

Shipping

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SHIPPING BULLETIN



Welcome to the March edition of our Shipping Bulletin.

Charterparties are the focus of this edition. Piracy has made a very significant impact on shipping operations worldwide, and our first article analyses a recent case which gives guidance on what effect the incorporation of the CONWARTIME clause in a charterparty will have on bespoke off-hire provisions. We also feature an article on a recent Court of Appeal decision in “The Rowan”, which is the latest judicial comment on the interpretation of oil major approval clauses. In addition, we consider the effect on the charterparty contract where one party exerts illegitimate pressure on the other to waive some or all of its rights.

Finally, given the fast-moving pace of events in Syria and Iran, we have included an update on the effect of the extensions of the sanctions in place against those two countries.

Our news section in this issue covers the release, on Wednesday 28 March 2012, of BIMCO’s latest maritime standard contract - GUARDCON - which relates to the use of armed guards on board merchant vessels. HFW’s Partner Elinor Dautlich was a member of the sub-committee responsible for drafting the contract, which is expected to be widely adopted by the industry. In addition, we announce the news of three Partner promotions.

Should you require further assistance or information on any of the articles included here, please do not hesitate to contact a member of the HFW team.

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Off-hire, the CONWARTIME and Punctuation Marks

Background

The High Court recently determined that the hijack of a vessel by pirates was an off-hire event pursuant to an additional clause that provided for the vessel to be off-hire for capture/seizure, despite the incorporation of the CONWARTIME 2004 clause. The judgment revisits the interpretation of exemption clauses and clarifies how the Court will approach those seeking to rely on off-hire clauses in the context of piracy. It also comments on the significance of syntax, including the use of punctuation marks, when construing clauses.

The decision

On 13 March 2012, Cooke J handed down judgment on an appeal from an arbitration award as to whether the “CAPT STEFANOS” was off-hire for the period of her detention by Somali pirates, pursuant to an additional clause in a trip time charterparty on an amended NYPE form. It was not contended (and the judge confirmed that it could not be contended) that the vessel was off-hire under clause 15 of the NYPE form in light of the recent decision in *The Saldanha*¹. Charterers’ case was that the vessel was off-hire under the terms of an additional clause which provided:

“Should the vessel put back whilst on voyage by reason of any ... capture/seizure, or detention or threatened detention by any authority including arrest, the hire shall be suspended from the time of the inefficiency until the vessel is again efficient...”

1. [2010] EWHC 1340 (Comm).

The arbitration Tribunal accepted charterers’ argument that the words “capture/seizure” applied to a hijack. The Tribunal rejected owners’ case that, in the context of the clause itself and the charter as a whole, those words should be construed on the basis that they were subject to the qualification that the seizure was “by any authority” and, since the pirates were not an “authority”, the seizure of the vessel did not constitute an off-hire event. Owners were given permission to appeal the decision to the High Court.

At the appeal hearing owners argued that the vessel should not be considered off-hire under Clause 56 for the following reasons:

1. The ambiguity in the clause

There was ambiguity in the clause because it was not clear whether the words “by any authority” should attach to the words “capture/seizure” as well as to the word “detention”. The correct construction depended on the significance the reasonable reader attaches to the comma after “capture/seizure”.

In addition, other than in relation to capture, seizure and detention, the clause refers exclusively to off-hire events associated with deficiencies in the vessel or crew. “Capture/seizure” should therefore refer to a capture or seizure arising as a result of the characteristics of the vessel or crew. Such a seizure would be undertaken by an authority and not by pirates.

2. The construction of ambiguities

Principles of construction require ambiguities to be construed in a commercial way with regard to the surrounding circumstances² and any ambiguity should be construed against the party seeking to rely on the clause. On this basis, charterers needed to bring themselves clearly within a defined off-hire event and the ambiguity in the clause should be construed against them.

3. The incorporation of CONWARTIME 2004

The parties had incorporated the CONWARTIME clause pursuant to which expenses arising from complying with charterers’ orders to trade the vessel through an area at risk of war risks (including piracy) lie with charterers. This demonstrated the parties’ clear intention as to the allocation of the risk of piracy, i.e. that it should lie with charterers, and it would be inconsistent with this allocation of risk to construe the additional clause in a manner that treated a hijack by pirates as an off-hire event. In support of their arguments on this point, owners relied on a passage in Wilford on *Time Charters*.³

Cooke J dismissed the appeal in its entirety and upheld the decision of the Tribunal.

The Court found that the wording used, the structure of the clause, its punctuation and its grammar all clearly supported the charterers’ submissions that the vessel was off-hire. Cooke J

2. *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50.

3. Paragraph 37.115 which states: *one effect of clause [(h) of the CONWARTIME wording] is that hire will be payable, and the ship will not be off-hire, so long as Owners are acting in accordance with any of sub-clause [(b) (c) (f) or (g)].*



said that “...the clause to my mind clearly sets out that it is only “detention or threatened detention” which is qualified by the expression “by any authority”. The words “capture/seizure” are free standing and constitute a separate head of off-hire...”

The Court went on to note that the off-hire provisions of a charter do not necessarily, nor indeed usually, tie in with the provisions of the charter which relate to breach and that standard form charterparties are often used with a series of “add-on” special clauses which do not always fit together immaculately or happily. Where there are one or more clauses which deal with off-hire events, they must clearly be looked at together and reconciled but where the charter provides for off-hire in some provisions and charterparty obligations and remedies for breach in others, the focus must inevitably be on the off-hire clauses when determining whether an off-hire event has occurred.

This rationale was then applied to the incorporation of the terms of the CONWARTIME which (contrary to the suggestion in *Wilford on Time Charters*) was held not to affect the construction of the additional clause concerning off-hire events. The Court held that CONWARTIME is restricted to setting out the rights liberties and obligations of the parties in circumstances where the vessel might be exposed to war risks including piracy. It is therefore a clause relating to the performance of the charter and to breach, and not to off-hire, and as such cannot affect the construction of off-hire clauses.

Cooke J doubted whether the reference at sub-clause (f)(i) of CONWARTIME to compliance with orders of “...any Government, body

or group whatsoever, acting with the power to compel compliance with their orders or directions...” as “due fulfilment” of the charterparty under sub-clause (h) was apt to include orders issued by pirates, commenting that there is no logic in a distinction between pirates operating the vessel themselves and pirates ordering the crew to operate the vessel for them. He held that in either case, sub-section (h) does not negate the application of specific off-hire provisions in the charterparty if the event falls within the scope of those provisions.

This judgment provides useful guidance on the scope and application of the CONWARTIME clause, particularly its ruling that the clause does not affect off-hire clauses. It reiterates the position regarding the interpretation of off-hire clauses and what is needed by way of contra-indications from other terms in a contract to outweigh the plain and obvious meaning of the language of a clause as a matter of syntax and grammar, including punctuation marks. It holds that the words “capture/seizure” include a hijack by pirates (without qualification).

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“The Rowan”

In 2007, owners chartered their vessel to the respondent (“S”) on terms that to the best of owners’ knowledge and without guarantee, the vessel was approved by a number of named oil majors. The

charterparty also incorporated the Vitol Voyage Chartering Terms and provided in respect of clause 18 that to the best of owners’ knowledge the vessel was approved by five named oil majors.

Shell, which was not one of the oil majors listed in the charterparty, had agreed with S to buy the vessel’s cargo, subject to vetting, but on inspection at Antwerp, Shell rejected the vessel and the cargo. S sold the cargo elsewhere and claimed the difference in price by way of damages from owners on the basis that owners had never had oil major approval, alternatively that the vessel had lost its oil major approval, and so owners were in breach of the charterparty.

Owners relied on letters provided at the outset of the charterparty from the majors named in the recap which stated that the vessel had been inspected, no further information was needed, but that this did not constitute a “blanket approval” and the vessel would be screened by the major on each occasion it was offered for business. At first instance, HHJ Mackie QC, accepted that such letters were at the time regarded as “approvals” for the purpose of clauses such as clause 18 of the Vitol Terms. Therefore owners had the necessary approvals in place at the outset of the charterparty. However, he found for S that owners had warranted that, to the best of their knowledge and belief, the vessel would remain approved by the oil majors specified throughout the charterparty. He also accepted S’s expert evidence that oil major approval was not only lost when an oil major rejected a vessel, but could be lost automatically if the

vessel fell into a condition that would lead a fresh vetting to fail. Therefore, the vessel lost its oil major approval at Antwerp, even though Shell was not one of the majors named in the charterparty, owners were in breach, and S were entitled to damages.

Owners' appeal was allowed. The Court of Appeal held:

1. The wording in the recap was not to be read together with the printed version of Vitol clause 18 but in substitution for it.
2. The Vitol clause was a continuing warranty of approval for the duration of the charter, but the new clause 18 was not. On its true construction the new clause was limited to a promise at the time when it was made.
3. On this basis, whether there was a breach of the charterparty depended on whether the vessel was approved by the named oil companies at the date of the charter, and whether owners knew anything at that date which would cause the approval of the oil companies to be lost.
4. Owners had obtained approvals from the named majors at the date of the charter, in the sense that the majors had indicated by letter that the vessel was acceptable to them. On the facts found at first instance, there was no evidence that at the date of the charter that owners knew anything about the vessel that would cause the named oil companies to disapprove the vessel or alter the terms of the approval letters. Therefore there was no breach of the charter.

The appeal focused on the construction of the charterparty, and so did not deal with the two more interesting questions posed at first instance, namely (1) whether the vague letters from oil majors following vetting can properly be called "approvals" (which Longmore LJ described as a "curious" interpretation) and (2) what needs to happen for an owner to lose that approval. The decision at first instance has attracted criticism from owners who, after all, would not necessarily know whether a particular deficiency would result in rejection until vetting took place. Any owner encountering this argument in future would need to argue that the decision in "The Rowan" was a finding of fact based on these particular circumstances and will need persuasive expert evidence.

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"Take it or leave it" - whether a settlement agreement can be avoided for economic duress

Progress Bulk Carriers Limited v Tube City IMS L.L.C [2012] EWHC 273 (Comm)

The owners concluded a charter for the carriage of a cargo, on a named vessel from the Mississippi River to China. There was no right to substitute the vessel. In repudiatory breach of charter owners delivered the named vessel to a third party. Rather than accepting the breach as terminating the charter the charterers

chose to keep it alive, relying upon assurances of owners that they would find an alternative vessel and compensate charterers for all damages resulting from their failure to provide the contracted vessel. Owners subsequently made a "take it or leave it" offer to charterers threatening not to deliver the substitute vessel unless charterers waived all claims for loss and damage arising out of the nomination of the substitute vessel outside the laycan and its late arrival, which offer was inconsistent with the prior assurances as to compensation for the repudiatory breach of charter. With barges waiting to load on the Mississippi and with a falling market charterers were "driven into a corner from which they could not escape" and had no alternative but to accept.

The question the arbitrators and the Commercial Court (Cooke J) on appeal had to determine, was whether or not the settlement agreement entered under protest by charterers could be avoided for economic duress, even though the owners were not obliged to provide a substitute vessel and the threat not to do so was not unlawful.

The parties agreed that there were two necessary elements in economic duress. First, "illegitimate pressure". Second "causation" (i.e. the illegitimate pressure must cause the pressurised party to enter into the contract). In deciding the case Cooke J had regard to a large volume of earlier case law and concluded that "illegitimate pressure" could amount to conduct which was not in itself unlawful and that a past unlawful act, as well as the threat of a future unlawful act could, in appropriate circumstances, amount to illegitimate pressure.



The Court found that owners earlier repudiatory breach of the charter was the root cause of the problem and that their continuing conduct from that moment was designed to put the charterers in the position where they had no option but to agree to a settlement so that they could ship the cargo to China and avoid further losses on their sale contract to the Chinese buyers. The arbitrators had taken the view, and Cooke J agreed, that owners maneuvered charterers into a position where they had no realistic practical alternative but to submit to owner's pressure while protesting at the time. Once that pressure was relieved they did not affirm the settlement and so were able to bring arbitration proceedings in respect of the claims they were forced to waive.

The Court determined that the demand by owners for a waiver of rights by charterers had to be seen in the light of the earlier repudiatory breach and their subsequent conduct including their refusal to honour the assurances they had given about providing a substitute vessel and paying full compensation for their breach. The refusal to provide the substitute and their subsequent misleading activity was found by the arbitrators to amount to "*illegitimate pressure*". The Court agreed.

While it will always be a matter of applying the relevant criteria to the facts of each case, the Court held that the more serious the impropriety which attaches to the conduct, the more likely that pressure will be seen as being "*illegitimate*". Further, while the previous cases expressed caution in relation to what were "*lawful acts*" in a commercial context

(e.g. exertion of pressure by lawful means) it was not suggested that the kind that owners had advanced in this case, being conduct so far beyond the norms of ordinary commercial practice that it could be considered on the same level as illegal or criminal conduct, should be limited in such a way.

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Further sanctions against Syria and Iran

On 24 March 2012, the EU published a new Regulation imposing further restrictive measures against Iran. The Regulation implements outstanding aspects of an earlier Decision published on 24 January 2012, most notably an oil embargo. Unlike the Decision, the Regulation applies to EU companies and individuals, with immediate effect.

The most significant new measure is a ban on the import, purchase and transport of Iranian crude oil, petroleum products, and petrochemical products as well as prohibitions on related financing, insurance and technical assistance (the oil embargo). The oil embargo will be subject to an interim period for pre-existing contracts, and contracts (including insurance and transport contracts) which are ancillary to such contracts. This will expire on 1 July 2012 in relation to crude oil and petroleum products, and on 1 May 2012 in relation to petrochemical products.

The Regulation also includes prohibitions on the supply of key equipment and technology (and related technical and financial assistance) to the Iranian petrochemical industry, as well as the granting of financial loans to, and the acquisition of shares in, any Iranian person or entity engaged in the petrochemical industry, subject to certain transitional periods. These prohibitions build on equivalent existing prohibitions in relation to the oil and gas industry in Iran.

HFW has prepared a detailed briefing on all the new measures contained in the Regulation, which can be found at <http://www.hfw.com/publications/client-briefings/iran-sanctions-update-the-eu-implements>.

On 18 January 2012, the EU passed further restrictive measures against Syria. The new measures build upon the pre-existing oil embargo and asset freezing measures introduced during 2011.

The new measures include (among others) a ban on the sale of equipment that could be used to monitor or intercept internet communications, a ban on the sale of specified equipment and technology used in the Syrian oil and gas industry and power generation, as well as restrictions on relations between Syrian and EU banks, and a ban on the provision of insurance to the Syrian state.

HFW has prepared a detailed briefing on these new measures, which can be found at <http://www.hfw.com/publications/client-briefings/syria-sanctions-update-eu-imposes-new-restrictions>.



Further restrictive measures were introduced against Syria on 27 February 2012:

- A ban on the sale, supply, transfer, or export, as well as the purchase, transport or import, of gold, precious metals and diamonds from or to Syria, and from or to the Syrian central bank, as well as the provision of technical assistance, finance or brokering services in relation to the same.
- The designation of the Syrian central bank as an asset freeze target.

These new measures, when combined with measures already in place, make it very difficult for EU corporate entities and individuals to conduct business with a connection to Iran or Syria.

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News

HFW advises on new industry standard contract for maritime armed guards

The firm has been influential in the development of BIMCO's latest maritime standard contract - GUARDCON - tailored for the employment of private military security companies (PMSCs) to provide security guards on board merchant vessels. GUARDCON now provides an industry standard set of terms governing the relationship between a) shipowner and PMSC; and b) ship master and on-board security guards. **Elinor Dautlich**, Partner, was a member of the sub-committee responsible for drafting GUARDCON. For further information, please contact **Elinor Dautlich**, Partner, on +44 (0)20 7264 8493 or elinor.dautlich@hfw.com, or visit <http://www.hfw.com/press-releases/holman-fenwick-willan-advises-on-new-industry-standard-contract-for-maritime-armed-guards>

HFW promotes three to Partner

The firm is delighted to announce three internal promotions (effective 1 April 2012) across core sectors of focus, including aviation, insurance and logistics. The firm's Dubai office

is boosted with the promotion of **Sam Wakerley**, specialising in shipping, trade and insurance (marine and non-marine), while in London, **Edward Spencer**, an aviation insurance specialist, and **Justin Reynolds**, who focuses on logistics and multimodal transport, are welcomed to the partnership.

Conferences & Events

Superyacht Security and Fiscal Summit

London
(28-29 March 2012)
Elinor Dautlich

Practical Guide to P&I Claims Handling in the Middle East

London
(17 April 2012)
Simon Cartwright and
Yaman Al Hawamdeh

ReCAAP conference on piracy

Singapore
(26 April 2012)
Bill Kerr

Bimco's using Supplytime Course

Rotterdam
(26-27 April 2012)
Paul Dean

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