. In the first paragraph of the clause it is accepted that the hire shall cease "for the time thereby lost". According to the second paragraph of the mentioned clause the vessel goes off-hire "from the time of her deviating" until back in the same or equidistant position.

The clause contains three different causes that puts the vessel off-hire. Those causes are "deficiency or/and default of men", "detention by average accidents" and "any other similar cause". In *Royal Greek Government v Minister of Transport*<sup>83</sup> the words "deficiency of men" was held to be interpreted as "numerical insufficiency." In *The Saldanha*<sup>84</sup> willful refusal to work by the crew was also interpreted as deficiency of men.<sup>85</sup> *The Saldanha* case will be discussed in section 4.1 in more detail.

### **Piracy Clauses**

Piracy clauses have been drafted by BIMCO and INTERTANKO to address some of the problems considered in this paper.

#### **3.1.3.1.3 BIMCO Piracy Clause for Time Charterparties**

Paragraph (a) of the BIMCO Piracy Clause for Time Charterparties allows the owners to refuse to proceed "where it appears that the Vessel, her cargo, crew or other persons on board the Vessel, in the reasonable judgement of th Master and/or the Owners, may be, or are likely to be, exposed to any actual, threatened or reported acts of piracy, whether such risk of piracy existed at the time of entering into this charterparty or ocured thereafter". If a place later becomes dangerous, the vessel shall be at liberty to leave it.

Paragraph (b) provides that any time lost due to compliance with alternative orders shall nor be considered off-hire. The charterers shall also indemnify the shipowners against any third party claims.

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<sup>83</sup> (1949) 82 Ll L Rep 196

<sup>84</sup> *Cosco Bulk Carrier Co Ltd v Team-Up Owning Co Ltd (The Saldanha)* 2010 WL 2131662, p. 5

<sup>85</sup> *The Saldanha*, p. 5

Paragraph (c) and (d) make provision for the owners's choosing to proceed. It passes the costs on the charterers and requires them to indemnify the shipowners against third party claims.

Paragraph (e) provides that the vessel shall remain on hire if attacked by pirates and however the hire is payable for the first 90 days of detention. After 90 days, the hire ceases until the ship has been released. Paragraph (f) protects the shipowners from the consequences of what would otherwise be deviation.

#### **3.1.3.1.4 INTERTANKO**

The INTERTANKO time clause is similar to BIMCO clause.

### **3.1.4 Conclusion**

It is well described before that the charterer bears the risk of any delay in a time charterparty. The principle is that the hire continues to be payable during the contract. Reasons stopping the charterer to pay hire are exceptional. Like all exceptions, the burden of proof is on the party who wants to enjoy the exception, who is the charterer in our case. In time charterparties, the charterer orders the vessel which ports to go, however, the master has the ultimate command to determine the route. The master shall act in utmost dispatch. As we can see in *The Hill Harmony* the master shall choose the shortest route, if not, he shall have some good reasons. Re-routing to avoid a piratical attack is a good reason and this will amount to a deviation. Thus, the charterers have to pay for the additional time and bunkers.

On the other hand, piracy can render a port unsafe and a charterer will be in breach of the charterparty if he orders the chartered vessel to an unsafe port.

When it comes to off-hire, piracy is not normally an off-hire event. Commonly used forms regulate the off-hire events. Deficiency or default of man, fire, breakdown, grounding etc. are regulated as an off-hire event, however, piracy is

not. Catchall phrases are common, but these clauses are not enough to put a vessel off-hire. As it is also stated in *The Saldanha*, the words “average accident”, “deficiency of man” or “any other similar cause” were not enough and Gross J advised parties to add the word “whatsoever” to the clause to make piracy an off-hire event.

## 3.2 Voyage Charter

The voyage charterparty is one of the oldest forms of contract for the carriage of goods.<sup>86</sup> In a voyage charterparty, freight is paid by the charterer for the carriage of his goods for a voyage, or series of consecutive voyages. The amount of freight payable can be agreed as a lump sum, but more usually it depends on the quantity of cargo carried. The distinctive feature is that it never depends on the time the voyage takes.

Thus, it is the shipowner, not the charterer, who bears the cost of any delay. If the voyage takes longer than expected, the shipowner loses out and cannot claim any extra freight from the charterer to compensate for the delay. He also cannot make use of the vessel for that period to earn freight elsewhere. On the other hand, if the voyage takes less time than expected, the shipowner gains since he can make use of the vessel for the time gained by employing her elsewhere. This is the fundamental distinction between voyage and time charterparties. In time charterparties, the charterer bears the risk of any delay. That is why voyage charterparties do not normally contain a stipulation as to the speed of the vessel, unlike time charterparties, which invariably do.<sup>87</sup>

### 3.2.1 Unseaworthiness

The requirement for a seaworthy vessel arises at the beginning of the voyage under a voyage charterparty. There is no doubt that the seaworthiness of the vessel

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<sup>86</sup> Paul Todd, *Contracts for the Carriage of Goods by Sea*, p.11

<sup>87</sup> *Ibid*, p.12

depends on her suitability for the particular voyage undertaken.<sup>88</sup> In *Kopitoff v. Wilson*,<sup>89</sup> Field J defines a seaworthy vessel as “good and in a condition to perform the voyage then about to be undertaken”<sup>90</sup>. Another definition of a seaworthy vessel can be found in the judgement of Channel J in *McFadden v. Blue Star Line*<sup>91</sup>:

“a seaworthy vessel must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it”<sup>92</sup>

It has been stated that seaworthiness varies according to the characteristics of the particular voyage and develops over the time to reflect evolving knowledge and standards of ship construction.<sup>93</sup>

The vessel may be considered as unseaworthy if it is known that the voyage will include areas at high risk of piracy and the vessel is not properly prepared to avoid piratical attacks. Standards of seaworthiness can vary, so the shipowners need to keep on top of the latest developments.<sup>94</sup>

### 3.2.2 Deviation

Shipowners may wish to avoid high risk areas because of piracy becoming to a greater extent localized. However, the shipowner is required not to deviate from the agreed or customary route. Avoiding an area only because of the risk of piracy may put the shipowner in a breach of the contract.<sup>95</sup> Under a voyage charterparty, the shipowner carries for a fixed freight and he suffers financially from any re-routing since he bears the costs of any extra time spent.

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<sup>88</sup> Paul Todd, *Maritime Fraud and Piracy*, p. 33

<sup>89</sup> (1876) 1 QBD 377

<sup>90</sup> (1876) 1 QBD 377, p. 380

<sup>91</sup> [1905] 1 KB 697

<sup>92</sup> [1905] 1 KB 697, p. 706

<sup>93</sup> Howard Bennet, *The Law of Marine Insurance*, 2<sup>nd</sup> edition, Oxford (2006), sec 19.18

<sup>94</sup> Paul Todd, *Maritime Fraud and Piracy*, p. 34

<sup>95</sup> *Ibid*, p. 39



Deviation is permitted to save life and property at sea. However, is it possible to deviate to avoid a piratical attack? An answer can be found in the judgement of Mellish LJ in *The Teutonia*:<sup>96</sup>

“It seems obvious that, if a master receives credible information that, if he continues in the direct course of his voyage, his ship will be exposed to some imminent peril, as, for instance, that there are pirates in his course, or icebergs, or other dangers of navigation, he must be justified in pausing and deviating from the direct course, and taking any step which a prudent man would take for the purpose of avoiding the danger”

Modern ransom hijackings off the coast of Somalia and the wider Indian Ocean do not usually involve loss of life and it does not seem safe to rely on the exception of deviation to save life.<sup>97</sup>

Todd thinks that it is more ideal to address the problem of re-routing explicitly with the piracy clauses.<sup>98</sup>

### 3.2.3 Frustration

The question of whether loss of a vessel to piracy can result in frustration is also one of fact and law.<sup>99</sup>

The question is whether a delay can theoretically result in frustration. Frustration occurs when, without the fault of either party, a contractual obligation has become incapable of being performed because the circumstances that call for performance render the obligation something radically different from that which was originally agreed. *Non haec in foedera veni. It was not this that I promised to do.*<sup>100</sup>

The question of fact then arises: is the delay in this case of sufficient length to cause frustration? It is not possible to state how long such a delay must be. Each

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<sup>96</sup> (1871-1873) LR 4 PC 171, 179

<sup>97</sup> Paul Todd, *Maritime Fraud and Piracy*, p. 40

<sup>98</sup> *Ibid*, p. 40

<sup>99</sup> *Universal Cargo Carriers v. Citati* [1957] 1 Lloyd's Rep. 174 at p. 192

<sup>100</sup> *Davis Contractors v. Fareham UDC* [1956] AC 696 at p. 729

case is different and will turn on its individual facts. All that is clear from the case law is that there must be a radical change on the contractual obligations of the parties to frustrate the charterparty contract.<sup>101</sup>

### **3.2.4 Freight**

The problem of freight arises when some or all of the cargo is lost and therefore not delivered by the receiver of the cargo. Since frustration of a contract affects only the performance of future obligations, freight already earned remains payable if the carriage contract is later frustrated or even that the shipowner is in repudiatory breach of it.<sup>102</sup> In dry-cargo trade, most of the charterparty contracts make freight payable in advance, whereas in tanker cargo trade, contracts usually provide for freight to be payable on delivery. In the latter case, freight will not be payable on stolen cargo.<sup>103</sup>

### **3.2.5 Standard Forms**

#### **Piracy Clauses**

##### **3.2.5.1.1 Bimco**

###### ***3.2.5.1.1.1 Piracy clause for single voyage charterparties***

According to Piracy clause prepared by BIMCO for single voyage charterparties, the shipowners are entitled to take a reasonable alternative route if any area on any part of the route becomes dangerous to the vessel, her cargo or the crew members or other persons on board the vessel due to any actual, threatened or reported piratical acts. This right should be exercised in the reasonable judgement of the master or the shipowner. In a case of taking an alternative route, a prompt notice should be given to the charterers.

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<sup>101</sup> Tatem v. Gamboa (1938) 61 LLR 149 at p. 156

<sup>102</sup> Paul Todd, *Maritime Fraud and Piracy*, p. 44

<sup>103</sup> Ibid.

If the vessel proceeds to or through an area exposed to the risk of Piracy the shipowners shall have the liberty to take reasonable preventative measures to protect the Vessel, her crew members and cargo such as re-routeing within the area, 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 have also liberty to comply with all orders, directions, recommendations or advice given by the Government of the Nation under whose flag the vessel sails, or other government to whose laws the shipowners are subject, or any other government, body or group, including military authorities, whatsoever acting with the power to compel compliance with their orders or directions.

Another liberty that the shipowners have is to comply with the terms of any resolution of the Security Council of the United Nations, the effective orders of any other Supranational body which has the right to issue and give the same, and with national laws aimed at enforcing the same to which the shipowners are subject, and to obey the orders and directions of those who are charged with their enforcement.

This piracy clause of BIMCO has to be incorporated into any bill of lading issued pursuant to the charterparty. The charterer has to indemnify the shipowners against all effects or liabilities that may arise from the master signing bills of lading if such bills of lading impose more onerous liabilities upon the shipowner than those assumed by the owners under this clause.

#### **3.2.5.1.1.2 Piracy for consecutive voyage charterparties and COAs**

Piracy clause of BIMCO for consecutive voyage charterparties and contracts of affreightments are almost same as the BIMCO clause for the single voyage charterparties. The difference occurs when it comes to costs.

If the shipowner takes an alternative route in order to avoid any acts of piracy, he is entitled to additional freight if the total extra distance exceeds one hundred miles.

If the Vessel proceeds to or through an area where due to risk of piracy and some additional costs are incurred by the shipowner such as additional personnel and preventative measures to avoid piracy attacks, then half such costs shall be reimbursed by the charterers to the owners.

If the underwriters of the shipowners' insurances require additional premiums or additional insurance cover is necessary because the vessel proceeds to or through an Area exposed to risk of piracy, then half such additional insurance costs shall be reimbursed by the charterers to the owners.

If the Vessel is attacked or seized as a result of piracy any time so lost shall be shared equally between the shipowners and the charterers. The charterers shall pay the owners an amount equivalent to half the demurrage rate for any time lost as a result of such attack or seizure. If the vessel is seized, the shipowners shall keep the charterers closely informed of the efforts made to have the vessel released.

Charterers also undertakes to incorporate this piracy clause into any bill of lading issued pursuant to this charterparty. The charterer has to indemnify the owners against all effects or liabilities that may arise from the master signing bills of lading if such bills of lading impose more onerous liabilities upon the owner than those assumed by the owners under this piracy clause.

#### **3.2.5.1.2 Intertanko**

Owners are entitled to take reasonable preventive measures to protect the vessel, her crew and cargo such as 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 if the shipowner or the master of the vessel

determine that the vessel, her crew members or the cargo may be exposed to the risk of piratical acts on any part of the voyage. Shipowners are also entitled to follow any instructions or recommendations given by the flag state, any governmental or supragovernmental organization and take a safe and reasonable alternative route, if there is a risk of piracy. In that case, a prompt notice about the alternative route, an estimated time, bunker consumption and arrival time should be given to the charterers.

If the shipowner exercises his rights mentioned above, the charterers shall pay additional freight calculated at the demurrage rate for time spent, together with the cost of all additional bunkers consumed, any additional insurance premiums, and additional crew or other costs incurred by shipowner as a result of actual or threatened piracy.

Charterers also guaranties that the terms of this clause will be incorporated effectively into any bill of lading issued pursuant to the charterparty.

### **3.2.6 Conclusion**

Unlike the time charterparties, it is the shipowner who bears the cost of any delay in a voyage charterparty. In a voyage charterparty, the shipowner should provide a seaworthy vessel to carry the goods of the voyage charterer between designated ports. If the voyage includes areas at high risk of piracy and the vessel is not properly prepared to avoid piratical attacks, the vessel may be considered as unseaworthy for the particular voyage undertaken.

The other problem is frustration. Is it possible to frustrate the voyage charterparty when the chartered vessel is detained by pirates? It is not easy to answer this question since each case has its own facts. Frustration occurs when the obligations of the parties change radically. Thus, time spent during the detention by pirates should put a party in a situation that such party would not sign the contract if he knew that such change will occur.

# 4 A critical analysis of the selected leading cases dealing with piracy

In this chapter, some recent cases will be discussed and tried to be analysed in order to have a better sight on the effects of piracy on charterparties.

## 4.1 The Saldanha

In this case, the issue concerns off-hire under a time charterparty. The question is whether detention of a vessel by pirates entitles the charterers of that vessel to put her off-hire.

Saldanha was a Panamax size bulk carrier. On 5 July 2008, she was chartered on a NYPE form for a period of 47 to 50 months. On 30 January 2009 charterers gave orders to load a cargo of bulk coal in Indonesia for carriage to Koper in Slovenia. Owners responded by saying that they supposed this voyage was via the Cape of Good Hope. When charterers said it was to be via the Suez Canal Owners reserved their right to refuse to comply with the orders unless Charterers confirmed that they would reimburse Owners for the additional war risk premium which they would have to pay. Charterers confirmed that they would do so “as per Charter”.<sup>104</sup> On 22 February 2009, the vessel was hijacked by the Somali pirates while she was sailing through the transit corridor in the Gulf of Aden. The pirates forced the master to sail the vessel to the waters off the Somali town of Eyl and the vessel was remained until 25 April until released by the pirates.<sup>105</sup> She reached an equivalent position to the location at which she was seized on 2 May.<sup>106</sup>

Charterer refuses to pay hire for the period between 22<sup>nd</sup> of February and 2<sup>nd</sup> of May. On the other hand, the shipowner claims the hire and the cost of bunkers

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<sup>104</sup> [2010] EWHC 1340 (Comm), p. 923

<sup>105</sup> Ibid, p. 919

<sup>106</sup> Ibid, p. 923

used in that period, additional war risk premium and crew war risk bonuses. Charterer counterclaims for damages alleging unseaworthiness of the vessel asserting that the vessel and her crew members had not been properly prepared to deal with a piratical attack.<sup>107</sup>

By its award on preliminary issues dated 8 September 2009, an eminent arbitration tribunal held unanimously that detention by pirates does not entitle the charterers to put the vessel off-hire in reliance upon the clause 15 of NYPE form of charterparty agreed by the parties.<sup>108</sup> From that decision the Charterer appeals.

The tribunal also considered preliminary issues arising under other clauses of the charterparty. In summary, the tribunal held that the vessel was not off-hire under clause 39 of the charterparty and that the war risk and insurance provisions of the charterparty did not preclude the shipowners from claiming hire in respect of periods during which the vessel was under the control of pirates. There is no appeal from these determinations of the tribunal and no more need be said of them. This appeal is accordingly solely focused on the question of off-hire under clause 15 of the charterparty.

Clause 15 of the charterparty provided as follows:

“That in the event of the loss of time from default and/or deficiency of men including strike of Officers and/or crew or deficiency of ... stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, dry-docking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost ...”

As it can be understood from the clause above, there are three causes for the charterer to put the vessel off-hire;

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<sup>107</sup> [2010] EWHC 1340 (Comm), p. 923

<sup>108</sup> Ibid, p. 922

1. Detention by average accidents to ship or cargo,
2. Default and/or deficiency of men,
3. Any other cause.

The principle of paying hire under a time charterparty is beyond argument. The hire is continuously payable during the contract. However, charterers can bring themselves within any exceptions. Burden of proof to do so is on charterers.<sup>109</sup>

### **Detention by average accidents to ship or cargo**

It should be underlined that certainty is of great importance in commercial law. In *The Mareva AS*<sup>110</sup> Kerr J says that ‘average accident’, ‘merely means an accident which causes damage’. However, this incident did not result in damage to the vessel.<sup>111</sup>

Gross J states that piracy cannot properly be described as an ‘accident’ and refers to the reasoning of the tribunal:<sup>112</sup>

“We cannot imagine a master telephoning or e-mailing his Owners after the seizure and saying “there has been an accident to the ship”. He would naturally say “the ship has been seized by pirates” or “we have been captured by pirates”. Accident requires lack of intent by all protagonists. An obviously deliberate and violent attack is not described as an accident, no matter how unexpected it may have been to the victim. A much more specific word or phrase is put to the incident, to reflect its deliberate and violent nature.”

Gross J states that damage to the ship is an essential ingredient for the wording ‘average accidents to ship’ to apply and that the wording ‘average accident’ points towards an insurance context.<sup>113</sup> The tribunal said:

‘... in the insurance context, “average” tends to be used to mean damage which is less than a constructive total loss: for example “free of average” or “particular average”. The word does not mean a maritime peril ...

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<sup>109</sup> [2010] EWHC 1340 (Comm), p. 923

<sup>110</sup> [1977] 1 Ll Rep 368, p. 381

<sup>111</sup> [2010] EWHC 1340 (Comm), p. 924

<sup>112</sup> [2010] EWHC 1340 (Comm), p. 924

<sup>113</sup> [2010] EWHC 1340 (Comm), p. 926



Accordingly, if the issue were free from authority, our view would be that the word, in context, was intended to refer to damage rather than to a peril, so that in clause 15 an average accident to ship or cargo was an accident which caused damage to ship or cargo, but not total loss.<sup>114</sup>

Gross J agrees with the tribunal and finds charterer's argument about this issue unsuccessful.

### **Default and/or deficiency of men'**

Under this heading, the issue of default or deficiency of the crew will be discussed. If the master and the crew members of the vessel fail to take anti-piracy measures before and during the attack, these failures would fall within the exception of default of men.<sup>115</sup>

Gross J says that the history of the clause must be considered and refers the case of *Royal Greek Government v Minister of Transport*<sup>116</sup>. In that case the charterer orders the vessel to sail but her crew refuses to do so, except in convoy. A dispute arises as to whether, charterer's order to sail having been disobeyed, the vessel was off-hire. Upholding the decision of Sellers J, as he then was, the Court of Appeal holds that charterer could not bring themselves within the off-hire clause, which contained only the printed words 'deficiency of men'. That wording means 'numerical insufficiency' and results in the vessel being off-hire when an adequate complement of officers and crew for working the ship is not available. However, the vessel had a full complement of crew, so that, on the facts, the wording does not assist the charterers.<sup>117</sup>

Briefly, Gross J states that there is no deficiency of men if the owners provide the necessary numbers of workforce to perform the chartered services and concludes that charterer fails to satisfy the burden of bringing themselves clearly within the wording of clause 15 in question.

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<sup>114</sup> [2010] EWHC 1340 (Comm), p. 926

<sup>115</sup> *Ibid.*, p. 927

<sup>116</sup> (1949) 82 Ll L Rep 196

<sup>117</sup> [2010] EWHC 1340 (Comm), p. 928

### **‘Any other cause’**

Here the court underlines the wording ‘*any other cause*’ and states that the difference is significant in the absence of the wording ‘*whatsoever*’.<sup>118</sup> In *The Laconian Confidence*<sup>119</sup> Rix J says that:

“In my judgment it is well established that those words [i.e. “any other cause”], in the absence of “whatsoever”, should be construed either ejusdem generis or at any rate in some limited way reflecting the general context of the charter and clause ... A consideration of the named causes indicates that they all relate to the physical condition or efficiency of either vessel (including its crew) or, in one instance, cargo. There is, moreover, the general context ... that it is for the owners to provide an efficient ship and crew. In such circumstances it is to my mind natural to conclude that the unamended words “any other cause” do not cover an entirely extraneous cause, like the boom in *Court Line*, or the interference of authorities unjustified by the condition (or reasonably suspected condition) of ship or cargo. *Prima facie* it does not seem to me that it can be intended by a standard off-hire clause that an owner takes the risk of delay due to the interference of authorities, at any rate where that interference is something beyond the natural or reasonably foreseeable consequence of some named cause. Where, however, the clause is amended to include the word “whatsoever”, I do not see why the interference of authorities which prevents the vessel performing its intended service should not be regarded as falling within the clause, and I would be inclined to say that that remains so whether or not that interference can be related to some underlying cause internal to the ship, or is merely capricious. That last thought may be controversial, but it seems to me that if an owner wishes to limit the scope of causes of off-hire under a clause which is deliberately amended to include the word “whatsoever” then he should be cautious to do so.”

In his judgement Rix J held that the vessel was not off-hire because in the absence of the wording ‘*whatsoever*’ the unexpected and unforeseeable interference by the authorities was a totally extraneous cause.<sup>120</sup>

In his judgement Gross J concludes that seizure by pirates is a ‘classic example’ of a totally extraneous cause and the wording ‘*any other cause*’ is not enough for the charterer to put the vessel off-hire in a piracy case.<sup>121</sup>

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<sup>118</sup> [2010] EWHC 1340 (Comm), p. 930

<sup>119</sup> [1997] CLC 300, pp. 314-315

<sup>120</sup> *Ibid*, p. 315

<sup>121</sup> [2010] EWHC 1340 (Comm), p. 931

## Conclusion

Arguments of the charterer found to be attempts to avoid the well known effects of the wording in the form agreed by the parties and they are all dismissed. The court came to the conclusion that the piracy is not *eiusdem generis*<sup>122</sup> and the shipowner should not take the risk of the full working vessel being prevented by an extraneous cause such as piracy. In conclusion, the court held that the seizure of a vessel by external actors, in this case pirates, is a recognized peril however, such peril was not covered by the clause 15 of the charterparty.<sup>123</sup>

Moreover, a clause dealing with seizure of the vessel was included in the charterparty which is as follows:

“Clause 40 – Seizure/Arrest/Requisition/Detention 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 times so lost shall be treated as off-hire until the time of her release.....”

The judge observed that the clause 40 of the charterparty is a “bespoke” clause dealing with the risk of seizure, arrest, requisition and detention and it is telling that the seizure clause did not extend to cover seizure by pirates.

Gross J concluded that:

“Intuitively, as a matter of indelible impression and in agreement with the tribunal, I think that seizure by pirates is a “classic example” of a totally extraneous cause. Suffice to say with regard to “average accident” that Charterers’ submissions gain no force from the wording “any other cause”; for the reasons already canvassed there was here neither an “accident” nor an “average accident” and Charterers’ case cannot be rescued by the sweep up wording (or “spirit”) of the clause. I do not think there is only a “fine distinction” between the narrower and wider constructions of “default of men”, still less a distinction that would bring Charterers within the sweep up

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<sup>122</sup> Latin word for ‘of the same kind’

<sup>123</sup> [2010] EWHC 1340 (Comm), p. 932

wording. I confess I regard as unreal the notion that the Officers' and crew's failure to carry out their duties under duress of pirates was equivalent to refusal to perform those duties."

Consequently, charterer fails to satisfy the burden of proof resting on them to come clearly within the wording of the off-hire provisions contained in clause 15 of the charterparty thus, appeal is dismissed and the arbitral award stands for the shipowner.

## 4.2 The Petro Ranger<sup>124</sup>

The Petro Ranger is a medium sized oil tanker. She was loaded cargoes of gasoil and kerosene at Singapore and sailed to Vietnam on 16 April 1998 pursuant to a voyage charterparty dated on 25 March 1998.

The vessel should have taken approximately two days to complete her voyage to the Vietnamese discharge port; however she was hijacked by pirates shortly after leaving the port of Singapore.

The pirates bound and threatened the crew and, having taken effective control of the vessel, forced her to deviate from her contractual route, and sailed her many miles north into Chinese waters in the vicinity of the city of Haikou.

So far as the shipowner was concerned the vessel had simply disappeared and he sent a report to the International Maritime Bureau. All attempts to make contact with the vessel were futile. It subsequently transpired that the pirates had over-painted the name on the hull of the vessel, changing the name from Petro Ranger to Wilby. The pirates also placed false registration papers on board and created false bills of lading for the cargo.

Nothing was known of the fate of the Petro Ranger until she was detected by the

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<sup>124</sup> Petroships Pte. Ltd. V. Petec Trading and Investment Corp. [2001] 2 Lloyd's Rep. 348

Chinese authorities on 26 April. When detected she was discharging the remaining oil into a lighter brought alongside her by the pirates or those with whom they were collaborating.

It subsequently transpired that a substantial quantity of oil (some 5,900 m.t. of gasoil) had already been discharged and taken away before the vessel was detected. This oil was never recovered.

Both vessels, the Petro Ranger and the lighter) were suspected of being involved in smuggling and were escorted by the authorities to an anchorage off Haikou. No further cargo was discharged until 22 May.

The vessel was placed under armed guard and access was controlled by the Chinese authorities. News filtered out of China that a vessel which could be the Petro Ranger was being detained in Haikou. The claimants and somewhat later the defendants sent representatives to Haikou to investigate.

Eventually, the cargo remaining on board both the Petro Ranger and the lighter having been discharged into shore tanks controlled by the Chinese authorities, the Petro Ranger was allowed to sail on 28 May 1998. The cargo which had been discharged into the shore tanks was auctioned off by the authorities shortly afterwards.

### **The Claim**

The claim of the charterer against the shipowner is for the loss of the entire cargo.

Eventually it was accepted that piracy had taken place, and the claim in respect of the cargo discharged and taken away before the Chinese authorities intervened on 26 April was abandoned during the course of the reference. However, the claim was maintained in respect of the cargo remaining on board the Petro Ranger at the time of the intervention, as well as in respect of the cargo which had been stolen

and was on board the lighter when the intervention occurred.

### **The Award**

By its award the tribunal found in favour of charterer for the full value of its claim, and dismissed shipowner's separate counterclaim for freight. The applications before the court are concerned with those parts of the award and reasons which deal with the charterer's claim. No issue arises in relation to the counterclaim.

### **Frustration**

The argument of the shipowner is that the charterparty was frustrated by 26<sup>th</sup> of April or alternatively 14<sup>th</sup> of May. The tribunal dealt with frustration in its reasons.

The tribunal considered whether the delay constituted a frustrating event in the context of a voyage where the vessel had not been destroyed and there remained cargo for on-carriage. Tribunal did not consider that 26th April was a possible date for frustration. Reasoning of the tribunal was that on 26th April the hijacking by the pirates and the detention of the vessel by the Chinese authorities only became known for the first time; there was no evidence which suggested that on that date further performance of the contractual voyage would not have been possible even if there would inevitably be some delay. Another reasoning of the tribunal was that between 26th April and 13th May there was a degree of community of approach between the parties, even if it fell short of formal collaboration. Tribunal noted that during this period there were no written or other exchanges between the parties which suggested that they were at arms' length or preparing for a fight with each other.

On 14th May there was a letter from Ms Fu to Mr. Wang Jing which suggested that the Marine Police had decided to confiscate the cargo. Tribunal considered the letter to be inconsistent with the steps which the parties took the previous day

at the instigation of the Chinese authorities. They found that there was no new event or material change in circumstances between 13th and 15th May.

Accordingly, the tribunal concluded that the Charter was not frustrated at the latest by 14th May, which was the date advanced by shipowner. Tribunal stated that the conduct of the parties showed that they did not consider the delay to have such effect as to make further performance impossible; they seem to have been working together for the purpose of having the voyage completed. Therefore, the tribunal held that the shipowner's submission that the charterparty contract was frustrated by 14th May at the latest failed. They underlined that a letter to charterer dated 21st May Mr. Tan as shipowner's representative was still discussing 'delivery' of the cargo in general terms.

The court states that there should be a radical change in the obligations of the parties in order to frustrate the contract. The test of a radical change in the obligation can be found in the judgement of Lord Radcliffe in *Davis Contractors Ltd. v. Fareham U.D.C.*:

“... frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do ... There must be ... such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.”

In subsequent cases the House of Lords has expressly upheld the *Davis Contractors* formulation of the test for frustration. In *National Carriers Ltd. v. Panalpina (Northern) Ltd.* Lord Simon restated the test as follows:

“Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance.”

The argument relied by the shipowner was the exceptions clause to excuse him from liability. The charter included the following express term:

“19. General exceptions clause ... And neither the Vessel nor Master or Owner nor the Charterer, shall, unless otherwise in this Charter expressly provided, be responsible for any loss or damage or delay or failure in performing hereunder, arising or resulting from — ... perils of the sea; act of public enemies, pirates or assailing thieves; arrest or restraint of princes, rulers or people, or seizure under legal process provided bond is promptly furnished to release the Vessel or cargo.”

Shipowner claimed that none of the cargo would have been lost if the vessel was not hijacked by the pirates.

### **Conclusion**

Regarding the exception clause, the tribunal held that the clause 19 of the charterparty no longer operated in the shipowners favour since the Chinese authorities were physically and legally in control of the vessel, the lighter, the cargo and the crew on 26<sup>th</sup> of April.

The tribunal decided in favour of the charterer and rejected the shipowners claim that the voyage charterparty was frustrated because of radical change of circumstances. However, Cresswell J found arbitrators reasons insufficient and ordered the tribunal to clarify its reasons regarding the frustration issue.



## 5 Conclusion

The definition of piracy should be well understood in order to interpret its effects on charterparty contracts. The international law definition of piracy is narrow for the reason of not to interfere the jurisdiction of any state and that approach is understandable. However, the parties of a charterparty contract are not concerned about the jurisdiction of the states and there is no difference for them if the pirates hijack the chartered vessel on territorial or international waters.

In contract law, the intention of the parties is vital and parties to a charterparty generally think that piracy is an armed robbery on seas. The judgement made by Pickford J in *The Republic of Bolivia* should be taken into consideration and a wider definition of piracy should be used to reach a conclusion on the effects of piracy on charterparties.

After defining the piracy for contractual purposes, now it is time to conclude its effects on charterparties. The nature of the time charterparties puts the time risk on the charterers. The general rule is that the charterer bears the risk of any delay. Every general rule has its own exceptions and this is off-hire in time charterparties. If the vessel goes off-hire, the charterer does not have to pay hire for that period. The essential question of this thesis is whether piracy is an off-hire event or not. As it is mentioned before, every contract has its own law and it is not easy to generalize. On the other hand, commonly used standard charterparty forms are usually silent about piracy. If the contract is silent about piracy, and does not include any word as 'whatsoever' in its clauses about off-hire, the courts consider that the piracy is not an off-hire event. As it is in *The Saldanha*, the court considered that piracy was not an 'average accident' with regard to the clause 17 of the NYPE 93 form since the detention of the vessel by pirates was not an accident. Arguments of the charterers referring the wording 'deficiency and/or default of men' also failed. According to the court the word 'deficiency' required a lack of numbers and 'default' required an intentional refusal by the crew to perform their duties. The candidate also agrees with the judgement of the court

that the loss of time is not a result of the deficiency or/and default of the crew since the sufficient number of crew was present on the vessel and the refusal of performing their duties was not intentional since the vessel and the crew was detained by pirates. There is no reason to disagree with the judgement of Gross J and his advice to the charterers about adding specific provisions to the charterparties regarding piracy. As it is touched in this thesis, piracy clauses drafted by Bimco and Intertanko can be used to bring clarity to the piracy issues. Bimco piracy clause tries to strike a balance between the charterer and the shipowner. It provides that the vessel shall remain on hire until the ninety first day after the seizure of the vessel by the pirates. That means that the hire will cease after ninety days of detention and the vessel will be off-hire until the release of the vessel.<sup>125</sup>

Another issue is the frustration of the charterparty in a case of detention of the vessel by the pirates. The principle of frustration is described before in more details. A contractual obligation should radically be changed without any fault of either party. Loss of the vessel or the cargo does surely cause a radical change on the obligation of a shipowner. Under a voyage charterparty, the shipowner will be incapable of delivering the goods to the agreed ports. The problem is whether a delay can frustrate the charterparty if the recovery of the vessel or the cargo is possible.

At this point, the difference between the Malacca straits piracy and the Somalia piracy should be underlined. As it is mentioned before, the aim of the Somalia pirates are to collect ransom from the shipowners for the release of the vessel, its crew and cargo onboard. On the other hand, Malacca strait piracy is different and pirates are interested in keeping the vessel and its cargo for their own use. Therefore, Somalia piracy can be defined as ransom piracy and Malacca Strait piracy can be defined as theft piracy. As a result of this difference, it can be said that it is more likely to recover the vessel, its crew and the cargo onboard from the Somalia pirates.

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<sup>125</sup> Another option for the parties of a charterparty is the Gulf of Aden Clause which provides that the vessel should be off-hire after sixty days of detention by pirates.

Consequently, if the vessel is hijacked by the Somalia pirates, the delay caused by the detention cannot easily frustrate the charterparty. Somalia pirates usually release the vessel, its crew and cargo not so late after collecting the ransom money. On the other hand, pirates in the Malacca straits keep the vessel for their own use and sell the cargo. In that context, the candidate thinks that a shorter delay can frustrate the charterparty if the vessel is hijacked by the pirates in Malacca straits. However, facts of each case should be analysed separately. As it is seen in *The Petro Ranger*, the vessel was hijacked by the pirates in Malacca strait. The tribunal in that case held that the delay did not constitute frustrating event since the vessel and the cargo was not lost. Chinese authorities detected the vessel 10 days after its seizure and took control of the vessel and placed it under the armed guards. Even the act of piracy took place in Malacca strait and the intention of the pirates was clear that they wanted to keep the vessel for their own use and sell the cargo because the name of the vessel was changed, false registration papers were produced and some of the oil cargo was transferred, the tribunal considered that ten days of delay was not enough to frustrate the contract since some of the cargo was recovered from the pirates and the recovery of the vessel was also possible. With that reasons, the tribunal did not consider that there was a radical change of any obligation of the shipowner and rejected his claim that the voyage charterparty was frustrated.<sup>126</sup>

Consequently, it can be said that the required delay to frustrate the charterparty depends on the facts of each case. In *The Petro Ranger* the control of the vessel was taken from the pirates ten days after the seizure and the candidate thinks that ten days delay should not be enough to frustrate the charterparty if some of the cargo and the vessel are recovered from the pirates. On the other hand, if the probability to recover the vessel and its cargo seems remote, a short delay can constitute frustration of the charterparty. If we compare theft piracy to ransom piracy, a longer delay needs to happen to claim frustration since the pirates will most probably release the vessel after collecting the ransom money.

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<sup>126</sup> Later, The Appeal Court found that the reasoning of the tribunal was not sufficient regarding the frustration issue.

Nevertheless, parties can agree on the terms of the charterparty contract in the realm of the principle of freedom of contract. Commonly used standard forms and some additional clauses which are produced by the maritime industry may help the parties of the charterparty, namely; the shipowner and the charterer to allocate the risk of piracy. Bimco additional piracy clause seems fair enough in the allocation of the risk of piracy between the shipowners and the charterers. However, it should never be overlooked that the long term sustainable solution to the piracy off the coast of Somalia can only be reached by restoring the order and law in Somalia. Otherwise, the political problems in Somalia will continue to affect the other states around the world.

## 6 Appendix

Baltime

### **“11. Suspension of hire etc.**

(A) In the event of dry docking or other necessary measures to maintain the efficiency of the Vessel, deficiency of men or Owners’ stores, breakdown of machinery, damage to hull or other accident, either hindering or preventing the working of the Vessel and continuing for more than twenty-four consecutive hours, no hire shall be paid in respect of any time lost thereby during the period in which the Vessel is unable to perform the service immediately required. Any hire paid in advance shall be adjusted accordingly.

(B) In the event of the Vessel being driven into port or to anchorage through stress of weather, trading to shallow harbours or to rivers or ports with bars or suffering an accident to her cargo, any detention of the Vessel and/or expenses resulting from such detention shall be for the Charterers’ account even if such detention and/or expenses, or the cause by reason of which either is incurred, be due to, or be contributed by, the negligence of the Owners’ servants.

Nype

### **“17. Off-hire**

[1] In the event of loss of time from deficiency and/or default and/or strike of officers or crew, or deficiency of stores, fire, breakdown of, or damages to hull, machinery or equipment, grounding, detention by the arrest of the Vessel, (unless such arrest is caused by events for which the Charterers, their servants, agents or subcontractors are responsible), or detention by average accidents to the Vessel or cargo unless resulting from inherent vice, quality or defect of the cargo, drydocking for the purpose of examination or painting bottom, or by any other similar cause preventing the full working of the Vessel, the payment of hire and overtime, if any, shall cease for the time thereby lost.

[2] Should the Vessel deviate or put back during a voyage, contrary to the orders or directions of the Charterers, for any reason other than accident to the cargo or where permitted in lines 257 to 258 hereunder, the hire is to be suspended from the time of her deviating or putting back until she is again in the same or equidistant position from the destination and the voyage resumed therefrom.

[3] All bunkers used by the Vessel while off hire shall be for the Owners’ account. In the event of the Vessel being driven into port or to anchorage through stress of weather, trading to shallow

harbors or to rivers or ports with bars, any detention of the Vessel and/or expenses resulting from such detention shall be for the Charterers' account. If upon the voyage the speed be reduced by defect in, or breakdown of, any part of her hull, machinery or equipment, the time so lost, and the cost of any extra bunkers consumed in consequence thereof, and all extra proven expenses may be deducted from the hire."

## Bovertime

### "8. Off Hire

After delivery in accordance with Clause 1 hereof, the Vessel shall remain on hire until redelivered in accordance with Clause 6(m), except for the following periods:

(a) *Unable to comply with instructions*: If the Vessel is unable to comply with the instructions of the Charterers on account of:

(i) any damage, defect, breakdown, or deficiency of the Vessel's hull, machinery, equipment or repairs or maintenance thereto, including drydocking, excepting those occasions when Clause 6 (l) applies,

(ii) any deficiency of the Master, Officers and/or crew, including the failure, refusal or inability of the Master, Officers and/or crew to perform service immediately required, whether or not within the control of the Owners,

(iii) arrest of the Vessel at the suit of a party where claim is not caused by the Charterers, their servants, agents or sub-contractors (See Clause 5(f)),

(iv) any delay occasioned by any breach by the Owners of any obligation or warranty in this Charter Party.

If any of the above incidents affect the full use of the Vessel, it shall be off hire. If they partially affect the use of the Vessel, it shall be off hire to the extent such incidents affect the Charterers' use of the Vessel (See also Clause 11(b)).

(b) *Deviation*: In the event of the Vessel deviating (which expression includes putting back, or putting into any port or place other than that to which she is bound under the instructions of the Charterers) other than to save life or property, hire shall cease to be payable from the commencement of such deviation until the time when the Vessel is again ready to resume her service from a position not less favourable to the Charterers than that at which the deviation commenced, provided always that due allowance shall be given for any distance made good towards the Vessel's destination and any bunkers saved. However, should the Vessel alter course to avoid bad weather or be driven into port or anchorage by stress of weather, the Vessel shall remain on hire and all costs thereby incurred shall be for the Charterers' account

(c) *Blocking and Trapping*: If during the currency of this Charter Party the Vessel is blocked or trapped in circumstances where Clause 19 (b) applies, the Vessel shall be off hire for the period blocked or trapped. If the Vessel is blocked or trapped for a period of 365 days this Charter Party shall be terminated.

(e) *Loss of Time*: In the event of loss of time for which the Owners are responsible including but not limited to terms of employment of Master, Officers and/or crew, the Vessel shall be off hire for the time thereby lost.

Any time during which the Vessel is off hire under this Charter Party may be added to the charter period, at the option of the Charterers. Such option shall be declared not less than two months before expected redelivery, or latest two weeks after the event if less than two months before expected redelivery"

## Bp time

### “19. OFF-HIRE

19.1 The Vessel shall be off-hire on each and every occasion that there is a loss of time arising out of or in connection with the Vessel being unable to comply with Charterers' instructions (whether by way of interruption or reduction in the Vessel's services, or in any other manner) in account of:-

19.1.1 any damage, defect, breakdown, deficiency of or accident to the Vessel's hull, machinery, equipment or cargo handling facilities, or maintenance thereto; or

19.1.2 any default and/or deficiency of the Master, officers or crew, including the failure or refusal or inability of the Master, officers and/or crew to perform the services required; or

19.1.3 any breach of sub-clause 9.6.5; or

19.1.4 any other cause preventing the full working of the Vessel

Notwithstanding the aforesaid, if the total loss of time pursuant to the sub clause 19.1 is less than three hours in any one calendar month, the Vessel shall not be off-hire

19.2 If the Vessel deviates, unless ordered to do so by the Charterers, it shall be off-hire from the commencement of such deviation until the Vessel is again ready to resume its service from a position not less favourable to Charterers than that to which the deviation commenced. For the purposes of this clause the term deviation shall include stopping, reducing speed, putting back or putting into any port or place other than that to which it is bound under the instructions of the Charterers for any reason whatsoever, including for maintenance, dry-docking, taking on stores or fresh water, but shall exclude deviations made to save life or property. Should the Vessel deviate to avoid bad weather or be driven into port or anchorage by stress of weather, the Vessel shall remain on hire and all port costs thereby incurred and bunkers consumed shall be for the Charterers' account. Any service given or distance made good by the Vessel while off-hire shall be taken into account in assessing the amount to be deducted from hire.

19.3 Any time during which the Vessel is off-hire under this Charter may be added, at Charterers' option, to the Charter Period. Such option shall be declared in writing not less than one month before the expected date of redelivery, or promptly if such event occurs less than one month before the expiry of the Charter Period. If Charterers exercise their option to extend the Charter Period

pursuant to this Clause, the Charter Period shall be deemed to include such extension and hire shall be payable at the rate(s) which would have been payable but for the relevant off-hire event.”

Piracy

Bimco

(a) The Vessel shall not be obliged to proceed or required to continue to or through, any port, place, area or zone, or any waterway or canal (hereinafter “Area”) which, in the reasonable judgement of the Master and/or the Owners, is dangerous to the Vessel, her cargo, crew or other persons on board the Vessel due to any actual, threatened or reported acts of piracy and/or violent robbery and/or capture/seizure (hereinafter “Piracy”), whether such risk existed at the time of entering into this charter party or occurred thereafter. Should the Vessel be within any such place as aforesaid which only becomes dangerous, or is likely to be or to become dangerous, after her entry into it, she shall be at liberty to leave it.

(b) If in accordance with sub-clause (a) the Owners decide that the Vessel shall not proceed or continue to or through the Area they must immediately inform the Charterers. The Charterers shall be obliged to issue alternative voyage orders and shall indemnify the Owners for any claims from holders of the Bills of Lading caused by waiting for such orders and/or the performance of an alternative voyage. Any time lost as a result of complying with such orders shall not be considered off-hire.

(c) If the Owners consent or if the Vessel proceeds to or through an Area exposed to the risk of Piracy the Owners shall have the liberty:

(i) to take reasonable preventative measures to protect the Vessel, her crew and cargo including but not limited to re-routeing within the Area, 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;



(ii) to comply with the orders, directions or recommendations of any underwriters who have the authority to give the same under the terms of the insurance;

(iii) to comply with all orders, directions, recommendations or advice given by the Government of the Nation under whose flag the Vessel sails, or other Government to whose laws the Owners are subject, or any other Government, body or group, including military authorities, whatsoever acting with the power to compel compliance with their orders or directions; and

(iv) to comply with the terms of any resolution of the Security Council of the United Nations, the effective orders of any other Supranational body which has the right to issue and give the same, and with national laws aimed at enforcing the same to which the Owners are subject, and to obey the orders and directions of those who are charged with their enforcement;

and the Charterers shall indemnify the Owners for any claims from holders of Bills of Lading or third parties caused by the Vessel proceeding as aforesaid, save to the extent that such claims are covered by additional insurance as provided in sub-clause (d)(iii).

(d) Costs

(i) If the Vessel proceeds to or through an Area where due to risk of Piracy additional costs will be incurred including but not limited to additional personnel and preventative measures to avoid Piracy, such reasonable costs shall be for the Charterers' account. Any time lost waiting for convoys, following recommended routeing, timing, or reducing speed or taking measures to minimise risk, shall be for the Charterers' account and the Vessel shall remain on hire;

(ii) If the Owners become liable under the terms of employment to pay to the crew any bonus or additional wages in respect of sailing into an area which is dangerous in the manner defined by the said terms, then the actual bonus or additional wages paid shall be reimbursed to the Owners by the Charterers;

(iii) If the underwriters of the Owners' insurances require additional premiums or additional insurance cover is necessary because the Vessel proceeds to or through an Area exposed to risk of Piracy, then such additional insurance costs shall be reimbursed by the Charterers to the Owners;

(iv) All payments arising under Sub-clause (d) shall be settled within fifteen (15) days of receipt of Owners' supported invoices or on redelivery, whichever occurs first.

(e) 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.

(f) If the Vessel is seized by pirates the Owners shall keep the Charterers closely informed of the efforts made to have the Vessel released. The Vessel shall remain on hire throughout the seizure and the Charterers' obligations shall remain unaffected, except that hire payments shall cease as of the ninety-first (91st) day after the seizure and shall resume once the Vessel is released. The Charterers shall not be liable for late redelivery under this Charter Party resulting from seizure of the Vessel by pirates.

(g) If in compliance with this Clause anything is done or not done, such shall not be deemed a deviation, but shall be considered as due fulfilment of this Charter Party. In the event of a conflict between the provisions of this Clause and any

implied or express provision of the Charter Party, this Clause shall prevail to the extent of such conflict, but no further.

Date: 13.11.09

#### Intertanko

1. 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.

2. Owners shall be entitled

(a) to take reasonable preventive measures to protect the vessel, her crew and cargo including 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,

(b) to follow any instructions or recommendations given by the flag state, any governmental or supragovernmental organisation and

(c) to take a safe and reasonable alternative route in place of the normal, direct or intended route to the next port of call, in which case Owners shall give Charterers prompt notice of the alternative route, an estimate of time and bunker consumption and a revised estimated time of arrival.

3. The vessel shall remain on hire for any time lost as a result of taking the measures referred to in Paragraph 2 of this Clause and for any time spent during or as a result of an actual or threatened attack or detention by pirates.

4. Charterers shall indemnify Owners against all liabilities costs and expenses arising out of actual or threatened acts of piracy or any preventive or other measures taken by Owners whether pursuant to Paragraph 2 of this Clause or otherwise, including but not limited to additional insurance premiums, additional crew costs and costs of security personnel or equipment.

5. Charterers warrant that the terms of this Clause will be incorporated effectively into any bill of lading issued pursuant to this charterparty.

Comment: Many current charterparties will not have anticipated the possibility of the vessel being hijacked. Owners must therefore check the terms of their existing charters and bills of lading before, for example, taking any decision to re-route the

ship. Re-routing may expose an owner to claims for breach of charter, for example a failure to prosecute the voyage with 'due' or 'utmost despatch', also claims under the bill of lading e.g. for deviation and late delivery. Owners should also check their war risk clauses, some of which permit a deviation in appropriate circumstances.

For new fixtures, INTERTANKO has produced the following clauses which address the main issues involved in transiting the Gulf of Aden and/or re-routing the ship. These clauses are not comprehensive and will need to be amended to suit the particular factors affecting each ship and voyage. The need for these clauses must also be assessed in the context of the charterparty as a whole. Owners should ensure that such provisions are also included in the bills of lading.

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