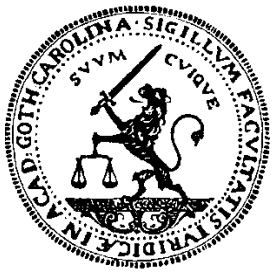

FACULTY OF LAW
University of Lund

Peter Hallin

At the Threat of Piracy

Hire Issues in Time Charterparties

Master thesis
30 credits

Supervisor
Lars-Göran Malmberg

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Contents

Summary

As the threat of piracy has gradually grown by the early 21st century the shipping industry has been forced to find ways to handle and apportion risks. In regard of piracy this thesis treats two main risk handling tools of the shipping industry – the standard forms and insurance. Focus lies mainly with the standard form clauses on "off-hire". Also related clauses will be brought under the light as well as insurance issues related to this. The thesis strives to answer the question whether a vessel, chartered on a time charter party, goes off-hire due to an attack by pirates. Further on it is investigated whether so called deviation – to avoid pirates – can found ground for the vessel to go off-hire. Lastly also the impact of the insurance market has on these issues is treated.

The question formulation originates from the conflict of interests that has occurred along with the rise of piracy in the Horn of Africa-region and the common usage of standard form based time charter parties in the shipping industry. One of the characteristics of the time charter party is that the ship-owner provides the crew (including master) while the charterer has the right to instruct the master. Hence, the master, employed by the ship-owner, executes the orders of the charterer. Herein lays the main discrepancy in interests where the safety of the crew and large sums of money is at stake.

The first chapters of the thesis – on piracy, a general view of time charter parties and a specific review of standard forms – are mainly descriptive. Here is identified the discrepancy of interests described above. Further on cases and doctrine is scrutinized for guidance in issues where the standard forms fails to give clear instructions.

Since the negotiating positions of the ship-owner and the charterer are closely related to the insurance market (risks apportioned by the contract may well be insurable and vice-versa) the reader is presented with an overview of the insurance market.

The thesis concludes with an analysis, where the questions posed in the introduction get answered, and a conclusion, where the conclusions of the author are presented.

Among the standard forms that have been reviewed it can safely be said that a vessel suffering a pirate attack rarely go off-hire because of the pirate attack. Neither does a vessel that deviates to avoid such an attack. It must, though, be pointed out that the off-hire clauses of the standard forms in some cases are very vague and need completion with so called "rider"-clauses to get, for sure, the above stated meaning.

Sammanfattning

Allteftersom hotet från sjöröveri har växt under 2000-talet har rederinäringen tvingats hitta sätt att hantera och fördela riskerna. Denna uppsats behandlar branschens kanske främsta riskfördelningsinstrument (i förhållande till sjöröveri) – standardavtal och försäkringar. I första hand ligger fokus på standardavtalens klausuler om "off-hire". I andra hand tas även frågor om kringliggande klausuler samt försäkringsfrågor upp. Uppsatsen strävar efter att besvara frågan om ett skepp, som är uthyrt på ett så kallat tidscerteparti (time charterparty), går off-hire till följd av ett pirattillslag. Vidare utreds i uppsatsen huruvida så kallad deviation – för att undvika pirattillslag – utgör grund för att ett fartyg på tidscerteparti ska gå off-hire. Slutligen berörs också hur försäkringar inverkar på dessa frågor.

Frågeställningen härrör ur den intressekrock som uppstått i och med sjöröveriets uppgång kring Afrikas horn och det flitiga användandet av (standardavtals-) tidscertepartier som instrument för resurshantering inom sjönäringen. Ett av kännetecknen för ett skepp uthyrt på tidscerteparti är att det är skeppsägaren som förser skeppet med en besättning (inklusive kapten) medan det är förhyraren som instruerar kaptenen. Kaptenen, som alltså är anställd av skeppsägaren, ska lyda instruktioner från förhyraren. Häri består den centrala intressekonflikten där besättningars trygghet och stora värden står på spel.

Uppsatsen inleds med ett par till största delen deskriptiva kapitel om dagens sjöröverisituation, tidscertepartier ur ett generellt perspektiv samt en specifik granskning av de standardavtal som ligger till grund för många av dagens certepartier. Här identifieras och problematiseras kring den intressekonflikt som beskrivits ovan. Vidare granskas rättsfall och doktrin utifrån uppsatsens frågeställning och med målet att finna vägledning i de fall där standardavtalen inte bistår med detta.

Eftersom skeppsägares och förhyrares förhandlingspositioner är tätt sammankopplade med försäkringsmarknaden (de risker som inte kan avtalas bort kan kanske försäkras bort) ges läsaren en översikt av försäkrings-marknaden i ett av de avslutande kapitlen.

Uppsatsen avslutas med ett diskussionskapitel, där uppsatsens frågeställningar besvaras, och ett avslutande slutsatskapitel där författarens slutsatser kort presenteras. Bland de standardavtal som granskats står det helt klart att ett skepp som utsätts för en piratattack knappast går off-hire av den anledningen. Inte heller de fall där kaptenen tar en omväg för att undvika pirater går skeppet off-hire. Dock ska påpekas att standardavtalens off-hire klausuler i många fall är mycket vaga och därmed måste kompletteras med så kallade "rider"-klausuler för att avtalet med säkerhet ska få ovan angivna innebörd.

Preface

For Poppy.

Malmö April 2, 2010

Peter Hallin

Abreviations

AIMU	American Institute of Marine Underwriters
ASBA	The Associations of Ship Brokers and Agents (USA) Inc.
ATL	Actual total loss
BALTIME	The BALTIME 1939 (rev 2001) standard form Issued by BIMCO
BIMCO	The Baltic and International Maritime Council
BMP3	Best Management Practices to Deter Piracy off the Coast of Somalia and in the Arabian Sea Area-booklet
BOXTIME	Uniform Time Charter Party For Container Vessels. Issued by BIMCO.
BPTIME 3	The BPTIME 3 standard form, 1 ed, 2001 Issued by BP Shipping Ltd and BIMCO
CEFOR	The Nordic Association of Marine Insurers
CTL	Constructive total loss
EEZ	Exclusive Economic Zone
FONASBA	The Federation of National Associations of Ship Brokers and Agents
GT	Gross Tonnage
GSHIC	The General Swedish Hull Insurance Conditions
HoA-region	The Gulf of Aden and the waters off Horn of Africa
IMB	International Maritime Bureau
MSCHOA	Maritime Security Centre Horn of Africa
nm	Nautical mile
NMIP	Norwegian Marine Insurance Plan

NYPE 93	The New York Produce Exchange form as amended 1993. Issued by ASBA
P&I	Protection and indemnity
UNCLOS	United Nations Convention on the Law of the Sea, 1982

1 Introduction

> Saturday 15 November, 2008 10 a.m.[1]
>
> Cruising some 450 nm southeast of the coast of Kenya, the 333 m, 162 000 GT, supertanker *Sirius Star*[2] was captured by pirates. A USD 15 million ransom was demanded for the vessel carrying crude oil worth USD 100 million.[3] Facing the threat of disastrous consequences a ransom sum of USD 3 million[4] was subsequently paid and the vessel was released. At stake were not only the lives of crew members and the environment but also, obviously, large sums of money.

In the wake of recent proliferation of piracy around the Gulf of Aden and off the Somali coast new issues have come into focus. In relation to piracy – issues such as safety, security and risk prevention has come on the tables. In relation between the owner and the charterer of a vessel the drafting of the charterparty contract is still very much the focal point. This thesis will focus on the hire issue, pertinent as ever following the re-proliferation of piracy.

The charterparty contract, a deal between the owner of a vessel on the one hand and a charterer on the other is a rather complex type of contract. However for the augmentation of fleet capacity, needed over certain time, it is ideal. For the purpose there is a set of different standard forms. These are constructed for different purposes and vary with the trade of the vessel they concern. They all have a similar structure. Owner provides a vessel along with a master and crew. The master follows the orders of the charterer. For this service the charterer pays hire. The hire is paid continuously out the duration of the contract. At certain circumstances the charterer may escape the duty to pay hire. These circumstances usually are set forth in the off-hire clause of the charterparty contract.

If a chartered vessel is subject for a pirate attack or hi-jacking and then cannot be used as was intended – who pays? Does the charterer still have to pay hire even though the vessel chartered cannot be used (The *Sirius Star* was kept by pirates for roughly one month)[5] as intended? Why should the owner pay for the mistake (of the charterer) to order the vessel into waters where it is likely to be subject to a pirate attack? Who pays for the extra time needed to deviate in order to maintain a safe voyage?

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[1] *http://gcaptain.com/maritime/blog/pirates-seize-saudi-supertanker/*
[2] *https://exchange.dnv.com/exchange/main.aspx?extool=vessel&subview=summary&vesselid=29210*
[3] *http://www.guardian.co.uk/world/2008/nov/24/pirates-tanker-ransom*
[4] *http://news.bbc.co.uk/2/hi/africa/7820311.stm*
[5] *http://news.bbc.co.uk/2/hi/africa/7820311.stm*

1.1 Problem

This thesis sets forth to investigate a three-piece problem. Piracy constitutes the first part. Can piracy lead to a vessel going off-hire? One part is deviation. Can deviation, to avoid a possible pirate attack, lead to a vessel going off-hire? These two issues has many sharing points but are very differently treated in standard forms used in today's charterparty contracts. As a third part of the problem appears insurance. How does insurance affect the above-mentioned issues?

1.2 Purpose

The purpose of this thesis is to put some light on the discrepancy in interests that occurs in time charterparties at the threat of piracy. The threat itself is often discussed thanks to its immediate character. Deviation, an effect of the immediate threat, is not as thoroughly discussed.

The discrepancy is constituted of the fact that the owner and crew (including master) often does not have the same set of interests as the charterer. For the charterer the chartering of a vessel is an economical favourable solution. For the owner the economic aspect is obviously there but also the social aspect of being the employer of the crew. At this side of the equation belongs also the crew facing the threat of a pirate attack or hi-jacking.

1.3 Method and disposition

Since the type of problem set forth for this thesis to solve is rather complicated and comprises various kinds of legal sources the method to work this material is also a bit complicated.

The current piracy situation is treated in the highly descriptive chapter two. Piracy is in many ways the core of this essay however here is only needed a contextual chapter. Good for the understanding of the issues of this thesis.

For the charterparty contract section, chapter three, the author has decided to describe the general ideas and features of the charterparty contract. Obviously all contracts are individual but through practice and court decisions over the years a picture of the general charterparty contract has effloresced. For this section court decisions, doctrine and various standard forms have been scrutinized. Both express terms and implied obligations are explained. The thesis focuses on standard forms since the lionpart of charterparties are fixed with standard forms.

Chapter four is a study in different standard forms for charterparty contracts. Examples and quotes have been taken to illustrate how the issues of this thesis have been treated in these standard forms. Along them some spare

comments. This chapter has both a referential purpose and a descriptive purpose since the clauses are commented.

In the insurance section of this thesis (chapter five) the insurance market is explained. Insurance cover for shipping is rather complex and here focus will only lie on the cover relevant for the issues of this thesis. Some contextual notes are also made. This part is highly descriptive and cannot be considered as all-embracing. Doctrine as well as the insurance policies for some actors on the insurance market is used for this purpose.

In the conclusion, the author will discuss the problem constructed in section 1.1 above. The author has no intention to present *de lege ferenda* arguments but discussing the current legal framework and its implications for the shipping industry.

1.4 Delimitation

Starting-point of this thesis is a situation where both parties to the charterparty contract intend to carry out their respective contractual obligations. However, a cost has to be apportioned. From this, it can be understood that frustration and breach of contract is not central in this thesis. Central will instead be the solution to a problem (piracy) that in today's marine environment has turned into a big issue. Breach of contract and frustration however may be touched upon as it is still very much a part of the context.

The cargo interest will not be discussed.

All references made to standard forms are made to version as issued and not as it may be changed by the parties to the contract. Further, the reader may be reminded of the fact that a charterparty contract can concern a specific vessel as well as being a head charterparty contract regulating issues between the owner and the charterer. Head charterparty contracts are not treated in this thesis.

Indented text *can* be read as contextual.

2 Piracy

Piracy has always been a threat for the shipping industry. This chapter intends to update the reader on the current state of maritime piracy. On the focus will be the activities around the Horn of Africa and the Gulf of Aden (below the HoA-region), where, as described below, most instances of maritime piracy seem to occur at the moment.

2.1 Piracy today

It has been argued that piracy is one of the oldest "professions".[6] The methods, means and reasons obviously differ today from past times but the "profession" seems to remain. This section does not aim to present a historical review of piracy but settles with establishing that piracy of today has developed alongside the society as a whole. Pirates move to places where their business is lucrative. Pirates change methods to improve their efficiency. Piratical activity may be induced by a changed social situation.[7]

A quick look at the International Maritime Bureau (below the IMB) Live Piracy Map 2010[8] shows that there is a strong focus of piratical activities in the HoA-region. The reason for this may be explained by two main factors.[9] First, the lack of effective governance (in Somalia) creates free havens for pirates. Piracy-like activity saw an up-swing in the HoA-region following the political instability in Somalia. For almost 20 years (since the fall of Siad Barre in 1991) Somalia has lacked an effective central government.[10] Second, the pervasive poverty and lack of means of living in the area. Since the tsunami in December 2004, people in the eastern coastal zone of the Somalia lack tools, vessels and other means for supporting their livelihood, fishing. For some people piracy has become a way out of the misery. An additional factor, though much debated, combines the two factors mentioned above. Foreign fishing fleets are active in what would be Somali waters or Exclusive Economic Zone (below EEZ) to the disadvantage of the Somali fishermen.[11] A properly working government with working law enforcement could hinder or stop illegal fishing. The relatively poor fishermen of Somalia cannot compete with the foreign fishing fleet.

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[6] Birnie, P. W., Piracy – Past, present future, Marine Policy, July 1987, Butterworth & Co (Publishers) Ltd, 1987, p. 163
[7] Lehr, Peter (ed), Violence at Sea – Piracy in the Age of Global Terrorism, New York, United States, 2007, p. 14
[8] *http://www.icc-ccs.org/index.php?option=com_fabrik&view=visualization&controller=visualization.googlemap&Itemid=219*
[9] Lehr p. 14
[10] *http://regeringen.se/sb/d/2574/a/75151*
[11] *http://regeringen.se/sb/d/2574/a/75151*

The Somali pirates have gotten more and more sophisticated. Some twenty years ago piracy-like activity mostly occurred on internal and coastal waters or in ports. Few pirates were seen further out than 20 nm. Most pirates were land-based, and the attacks were armed robberies with a certain degree of violence.[12] Today operations can be carried out from a mother ship.[13] This allows pirates to go much further out for their prey.[14] The IMB advises not to sail closer than 600 nm to the Somali coast. Attacks have been reported out to 1000 nm.[15] Still, the risk of hi-jacking in the Gulf of Aden is less than 1%.[16]

Relying on a Security Council resolution[17] there is today a military presence in the HoA-region. The presence mainly consists of vessels sent by European countries (e.g. United Kingdom and Germany) to support the Eunavfor operation "Atalanta". The purpose of this operation is to secure food transport to Somalia and fight piracy. The latter by, mainly, escorting vessels through the Gulf of Aden.[18]

The *modus operandi* for the pirates seems to be rather simple. The pirates capture vessels in order to ransom them. Persons or governments interested in the safe release of the crew and goods are expected to come up with the money. In most cases Somali pirates have treated their hostages with care in the hope of receiving a substantial ransom payment.[19]

In the ***Masefield v Amlin*** case, ransom was paid for the release of the *Bunga Melati Dua*. It was argued that paying ransom was contrary to public policy and could therefore not be taken into account in estimating the prospects of recovery. Meaning that if paying ransom was the only way of recovering the vessel, and paying ransom was contrary to public policy, then the vessel had to be regarded as a total loss. The court held that paying ransom was *not* against public policy as of today. The court, however, admitted that this practice probably would encourage pirates.[20]

2.2 Defining piracy

Piracy, as a notion, comes with a lot of different associations. Some think of music and software piracy while other thinks of an eye-patched villain at sea from the seventeenth century. These may all be accurate but not always

[12] Birnie, p. 173
[13] Lehr, p. 17
[14] As illustrated in the introduction of this thesis.
[15] *http://www.icc-ccs.org/index.php?option=com_content&view=article&id=70&Itemid=58*
[16] Wollin Ellevsen, Anna, A Contractual View on Piracy, Shipping & Trade Law, Vol 09 No 01, January 23 2009
[17] The United Nations Security Council Resolution S/RES/1816 (2008)
[18] *http://www.forsvarsmakten.se/sv/Internationella-insatser/Eunavfor--Somalia/*
[19] Masefield AG v Amlin Corporate Member Ltd, *2010 WL 517040*, p 4
[20] Shipping Insurance update – Piracy, March 2010, Newsletter issued by Clyde & Co, *www.clydeco.com*

pertinent. To set things straight a clear definition of piracy is needed. This thesis covers the piracy-like activity occurring today on a daily basis around the Horn of Africa and the Gulf of Aden. This situation has come to pose a major threat to all actors involved in the transport of goods to and through this area.

In the United Nations Convention on the Law of the Sea (below UNCLOS) piracy is defined in article 101 (the provision is basically retaken from the 1958 Convention on the High Seas, done in Geneva[21]).

> Piracy consists of any 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 the 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;
> (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
> (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).[22]

This definition is very narrow and contains several vague expressions. For instance it does not further define what "private ends" is supposed to imply. The definition also requires two ships (two-ship rule)[23], the attacking ship and the attacked ship. The crucial aspect of the piracy definition under the two major international conventions, which provides its limited scope, is that piracy can only be committed on the high seas. Piracy consists of "[a]ny illegal acts of violence, detention or any act of depredation, committed for private ends.../… *on the high seas*."[24] The Exclusive Economic Zone (EEZ) is in this case considered as high seas.[25] This still leaves, in most cases, 12 nm of territorial sea where "[a]ny illegal acts of violence, detention or any act of depredation, committed for private ends..." would not be considered piracy. That is in line with the idea that in the territorial sea national jurisdiction applies. A rather acute problem, in this case, is that piracy-like activity is present mainly in locations where the national government is weak or even non-existent. The situation in the HoA-region is not made less complicated with Somalia, whose territorial sea claims extend as far out as 200 nm[26]. More or less the whole Gulf of Aden is made territorial sea by this unilateral claim.

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[21] Convention on the High Seas, 1958 (Geneva), art 15
[22] UNCLOS art 101
[23] Mejia Jr, Max, Maritime Gerrymandering: Dilemmas in Defining Piracy, Terrorism and other Acts of Maritime Violence, Journal of International Commercial Law 2(2):153-175, p. 160
[24] UNCLOS, art 101 (emphasis added)
[25] UNCLOS, art 58(2)
[26] Churchill, R.R. and Lowe A.V., The Law of the Sea, 3rd ed, Juris Publishing, Manchester, 1999, appendix 1

It has been suggested that the geographical area where actions may be defined as piracy shall be construed as wide as possible since the definition was originally drafted in a time when the territorial sea was considered only 3 nm.[27]

The UNCLOS definition focuses on the perpetrator and not on the victim. This definition may be legally correct and acceptable, but it, nonetheless, offers no comfort for those exposed to the attack. As the victim of such an attack, whether or not by legally defined pirates, the risk of suffering physical as well as psychological damage is obvious. Furthermore, the same economical values are at stake if an attack occurs within the definition or outside it.

In the case of the ***Andreas Lemos***[28] it was contended that piracy only can occur in the high seas. It was subsequently held that (in regard of insurance) piracy may well be committed in the territorial waters of a state.

> The insurance policy that the owners of the *Andreas Lemos* held for the vessel covered war risks. Armed "raiders"[29] boarded the vessel in the territorial sea of Bangladesh. The owners argued that since the holder of the policy was "warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom or piracy"[30] the owners would be indemnified. The insurance company responded that the vessel was, at the time, located well within territorial sea of Bangladesh[31] and piracy can only be committed on the high seas.

The Norwegian Marine Insurance Plan[32] (below NMIP) Commentary defines piracy as illegal use of force against a vessel "en route" between two ports. Regardless of the criminal jurisdiction or the UNCLOS. An attack against a vessel in port is not considered a piracy attack.

For statistical reasons the IMB has drafted an alternative definition of piracy:

> "An act of boarding or attempting to board any ship anywhere with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act"[33]

The IMB definition is wider but cannot found jurisdiction as the UNCLOS might. It focuses on the victim of piracy instead of the perpetrator. The IMB definition is better tailored to capture the majority of today's piracy-like

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[27] Thomas, D. Rhidian (ed), The Modern Law of Marine Insurance (vol 3), Informa, Bodmin, United Kingdom, 2009, p 185
[28] The Andreas Lemos [1983] Q.B. 647
[29] The Andreas Lemos , p 649
[30] The Andreas Lemos , p 651
[31] Whose claim at the time amounted to 12 nm. The Andreas Lemos, p 652
[32] Norwegian Marine Insurance Plan 1996, version 2010 – Commentary Part I, p 45 issued by The Nordic Association of Marine Insurers (CEFOR) fetched at: *www.norwegianplan.no/eng/index.htm*
[33] Mejia Jr, Maximo Q and Xu, Jingjing (editors), Coastal Zone Piracy and Other Unlawful Acts at Sea, WMU Publications, Malmö, Sweden, 2007, p 97

activity than the UNCLOS definition, which has not been able to keep up with the changed tactics of pirates.

A number of organizations[34], having interest in minimizing piratical activity, have issued a booklet[35] (below BMP3) on managing the threat of piracy in the HoA-region. The BMP3 defines piracy as:

> a) The use of violence against the ship or its personnel, or any attempt to use violence.
> b) Attempt(s) to board the vessel where the master suspects the persons are pirates.
> c) An actual boarding whether successful gaining control of the vessel or not.
> d) Attempts to overcome the ship's self protection measures by the use of:
> i) Ladders
> ii) Grappling hooks.
> iii) Weapons deliberately used against the vessel.[36]

This booklet focuses on the ship owner and crew safety, avoiding *all* kinds of attacks. Therefore the scope of its definition is very wide. It is not supported by national law and, hence, cannot found jurisdiction in any way.

As this thesis focuses on standard forms in today's shipping industry, the relevant definition of piracy is the interpretation that applies to the different standard forms scrutinized. Since most standard forms are modeled by many of the parties that also created the BMP3, the wide definition of piracy in BMP3 might be the one thought of in the standard forms. This thought is backed by the holding in the ***Andreas Lemos*** case.

In this thesis the word 'piracy' is used for the narrow interpretation of piracy-like activity (cf. the UNCLOS definition above) while the words 'piratical activity' are used for the wider (cf. IMB and BMP3) definition of piracy-like activity. Unless another definition of piracy is expressly stated in the standard forms this thesis will consider the word 'piracy' (in the standard forms) comprising the piracy-like activity described by the IMB definition of piracy (cf. above).

[34] Among them BIMCO, International Group of P&I Clubs and IMB. It is further supported by Maritime Security Centre Horn of Africa (MSCHOA)
[35] Best Management Practices to Deter Piracy off the Coast of Somalia and in the Arabian Sea Area, version 3, Witherby Seamanship International Ltd, Edinburgh, United Kingdom, 2010
[36] BMP3, p 49

3 The contracts

The type of contract in focus in this thesis is the charterparty contract. Charterparty contracts (or charterparties) can be divided into two types – the *voyage charterparty* and the *time charterparty*. The difference between the two is obvious. Voyage charterparty is an agreement of letting a vessel (in regard of loading capacity) during a specified voyage. The vessel is on *voyage charter*. The time charterparty is the same deal but instead of voyage, the letting is agreed to a specified time. The vessel is on *time charter*. There are two parts to the charterparty. First there is the owner, who lets the vessel, and then there is the charterer, who charters the vessel.

The two mentioned charterparties may not be confused with the demise charterparty (often called *bareboat charter*). The demise charterparty is the term used for leasing the whole vessel as it is. The charterer is then as close to be the actual owner as possible without actually owning the vessel – being responsible for manning the ship as well as insurance issues etc. Demise charterparties will not be treated further here.

A charterparty contract can be rather complex. Many factors have to be taken into account (e.g. factors outside the contract itself, such as nationalities and language barriers – matters in the international environment that shipping is). As a result of this a variety of standard forms has developed to facilitate fixing of vessels. Standard forms for charter-parties are made up of several clauses of different types. Either the clauses are put together as the parties wishes or a standard form is used in its entirety. Depending on which type of charter is in question – different set of standard forms are used. Used form also varies with the trade the vessel is involved in.

It is important to remember that the ship owner still is in charge of the ship providing a service to the charterer. In the voyage charter, the owner agrees to perform a carriage between specified points. In the time charter the owner agrees to let the charterer use the vessel for the charterers own purposes.

3.1 Time Charterparty

The description of the charterparty contract in this chapter is somewhat generalized. The reader has to bear in mind that the charterparty contract is a contract that can be negotiated to the liking of the parties even though standard forms have a dominant position.

The charterparty contract is more or less a set of warranties and conditions under which the contract will be executed. A condition is traditionally viewed as a basic term while the warranty is a minor term. A breach of a warranty is compensated by damages. A breach of a condition can entitle

the party not in default to walk away from the contract. If a term is to be considered a condition or a warranty depends on its context. Except from the express obligations of the contract there are also implied obligations.

3.2 General obligations

In the time charterparty the charterer has the ship at disposal for an agreed period of time. This disposal covers all the commercial aspects of the vessel operation.[37] The crew is normally employed by the ship owner but the master obeys the instruction of the charterer.[38] Costs for the ship owner arising out of instructions from the charterer are usually covered by the charterer if not stated otherwise in the charterparty contract.

3.3 Hire

The price paid by the charterer for the service provided by the ship owner is called hire. Hire is usually paid monthly in advance during the period the charterer has the ship in disposal.[39] As opposed to the lump sum often paid for the voyage charter.[40] While the time charter provides a relative freedom to the charterer the price to pay for this advantage is the duty to always pay the hire on time – even though the charterer not always can use the ship as intended.

Hire is paid from the moment that the ship is at disposal of the charterer. At what time the ship enters this state is determined by the contract. If the charterer fails to pay the hire in due time the ship owner may have the right to withdraw the ship.[41] This depends on the withdrawal clause. If the ship owner uses the right to withdraw the ship the charter contract comes to an end.[42]

In the ***Halcyon Steamship v Continental Grain***[43] it was held that only two events can relieve the charterer from the duty of continuous payments. That would be deduction of hire or complete relief of duty to pay hire on due date ensuing from express statement in the charterparty contract.[44] Such express statement is the off-hire clause, present in most charterparty contracts but it can also be found elsewhere in the contract. The other event would be a set-

[37] Wilson, John F, Carriage of Goods by Sea, 6 ed, Pearson Education, Dorchester, United Kingdom, 2008, p 83
[38] Wilford, Michael, Coghlin, Terence and Kimball, John D., Time Charters, 5 ed. Informa Professional, Bodmin, United Kingdom, 2003, p 315
[39] Time Charters 5 ed, p 273
[40] Wilson, p 5
[41] Time Charters 5 ed, p 275
[42] Time Charters 5 ed, p 275
[43] Halcyon Steamship Co Ltd v Continental Grain Co [1943] K.B. 355
[44] Time Charters 5 ed, p 267

off or deduction of hire as a claim for damages when charterer is deprived usage of the ship, in whole or in part.[45]

3.4 Off-hire

The off-hire function is a distribution, or rather redistribution, of risk in the time charterparty.[46] It stipulate when the vessel goes off-hire and the charterer is relieved from the duty to pay hire.[47] Conditions for the ship going off-hire are usually found in the off-hire[48] clause. This happens when the vessel is prevented from its *full working* (and time is lost) by a *cause* (or event). Such an event can be engine failure or crew deficiency.[49] The list of events that trigger the ship into going off-hire, e.g. deficiency of men, machinery breakdown, is to be construed narrowly.[50] In ***The Mareva AS***[51] it is stated that "...[i]t is settled law that *prima facie* hire is payable continuously and that it is for the charterers to bring themselves clearly within an off-hire clause if they contend that hire ceases." The ***Royal Greek Government v. Minister of Transport***[52] case pointed out that the charterer "...must bring himself clearly within the exceptions." It is not necessarily a fault of the ship owner that triggers the off-hire clause.[53]

An off-hire event can occur before the beginning of the charter period, i.e. a grounding that occurs before the charter period can constitute reason for the ship to go off-hire if it has to go into repairs, because of the previous grounding, during the charter period.

An off-hire event can be, but is not necessarily, a breach of contract.[54]

3.4.1 Off-hire causes

Below follows a list of common off-hire events.[55]

1) Breakdown or deficiency of hull, machinery or equipment,
2) Dry docking,
3) Collision and grounding,
4) Detention, seizure or arrest,
5) Deficiency or strike in crew,

[45] Time Charters 5 ed, p 269
[46] Thomas, D Rhidian (editor), Legal Issues Relating to Time Charterparties, Informa, Bodmin, United Kingdom, 2008, p. 141
[47] Time Charters 5 ed, p 405
[48] Also called suspension of hire.
[49] Wilson, p 5
[50] Thomas 2008, p. 136
[51] As cited in Time Charters 5 ed, p 405
[52] As cited in Time Charters 5 ed, p 405
[53] Wilson, p 84
[54] Time Charters 5 ed, p 406
[55] Thomas 2008, p 141

6) Deficiency of stores and
7) Deviation.

The common denominator of these events is that they derive from the vessel itself (internal). As mentioned above, the efficiency of the vessel is the primary responsibility of the owner. Important is therefore to consider whether external causes also can be an off-hire event. External causes are obviously not something in the hand of the owner. Actually external causes have traditionally been a risk borne by the charterer.[56] External causes can of course be a wide variety of events. Those thought of first in this context ought to be

a) weather,
b) port congestion,
c) tides,
d) blocked canals and waterways,
e) detention for different reasons,
f) war and civil unrest and
g) piracy.

An example can be found in ***Court Line v Dant***[57] where a vessel was prevented from sailing further by a boom trapping the vessel up-river.

While the first set of events (1-7) often is explicitly mentioned in the off-hire clause the second set (a-g) is rarely explicitly written in the contract. The parties may have agreed on external causes to be an off-hire event. The result in the contract is then often a sweep-up sentence such as ”or any other cause”[58] or even wider ”or any other cause whatsoever”. The exact scope of those words is very hard to determine. It seems as the usual, narrow, interpretation of off-hire clauses is intended to be widened by such an addition.[59] When ”whatsoever” is included ***The Mastro Giorgis***[60] case provides an example of how it has been interpreted.

> ”Where a vessel is fully efficient, and capable in herself of performing the service immediately required by charterers, she is on-hire, even if she is prevented from performing that service by an extraneous cause… She was just as much incapable in herself of performing the service immediately required, that is to say, leaving port, by reason of the arrest as she would have been if she had suffered a breakdown in her engines. There is no distinction to be drawn between legal incapacity and physical incapacity.”[61]

[56] Thomas 2008, p 141
[57] As cited in: Actis Co. Ltd. v Sanko Steamship Co. Ltd. (The Aquacharm), [1982] 1 W.L.R. 119, p 122
[58] At times considered as *ejusdem generis* the other mentioned events, i.e. not with intent to sweep up. Andre et Cie SA v Orient Shipping (Rotterdam) BV (The Laconian Confidence) [1997] C.L.C.300, p 300
[59] Thomas 2008, p 146
[60] Belcore Maritime Corp v Fratelli Moretti Cereali SpA (The Mastro Giorgis) [1983] 2 Lloyd's Rep. 66
[61] As cited in The Laconian Confidence, p 309

The external causes (a-g) can be split into two categories. Ones completely external that have absolutely nothing to do with the vessel (e.g. weather conditions) and those that can be connected to the vessel in some regard (e.g. detention). Of the first category several cases have ruled these causes as not being off-hire events.[62] In the second category, e.g. the detention, an underlying internal event (the reason for detention) has to be considered in deciding whether the vessel is to go off-hire or not.[63] Thus an external cause is made internal. In ***The Roachbank***[64] the court had a slightly different take on this as it stated that "...an 'extraneous' event can change its character or history and become an 'internal' one". The external cause (detention) was caused by the history of the vessel (carrying refugees onboard). This operation was made, in *obiter*[65], in ***The Laconian Confidence***[66] where a vessel was kept in port by authorities for 18 days as a result of procedure for gaining permission to clean holds (and dump residues). The actions by the authorities were seemingly exaggerated. If "...the authorities act properly or reasonably pursuant to the (suspected) in efficiency or incapacity of the vessel, any time lost may well be off-hire."[67] The court concluded though that in this case the actions taken by the authorities was "totally extraneous"[68] and would cause the vessel to go off-hire only if the off-hire clause was amended with "whatsoever".

Delays that flows out of compliance with the charterers instructions do not fall within the off-hire clause.[69] Nor do delays caused by the non-action of the charterer where action was required.

3.4.2 Working of the vessel

The mere fact that an event is at hand is not enough, though. The vessel also has to be prevented from its working[70] due to the off-hire event.[71]

"The full working of the Vessel"[72] it has been argued shall be tested against the ability to perform the service immediately required by the vessel. "[T]he service immediately required is to be identified, not by the Charterer's

[62] ***Court Line v Dant*** – Vessel prevented from sailing further by boom placed across the Changjiang River by local authorities. ***The Aquacharm*** – Vessel prevented by authorities to pass throught the Panama canal due to excessive draft (as considered by the authorities).
[63] The Mastro Giorgis as cited in Weale
[64] [1987] 2 Lloyd's Rep 498, as cited in Weale, p 7
[65] Weale describes it as if ***The Laconian Confidence*** decision allow an amended clause to catch external causes which was excluded by ***The Maestro Giorgis,*** Weale, John, The NYPE Off-hire Clasuse and Third Party Intervention: Can An Efficient Vessel Be Placed Off-hire?, p 11
[66] [1997] C.L.C. 300
[67] The Laconian Confidence, p 315
[68] The Laconian Confidence, p 315
[69] Weale p 3
[70] Differs with the standard form. E.g. NYPE 93; "preventing the full working"; BALTIME 1939 (rev 2001), "hindering or preventing the working"
[71] Time Charters 5 ed, p 406
[72] NYPE 93, cl 17

orders, expectations or hopes, but as the next step logically entailed in the employment of the vessel in the contingent factual situation..."[73]

As stated above, time must have been lost due to the event. Thus, a ship with a broken down engine may go off-hire while still at sea (time is lost due to speed reduction) but go on hire again as it reaches the discharging port (time is no longer lost as the ship lies still during discharge).

3.4.3 Period clause

An off-hire clause can specify a threshold duration for which the deficiency event shall last (e.g. 24 working hours).[74] When this duration is completed the ship goes off-hire and payment of hire cease. The cease of hire period is counted from the beginning of the deficiency period, and not from the end of the threshold duration, until the ship can resume service.[75]

This type of clause is called a *period clause*.[76] In the case of a period clause hire payment is to be resumed when the ship is in an efficient state to resume service again. This may result in loss of time for the charterer. The ship may well suffer from deficiency while at sea but turn efficient again in port. Having to "go back" and resume its voyage at the expense of the charterer as the ship goes on-hire again when efficient after repairs in port.

3.4.4 Net loss of time clause

Another type of off-hire clause is the *net loss of time clause*[77]. This type suggests the off-hire period to take net loss of time into account in calculations. With such a clause the charterer may deduct any time lost. This would include time to regain the same – or equivalent – position as when the deficiency event occurred.[78]

3.4.5 Partial inefficiency

Partial inefficiency is a term used when a ship lost efficiency, but not totally, due to some deficiency (i.e. same deficiencies as in the off-hire clause). In period clauses this has no effect - the result is the same as total inefficiency. In the case of a net loss of time clause the scenario is different. If three "...cranes, instead of two, had been available throughout..."[79] how

[73] Weale, p 15
[74] Boyd, Stewart C. et al., Scrutton on Charterparties and Bills of Lading, 21 ed., Sweet & Maxwell, Gloucester, United Kingdom, 2008, p 322
[75] Scrutton, p 323
[76] Time Charters 5 ed, p 409
[77] Time Charters 5 ed, p 410
[78] Time Charters 5 ed, p 407
[79] The H.R. Macmillan [1974] 1 Lloyd's Rep. 311 as cited in Time Charters 5 ed, p 410

much earlier could the vessel have left the port? The net time loss would have to be calculated.

3.5 Safe port

For the money spent on hire the charterer gets the right to the earning capacity of the vessel. This right is not unlimited though. Either explicitly or impliedly trading limits are set forth. The vessel is to be operated within those limits. As the character of the charterparty contract implies, the charterer has the right to name the ports which the vessel calls at. In the NYPE 93 form, for instance, clause 5 obliges the charterer to name "safe ports and safe places within..." the frames agreed on in the contract. Even if the charterer name a port within the trading limits the port still has to be safe. A definition of "safe port" can be fetched from ***The Eastern City***[80] case:

> "If it were said 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."[81]

A safe port can, according to this, be reached by good navigation and good seamanship.[82] Some twenty years later the idea of safe port from ***The Eastern City*** was clarified in ***The Hermine***[83]. A safe port means that it is free of any risks but abnormal events subsequent the time of nomination.[84] That includes geographical conditions[85], weather conditions[86] and also political conditions[87]. Political conditions that render a port unsafe can be the risk of a terrorist attack, detention or seizure by local authorities.[88] Conditions can at times be helped. Adequate dredging can help off the danger of silting. Military escort can provide safety to a port usually susceptible the danger of terrorists.

The doctrine of safe port further contains a requirement for the charterer to not "subordinate the safety of the vessel and its crew to the pursuit of its own financial interest."[89] The profit of the vessel may not be at the expense of crew welfare and the owner's future interest of the vessel.[90] Here lies a

[80] Leeds Shipping v. Société Francaise Bunge (The Eastern City) [1958] 2 Lloyd's Rep 127
[81] The Eastern City, p 131
[82] Transoceanic Petroleum Carriers v Cook Industries Inc (The Mary Lou) [1981] 2 Lloyd's Rep. 272
[83] Unitramp SA v Garnac Grain Co Inc (The Hermine) [1979] 1 Lloyd's Rep. 212
[84] Thomas 2008, p 61
[85] The Mary Lou
[86] The Eastern City
[87] Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes (The Evia) [1982] 2 Lloyd's Rep. 307
[88] Thomas 2008, p 52
[89] Thomas 2008, p 47 and The Hermine, p 214
[90] Thomas 2008, p 47

dual interest. On the one hand there is the ship owner, providing crew and master, and on the other hand there is the charterer giving instructions of how the vessel shall be employed. Question may still arise for whom the port shall be safe.

The hire is not paid for the carriage of goods but for the use of the vessel. Hence it is the charterer who decides how the vessel shall be employed. The vessel does not have to be employed all the time.[91] Regardless of how the vessel is employed costs that the charterer is incurring the owner as a result of the employment of the vessel is to be compensated. Nomination of port is a key part in the employment of the vessel and is considered to be a promissory obligation[92] or contractual promise[93]. If the vessel is damaged because of the orders of the charterer – the charterer will be responsible for the costs incurred. The owner, as being responsible for the navigation of the vessel, cannot get compensation for costs that rises out of the navigation of the vessel. However the owner can discontinue navigation if the orders of the charterer are not in accord with the contract.[94] To name an unsafe port can be a breach of contract and result in right to damages.[95]

3.5.1 Prospective safety

To nominate a port that, for the moment, is safe – but for sure is not when the vessel is due to arrive – cannot be considered a nomination of a safe port. This was established in ***The Mary Lou*** where it was concluded to be ”...absurd to hold that the shipowner would be obliged to comply with an order to a port which, although currently clear, would unquestionably become ice-bound by the time the ship arrived.”[96] In ***The Evia*** it was subsequently confirmed in positive wording. A charterer can ”...order the ship to a port or place the approaches to which were at the time of the order blocked as a result of a collision or by some submerged wreck or other obstacles [if] such obstacles would in all human probability be out of the way before the ship required to enter.”[97] Some prediction of the conditions on arrival must be included in the nomination. In ***The Evia*** it is also concluded that naming a safe port does not give rise to an absolute continuing promise of safety.[98]

The predicted conditions must be characteristic for the concerned port and not just a randomly bad condition.[99] Storm or ice may well cause the vessel damage but the port is not considered unsafe if it is not a characteristic

[91] Thomas 2008, p 48
[92] Thomas 2008, p 50
[93] The Evia, p 321. The term ‘warranty’ is often used.
[94] Thomas 2008, p 74
[95] The Mary Lou
[96] The Mary Lou, p 278
[97] The Evia , p 315
[98] The Evia, p 317
[99] See inter aliaThe Evia, p 315

condition of the port. Such a characteristic condition can be the fact that ports in the Gulf of Bothnia is ice-bound during parts of the year. In ***The Eastern City*** the weather at Essaouira (formerly Mogador), Morocco was considered such a characteristic condition.[100] Also the duration of the condition has to be taken into account when nominating safe port.

The promissory obligation of nomination of safe port does not entail that the port will always be free of risk. Quite on the contrary the master of the vessel is expected to handle some risks, as a part of the competence of the master. "[W]here the danger is of such a nature that the master can (having recognized it) circumvent it by the exercise of reasonable skill and care, the port is not, in a relevant sense, unsafe."[101]

Even a properly handled vessel may suffer damage due to a risk or danger of a certain port. Thus disposing an allegation of that the nominated port was unsafe cannot be done simply by showing that the vessel was not handled with reasonable skill and care.[102] If the master proceeds to a port, in spite of knowing a patent risk, the causal link between the charterers order and the damage suffered can be lost.[103]

3.5.2 Third party danger

Conditions such as weather or geographical situation can rather easily be anticipated. Occurrence of ice in ports in the Gulf of Bothnia wintertime is not very debated. The approach of the ports up the river Mississippi has also very well known navigational difficulties.[104] The risk of a third party causing the danger is not as easily foreseen. Still the safety of the port has to be estimated. The case of ***The Saga Cob***[105] is illustrative.

The *Saga Cob*, a time chartered vessel, was on September 7, 1998, attacked by Ethiopian guerillas while at anchor outside the port of Massawa, Ethiopia (now Eritrea). The vessel had been ordered there on August 26. Question was whether the charterer could be held responsible for the damage caused to the owner as a result of the vessel being at Massawa at the time. Could the risk of an attack that, de facto, existed September 7 have been anticipated on August 26, when the vessel was ordered there?

> The court took into account, examining whether the port was safe, the testimony of the *Omo Wonz*. A vessel that on May 31 was attacked by the very same guerilla movement which attacked the *Saga Cob* approaching Massawa (and with the *Saga Cob* actually following not far behind with military escort in between the two vessels). The master of the *Saga Cob*

[100] The Mary Lou, p 279
[101] The Mary Lou, p 279
[102] The Mary Lou, p 280
[103] The Mary Lou, p 280
[104] The Mary Lou, p 272
[105] K/S Penta Shipping A/S v Ethiopian Shipping Lines Corp (The Saga Cob) [1991] 2 Lloyd's Rep. 398

> expressed grave concerns for the safety in calling at Massawa and was after the incident with the *Omo Wonz* instructed to proceed in convoy. By mid June Ethiopian authorities decided to patrol the waters outside Massawa and to set approach routes to Massawa further out from the coast. The replacement vessel of the *Saga Cob*, the *Jian-Chi 21*, performed the same services as the *Saga Cob* for almost two years without any incidents reported. In fact, after the attack on the *Saga Cob*, no attacks at all were reported in Massawa until two years later. It was also not until two years later additional risk premiums for Ethiopia was required by underwriters.[106]

By August 26 an attack from Ethiopian guerillas on vessels en route to and from or at anchor at Massawa could be considered characteristic for the port. There was a "...small but nevertheless appreciable risk"[107]. The port of Massawa, hence, was unsafe and this caused the damage.[108]

Under these circumstances the charterer should not have ordered the vessel to Massawa. The charterer "...failed to exercise due diligence to ensure that the vessel was only employed between and at safe ports, places, berths"[109] as was agreed in the contract[110].

This decision was reversed in the Court of Appeal[111] with the argument that risk was too slight to be characteristic of the port and hence to be considered unsafe. If such risk shall render the port unsafe then all ports in the area would turn unsafe even though there was no evidence of any such threat. A terrorist attack, however, can occur at all times and cannot be taken into account when reflecting over the safety of a certain port.

In ***The Saga Cob*** it was added to the definition from ***The Eastern City*** (see above) a judgment of a "reasonable shipowner or master"[112]. The port will be regarded as unsafe if "...the political risk is sufficient for a reasonable ship owner or master to decline to send or sail his vessel there"[113] This decision seems to concern third party danger and risks similar to those present in ***The Saga Cob*** – e.g. piracy-like actions and civil unrest. However such risks, it was subsequently held in ***The Chemical Venture***[114], cannot be avoided and are not "serious enough to justify a reasonable owner or master to decline to go to that port."[115] The decision in ***The Saga Cob*** envisaged

[106] The Saga Cob, p 404
[107] The Saga Cob, p 409
[108] The Saga Cob, p 408
[109] The Saga Cob, p 409
[110] Shelltime 3, clause 3: Charterers shall exercise due diligence to ensure that the vessel is only employed between and at safe ports, places, berths, docks, anchorages and submarine lines where she can always lie safely afloat, but notwithstanding anything contained in this or any other clause of this charter, Charterers shall not be deemed to warrant the safety of any port, place, berth, dock, anchorage or submarine line and shall be under no liability in respect thereof save for loss or damage caused by their failure to exercise due diligence as aforesaid.
[111] The Saga Cob as cited in Thomas 2008, p 56
[112] The Saga Cob as cited in Thomas 2008, p 56
[113] The Saga Cob as cited in Thomas 2008, p 56
[114] Pearl Carriers Inc v Japan Line Ltd (The Chemical Venture) [1993] 1 Lloyd's Rep 508
[115] The Chemical Venture as cited in Thomas 2008, p 57

maybe the following corollaries. Physical danger can be avoided by good seamanship (compare with definition above) and political danger can be avoided by a prudent conduct (which is how a reasonable ship-owner or master would act).[116]

3.5.3 Changed conditions

Once a port has been nominated the port still can turn unsafe by subsequent events. This issue was addressed in ***The Evia***. Partly in *obiter* it was concluded that the promissory obligation of nomination of safe port is possible to divide into separate obligations. The primary one is to name a prospectively safe port. A secondary one, divided in two parts, is to cancel the order, and nominate a new prospectively safe port, if the port after the original nomination, but before arrival of the vessel, turns unsafe. If the vessel already reached its destination this secondary obligation is to nominate and order the vessel to a safe port if it can leave the current port avoiding the danger that turned the port unsafe. If that is not possible then in this case there would be no secondary obligation for the charterer.[117]

The *Kanchenjunga* was a vessel that, during the Iran/Iraq war, was ordered to the Khark Island, Iran. When calling at the port it was attacked. The master decided to retreat some 25 nm and wait for the nomination of a new, safe, port. Any such nomination was not issued. The charterer argued that the Khark Island had been accepted as a safe port by the owner since a notice of readiness already been served. The court held that any acceptance of safe port was possible to do *per se*. Such an argument could not be held against the owner; however, in this case, since notice of readiness had been served the charter had no secondary obligation to fulfill.[118]

3.5.4 Inbound and outbound

The passage to and from the port is included in the safe port notion.[119] If any part of the route a vessel has to take, as a result of the order of the charterer, is not safe then the port itself is considered not safe. The contractual obligation to nominate a safe port would thereby be broken.

Hence, a danger may be located outside the port itself. If such a danger is to make the port to count as unsafe the vessel inevitably has to pass it on its way to or from the port. At a river port the river up to the port must be safe if the port itself is to be safe.[120] The danger can be located as far as 100

[116] Thomas 2008, p 57
[117] The Evia, p 320
[118] Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga) [1990] 1 Lloyd's Rep. 391
[119] Thomas 2008, p 54
[120] The Mary Lou, p 280

miles from the port itself.[121] However the possible alternative routes generally increases the further from the port the danger is located.

It was held in ***The Sussex Oak***[122] that "[t]he charterer [is not to] guarantee that the most direct route or any particular route to the port is safe, but the voyage he orders must be one which an ordinary prudent and skilful master can find a way of making in safety."[123]

3.5.5 Delay

If, in the approach to nominated port, the vessel is delayed so severely that it amounts to frustration of the charterparty that port will also be considered not safe. Also delays occurring while in port counts here. When is the charterparty frustrated then? In the voyage charter case of ***The Hermine*** it was held that if the commercial object of the charter is frustrated by the delay the port would not be safe. "Commercially unreasonable"[124] was not enough.

In the fairly recent case of ***The Count***[125] the port of Beira, Mozambique, was blocked by two vessels that had run aground. The vessel was delayed by four days. It was held that the delay did not frustrate the charterparty contract (*nota bene*, in this case a voyage charterparty) and thus the port of Beira was not unsafe.

3.5.6 Third party instructions

When a vessel reaches the nominated port the port authority usually directs the vessel to a berth. These directions are considered the directions of the charterer. The safe port nomination by the charterer is to be "...understood as an order to proceed to that port and, within the port, to such berth or place as the port authority should direct."[126]

3.5.7 Rejecting nomination

The owner may decline the nomination of a port not safe.[127] It is here important to dissociate the decline to proceed to port as a result of an non-contractual nomination on the one hand and as a result of the port being prospectively unsafe on the other. It is only the latter one which entitles

[121] The Mary Lou, p 280
[122] GW Grace & Co Ltd v General Steam Navigation Co Ltd (The Sussex Oak) [1950] 2 K.B. 383
[123] The Sussex Oak, p 391
[124] The Hermine, p 216
[125] Independent Petroleum Group Ltd v Seacarriers Count Pte Ltd (The Count) 2006 WL 3835262
[126] Thomas 2008, p 67
[127] Thomas 2008, p 74

refusal of proceeding to the port. The right to decline to proceed because of a non-contractual nomination requires the nomination to fall outside the employment limits in the contract – i.e. a contract breach.

The rejecting is in most cases an implied right – a corollary to the charterers duty to employ the vessel in safe ports. War risk clauses, of standard forms, however, often add an out for the owner to not proceed to a nominated port.

> "The vessel... shall not be ordered to or required to continue to or through, any port, place, area or zone (whether of land or sea), or any waterway or canal, where it appears that the Vessel,... in the reasonable judgement of the Master and/or Owners, may be, or are likely to be, exposed to War Risks."[128]

With reasonable judgment is meant that it is not "arbitrary or so outrageous in its defiance of reason that it can properly be categorized as perverse..."[129] If the master still proceeds the vessel to a port which is considered unsafe by the owner the right to object to the nominated port is considered waived.[130] However, the master cannot proceed to an obviously unsafe port at the expense of the charterer. The nomination of an unsafe port may still have been a breach of contract but do "...not justify the deliberate act of allowing the ship to suffer damage."[131]

In ***The Stork***[132] the master had serious doubts of the safety of the port. There was little space for manoeuvering and also bad weather. The *Stork* was though guided by an experienced pilot who managed to get the vessel moored at loading berth. The weather got worse and the vessel was moved as a safety precaution but ran aground in the process. In taking guidance by an experienced local pilot the master did "...not act unreasonable"[133] even though having some knowledge of the dangers of the port .

This situation puts the master"...in a predicament."[134] If the master refuses to follow the employment orders by the charterer the owner can be liable – but in proceeding the vessel can be damaged, crew can be injured and the vessel even lost.

3.6 Despatch

As the vessel and crew is under command of the charterer the master of the vessel has to follow and execute the orders of the charterer. Despatch is, within the maritime field, to expedite (promptly) the orders of the charterer. This is most likely included in the charterparty contract in some way. The

[128] BPTIME 3, rows 468-472
[129] Ludgate Insurance Co Ltd v Citibank NA, 1998 WL 1042401
[130] Thomas 2008, p 76
[131] Thomas 2008, p 77
[132] Compania Naviera Maropan SA v Bowaters Lloyd Pulp & Paper Mills Ltd (The Stork) [1955] 2 Q.B. 68
[133] The Stork, p 107
[134] The Stork, p 99

NYPE 93 form says that "[t]he Master shall perform the voyages with *due despatch.*"[135] BALTIME sets the criteria to "utmost despatch"[136] while BOXTIME calls for "due dispatch."[137] If it, for some reason, is not included in the contract it would be an implied obligation to be within reasonable time.[138]

The clauses cited above calls for the master to perform the voyage the quickest possible or at least the shortest route (which ought to be the same at most occasions).[139] The words due/utmost does not leave much room for not taking the route that saves most time for the charterer. "Under the time charter the obligation is not simply to proceed by a usual route but to proceed with the utmost dispatch."[140] It has even been argued that taking a route that has been common practice for years, but not the shortest route, may constitute a breach of the due/utmost despatch clause.[141]

3.7 Masters responsibility

As touched upon above, the interest of the charterer is often not converging with the interest of the owner and master. The master, appointed by the owner, is responsible for the safety of the vessel and crew. In a situation where safety is threatened the master may disobey the orders of the charterer.

> "The master remains responsible for the safety of the vessel, her crew and cargo. If an order is given compliance with which exposes the vessel to a risk which the owners have not agreed to bear, the master is entitled to refuse to obey it: indeed, as the safe port cases show, in extreme situations the master is under an *obligation not to obey* the order."[142]

This does not mean that the master can always chose a calm weather route – rather the opposite. If the vessel is constructed to handle rough weather and the master out of convenience (disguised in safety reasoning) chooses a calm water route – that does not fall under the right to disobey the order of the charterer. [143]

A distinction should be made between the employment of the vessel (right of the charterer) and the navigation of the vessel (left to the master). The former having bearing on economical aspects. The latter is concerned with

[135] NYPE 93, cl 8(a), emphasize added. Also BPTIME 3 cl 10.2
[136] BALTIME 1939 (rev 2001), cl 9
[137] BOXTIME 2004
[138] Debattista, Charles et al, Southampton on Shipping Law, Informa, Bodmin, United Kingdom, 2008, p 59
[139] Coghlin, Terence et al., Time Charters 6 ed, Informa Business, Bodmin, United Kingdom, 2008, p 328
[140] Whistler International Ltd v Kawasaki Kisen Kaisha Ltd (The Hill Harmony) [2001] 1 A.C. 638, p. 654
[141] Time Charters 6 ed, p 328
[142] The Hill Harmony, p 658, emphasize added
[143] The Hill Harmony, p 653

the safety and a good seamanship. Employment would be the order to proceed to a port while navigation would be taking the advice of the pilot in the approach.[144]

3.8 Deviation

The issue of deviation is delicate. On the one hand there is the owner of the vessel for whom the primary interest is the vessel and crew (i.e. safe voyages and reaching the destination in avoiding hi-jacking *etcetera*). On the other hand the charterer's interest lies with swift voyages keeping up with the timetables. Regardless of the contractual status a deviation, e.g. sail around the Cape instead of travelling the Gulf of Aden and Suez, will incur loss of time and additional costs (especially if the vessel is still on-hire).

In the contract of affreightment deviation is an implied obligation. The obligation is to *not* deviate from the contracted route. The relevance of this obligation is more substantial in a voyage charter or bill of lading than in the time charter as the latter can be described more adequate as a contract of providing a service (vessel with crew). The presumption is that the direct geographical route between two ports is the proper one in respect of this obligation.[145] In regard of voyage charter it was held in ***Reardon Smith Line Ltd v Black Sea and Baltic General Insurance Co Ltd***[146] that "[i]t is the duty of a ship, at any rate when sailing upon an ocean voyage from one port to another, to take the usual route between those two ports." Exceptions can be made, it was held, for navigational reasons.

If the vessel has deviated by mistake or by bad weather there is no deviation at hand. The deviation has to be intentional by the master/owner to constitute a breach of the obligation.[147]

Three types of deviation have been pointed out as allowed deviation in common law.[148] These are 1) deviation for saving life or communicating with a vessel in distress, 2) deviation to avoid danger to the vessel and the cargo and 3) deviation caused by charterer. It is quite obvious that the first one is justified. However it does not include salving property and the salvage of vessels. For this thesis the second type, deviation to avoid danger to the vessel and its cargo, must be considered very pertinent. It is an implied obligation that the master shall exercise reasonable care and skill navigating the vessel.[149] Therefore deviation may be justified in the case of a threat to the safety of the vessel and its cargo. This too is, quite understandable, nothing that can be held against the owner/master since it is done in the interest of the charterer. Risks to deviate from may, *inter alia*, be storms or ice. Also "...political factors such as the outbreak of war or the

[144] The Hill Harmony, p. 657
[145] Wilson, p 16
[146] [1939] AC 562, as cited in The Hill Harmony, p 642
[147] Wilson, p 16
[148] Scrutton, p 60
[149] Wilson, p 18

fear of capture by hostile forces"[150] may be deviated from. The risk, however, must be of reasonable permanence in its nature.[151] Also the inconvenience of deviating must be compared with the faced danger.[152] It can be, and has been, as a corollary of good seamanship, argued that it is a *duty* to deviate in these circumstances. "[I]n the event of any disaster happening to the ship or cargo... …the master shall act as his agent, and use his best efforts for the protection and preservation of the cargo."[153]

[150] Wilson, p 18
[151] Wilson, p 18
[152] Wilson, p 19
[153] Notara v Henderson (1869-70) L.R. 5 Q.B. 346, p 353

4 Clauses

This chapter presents various clauses of the more common standard forms used in shipping today. First, a selection of off-hire clauses will be presented. Further on both war and piracy clauses are treated.

4.1 Off-hire clauses

The selection of standard forms presented here is made so as to cover different parts of shipping trade. Baltime 1939 (rev 2001) and NYPE 93 represents dry cargo, while Boxtime represent container and BPTIME 3 represent tanker trade.

As this thesis aims to look a little bit further into the relation off-hire/deviation the deviation parts of these off-hire clauses will be treated in short below.

4.1.1 Baltime 1939 (rev 2001)

Baltime 1939 (rev 2001) (below Baltime) is a standard form intended for dry cargo trade but has a rather general scope. Baltime is issued by the Baltic and International Maritime Council (below BIMCO). The form is divided into two parts. The first part, containing blank boxes, is to be filled out by the parties while the second part contains some twenty clauses. The off-hire clause reads as follows.

> "**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."[154]

The Baltime clause 11 is a period clause since requiring the vessel to be out of order "for more than twenty-four consecutive hours." In subsection (A)

[154] Clause 11 of the Baltime 1939 (rev 2001) form

causes for a vessel to go off-hire are listed. In regard of piracy the "deficiency of men" and "other accident" causes must be mentioned. If any of these causes comprehend piracy may be debatable. For instance, can an "accident" ever occur when one party (the pirates) intentionally strive for the "accident" to happen? If piracy is intended to be comprehended by any of the causes in the clause why did BIMCO issue a separate Piracy clause in 2009? Notable is that "any detention", in subsection (B) is for the charterers account.

4.1.2 NYPE 93

NYPE 93 is an abbreviation the New York Produce Exchange form. A standard form mainly for dry cargo, revised 1993. The form is a revision of the original NYPE 1946 standard form. It is recommended by BIMCO and The Federation of National Associations of Ship Brokers and Agents (FONASBA). The off-hire clause reads as follows.

> "**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."[155]

[155] Clause 17 of the NYPE 93 standard form issued by the Association of Ship Brokers and Agents (U.S.A.), Inc. Separation into sections by the author of this thesis. Lines 257 and 258, referred to in the quote, reads as follows. Under heading **22. Liberties** of the NYPE '93 standard form"The Vessel shall have the liberty to sail with or without pilots, to tow and to be towed, to assist vessels in distress, and to deviate for the purpose of saving life and property"

The NYPE 93 clause 17 is a "net loss of time" clause. In paragraph one hire shall cease "for the time thereby lost". The second paragraph puts the vessel off-hire "from the time of her deviating" until back in the same or equidistant position.

The clause contains, for this thesis relevant, three different events, or causes, for the vessel to go off-hire. Those are the deficiency/default of officers/crew, detention by average accidents and "any other similar cause". In ***Royal Greek Government v Minister of Transport*** the words "deficiency of men" was held to be interpreted as "numerical insufficiency."[156] Present in ***The Saldanha*** was also, in addition, the words "default of men". The "default of men" addition (compared to the ***Royal Greek Government v Minister of Transport)*** was interpreted as to cover also willful refusal to work.[157] An average accident means, it was concluded in ***The Mareva AS***, an accident which causes damage.[158] Regarding an "accident" it must again be questioned whether an "accident" ever can occur when one party (the pirates) intentionally strive for the "accident" to happen? Further on it might be noted that pirates of today rarely cause physical damage since their purpose is to ransom the vessel. That generates money only if the vessel is kept intact and damage is kept to a minimum. The third event "any other similar cause" was also discussed in ***The Saldanha*** (in fact the wording was "any other cause" in that case). In the absence of the word "whatsoever" the words "any other cause" is to be treated as an *ejusdem generis* rule.[159] The addition of "similar" is not likely to change its meaning in any sense. Hence, if the off-hire clause contains a "catch-all" sentence such as "any other similar cause" it is only likely to cover the physical condition of the vessel. In such a case it does also not cover third party interventions (in the operating of the vessel) – such as piracy.[160] Practice have shown that this clause often is amended so that the catch-all provision reads "or by any other cause *whatsoever*". The idea of this is obviously to widen the provision so that it is no longer *ejusdem generis.*[161] It will, however, never be wider than the "general context of the charter."[162] Not just anything will suffice.

These events mentioned above shall all prevent "the full working of the vessel". Hence, to trigger the NYPE 93 off-hire clause three requisites must be fulfilled. These are 1) loss of time which is 2) caused by named events (in the case an amended clause also other events possible) which 3) has the effect of preventing the full working of the vessel. In the case of an unamended first section[163] third party interventions are not likely to render the vessel off-hire.

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[156] Cosco Bulk Carrier Co Ltd v Team-Up Owning Co Ltd (The Saldanha) 2010 WL 2131662, p 5
[157] The Saldanha, p 5
[158] The Saldanha, p2
[159] The Laconian Confidence, p 314
[160] Piracy and the Charterer, Marsh's Global Marine Practice, www.marsh.com, p 4
[161] Weale, p 2
[162] Weale, p 5
[163] As divided in this thesis.

4.1.3 Boxtime

Boxtime is the short name for The Baltic and International Maritime Council Uniform Time Charter Party for Container Vessels – a standard form that also uses the box layout. It has an additional third part for specifics regarding the vessel. The off-hire clause reads as follows.

"**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"[164]

The build of the Boxtime off-hire clause is slightly different from the ones in the previous mentioned standard forms. Instead of positively state off-hire events the Boxtime clause determines off-hire with five excepting headings from the vessel being "on hire". Among the exceptions, pertinent for this thesis, deviation (b), blocking and trapping (c) and loss of time (e) must be mentioned.

The Boxtime off-hire clause, clause 8, is a "net loss of time" clause. The vessel will be off-hire if the full use of the vessel is hindered. It may also go off-hire if the mentioned incidents only "partially affect the use of the Vessel". Then only to the extent the use is set down.

4.1.4 BPTIME 3

This standard form is issued by BP Shipping Ltd, United Kingdom, in association with BIMCO. It is intended to be used in tanker trade. The off-hire clause reads as follows.

"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

[164] Clause 8 of the Uniform Time Charterparty for Container Vessels (Boxtime) issued by BIMCO. In this quote section (d) *Requisitions* is omitted deemed not to be pertinent to the subject of this thesis.

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."[165]

The off-hire clause of BPTIME 3 is a combined clause. Paragraph 19.1 is a "period clause" (requiring minimum three hours lost time) while paragraph 19.2 is a "net loss of time" clause describing the vessel as 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."

In paragraph 19.1 the vessel shall be considered off-hire if 1) there is a loss of time, 2) the vessel is unable to comply with the charterers instruction, 3) because of named damage and deficiencies along with a sweep-up sentence in 19.1.4 "any other cause preventing the full working of the Vessel". This sweep-up declaration is to be interpreted as an *ejusdem generis* rule (cf. **The Laconian Confidence**, above).

4.2 The off-hire clause and deviation

Deviation is an off-hire event according to most of the off-hire clauses treated above. Since the issue of deviation is set out as problem for this

[165] BPTIME 3, 1st edition, February 2001, issued by BP Shipping Limited in association with BIMCO

thesis to look into the provisions regarding deviation are here brought out of their usual environment to be highlighted.

Avoiding deviation, as seen above, is an implied obligation of the charterparty contract. However, most standard forms have their own definition of the term and how it should be interpreted between the parties.

In BPTIME 3 deviation is made an off-hire event. If, unless ordered by the charterers, the vessel deviates – it shall be off-hire.[166] Deviation is defined as "…stopping, reducing speed, putting back or putting into any port or place…" other than those instructed by the charterer for "any reason whatsoever". Deviations made for saving life or property will not turn the vessel off-hire, neither will deviation because of bad weather.

In the NYPE 93 the language is somewhat different. "Should the Vessel deviate or put back during a voyage, contrary to the orders or directions of the charterers..."[167] hire is suspended (off-hire) until the vessel has regained the same or equivalent position. Linked with the off-hire clause is a liberty clause.[168] The vessel is accorded the right "...to assist vessels in distress, and deviate for the purpose of saving life and property…"[169] without going off-hire. Also accident to cargo found right for the vessel to deviate without going off-hire.

Boxtime defines "deviating" as including "putting back, or putting into any port or place…"[170] other than those instructed by the charterer. Deviations made for saving life or property will not turn the vessel off-hire, neither will deviation because of bad weather. The Boxtime off-hire clause also includes the notion of "Blocking and Trapping"[171] where the vessel goes off-hire if the vessel is blocked or trapped due to circumstances described in clause 19(b). Such a circumstance is, *inter alia*, "warlike action or piracy". Also the owner must have consented to the vessel going to the place where it eventually got trapped or blocked. In subsection (e) the Boxtime off-hire clause concludes with the "Loss of Time"-rule where the vessel is deemed to go off-hire if time is lost due to terms of employment of crew.

4.3 Limit and employment clauses etc.

In this section the intention is to provide the reader with other relevant clauses in addition to those mentioned above. The different construction of the standard forms makes relevant provisions being situated in various different places in respective form. Again it can be good to point out that these standard forms are merely the base for most charterparties and very

[166] BPTIME 3 cl. 19.2
[167] NYPE 93 cl 17
[168] NYPE 93 cl 22 "Liberties"
[169] NYPE 93 cl 22
[170] Boxtime 8(b)
[171] Boxtime 8(c)

much susceptible for additions[172], reductions and changes. Liaised with deviation is the allowed employment of the vessel. This is usually set out in a limit and employment clause. Below is a brief summary of these clauses of the standard forms that are scrutinized in this thesis.

4.3.1 Baltime 1939 (rev 2001)

In the Baltime form trading limits are set so that "[t]he Vessel shall be employed in lawful trades... only between safe ports or places where the Vessel can safely lie always afloat..."[173] The limits are to be filled out by the parties in the first part of the form. The master is under the orders of the charterer and "...shall prosecute all voyages with the utmost despatch..."[174] The owner is responsible for any delays caused by lack of due diligence in making the vessel seaworthy but not for other delays.[175]

4.3.2 NYPE 93

Clause 5 of the NYPE 93 form sets the trading limits for the vessel to safe ports and safe places within, by the parties, specified area.[176] The master "...shall perform the voyages with due despatch..."[177] at the order of the charterer. The NYPE 93 form has a berth clause requiring the vessel to be loaded and discharged only in a "...safe dock or at any safe berth or safe place..."[178] where the vessel "can safely enter."[179] According to clause 22, "Liberties", the vessel has the liberty to deviate for saving life and property.

4.3.3 Boxtime

A vessel under the Boxtime standard form is to be employed in lawful trades to safe ports or places within Institute Warranty Limits[180] (below IWL) and any further, by the parties, appointed limits.[181]

4.3.4 BPTIME 3

In the BPTIME 3 form the parties set out limits for where the vessel can trade in section L. Further on clause 7, "Trading Limits", calls for

[172] Both within clauses and with so called "rider clauses" added after the standard form itself.
[173] BALTIME cl. 2
[174] BALTIME cl. 9
[175] BALTIME cl. 12
[176] NYPE 93 cl. 5
[177] NYPE 93 cl. 8
[178] NYPE 93 cl. 12
[179] NYPE 93 cl. 12
[180] Trading limits imposed by hull insurers on the ship e.g. restricted to areas free from ice hazards. Source: *www.m-i-link.com/dictionary/default.asp?s=s&q=institute+warranty*
[181] BOXTIME cl. 3

employment in lawful trade within IWL. The master shall in operating the vessel "...carry out his duties in a manner consistent with good seamanship.../... and shall prosecute all voyages with due despatch."[182] The master shall further on observe recommendations on routing issued by "responsible organisations or regulatory authorities."[183]

4.4 War clauses

This chapter deals with different war clauses. These clauses covers war risks and risks similar to war. The BALTIME form has incorporated the "Conwartime 1993"[184] war clause.[185] Since the Conwartime clause has been updated in 2004 the "Conwartime 1993" will not be treated here. Instead the "Conwartime 2004"[186] clause will be treated below.

4.4.1 NYPE 93 "War clauses"

The war clause of the NYPE 93 is situated in clause 31(e) under the header "Protective clauses" (which it shares with *inter alia* a drug clause and a paramount clause) where (e) is called "War clauses".

> "(e) WAR CLAUSES
>
> (i) No contraband of war shall be shipped. The Vessel shall not be required, without the consent of the Owners, which shall not be unreasonable withheld, to enter any port or zone which is involved in a state of war, warlike operations, or hostilities, civil strife, insurrection or piracy whether there be a declaration of war or not, where the Vessel, cargo or crew might reasonably be expected to be subject to capture, seizure or arrest, or to a hostile act by a belligerent power (the term 'power' meaning any de jure or de facto authority or any purported governmental organization maintaining naval, military or air forces).
>
> (ii) If such consent is given by the Owners, the Charterers will pay the provable additional cost of insuring the Vessel against hull war risks in an amount equal to the value under her ordinary hull policy but not exceeding a valuation of [blank space] In addition, the Owners may purchase and the Charterers will pay for war risk insurance on ancillary risks such as loss of hire, freight disbursements, total loss, blocking and trapping etc. If such insurance is not obtainable commercially or through a government program, the Vessel shall not be required to enter or remain at any such port or zone."[187]

[182] BPTIME 3 cl. 10.2
[183] BPTIME 3 cl. 10.3
[184] Issued by BIMCO
[185] BALTIME cl. 20
[186] BIMCO Special Circular, no 5, 2004, p.5
[187] NYPE 93 cl. 31(e), subparagraphs (iii) and (iv) are left out here.

4.4.2 BOXTIME "War"

The "War" clause of Boxtime, clause 19, is divided into several subsections where subsection (a) deals with the risks and subsection (b) covers risk management.

> "19. War
>
> (a) Unless the consent of the Owners be first obtained, the Vessel shall not be ordered to nor obliged to: -
>
> (i) remain in or pass through any area which is dangerous or is likely to become dangerous as a result of war, hostilities, warlike action or piracy, actual or threatened, nor
>
> (ii) call at any port where there is any revolution, civil war, civil commotion or any threat thereof, nor
>
> (iii) carry any goods that may in any way expose her to any risk of seizure, capture or detention.
>
> (b) However, should the Owners consent to allowing the Vessel to proceed, notwithstanding the existence or threat of the danger(s) outlined in Clause 19(a), the Owners agree that the Vessel proceeds at their own risk in consideration of the Charterers agreeing that the Owners may effect the following insurances for which the Charterers will reimburse the Owners the net cost of premium/calls therefore: (See Clause 6 (n))
>
> (i) Reinstatement of the War Risks cover on Hull and P & I for trading to the required area
>
> (ii) Any further additional premia necessary to maintain Hull cover whilst blocked or trapped pending release of the Vessel, acceptance of constructive total loss by insurers or trapped for 365 consecutive days, whichever shall first occur.
>
> (iii) Insurance of hire on the Vessel for not exceeding 365 days.
>
> (f) If in compliance with the provisions of this Clause anything is done or is not done, such shall not be deemed a deviation."[188]

4.4.3 BPTIME 3 "War risks"

"War risks", clause 30, of BPTIME 3 is a comprehensive clause with definitions as well as material provisions. "War risks" are defined in sub clause 30.1.2 as...

> "...any war (whether actual or threatened), act of war, civil war, hostilities, revolution, rebellion, civil commotion, warlike operations, the laying of mines (whether actual or reported), acts of piracy, acts of terrorists, acts of hostility or malicious damage, blockades (whether imposed against all vessels or imposed selectively against vessels of certain flags or ownership, or against certain cargoes or crews or otherwise howsoever), by any person, body, terrorist or political group, or the Government of any state whatsoever, which in the reasonable judgment of the Master and/or Owners, may be dangerous or are likely to be or to become dangerous to the Vessel, its cargo, crew or other persons on board the Vessel"

[188] BOXTIME cl. 19, subparagraphs (c), (d) and (e) are left out here.

The vessel then, unless consent from the owner, "...shall not be ordered to or required to continue or through any port, place, area or zone" where, subject to the reasonable judgment of the master, there is a risk of the vessel being exposed to war risks. If the vessel is at such position and it becomes dangerous the vessel has the liberty to leave it.[189]

If the vessel is to proceed the owners may insure the vessel for additional war risks. If this requires additional premiums the owner shall be reimbursed for these at the next payment of hire.[190]

4.4.4 Conwartime 2004

Conwartime 2004 is a clause issued by BIMCO that can be used as a rider clause or simply replace another clause in an existing standard form. It is, like the BPTIME 3 war risk clause, a very comprehensive clause. What is considered a war risk is almost *verbatim* to the definition in BPTIME 3. Both these documents are issued by BIMCO which explains that oddity. The differences between the two is likely not material but editorial.

Subsection (b) is a copy of BPTIME 3 prescribing that the vessel, unless consent from the owner, "...shall not be ordered to or required to continue to or through, any port, place, area or zone (whether of land or sea), or any waterway or canal, where it appears that the Vessel, her cargo, crew or other persons on board the Vessel, in the reasonable judgment of the Master and/or the Owners, may be, or are likely to be, exposed to War Risks."[191] The vessel also has the same liberty to leave a dangerous place as described above.

The issue of additional insurance is solved in the same manner as in BPTIME 3 (see above) save for some small editorial differences.

When the vessel is exposed to war risks the Conwartime clause (f) gives the vessel certain liberties, *inter alia* to comply with the orders of authorities, switch crew if risk of imprisonment and discharge cargo that can be considered as contraband goods. These liberties also exist in the BPTIME 3 form. However the Conwartime 2004 clause has one additional sub clause, (h).

> "If in compliance with any of the provisions of sub-clauses (b) to (g) of 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."

[189] BPTIME 3 cl 30.2
[190] BPTIME 3 cl 30.4
[191] Conwartime 2004, BIMCO Special Circular, no 5, December 2004, para (b)

4.5 Piracy clauses

The rise of piratical activity in the Gulf of Aden and off Somalia has created a need for piracy clauses. The following clauses are often added as rider clauses when the war risk clause is assessed not covering piratical activity.

4.5.1 BIMCO

The BIMCO piracy clause[192] was issued 2009. The comprehensive clause reads as follows:

(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

[192] BIMCO Piracy clause, BIMCO Special Circular, no 2, November 2009

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.

4.5.2 Intertanko

Intertanko is short for the Association of International Tanker Owners. In December 2008 Intertanko issued a piracy clause. It reads as follows:

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."[193]

[193] The Intertanko piracy clause, fetched at:
www.skuld.com/upload/News%20and%20Publications/Publications/Piracy/INTERTANKO%20Piracy%20Clause%20-%20Time%20Charterparties.pdf

5 Insurance

The operation of a vessel involves a considerable amount of risks. As a result the shipping insurance market is rather complex. This chapter has no intention to explain its working save for insurance regarding piracy-related risks.

5.1 War risk

War risk insurance is intended to cover war perils.[194]

Over the years it has been debated whether piracy should be considered a marine risk (covered by marine risk insurance e.g. hull insurance[195]) or a war risk (covered by war risk insurance). It has basically shifted with the level of piratical activity and the insurance provider. In times with less piratical activity it has been considered marine risk and with increased activity it has been considered a war risk.[196] Looking into the NMIP piracy is currently *included* in war risks as of April 2010.

> **"§ 2-9. Perils covered by an insurance against war perils**
> An insurance against war perils covers:
> (a) war or war-like conditions, including civil war or the use of arms or other implements of war in the course of military exercises in peacetime or in guarding against infringements of neutrality,
> (b) capture at sea, confiscation and other similar interventions by a foreign State power. Foreign State power is understood to mean any State power other than the State power in the ship's State of registration or in the State where the major ownership interests are located, as well as organisations and individuals who unlawfully purport to exercise public or supranational authority. Requisition for ownership or use by a State power shall not be regarded as an intervention,
> (c) riots, sabotage, acts of terrorism or other social, religious or politically motivated use of violence or threats of the use of violence, strikes or lockouts,
> (d) *piracy* and mutiny,
> (e) measures taken by a State power to avert or limit damage, provided that the risk of such damage is caused by a peril referred to in paragraphs (a)-(d)."[197]

The reader has also to be reminded that even though piracy is a risk covered not all losses are necessarily covered. However pertinent for this thesis total loss[198], loss of hire[199] and owners liability[200] are all covered by the war risk insurance.

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[194] NMIP §15-1
[195] Johansson, Svante O., Marine and Other Types of Transport Insurance, Jure Förlag, Stockholm, 2008, p 44
[196] Thomas 2009, p 156
[197] NMIP §2-9, emphazise added
[198] NMIP §15-2(a), §15-10 and § 11-1-9

Another feature of the war risk insurance is the trading limits[201] clause. According to this clause "[t]he insurer may at any time designate new or change existing trading areas..." in two ways. First, an area can be made conditional – allowed to sail in but an additional premium required. Second, an area can be excluded from the insurance – to sail there is not covered by the insurance.

The NMIP has stepped away from the UNCLOS definition of piracy. As of today piracy is defined as the illegal use of force against a ship en route between two ports. With this approach to the piracy notion vessels that are attacked on rivers or on inland lakes (but not in ports) fall within the definition.[202]

5.1.1 Total loss

A vessel that is lost or damaged beyond repair constitutes a total loss. War risk insurance covers total loss of the vessel "[i]f the ship has been captured by pirates or taken away from the assured by similar unlawful interventions..."[203] and the vessel has not been recovered within twelve months. The assured may then claim for a total loss.

If, for some reason, the vessel has been captured by criminals other than pirates the assured can claim for total loss if there is no prospect of recovery of the vessel.[204] The frame for this is much smaller than the case when the criminals are considered pirates. The definition of piracy in the specific insurance policy can also force the assured to this paragraph. However, the NMIP does not coerce the insured this way.

5.1.2 Loss of hire

If the vessel is damaged, by pirates or other criminals, the possible loss of hire will be covered. "The insurance covers loss due to the ship being wholly or partially deprived of income as a consequence of damage to the ship."[205] The damage has to be recoverable according to the hull insurance.[206]

Loss of hire as a result of capture by pirates has an odd solution in the NMIP. In the case of the vessel brought to port for the purpose of capture or detention[207] cover for loss of hire is provided unless the vessel is also covered by NMIP §15-12 (total loss) which refers to the actions of "State

[199] NMIP §15-2(e), §15-16 and chapter 16 (of the NMIP)
[200] NMIP §15-2(f) and §15-20. This is P&I insurance for liability caused by war risks.
[201] NMIP §15-9
[202] NMIP Commentary, p 45
[203] NMIP §15-11
[204] NMIP §11-1
[205] NMIP §16-1
[206] Thomas 2009, p 198 and NMIP §16-1
[207] NMIP §15-17(b)

power" and piracy. However NMIP §15-17 does not refer to pirates at all. The result would be that cover is provided when pirates detain a vessel but not when it is captured.[208]

In the case of a total loss it is the hull insurance that covers the loss of income.[209]

5.1.3 Owners liability

War risk insurance includes so called protection and indemnity (below P&I) cover. However there are two requirements. First, the liability must be caused by a war risk. Second, such liabilities need also to be covered by the vessels P&I insurance if it was not caused by a war risk. The observant reader notes that this may result in double coverage. Piracy is covered by P&I insurance *and* war risk insurance. In practice the war risk insurer takes this risk. However if for some reason the vessel got no war risk insurance the P&I insurance take on the risk.[210]

5.2 Hull

The first insurance to be bought by a ship-owner might be the hull insurance. The main feature of this kind of insurance is that it covers property damage. In some extent also collision liability is covered.[211] This kind of insurance is with a few exceptions of interest for the issues discussed in this thesis.

Here it shall only be mentioned that hull insurance is commonly offered on different levels. The General Swedish Hull Insurance Conditions[212] (below GSHIC) offers a good example. The levels in GSHIC clause 5 is the following.

a) actual or constructive total loss of the vessel (below ATL and CTL respectively)
b) contribution to general average
c) assumed general average
d) third party liability
e) all other perils
f) sue and labour costs[213]

In regard of this essay level a) is of most importance. It is practically always included in the cover.[214] This is important since the capturing, by pirates, of

[208] Thomas 2009, p. 198
[209] Thomas 2009, p. 198
[210] Thomas 2009, p. 201
[211] Johansson, p. 44
[212] Fetched at *http://www.sjoass.se/orgvillpdf/kaskovil/av200eng/aveng.pdf*
[213] GSHIC cl 5
[214] Johansson, p 44

the vessel has been considered as an ATL even though the vessel later have been recovered.[215]

In the very recent case of ***Masefield v Amlin,***[216] a cargo insurance case, the *Bunga Meluti Dua*, en route to Rotterdam, was seized by pirates in the Gulf of Aden. A month after the seizure the cargo owner tendered a notice of abandonment intending to treat it as an ATL. Some days later ransom was paid and the vessel with crew and intact cargo load was released.

The primary issue was if, when notice of abandonment was served, the cargo owner had been irretrievably deprived of the cargo (and the ship owner of the vessel).

The cargo owner relied on the old case of ***Dean v Hornby***[217] where it was held that capture by pirates would render the vessel a total loss immediately despite later recovery of the vessel. The court held that ATL was only at hand where the pirates had the intention to actually keep the vessel. In this case it was quite obvious from the very beginning that the vessel would eventually be released pending the payment of ransom. In such a case the vessel cannot be considered an ATL. Nor could the events amount to the vessel being considered as a CTL since an ATL never appeared to be unavoidable.[218]

5.3 P&I

P&I insurance is a cover that indemnifies the holder for liabilities occurring in the operation of a vessel. It is usually addressed the owner of the vessel but also the charterer of a vessel can obtain a P&I cover as an additional insurance.

5.3.1 Owners P&I

The owner of a vessel is by a P&I insurance covered for most legal liabilities and costs that arises out of the operation of the vessel.[219] It is worth noting that the cover only encompasses liabilities occurred as direct consequence to the operation of the vessel. P&I insurance policies often have a catalogue of rules defining the indemnified liabilities.[220]

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[215] Shipping Insurance update – Piracy, March 2010
[216] Masefield AG v Amlin Corporate Member Ltd 2010 WL 517040
[217] Dean v Hornby 118 E.R. 1108
[218] Shipping Insurance update – Piracy, March 2010, Newsletter issued by Clyde & Co, *www.clydeco.com*
[219] Thomas 2009, p. 190
[220] See Gard Rules, fetched at *www.gard.no/ikbViewer/Content/77368/Gard%20Forsikringsvilkaar%20april%202010.pdf* , rule 27-63

War risks are excluded from P&I insurance.[221] As is acts of terrorism save for piracy.[222] So P&I insurance cover liability inflicted by acts of piracy but not terrorism. Again the definition of piracy is central. In P&I insurance piracy has been defined as robbery committed with violence or threat thereof for personal gain. It can be committed anywhere (e.g. in port, territorial waters and high seas).[223]

Deviation[224] clauses fall under the cargo liability section.[225] "[D]eviation or departure from the contractually agreed voyage or adventure which deprives the member of the right to rely on defenses or rights of limitation"[226] However, it has to be remembered, this is an exception to the standard rule of cover for liability in case of "cargo loss, shortage, damage, delay or other responsibility occurring in relation to the carriage of cargo on the entered vessel."[227] The deviation cover excluded in these insurances can be added as buy-backs.[228]

5.3.2 Charterers P&I

The charterer of a vessel is by a P&I insurance covered for most legal liabilities and costs that arises out of the operation of the charter. The insurance cover only liabilities arising for the charterer in the capacity of being charterer of a specified vessel.[229] One main feature of this insurance is that it covers liability arising out of breach of obligation to nominate safe port.[230]

P&I policies for charterers are usually tied in to the underlying charterparty contract. Hence liabilities that cannot occur out of the charterparty will not be covered by the insurance.[231]

5.4 Loss of hire

If a vessel is damaged the possible loss of income (hire) will be covered by loss of hire insurance. Since hire is specific for charterparties, loss of hire

[221] Gard Rules, rule 58(1a),
[222] Gard Rules r. 58(1b)
[223] Thomas 2009, p. 190
[224] Reader is reminded of that there is two kinds of deviation. Geographical and contractual.
[225] See e.g. Gard Rules r. 34(1b)(xi) or Skuld Statutes 2010, fetched at *http://www.skuld.com/templates/Page.aspx?id=2315*, r. 5.2.11
[226] Skuld Statutes 2010 r. 5.2.11
[227] Skuld Statutes 2010 r. 5.2
[228] Skuld Statutes 2010 r. 5.4.5, Gard Rules Tillegg I(4)
[229] Lemon, Robert T. II, Allocation of Marine Risks: An Overview of the Marine Insurance Package, 81 Tul. L. Rev. 1467, p 1488
[230] See Charterer's Legal Liability Rider (Single Voyage), SP-42A issued by American Institute of Marine Underwriters (AIMU), cl. 1(a)
[231] Lemon, p 1488

insurance requires an underlying charterparty contract.[232] This type of insurance applies to both war perils and marine perils.[233] However the damage must be covered by the hull insurance. The result of this operation is that damage (causing loss of hire) caused by the perils stated in NMIP §§2-8 (pirates and terrorists) and 2-9 (other criminals) will be covered by the loss of hire insurance. Loss of hire that is a result of a total loss is not covered by the loss of hire insurance.[234]

Loss of time is calculated as net loss of time from the point of damage as long as the vessel is deprived of income. In a charterparty with a net loss of time clause this would be from damage event until voyage is resumed. For a period clause it would extend to the period calculated from that clause. The NMIP also takes into account partial damage. Such damage shall be converted into "corresponding period of total loss of income"[235]

5.5 Loss of use

Loss of use insurance is a rather new insurance product. The idea is to insure the charterer from the loss of use of the vessel and the economic implications such a loss brings. The basic feature is that the insurance covers the hire cost for the time the vessel is not disposable due to detention by pirates.[236]

This insurance is available as an additional insurance to be bought when transiting high risk areas.

5.6 Minimise loss[237]

Regardless of what type of insurance cover the vessel got, costs taken to minimize loss is likely to be there. In the NMIP §4-7 states that "[i]f a casualty threatens to occur or has occurred, the insurer is liable.../... for the costs of measures taken on account of a peril insured against, provided that the measures were of an extraordinary nature and must be regarded as reasonable." The rule is specified by subsequent paragraphs and can be divided in cover for general average contribution and particular average. The important feature of these paragraphs is that they cover costs as ransom payments and expenses needed for avoiding being attacked by pirates.[238]

[232] Lemon, p 1477
[233] NMIP §16-1(1)
[234] NMIP §16-2
[235] NMIP §16-4(1)
[236] Piracy and the Charterer, Marsh's Global Marine Practice, p 5
[237] This is not a type of insurance
[238] Thomas 2009, p 203

5.6.1 General average

If a general average action is taken to minimize loss it is covered by NMIP §4-7. ”If a casualty threatens to occur or has occurred, the insurer is liable in accordance with the [general average rules] for the costs of measures taken on account of a peril insured against, provided that the measures were of an extraordinary nature and must be regarded as reasonable.”[239] A general average action, the reader is reminded, is, according to York/Antwerp rules, at hand when ”any expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from a peril...”[240] to the cargo that threats the common maritime adventure.

An occurred casualty might not cause interpretative problems but what constitutes a threat? In the words ‘preserve from a peril’ lies that the peril might not yet have materialized. How far off the peril can be is not really disclosed in the wording. However it has been stated that such a peril shall not be restricted to imminent or immediate perils.[241] A general increase of maritime risks would still not be covered. Hence a deviation because of a recommendation to keep out of certain waters due to risk of piracy attack would not qualify as general average.[242] Such a deviation would maybe qualify if the deviation was made when the attack is imminent.

Further on the expense has to be extraordinary. An increase in fuel usage might not be enough to qualify while the paying of ransom very well might qualify.[243]

Finally the expenditure must be reasonable. Ransom may not be considered reasonable since it may be illegal to pay ransom in some jurisdictions. In Swedish law it is illegal to supply money with the knowledge that it will be used in particularly severe crimes.[244] Whether this comprises piracy or not is outside the scope of this thesis to find out.

5.6.2 Particular average

Particular average covers costs for rescue actions which are not covered by general average (e.g. pertaining to crew). This can be compared with sue and labour rules of P&I insurances.[245] In the NMIP it is treated in §4-12. ”If measures to avert or minimize loss...” have been taken and it is not a general average action ”...the insurer is liable for loss of or damage to the property

[239] NMIP §4-7
[240] York/Antwerp Rules 04, fetched at *http://www.usaverageadjusters.org/YAR04.pdf*, rule A
[241] Thomas 2009, p 205
[242] Thomas 2009, p 205
[243] Thomas 2009, p 206
[244] Swedish legislation: Lag (2002:444) om straff för finansiering av särskilt allvarlig brottslighet i vissa fall, section 3
[245] See e.g. Skuld Rules 2010, r 24

of the assured, and for liability and costs incurred by the assured." This also has to be read in conjunction with NMIP §4-7 above.

Here, obviously, it is important to look into what the insurance cover, since only costs taken on account of an insured peril will be covered. So, the definition of pirates is again needed, since pirates but not terrorist might be brought to the P&I insurer.[246] Further on, in regard of insurance cover, the insured interest is central. War risk insurance covers (a) total loss, (b) damage, (c) collision liability, (d) hull interest/freight interest, (e) loss of hire, (f) owner's liability (P&I), (g) occupational injuries.[247]

If it is neither terrorist nor pirates (by definition[248]) that is the threat then the hull insurance steps in. Measures taken to avoid loss of hire will be covered by the loss of hire insurer and measures to avoid liability is covered by the P&I insurer.

[246] Thomas 2009, p 209
[247] NMIP §15-2
[248] NMIP §2-9

6 Analysis

The thesis set forth to investigate a three-piece problem.

- Piracy as an off-hire event.
- Deviation to avoid pirates as an off-hire event.
- How insurances can affect these two issues.

Therefore this chapter starts with a section on piracy followed by a section on deviation because of piracy. Insurance aspects are integrated in both sections but also commands an own section.

6.1 Piracy – an off-hire event?

This chapter affords a quick conclusive part on the definition of piracy. Then the query set out in chapter one, can piracy lead to a vessel going off-hire?, will be answered.

6.1.1 Defining piracy

First it has to be settled what piracy is. The definition in UNCLOS can serve as a starting point. There has to be violence, detention or depredation for private ends. It must be directed against another ship (probably intended to cover all kinds of vessels) on the high seas. This is a widely accepted definition – however not uncontested.

It is outside the scope of this thesis to analyze the notion of piracy in a larger extent but two points must be made. First, regarding the requisite of private ends, that may raise some concerns. However the importance of that, in regard of insurance, is not as big. Since, if it is not for private ends, it is likely to fall under the category of terrorism (political/religious ends). Acts of terrorism is covered by the war risks insurance.

Second, the ”on the high seas” requisite. In the insurance case of ***The Andreas Lemos*** this criteria was declared void (in regard of insurance matters). This should also be the case for matters relating the contractual relation between the owner and the charterer.

The UNCLOS leaves the 12 nm of territorial sea to national jurisdiction which, in today’s situation, makes no substantial difference since piratical acts mainly is committed either in the high seas or in waters where the national government is weak or even non-existent. Further on, from the pirate’s point of view it does not matter. The pirates in the HoA-region are today capable to capture vessels several hundred nm from the coast. Their objectives are always the same, capture and then ransom the vessel. This strategy will be the same regardless which rules applies. Therefore, in the

relation between the owner and the charterer, the ”on the high seas” requisite must be considered void. Note that this conclusion does not comprehend the definition in the sense of criminal jurisdiction.

6.1.2 The charterparty

When pirates strike, the charterers find themselves in a situation where the use of the vessel is reduced to none – but hire is still expected to be paid. It does not require a legal degree to understand that this is a situation that the charterer is keen to avoid.

Traditionally the owner has borne risks of internal character (e.g. machinery breakdown) and the charterer external risks (e.g. the boom in ***Court Line v Dant***). However there can be no general answer to whether piracy is an off-hire event or not (in ***The Roachbank*** and ***The Laconian Confidence*** the traditional allocation was, rightly, questioned). That can only be decided out of looking into the individual contract clauses. What is clear, though, is that the charterer ”...must bring himself clearly...” within the off-hire clause as seen in ***Royal Greek Government v. Minister of Transport.***

Question is – is a pirate attack such an event triggering the off-hire clause in favour of the charterer? Can pirate attacks be clearly brought within the off-hire clauses of today? Most off-hire clauses have, at least, a double requirement. The event itself and the result of the event.

The first requirement is basically that there has to be an off-hire event and it has to affect the vessel in such manner that the charterer is deprived of the use of the vessel. Previously has been mentioned several events that may trigger the off-hire clause. To that must be added the fact that sometimes these events can be accompanied with a catch-all phrase such as ”any other similar cause”[249] or “whatsoever”[250].

Turning to the off-hire events in the Baltime, the suspension of hire clause lists the events causing the vessel to go off-hire. Relevant for this thesis is the “deficiency of men” and “other accident” events. The everyday interpretation of the word “accident” basically excludes “other accident” as covering piracy. Pirates intend to board the vessel – that is not an accident. The master would not report to the owners as ‘there has been an accident’. As Baltime is issued by BIMCO it is fair to assume that this clause must be read in conjunction with other documents and rider clauses issued by BIMCO. One such is the Piracy clause of 2009 which is supposed to be added to charterparty contracts as a rider clause. That means it is supposed to co-exist (or at least can co-exist) with the regular off-hire clause of Baltime. Why would BIMCO issue a piracy rider clause if piracy was supposed to be included in the off-hire clause that already exists? Conclusion must be that “other accident” not comprehend piracy either. It

[249] NYPE 93 cl. 17
[250] The Saldanha, p 6

must be fairly safe to conclude that Baltime clause 11 (paragraph A) is restricted to internal causes. Hence without any amendments this clause will not include piracy.

The NYPE 93 off-hire clause has a slightly wider approach. Naming events such as “detention by average accidents” or “default/deficiency of men” and concluding with ”any other similar cause”. In ***The Saldanha*** a NYPE 93-contract was at dispute. It was investigated whether piracy was to be comprehended in the above mentioned wordings except for “any other similar cause” which in this case was “any other cause”. As seen above “detention by average accident” means detention by accident that causes damage. Today, the vessels captured by pirates are not detained because of the damage that the pirates cause the vessel. Further, as stated above, an accident does not occur if one of the parties intentionally strives for it to occur. The event of “default/deficiency of men” (which in the NYPE 93 is put “deficiency and/or default and/or strike of officers or crew”) obviously purport two different things depending of the string of words used. “Deficiency of men” was already in ***Royal Greek Government v Minister of Transport*** considered to only cover numerical insufficiency of crew. Hence, it did not cover willful refusal to work. The “default of men” is intended to cover this as stated in ***The Saldanha.*** So, when the crew follows the orders of the pirates that have captured the vessel instead of the orders of the charterer, is that willful refusal to work? The answer must surely be no. These words do not point towards the acts of the crew when under duress from pirates but rather to refusal to work under normal circumstances. The last event, “any other (similar) cause” is the one most likely to comprehend piracy. First it can be concluded that if the string of words are “any other cause” ***The Laconian Confidence*** case established that those words are to be interpreted as an *ejusdem generis* rule. Meaning that only events like those mentioned in the clause (i.e. the physical condition of the vessel, internal causes) can be off-hire events. The NYPE 93-form uses a string of words with the word similar added, “any other similar cause”. Can this addition bring extraneous events within the off-hire clause? With the addition of “whatsoever” (“any other cause whatsoever”) extraneous events would probably be brought within the clause. That must be the conclusion of ***The Laconian Confidence*** and ***The Saldanha*** cases. Left is to determine if the addition of “similar” can purport the same meaning as the addition of “whatsoever”. Both words are intended to sweep up and catch relevant events that are not explicitly mentioned. None of the clauses can be considered exhaustive. However none of the events mentioned can linguistically, or with respect to the crew suffering a pirate attack, come close to be considered as “similar” piracy. Piracy just isn’t similar to machinery breakdown or grounding. Detention by arrest would be the closest to piracy. That is if piracy is regarded, which it very well can be, as a detention waiting the paying of a fee (ransom) of some kind. That is a very farfetched argument. Because of the reasons stated above not even detention by the arrest of the vessel can be considered similar to piracy.

In Boxtime there is a separate loss of time exception (e) to when the vessel shall be considered as on hire. One must not be fooled by the fact that the "loss of time" requirement relates only to heading (e). The whole clause is still a net loss of time clause, which can be exemplified by heading (a) where the vessel "…shall be off hire to the extent [the events mentioned in a-i to a-iv] affect the Charterer's use of the Vessel."

Most provisions in the Boxtime clause have a corresponding provision in, for instance, the NYPE 93, where similar wording is used. However there is not a sweep-up sentence in the Boxtime clause (if not amended). In return the clause offers a wider range of examples of off-hire events. Notable is the deviation heading (b) and the blocking and trapping heading (c). These two are liaised and will be treated further below. The blocking and trapping heading commands some further treatment here though. It basically says that, read together with clause 19 (Boxtime war clause), if the owners agree (and gets reimbursed for insurance costs *etcetera*) to let the charterer order the vessel into a piracy prone area (such as the HoA-region) and the vessel gets blocked or trapped – the vessel goes off-hire. An interpretation of the words "trapped" and "blocked" generally does not include "seizure" (by pirates). The words "trapped" and "blocked" rather points towards the vessel being upheld in port (due to hostilities in the waters outside the port) or having to "wait" for appropriate escort through piracy prone waters such as the Gulf of Aden.

Paragraph 19.1 in the BPTIME 3 shows many similarities with the NYPE 93 off-hire clause. The difference lies mainly with the sweep-up provision in 19.1.4 (BPTIME 3) where "any other cause" is used instead of the NYPE 93 "any other similar cause". As seen above authority, **The Laconian Confidence**, shows that this provision is to be interpreted as an *ejusdem generis* rule and therefore cannot comprehend piracy.

The secondary requirement (the result of the event) is put slightly different in the different standard forms. The NYPE 93 and the Baltime requires that the off-hire event prevents the (full) working of the vessel (hinged to this is at some places the loss of time). Out of Boxtime the same conclusions can be drawn as out of NYPE 93 in regard of the off-hire event. One peculiarity is though that the requirement "to perform service immediately required" only is applicable in section (a)(ii) while "Vessel is unable to comply with the instructions of the Charterers" is used as requirement for the whole clause. In BPTIME, except from the off-hire event, there are two requirements. The "unable to comply" and the prevented full working. This seems to be tautology. The effect would have been the same without either of them but the "preventing the full working of the Vessel" is used as a catch-all phrase which can justify its existence.

Does capturing by pirates fall within these secondary requirements? Yes it does. It prevents the (full) working of the vessel and it definitely makes it unable to comply with the orders of the charterer.

To conclude, where piracy is not explicitly mentioned as an off-hire event (which it isn't in any of the clauses brought up here), piracy generally is not an off-hire event. By amendments such as the word "whatsoever" to the sweep-up sentence of "any other cause" piracy may be comprehended by the clause. Practice shows, however, that piracy is an event *sui generis* that requires special treatment (in the shape of a rider clause for instance).

6.2 Deviation dilemma

The many different features of deviation make it a delicate issue to sort out. It must be pointed out that this thesis primarily covers geographical deviation. Chapter 1.1 was querying if deviation to avoid a possible pirate attack lead to the vessel going off-hire.

First it is of interest to remind the reader of the conditions making deviation a dilemma. The setup of the time charterparty is that the owner lets a vessel with master and crew to the charterer. Generally the deal affords the charterer the right to instruct the master while the master (employed by the owner) has the command of the vessel. The master is required to conduct good navigation and seamanship. The master is also responsible for the safety of the crew, cargo and vessel. Here lies the discrepancy in interests. While the charterer wishes to employ the vessel on a certain route the master (owner) may be reluctant to travel that certain route for, let's say, safety reasons. The master deviates, maybe to avoid pirates, since that must be considered good navigation and seamanship (obviously that would be in the interest of the crew in regard of safety). Hence, the master does not follow the given instructions. During the deviation the charterer cannot use the vessel as intended in the first place. This may constitute a breach of the contract by the owner vis-à-vis the charterer. However if the owner demand of the master to follow, at all times, the instructions by the charterer, then the owner may be in breach of contract vis-à-vis the crew. If the master does not exercise reasonable care and skill in the navigation of the vessel that may constitute a breach of implied obligations too, i.e. by the owner vis-à-vis the charterer. As can be understood from this, deviation can be very costly for the owner. For the owner the cost of deviating must be compared to the profit of satisfying the charterer. Hopefully the crew has good terms of employment since they may, in these situations, be reduced to bricks in a financial game.[251]

The emergence of this situation is dependent upon several provisions in the charterparty contract. Quite naturally these provisions are the parts of the charterparty that regulates deviation. Also other core provisions such as those regarding nomination of safe port, limits of employment and due

[251] Boxtime actually makes conflicts between the owner and its crew regarding the terms of employment an off-hire event – if time is lost due to the conflict (see Boxtime cl 8(e). This provision is likely to prevent the crew from ending up caught between the financial interests of the owner and the charterer.

despatch are essential for this consideration. Since these issues are closely intertwined it is a logical corollary to talk about deviation as a wide notion containing all these factors rather than to employ a restrictive interpretation of the notion. This said, it must be pointed out that an explicit provision in a contract obviously prevails over the general inclination of the provisions, even those closely related to the first provision. The related issues must though be considered as contributing to an interpretation of the explicit provision, in this case, the deviation provisions, or they should at least be considered as context.

The dilemma described above is in many cases resolved by rider clauses such as a piracy clause. More on this below.

6.2.1 Deviation

Avoiding deviation is an implied obligation of the charterparty contract. However, due to its importance to the contract most standard forms contains its own definition and provisions of deviation. Here it is not necessary to find a general definition of deviation good for all standard forms. The object is rather to see if deviation to avoid pirates can be comprised in any of the definitions of the standard forms.

To begin with the implied obligations of the charterparty regarding deviation allows for the vessel to deviate to save life and/or help vessels in distress. This justification aims for vessels other than the deviating vessel itself. It is also impliedly justified to deviate to avoid danger to the ship or cargo. This is likely to include the danger of a pirate attack. However, it is still unclear whether it covers deviation made preventively or only deviation as an act to avoid an immediate danger.

Since most standard forms explicitly exhumes the issue of deviation the nuances in the implied obligations fade somewhat. An explicitly agreed provision prevails implied terms in most contractual situations. Actions such as reducing/increasing speed, waiting for escort, changing direction or even put into port are all actions that in some way can be useful in avoiding pirates. These are all made off-hire events by BPTIME 3, NYPE 93 and Boxtime. Regarding BPTIME 3, in fact, any reason whatsoever for the deviation is enough to put the vessel off-hire. In the NYPE 93 all the above mentioned actions are deemed deviation. However, they can be justified for the purpose of saving life and property or by accidents to cargo. Whether “property”, in the clause, includes the vessel itself or only refers to extraneous or carried property is not clear by the clause. Accident to cargo literarily refers to an accident that has occurred and not accidents that threatens to occur. Further on, pirates may not even touch the cargo laden onboard the vessel since it is not of their interest. In such a case it will be hard to argue for an accident to the cargo – as it is still intact. The Boxtime form uses the same reasoning but have an interesting “Blocking and Trapping”-subclause. A vessel that is blocked or trapped due to warlike action or piracy goes off-hire. This is the only off-hire clause that explicitly

refers to piracy (even if this is made by cross-reference in this case). Blocked or trapped is not likely to comprise rerouting or seizure respectively. That is simply not the meaning of those words. If such situations were intended to be covered by the clause the wording should have been different. To wrap up this subsection it can be concluded that deviation is an off-hire event even if it is done to avoid an attack by pirates. Rerouting instructed by the charterer to avoid piracy does not render the vessel to go off-hire – which is quite natural by the wording of the off-hire clauses. It can hardly be considered a deviation from the instructions of the charterer if the charterer self has instructed to deviate from the original instruction! However this makes the charterparty contract a bit lopsided. Consider a vessel that is bound to traverse the HoA-region on its way from Southeast Asia to Europe. The owner would be better off, financially, if the charterer decides to reroute than if that decision had to be taken by the master.[252] In this case the decision made by the charterer, whose interest lies mainly with the cargo reaching its destination, can be unilaterally favorable for the owner. As this may be an insurable interest – insurance turns interesting. It adds an angle of incidence since deviation also can be considered a kind of mitigation in regard of insurances.

6.2.2 Adjacent clauses

The off-hire issue cannot be resolved only looking into the off-hire clause. Depending on the standard form at hand various other places in the contract must affect the resolving of the off-hire issue.

Within the trading limits set forth in the contract the charterer has the right to name the ports where the vessel shall call. The named port must be safe, which means that the vessel shall be able to reach (meaning the whole approach) and depart from it without being exposed to dangers that cannot be avoided by the reasonable master's good navigation and seamanship. Piracy is such a danger.

The port is to be safe when the vessel arrives until it departs. The conditions at the time of nomination are irrelevant. Must the charterer foresee danger? Yes, in some extent. The characteristics of the port must be estimated. The case of ***The Saga Cob*** is illustrative of this. Question is then how the fact

[252] Here deserves again to be mentioned subsection (e) of the Boxtime off-hire clause (cl. 8). The subsection is not exhaustive and can probably be understood as an intention to keep the charterer free of harm when a conflict arises between the owner and the employees. This is very interesting since the terms of employment must cohere with the service the owner provides for the charterer. Basically: if the owner says to its employees "You don't have to go there" the deal with the charterer has to cohere: "You can't go there". Otherwise the owner faces the vessel going off-hire. The owner gets to gamble with the income that comes from striking a deal with the charterer in the first place and finding replacements at a cheap cost to perform the manning of the vessel where the original crew may leave the vessel and cause the vessel to go off-hire. The result of this subsection seems to be that the charterer is kept free of harm and the employees (the crew) of the owner get a relative safeness at work.

that less than 1% of the vessels transiting the Gulf of Aden are being subject for piracy attacks shall be understood in regard of characteristic events? If the port turns out to be unsafe then the charterer is obliged to order the vessel to another – safe – port. After all the conclusion must be that the threat of piracy can render a port unsafe. The question now is if that port is still within the limits? If the charterer orders the vessel to a port that turns out to be unsafe (e.g. due to piracy) and the master deviates (as per the definition in the off-hire clause) it would be unreasonable if the charterer in such a case could enjoy the benefit of the vessel going off-hire.

Another important feature of the duty to nominate safe ports is that financial interests in the vessel may not have the upper hand on the safety to the vessel and its crew. If the master considers the port unsafe upon approaching it the nomination of that port may be rejected. That rejection, though, has to be because of the prospective unsafety of the port.

As the master remains responsible for the navigational matters of the vessel at all times, the safety of the vessel and the crew is the first priority for the master. The master may even be obliged to, under circumstances threatening the safety of the vessel and crew, to not obey the orders of the charterer.

The orders of the charterer shall be expedited promptly. It falls quite natural for it to be that way. The presumption is that the direct geographical route between two ports is the proper one in respect of this obligation. Bad weather may change this. Re-routing is allowed, in some extent, because of bad weather. The status of the vessel (construction, durability etc.), the route (is there any alternative routes?) and the severity of the bad weather conditions all affects if re-routing shall be allowed.

6.2.3 Piracy and War clauses

Most of the standard forms allow a certain kind of deviation. Saving life is the most obvious one. Between the contractual parties this is not deviation. As it is not deviation the vessel does not go off-hire because of it. The liberties afforded the vessel are often explicitly described and is by nature to be interpreted narrowly. However, isolating these provisions may not be wise. Since the master remains responsible for the navigational matters of the vessel at all times, glimpses of other occasions where some kind of rerouting can be allowed on hire can be perceived.

A charterparty contract of today contains most likely war and piracy clauses (either as a regular clause or as a rider clause). For instance, the Baltime off-hire clause does not mention deviation explicitly. Deviation is instead referred to in the war clause (Conwartime 1993). The BPTIME 3 “war risks” subsection has a wide definition of war risks, where even the threat of piracy is comprehended. The subsequent subparagraphs afford the vessel liberties. These may be contrary to the deviation clause, i.e. allows the

vessel to deviate under explicitly mentioned circumstances.[253] The word "deviation" is not mentioned in the "war risk" section. According to the NYPE 93 "war clauses" section, (e), the vessel shall not be ordered into an area in state of war unless the owner consents to this and the charterer pays the additional insurance costs.[254] The threat of a piracy attack is comprehended by the clause. Deviation to avoid entering into such an area is not mentioned in the clause. This means that the vessel may go off-hire if deviating to avoid the risk of a piracy attack.

The war risks in the Conwartime 2004 are very close, in their wording, to those in the BPTIME 3. It is in general very similar to the BPTIME 3, of reasons explained above. Conwartime 2004 has, though, one additional sub clause – that it shares with Boxtime. Namely, if the vessel acts in compliance with the clause (e.g. fulfilling the requirements of the clause and still having to reroute) any rerouting is not considered deviation. Hence the vessel would not go off-hire.

Piracy clauses touches the subject of piracy directly where other clauses needs interpretation. Their mere presence indicates them to prevail (when contradicting) over regular clauses in regard of piracy issues. This thesis has presented the reader with two rider piracy clauses, the BIMCO and the Intertanko piracy clauses.

The master is, in the words of the Intertanko piracy clause, not "…required to follow Charterers' orders…" if they, in the opinion of the master or the owner, expose the vessel to the risk of piracy attacks. The owner shall further be entitled to take preventive measures such as proceeding in convoy or adjust speed *etcetera* – on hire and at the expense of the charterer. If the vessel is captured by pirates it remains on hire. According to this clause the vessel does not go off-hire due to piracy or because of deviation due to the risk of piracy.

According to the BIMCO piracy clause the vessel remain on hire if the vessel is captured by pirates (see sections (e) and (f)). However the vessel shall not be obliged to proceed to piracy prone areas (in the "reasonable judgement" of the master). If the vessel has entered into such an area it has the liberty to leave it. This shall not constitute an off-hire event even though it is contrary the original orders of the charterer. The charterer shall be informed of the master's decision and given the opportunity to issue new directions. Any time lost in this procedure shall not be considered off-hire. At the owner's consent the vessel may be directed into a piracy prone area. In such a case the master has the right reroute, proceed in convoy *etcetera* to protect the vessel, its cargo and the crew. Also costs incurred to mitigate risks of piracy attack shall be for the charterers account. The conclusion of

[253] e.g. to "comply will all orders [and] directions… …given by the Government of the Nation under whose flag the Vessel sails" (30.6.1), to "divert and discharge at any other port any cargo…" that "…may render the Vessel liable to confiscation as a contraband carrier" (30.6.4) or to "divert and call at any other port to change the crew" (30.6.5).
[254] This opportunity is also included in the BPTIME 3 "war risks" clause.

this is that the vessel does not go off-hire due to neither piracy itself nor because of deviation due to the risk of piracy. Alas, not even if the vessel gets captured by pirates hire cease until after 91 days in captivity.

6.3 Insurance

The owner of a vessel that operates commercially holds a variety of insurances. As do the charterer. This obviously affects the charterparty contract. Risks that cannot be avoided by contract may well be insurable and vice versa. Below a brief analysis of the insurances available regarding the threat of pirates follows.

6.3.1 Insurance and piracy

For the case the vessel should go off-hire (due to piracy or other reasons) the owner should have a loss of hire insurance. Loss of hire is included in common war risk policies. The war risk insurance is affected by trading limits since those often also set out the limits for the insurance too. Piracy should (and is in most cases) considered a war risk. The flexibility of the war risk insurance (e.g. with movable trading limits) makes it more apt to handle the threat of piracy.

A loss of hire insurance can also handle the loss of income that a piracy attack can cause. When pirates detain a vessel without the purpose of keeping it this kind of insurance that cover the loss of hire. This is the common situation with today's pirates. Their *modus operandi* does not include keeping the vessels. Should the pirates decide to keep the vessel (something that would not be disclosed immediately though) the hull insurance steps in to cover the loss of hire. This was highlighted in the ***Masefield v Amlin*** case where a piratical attack occurred and the vessel was captured. It was held that it will not immediately turn into an ATL or CTL. Until it has turned ATL or CTL the loss of hire cover must be provided by other insurance than the hull insurance.

The conclusion of this is that only relying on a hull insurance is not enough since it will not cover the loss of income caused by the vessel going off-hire. However if the vessel is kept by the pirates for more than twelve months it will be considered a total loss and the hull insurance will cover.

Should the vessel not go off-hire due to the capture or detention by pirates then the charterer can get insurance cover for the *loss of use* that is suffered during the period that the pirates keep the vessel.

At all times it shall be reminded that mitigation costs are likely to be covered by all types of insurances. A general average action is not, *per se*, an off-hire event. However it may mitigate costs that an off-hire can bring. Ransom is one such expense that has been covered by general average but also other costs needed for avoiding being attacked by pirates are included.

The insurance policies are rather complicated on this issue and have to be read together with general average rules.

Together the components create a rule which reads somewhat as follows. *If a casualty occurs or threatens to occur, insurance cover is provided for any expenditure that is intentionally and reasonably made or incurred for the common safety to preserve the cargo from a peril that threatens the common maritime adventure provided that the measures were of an extraordinary nature and must be regarded as reasonable.*

Several interpretations have to be done to sort out this rule. That is outside the scope of this thesis. Unless the vessel is going ballast this rule might apply. If the vessel goes ballast the general average is not possible per definition. Mitigating costs that is not referred to as general average action are particular average and the same kind of rule as above can be created out of this. *If a casualty occurs or threatens to occur, insurance cover is provided, for costs taken, on account of an insured peril, to minimize loss, if the measures were of an extraordinary nature and must be regarded as reasonable.*

6.3.2 Insurance and deviation

War risk insurance covers loss of hire that have been caused by pirates. So, if pirates have caused the vessel to go off-hire the war risk insurance pays.

P&I insurances is focused on liabilities and the deviation cover of a P&I insurance has to be bought back since it is excluded in most P&I policies. Whether these cover also liability, other than rising out of the cargo, is not clear from the rules. However an additional insurance for geographical deviation[255] can be added which indicates that the buy-back cover (above) only refers to the cargo liability whereas the additional insurance would cover all liability arising out of deviation.

The main insurance regarding to deviation must be the loss of hire insurance. This cover applies to piratical actions but is conditional to the terms of the charterparty contract. If an event fall within the insurance cover, it will not be covered, unless the vessel also goes off-hire according to the charterparty. A vessel under a charterparty (that has an off-hire clause of that kind presented in this thesis) can not only partially be deprived of income in the way that this clause stipulates. It is either on hire or off hire. How that is to be dealt with, in regard of a charterparty contract is not sure. The charterparty contract sets forth when hire is lost. However these provisions may aim for a bill of lading contract.

[255] Skuld Statutes Appendix 7(4.1)

7 Conclusion

Today piracy generally is not an off-hire event. Practice shows that piracy is an event *sui generis* that requires special treatment in the standard forms. Amendments and additions may though bring piracy within the off-hire scope – something that is confirmed by the existence of piracy rider clauses (that explicitly exclude piracy as an off-hire event). The mere existence of these clauses indicates that it is not clear cut that the original, not amended, standard forms excludes piracy as an off-hire event. When piracy or war clauses are incorporated in the charterparties vessels rarely go off-hire due to piracy.

Regarding deviation it may be of interest to look upon it from two points of views. First, there is the possibility of a contract without piracy or war clauses added to it. Contracts structured like that essentially make all actions like reducing/increasing speed, waiting for escort, changing direction or putting into port off-hire events. In short – altering route puts the vessel off-hire – even if it is done to avoid pirates. In this case of deviation it is this authors view that not only the clauses strictly regarding deviation must be taken into account before a decision on whether it is a deviation that causes the vessel to go off-hire or a deviation that shall have no effect on the charterparty. A charterer that orders a vessel to a port that is unsafe cannot count on getting the upside of an off-hire clause if the master at the same time fulfills the requirement of due despatch and good navigation and seamanship. Why should it be held against the owner if the master exercises good seamanship to save the vessel and crew from an imminent danger?

However, most charterparty contracts contain a piracy or war clause. Therefore it is essential to also look upon deviation from this point of view. When altering course in conformity with piracy and war clauses, it must be kept in mind, it is not deviation in the sense of the off-hire clause though. The war clauses scrutinized in this thesis keeps the vessel on hire at most times. The NYPE 93 clause *may* put the vessel off-hire if deviation is done to avoid pirates. When it comes to piracy clauses it can fairly easy be established that the vessel does not go off-hire due to neither piracy itself nor because of deviation to avoid the threat of pirates. Actually, the vessel remains on hire some three months into captivity according to the BIMCO piracy clause.

To wrap this up it can be said that the off-hire clauses generally has too many vague provision to say, with certainty, whether the vessel goes off-hire or not due to piracy. The piracy and war clauses are basically put in the contracts to keep the vessel on hire. Regarding deviation to avoid pirates the off-hire clause and adjacent clauses puts the vessel off-hire *if* the deviation is not within the piracy or war clause which keeps the vessel on hire.

The insurance market is vital. It follows the needs of the actors. As most standard forms are interpreted the same or similar way (piracy is not an off-hire event) the market developed cover for the charterer. Example of that is the loss of use insurance mentioned above. Should the opinion change or the power of the drafters of charterparties shift the insurance market will be one step behind following closely. The flexibility of the market – supply and demand – will render the question of hire/insurance a zero-sum game. If the drafters decide to let piracy be an off-hire event then the hire would be higher. The need for a loss of use insurance for the charterer would in return lessen. In the opposite situation the hire would be reduced and the need for the loss of use insurance would be reinstated.

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