Neutral Citation Number: [2019] EWHC 910 (Comm)

Case No: CL-2018-000181

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERT COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN ARBITRATION CLAIM

Royal Courts of Justice
7 Rolls Buildings
Fetter Lane, London, EC4A 1NL

Date: 10/04/2019

Before :

THE HON. MR JUSTICE POPPLEWELL

- -

Between :

Eleni Shipping Limited	**Claimant**
- and -	
Transgrain Shipping B.V.	**Defendant**

- -
- -

Robert Thomas QC (instructed by **Watson Farley & Williams LLP)** for the **Claimant**
Thomas Macey-Dare QC (instructed by **Clyde & Co LLP**) for the **Defendant**

Hearing dates: 28 March 2019

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Approved Judgment

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MR JUSTICE POPPLEWELL

Mr Justice Popplewell :

Introduction

1. This is an appeal under s. 69 of the Arbitration Act 1996 by the Claimant ("the Owners") against an award dated 19 February 2018, as corrected ("the Award") by which the majority of the tribunal rejected the bulk of the Owners' claims against the Defendant ("the Charterers") arising out of the capture by pirates in the Arabian Sea of their Panamax bulk carrier "ELENI P" ("the Vessel").

The facts

2. The following facts are taken from the Award.

3. On 8 September 2009 the Owners time chartered the Vessel to Deiulemar Shipping SpA who subsequently sub-chartered the vessel to the Charterers on substantially back to back terms by a time charter on an amended NYPE 1946 form dated 15 October 2009 ("the Charterparty"). The Vessel was delivered into the Charterparty on 29 October 2009, and was due for redelivery thereunder between 20 June 2010 and 20 August 2010. The Charterers in turn sub-sub-chartered her to Vista Shipping Limited on 20 April 2010 for a time charter trip via the Black Sea to the Far East. On 29 April 2010 Vista gave voyage orders under the sub-sub-charter, which also constituted the Charterers' instructions under the Charterparty, for the Vessel to load a cargo of iron ore at a port in Ukraine for discharge at Xiamen in China. The Vessel was routed via the Suez Canal and the Gulf of Aden. Following completion of transit of the canal on her laden voyage, she sailed through the Gulf of Aden without incident and into the Arabian Sea, but was there attacked and captured by pirates on 12 May 2010 at a position in the Arabian Sea approximately 15.55^0 N 60.50^0 E. She was only released by the pirates some seven months later on 11 December 2010. Following visits to Salalah and Fujairah for emergency repairs, bunkering, supplies, crew changes and hull cleaning, she in due course proceeded to China to discharge her cargo and was redelivered under the Charterparty on 18 January 2011.

4. The Owners' claim was for a total of a little over US$5.6 million, the greatest part of which was for hire from the time of the Vessel's seizure until 25 December 2010 when she was again equidistant from her destination to the point of her capture, an amount exceeding US$ 4.5 million. The majority of the tribunal rejected the Owners' claim for hire for this period on the grounds that it was excluded by each of two additional typewritten clauses in the Charterparty, clauses 49 and 101.

The Charterparty terms

5. Clause 4 provided for payment of hire every 15 days in advance. Clause 8 contained the obligation to comply with charterers' instructions as to employment of the Vessel, qualified by particular trading exclusions enumerated in clause 74 which included "war zones and/or war risk zones declared warlike or unsafe by Owners' Underwriters." The Charterparty also contained the Bimco Standard War Risk Clause for Time Charters 2004 ("Conwartime 2004") which by paragraph (b) entitled the Vessel to refuse to go to any place where in the reasonable judgement of the

Master or the Owners it appeared that the Vessel might be exposed to War Risks, which were defined in paragraph (a)(ii) to include acts of piracy.

6. Clause 15 contained the printed off hire clause modified as follows:

> "15. That in the event of the loss of time from deficiency and/or default of Owners' men or deficiency of stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, drydocking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost and bunker consumed during the period of suspended hire for the Owners' account (except when caused by the actions of Charterers or their Agents / servants); and 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 fuel consumed in consequence thereof, and all extra expenses directly related to loading and discharging and bunkering shall be deducted from the hire. Only amounts not in dispute are allowed to be deducted from the hire. (See Clause 49)"

7. Clause 49 provided:

> "Clause 49 – Capture, Seizure and Arrest
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> Should the vessel be captures [sic] or seized or detained or arrested by any authority or by any legal process during the currency of this Charter Party, the payment of hire shall be suspended for the actual time lost, unless such capture or seizure or detention or arrest is occasioned by any personal act or omission or default of the Charterers or their agents. Any extra expenses incurred by and/or during the above capture or seizure or detention or arrest shall be for the Owners' account.
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> Should the vessel be arrested during the currency of this Charter Party at the suit of any party having or purporting to have a claim against or any interest in the vessel, hire under this Charter Party shall not be payable in respect of any period during which the vessel is not fully at Charterers' disposal, and any directly related / proven expenses shall be for Owners' account, unless such arrest is due to action against Charterers or sub-Charterers or their Agents or the Contractors or the cargo Shippers or Consignees, thence hire is payable and Charterers undertake the responsibility to release the vessel by taking appropriate and required measures (issuance of security / etc) as the case maybe or arise."

8. Clause 101 provided:

> "Clause 101 – Piracy Clause
> Charterers are allowed to transit Gulf of Aden any time, all extra war risk premium and/or kidnap and ransom as quoted by vessel's Underwriters, if any, will be reimbursed by Charterers. Also any additional crew war bonus,

> if applicable will be reimbursed by Charterers to Owners against relevant bona-fide vouchers. In case vessel should be threatened/kidnapped by reason of piracy, payment of hire shall be suspended. It's remain understood [sic] that during transit of Gulf of Aden the vessel will follow all procedures as required for such transit including but not limited the instructions as received by the patrolling squad in the area for safe participating to the convoy west or east bound."

The approach to construction

9. There is no shortage of recent high authority on the principles applicable to the construction of commercial documents. It includes ***Investors Compensation Scheme Ltd v West Bromwich Building Society*** [1998] 1 WLR 896; ***Chartbrook Ltd v Persimmon Homes Ltd*** [2009] 1 AC 1101; ***Re Sigma Finance Corp*** [2010] 1 All ER 571; ***Rainy Sky SA v Kookmin Bank*** [2011] 1 WLR 2900***; Arnold v Britton*** [2015] AC 1619; and ***Wood v Capita Insurance Services Ltd*** [2017] AC 1173.

10. In ***The Ocean Neptune*** [2018] 1 Lloyd's Rep. 654, I endeavoured to summarise the principles to be derived from those cases as follows. The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

11. These principles are applicable to all contracts, including charterparties, but time charters give rise to particular considerations because of the allocation of risk which is inherent in their nature. Under a time charter the risk of delay is fundamentally on the charterer who remains liable to pay hire in all circumstances unless exempt from doing so under an off-hire provision. Accordingly the burden lies on a charterer to bring himself within the plain words of an exception from the obligation to pay hire; and, all other things being equal, doubts as to the meaning of such exceptions are to be resolved in favour of owners. This approach, described as long ago as 1948 as a cardinal rule, has been articulated and applied in many cases both before and since

the recent House of Lords and Supreme Court cases on the approach to construction generally: see ***Royal Greek Government v Ministry of Transport*** [1959] 1 KB 525 per Bucknill LJ at 529; ***The Doric Pride*** [2006] 2 Lloyd's Rep 175 per Rix LJ at [28]; ***The Saldanha*** [2011] 1 Lloyd's Rep 187 per Gross J at [8]; ***The Captain Stefanos*** [2012] 2 Lloyd's rep 46 per Cooke J at [7]; and ***The Global Santosh*** [2014] 2 Lloyd's Rep 103 per Gross LJ at [28] (unaffected on this point by the appeal to the Supreme Court). This is the fulfilment of recent guidance on the approach to construction of contracts generally because, to adopt the words of Lord Hodge in ***Wood v Capita*** at [10], the nature of such contracts requires the court to give weight to such considerations as part of the wider context.

Clause 49

12. The Owners contended that each of the expressions "capture[d]", "seized", "detained" and "arrested" were governed and qualified by the following words "by any authority or any legal process". The Charterers submitted, and the majority of the tribunal held, that the words "by any authority or any legal process" did not govern or qualify the word "captured", which was freestanding and covered capture by any cause or protagonist including capture by pirates.

13. The Owners' construction of the clause is to be preferred for the following reasons. First and foremost this seems to me to be the clear meaning of the language of the clause, both as a matter of impression and on a more detailed syntactical analysis. The disjunctive categories of the four enumerated off-hire events "capture[d]", "seized" "detained" and "arrested", are all separated by the word "or". That is in itself neutral as to whether the following words "by any authority or any legal process" qualify all four or only the last. However the words which follow those ("during the currency of this charterparty") undoubtedly govern all four, suggesting that the same applies to the words sandwiched between them. Moreover, if the fourth event ("arrested") were the only one qualified by the words "by any authority or by any legal process" the latter words would be superfluous. Neither side was able to suggest how a vessel could be arrested other than by one of those two methods. Whilst the presumption against superfluity is not always of significant weight in charterparties, in this instance it would involve surprisingly inept drafting if it had been added immediately after the word arrested to provide a meaningless qualification to it.

14. Secondly, clause 49 would not sit consistently with clause 15 on the Charterers' construction because clause 15 treats as an off-hire event a limited type of detention, namely "detention by average accidents to ship or cargo". This qualification would be rendered inoperative if clause 49 treated any detention as off-hire regardless of cause or nature. Mr Thomas QC's submission on behalf of the Owners went further and involved the proposition that if clause 49 caused any form of detention to be an off-hire event, the careful enumeration of off-hire events in clause 15 would be overtaken by clause 49. This put the point too high, because clause 15 is concerned with loss of time from off-hire events, which may arise without the vessel being "detained". But there is force in the submission that it would substantially cut across the careful allocation of risk in clause 15 in many cases, without any apparent commercial rationale for doing so.

15. Third, the construction contended for by the Charterers would lead to surprising and uncommercial results. The natural meaning of detention of a vessel is anything which prevents its movement, whether physically or in practice, as Mr Macey-Dare QC accepted. Yet if the vessel being "detained" were a freestanding off-hire event under clause 49, unqualified by the act of an authority or legal process, it would cast on to the Owners the risk of loss through a raft of circumstances where the risk is traditionally borne by charterers as part of the inherent nature of a time charter, such as detention of the vessel at a berth as a result of weather or port conditions or congestion. Mindful of the unattractiveness of this conclusion, Mr Macey-Dare argued in the alternative that in clause 49 detention was so qualified, but that capture and seizure were free standing and unqualified off-hire events. But if "detained" as well as "arrested" is qualified by the following words, it is difficult to see any linguistic basis for treating two of the enumerated off-hire events as governed and two not. If the qualifying words apply to more than the immediately preceding off-hire event, arrest, they would as a matter of the natural use of language apply to all of them. Moreover there is in substance little distinction, and a great deal of overlap, between the concepts of capture, seizure and detention. There would seem to be no commercial rationale for treating them differently as off-hire events.

16. The essential reasoning of the tribunal in reaching the contrary conclusion was expressed in paragraph 47 of the Award in these terms:

> "Fundamentally, though, we cannot accept that "captured" is a word that can fairly be read as qualified by "by any authority or by any legal process". In the context of a charter which clearly anticipates piracy risks and in an age when questions of prize – a concept in which the word "captured" might reasonably be seen as something an "authority" might be involved in – no longer arise, we consider that the word must here be read disjunctively from the causes that follow."

17. With real respect for the views of these experienced arbitrators I do not find such reasoning persuasive. It is true that clause 101 recognises the risk of piracy, but it has its own off-hire provision. It therefore affords no guidance to the scope of "capture" as an off-hire event in clause 49. Nor can I accept that "capture" is something which an authority is incapable of carrying out. As a matter of the ordinary use of language, capture does not necessarily connote the use of force. Unoccupied land or undefended goods may be captured. My wife may capture my heart. I see no difficulty as a matter of the ordinary use of language in the concept of a governmental authority or ruler capturing a vessel.

18. Nor is that an alien concept in charterparties or maritime affairs more generally. In ***In Re an arbitration between Tonnevold and Finn Friis*** [1916] 2 KB 551, Scrutton J was concerned with a clause which provided that "no voyage be undertaken and no goods, documents or persons shipped that would involve risk of seizure, capture, repatriation, or penalty by rulers or Governments". He interpreted the intention of the parties as being that "the shipowner should not be bound to undertake any voyage which would expose him to the risk of having his vessel taken out of his possession "by rulers or Governments" and that when they used the words "seizure" and "capture" they were indicating acts of rulers or Governments which would deprive the owner of his vessel." Although that case concerned the risk of capture in time of war, it clearly demonstrates that capture is a word which can properly be applied to

acts of a governmental authority; and there is no reason to think that it would be inapt in the modern era to provide for capture by such an authority in the context of a long term timecharter permitting worldwide trading. Indeed Clause 28 of the Shelltime 4 Form in current use provides that "No voyage shall be undertaken, nor any goods or cargoes loaded, that would expose the vessel to capture or seizure by rulers or governments": see ***The Greek Fighter*** [2006] 1 Lloyd's Rep 99; ***The CV Stealth*** [2016] 2 Lloyd's Rep 16. In ***The Captain Stefanos*** Cooke J said at [20] that although in the clause he was considering, which was in different terms to clause 49 in this case, the expression "capture/seizure" was not qualified by the subsequent words "by any authority or by any legal process", it could have been so drafted to make those qualifying words govern "capture/seizure". He saw no impossibility of a capture by authority or legal process as a matter of the use of language. Further, Merchant Marine Circular MMC-360 issued by the Panama Maritime Authority talks of it "capturing" ships which assist North Korea.

19. Finally, if I were left in doubt about the construction of clause 49, which I am not, the most that could be said is that it would be capable of bearing either of the meanings for which the parties contend. In those circumstances the doubt would be resolved in favour of the Owners and Charterers would have failed to bring themselves within a clear exception to the obligation to pay hire, in accordance with the principles in ***Royal Greek Government*** and the subsequent cases which I have identified above.

Clause 101

20. The Owners contended that the third sentence put the Vessel off-hire only if the kidnap or threat of kidnap by piracy took place during transit of the Gulf of Aden, which was a finite geographical area capable of identification. The Charterers did not maintain that the third sentence provided for off hire as a result of piracy anywhere in the world. They supported the finding by the majority of the tribunal that the clause was operative if the threat/kidnap took place within the Gulf of Aden, however defined, "or as an immediate consequence of her transiting or being about to transit the Gulf". Although the majority expressed this as involving either of two alternatives, in essence the former is subsumed by the latter. The rival constructions are therefore whether the threat/kidnap must occur within a geographical area identified as the Gulf of Aden (the Owners' case) or whether the threat/kidnap must take place as an immediate consequence of the Vessel being required to transit the Gulf of Aden (the Charterers' case). Both require reading words into the third sentence of clause 101 which is silent as to its scope of application.

21. The relevant factual background which was known or reasonably available to the parties, was set out in the Award by the majority in the following paragraphs:

    (1) In paragraph 29 the majority recorded the Charterers' argument that there was no defined geographical extent for the Gulf of Aden. Reference was there made to two potential definitions, one being that used by the International Hydrographic Organisation which treated the zone ending at its eastern border at 51.16^0 E, and another the area used by the Joint War Committee to define for the purpose of war risk insurance what it called the "Gulf of Aden transit area" extending to 57^0 E. The western borders of the two areas were also significantly different. The capture by pirates in this case took place at

60.50^0 E, further east in the Arabian sea than would be comprised by either of those two definitions. At paragraph 6 the majority recorded that the capture occurred after "sailing through the Gulf of Aden and into the Arabian Sea without incident".

(2) In paragraph 34 the majority held that "the expression "Gulf of Aden" has no clear meaning in the context of a charterparty of this kind". In paragraph 37 they referred to the clause being "concerned with a *transit* through an area that remains undefined" (their emphasis). In paragraph 41 they described their construction as consistent with the fact that it does not depend upon geographical limits of the Gulf being ascertainable."

(3) In paragraph 36 the majority found that "it is clear on the evidence that the parties will have known – as indeed the whole shipping community knew at the relevant time – that transiting the Gulf of Aden exposed ships to the risk of piracy not only in whatever might have been understood as the Gulf, but also in the Arabian Sea, on occasions hundreds of miles from the Somali coast; and that the risk of piracy was expanding.

22. The language of the third sentence is silent as to the ambit of the off-hire provision. Some wording must be read in. There is nothing in the language of the other parts of the clause which provides clear guidance in favour of either of the rival constructions. The first sentence refers to permission to transit Gulf of Aden, which is a process of passing through an area and necessarily involves a sea passage on either side of such area. It is neutral as a pointer towards either place or process. The fourth sentence refers to following procedures "during" transit of the Gulf, which suggests that that sentence is confined in its application to a particular duration and therefore geographical scope. Mr Thomas argued that this was a provision for the benefit of the Owners, providing for the protection of patrolling vessels in the area as the quid pro quo for the Owners being prepared to take the risk of the Vessel being off-hire, and was therefore a powerful pointer to a geographical interpretation of the scope of the third sentence which contained that allocation of risk. He argued that the commercial rationale of the clause was that the Vessel should only be off-hire for so long as the Owners had the protection contemplated by the fourth sentence. However there was no finding by the tribunal of the area in which protection or patrols were available in and around the Gulf of Aden and adjoining Arabian Sea, and no suggestion that the formal convoy route was co-extensive with either the IHO defined area or the JWR Committee defined area, so as to make the protection afforded by the fourth sentence co-terminous with any geographical definition of the area for the purposes of the third sentence. Further, the fourth sentence of the clause is for the Charterers' protection as much as the Owners' since the safety of the cargo from piracy is as much a concern as the safety of the Vessel. It is not simply the quid pro quo for the Owners accepting the off-hire risk in the third sentence. The fourth sentence therefore gives no guidance as to the ambit of the off-hire provision in the third sentence.

23. Against that background the construction adopted by the majority is to be preferred for three reasons.

24. First, the majority have found that the expression "Gulf of Aden" is not capable of being given a meaning by way of any geographical definition in the context of a time

charter of this kind. That is a finding of fact which is not susceptible to challenge on an appeal under s. 69. That is itself fatal to the Owners' construction. Mr Thomas argued that the fact that there might be two rival contentions as to what geographical area was comprised by "the Gulf of Aden" did not prevent the expression being given a purely geographical interpretation; if it had mattered which was correct the tribunal would have had to decide, but it had not needed to in this case because the seizure took place outside either of the identified areas. However this ignores the finding of the majority that the expression has *no* geographical meaning for the purpose of a charterparty of this kind. A fair reading of paragraphs 34, 37 and 40 is that the majority found the expression to refer to an area which was unascertainable and incapable of definition in purely geographical terms for the purposes of a clause in a charter of this nature.

25. Secondly, clause 101 as a whole is concerned with voyages through the Gulf of Aden. Its principal and critical purpose in a term time charter of this nature is to enable the Charterers to trade the Vessel through the Suez canal. The effect of the Conwartime 2004 clause is that but for the liberty conferred by the first sentence of clause 101 the Owners would otherwise be entitled to refuse voyage orders to make a transit of the Gulf of Aden, which would preclude trading between Europe and Asia, without having to go around the Cape of Good Hope. That would make the Vessel significantly less attractive to potential charterers. It was therefore of benefit to the Owners to agree to Gulf of Aden transit as the quid pro quo for the commercial advantage in being able to offer their Vessel for such service, which was no doubt reflected in the other terms including the rate of hire. The clause then allocates risk in relation to such transit by providing that the Charterers are to bear the additional cost in insurance premium and crew war risk bonus; but that the Owners are to bear the risk of loss of time from piracy putting the Vessel off-hire.

26. The purpose of the third sentence of the clause is to allocate to the Owners the risk of delay from detention by pirates (or the threat thereof) as a consequence of the transit which the first sentence requires the Owners to undertake if given such voyage orders by the Charterers. The findings at paragraph 36 of the Award show that the parties would have regarded that risk as existing beyond what might be understood as the Gulf itself. The natural construction of the allocation of risk in the third sentence against that background is that the Vessel should be off hire if the piracy detains her as an immediate consequence of the transit, rather than by reference to a particular geographical area.

27. Third, the allocation of risk in the second half of the first sentence (war risk and kidnap and ransom premium) and in the sentence of the clause (crew war bonus) is not defined by reference to a single geographical area. The Joint War Committee is a Lloyd's Market Association committee comprising representatives who underwrite marine hull war business in the London market. Neither its views nor its terms were said to be of universal application. There was no evidence or finding that extra war risk premium or K & R premium was tied to a single and definable geographical area in all cases. The same is true of crew war bonus. These parts of the clause therefore refer to payments which arise by reason of transit of the Gulf of Aden, and not by reference to a single strictly defined geographical limit which is capable of definition.

28. Mr Thomas argued that the Charterers' construction was anomalous because the Vessel might have been captured by pirates in exactly the same spot when making a

journey from Dubai or Muscat to east coast Africa, in which case the Vessel would not have been off-hire. I see nothing anomalous in that consequence. The clause is concerned with passages through the Gulf of Aden, and if the Charterers have not given voyage instructions for such a passage, the clause is not engaged because its principal purpose, which is to permit such instructions, is not engaged. Charterers bear the risk of piracy in such circumstances just as they do for piracy anywhere else in the world. Clause 101 carves out a different regime of risk to facilitate Suez canal passage (or Red Sea ports to/from the south) and allocates the piracy risk which is an immediate consequence of that trading route. If the Vessel were ordered to trade from Dubai to east coast Africa through a part of the Arabian Sea carrying a piracy risk, Conwartime 2004 would permit the Owners to refuse such a voyage order, but clause 101 has nothing to say about such circumstances, just as it has nothing to say about allocation of risk anywhere absent a voyage instruction to transit the Gulf of Aden.

Conclusion

29. The appeal succeeds on clause 49 but fails on clause 101. I will hear the parties on the form of order and costs.