

THE ARREST

news

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Attacks on the Red Sea: A Singapore Perspective by John Sze, Jolene Tan & Emma Ng, JTJB

Introduction

Since mid-November, the Houthi militia have been launching attacks on commercial vessels transiting the Red Sea. Presently, the situation appears to be escalating, and as a result, many vessels have chosen to avoid the Red Sea route by sailing around the Cape of Good Hope. This alternate, safer route, has added approximately 2 to 4 weeks of travel for vessels.

Various legal issues arose as a result such as disputes between parties in shipping contracts due to deviations by vessels from their courses, frustration of charterparties, and applicability of war risk clauses. This article seeks to address the legal complexities surrounding these issues from a Singapore perspective as this is helpful for charterparties and bills of lading where Singapore law is the governing

law. References are also made to certain UK cases as far as they appear to be relevant to the issues at hand.

War Risk Clauses

Charterparties may often include clauses that set out rights and obligations where the vessel is subjected to war risks, which will be defined and usually includes situations of war, acts of war, hostilities, acts of piracy, violence, terrorism, blockades and seizure or detention. The Houthi attacks may constitute a situation of hostility, violence or terrorism, and may fall under a war risk depending on how the clause may be construed, the contract may be cancelled or terminated. Such war risk clauses typically also provide that masters or owners of the vessel should reasonably exercise their judgment on whether the vessel is subject to war risks.

Most commonly, clauses on war risks in voyage and time charters provide that the Master and Owners of the vessel must reasonably exercise their judgment in determining whether the vessel is subject to war risks. While the widely reported conflict has provided ample evidence of such risks, the prevalence of the attacks may fluctuate, hence if parties are making an argument that a reasonable judgment has been made considering the risks, they may need to gather more current evidence in support of the hostility of the situation.

In the recent case of *MV Polar* [2024] UKSC 2, the Supreme Court held that where “special terms are agreed for transiting the Gulf of Aden in light of existing known risks, it may be inconsistent for a ship owner to be permitted to rely on more extensive rights to refuse transit on the basis of those same risks”. As such, if a ship owner agrees to special terms acknowledging and mitigating the risks associated with transiting an area which is deemed to be of risk, it would be incongruous for them to subsequently exercise broader rights to refuse transit based on those same risks.

Generally, parties should understand their rights to pursue a claim as well as their liabilities based on the charterparty between them. Several cases have stated that,¹ when determining issues of losses, the courts will look closely at what was set out in the charterparty. By preemptively clarifying their rights within the charterparty, shipowners can navigate such situations with greater assurance and minimize the likelihood of adverse financial consequences stemming from disputes with charterers.

Deviation

The question is if a vessel transits via the Cape of Good Hope instead of the Red Sea, whether it would be regarded as a deviation leading to a breach of contract. This would require a multi-faceted, case-by-case assessment, taking into account the facts and

evidence at hand. It is crucial to emphasise the inherent risks associated with both not deviating (sailing through the dangerous waters), as well as deviating from the usual route and navigating around the Cape of Good Hope.

To begin with, parties should first look to whether there is an explicit provision that permits the deviation from the contractually stipulated route, which may be found in the charterparty or bill of lading. If there is no such provision, evidence of what was intended to be the contractual route may be tendered, as set out in the case of *Reardon Smith Line Ltd v Black Sea and Baltic General Insurance Co Ltd* [1939] AC 562 at 584. Where no contrary evidence is given, the route is presumed to be the most direct geographical route to the port at which the cargo is to be discharged, although this may be modified for navigational or other reasons such as the usage of trade or commercial exigencies.² The determination of whether a vessel can deviate from its contractual route hinges on the terms of the contract between the parties. A deviation occurs when there is a voluntary change of the ship’s contractual voyage, resulting in a breach of the contract.³

Consequently, parties should look to whether there is an explicit provision permitting deviations from the specified route, along with understanding the extent of the contractual freedom to deviate. Without such a provision incorporated into the charterparty or bill of lading, an owner opting to deviate from the agreed route risks breaching the contract of carriage established with the bill of lading holder.

The necessity of vessel deviation during the Red Sea Attacks stems from a crucial need to safeguard both the vessel and its cargo. This involves a factual analysis, taking into account factors such as the vessel’s flag, its condition and the nature of the cargo. Adapting to the shifting risk scenario in the region is essential, and carriers must provide convincing evidence to support any deviations.

¹ Several cases have elucidated the general principle that the charterparty should expressly state the liabilities of Owners and Charterers such as: *Kodros Shipping Corporation v Empresa Cubana De Fletes* [1982] 2 Lloyd’s Rep. 307 (‘The Evia (No 2)’) and *Herculito Maritime Ltd v Gunvor International BV* [2024] UKSC 2 (‘The Polar’).

² Tan, L. M. (2018). *Law on carriage of goods by sea* (Third edition.). Academy Publishing.

³ *G H Renton & Co Ltd v Palmyra Trading Corp of Panama* [1957] AC 149 at 175

Further, parties should also consider the incorporation of charterparty terms into the bills of lading. While charterparties may contain express liberty clauses granting the carrier the right to deviate from the agreed route under specific circumstances, parties should be aware of the applicability of charterparty terms and terms explicitly outlined in bills of lading. The automatic incorporation of charterparty terms into bills of lading is not guaranteed, and a carrier must navigate the potential disparity between these two sets of contractual obligations. In the absence of explicit provisions within the bills of lading, the carrier may nonetheless rely on Article IV, rule 4 of the Hague/Hague-Visby Rules to justify deviation.⁴ However, cargo interests may not be bound by the liberty to deviate granted in the charterparty, posing challenges for the carrier in enforcing such rights and emphasizing the significance of clarity in contractual arrangements to avoid disputes and legal complexities.

Termination of Charterparty in a Pre-Charter Situation

In the context of pre-charter scenarios, where charterparties include clauses mandating owners to deliver the vessel and cargo within a specified timeframe, the failure of the vessel to arrive within this stipulated period due to unforeseen circumstances such as deviations can lead to the right to terminate the charterparty. This becomes particularly relevant when parties have outlined conditions for the termination of the charterparty in such situations. The right to cancel may be exercised if the ship fails to be delivered by the specified cancellation date, which can either be a fixed date or within a laycan period agreed upon by both parties. The length of this laycan period is typically subject to mutual agreement between the contracting parties, providing a mechanism for terminating the charterparty if delivery cannot be fulfilled within the agreed-upon timeframe.

Frustration/Force Majeure

Voyage charterparties may contain force majeure clauses that set out specific situations which will, upon

the occurrence of an event, not require further performance of the contract, discharging the obligations of the parties. In the alternative, where force majeure clauses are not available, the parties may invoke the doctrine of frustration, where their claim may be based on the Frustrated Contracts Act. The question here, is whether the delays caused by such attacks would be sufficient to invoke a force majeure clause, or in the alternative, frustrate the contract.

Force Majeure Clauses

Typically, parties may prescribe certain procedures in the charterparty upon the declaration that a force majeure event has occurred. This refers to contractual terms that the parties have agreed upon to deal with situations that might arise, over which the parties have little or no control that may impede or obstruct the performance of the contract. Whether such a situation arises, where it arises, the rights and obligations that follow depend on what the parties have stipulated in their contract.

In Singapore, it was suggested by the Court of Appeal in *Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd* [2011] 2 SLR 106 that where a party to a contract is seeking to rely on the protection of a force majeure clause which would excuse non-performance on occurrence of an event whose occurrence was “beyond the control” of the party (or parties, as the case may be), in such a case, the party seeking to rely on such a clause would not only have to show that the occurrence of the event in question had been “beyond the control” of the parties as specified by the clause, but would also have to show that even though it had taken reasonable steps to mitigate or avoid the effects of such event, it still suffered substantial adverse consequences beyond its control. As such, in order for a court to determine that a force majeure event has occurred, it is likely insufficient for a party to show that it is merely more difficult or expensive for them to discharge their obligations. Rather, they must show it is impossible or impractical to fulfill their obligations,

⁴ According to Article IV, Rule 4 of the Hague/Visby Rules: “Any deviation in saving, or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules, or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.”

as well as establish the reasonable measures they took to avoid such adverse consequences.

While an event such as the Red Sea attack may be beyond the control of parties involved and pose challenges in fulfilling their contractual obligations, parties may have to establish that they have considered the feasibility of alternative routes and the reasonable steps taken to go by this route, but they must also demonstrate that the alternative routes were either unavailable or would result in similarly detrimental consequences. It may be possible however, for parties that may be carrying perishable goods on their vessels to show that by travelling via an alternate route would lead to added time which would cause their goods to be perished, in showing the impossibility of fulfilling their contractual obligations.

Frustration

What is sufficient to frustrate the contract?

The applied test to invoke the doctrine of frustration is that of a radical change in obligation where the law recognizes that without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract.

Whether a delay in performance is sufficient to frustrate the charterparty?

Whether a delay may result in the performance of a charterparty being radically different from originally envisaged depends on the effect of the delay suffered, and likely to be suffered. The delay must thus likely be of considerable length and of an uncertain duration.

In the case of *Ocean Tramp Tankers Corp v V/O Sovfracht (The Eugenia)* [1964] 2 QB 226, a vessel was trapped in the Suez Canal for several weeks after the Canal was closed as a result of hostilities after the Canal was nationalized by the Egyptian Government. As the canal remained closed, the vessel had to sail to India via the Cape of Good Hope. The question in this

case was whether the longer and more expensive voyage made the adventure fundamentally different from what was contemplated under the contract. The English Court of Appeal held that the delay and additional costs did not frustrate the charterparty. This was because the cargo of iron and steel would not have been adversely affected by the longer voyage, and there was no special reason to warrant their early arrival.

Even in *Palmco Shipping Inc v Continental Ore Corp (the Captain George K)* [1970] 2 Lloyd's Rep 21, the charterparty was not frustrated despite the length of the voyage being doubled. In that case, the freight for the carriage of a cargo of sulphur from Mexico to India was fixed on the basis of a voyage through the Suez Canal. However, by the time the vessel reached the canal, the canal was closed, and the vessel had to sail back up to proceed via the Cape of Good Hope, where the voyage instead of 52 days, had taken 95. However, as the Judge was bound by *The Eugenia*, it was held the voyage charterparty was not frustrated, and the shipowners were not entitled to additional freight for the voyage round the Cape.

In *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233; [1994] SGCA 15, the judge quoted *The Eugenia*, stating that a key concept of frustration, is that parties must not have foreseen the event happening and thus had not made any provisions for it. Whereas, if the parties had foreseen the event, they would be expected to make a provision for it. As such, it is important to assess whether the delay or change in circumstances was within the contemplation of the parties at the time of entering into the charterparty. Where the delay was unforeseeable and not beyond the reasonable contemplation of the parties, it may then form a basis for a claim of frustration.

Whether a change in profitability is sufficient to frustrate the charterparty?

A mere change in profitability is also unlikely to be sufficient to frustrate the charterparty. In *Glahe International Expo AG v ACS Computer Pte Ltd* and

another appeal [1999] 1 SLR(R) 945, the Court of Appeal reiterated that the mere change in the profitability of a contract or an increase of the burden upon a party under a contract is not enough to discharge him from further performance of the contract. While there may be cases that render a contract so unprofitable that performance of the contract becomes commercially impracticable, the focus of the inquiry is on the nature of the obligation and not the degree of profitability.

Conclusion

In summary, the recent escalation of attacks in the Red Sea has posed legal challenges to parties in shipping contracts. Navigating such issues would require parties to understand their contractual obligations, in order to avoid situations that they may be liable for damages or losses caused to the vessel or cargo. Thus, it is crucial for parties to clarify their rights within their charterparties to minimise the potential disputes. Where disputes arise, parties should also gather evidence to document the dispute in preparation to claim for any losses.



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Updates from Egypt

by Usama Soliman, Soliman Advocates Law Firm

Impact of the Grounding: The Legal Waves of the "Ever Given" Incident in March 2021

Five fishing associations, representing hundreds of members who work in lakes connected to the Suez Canal and the Mediterranean Sea, filed a legal lawsuit related to the "Ever Given" vessel.

The Request:

Impose a precautionary arrest order on the "Ever Given" ship when it docks at Port Said or any other Egyptian port until a financial guarantee is provided.

Legal Basis for Action:

1. Declaration of Hazardous Goods: Consideration of the need to declare hazardous goods before entering Egyptian territorial waters to allow for necessary precautionary measures.
2. Ballast Water Discharge: Addressing issues of ballast water discharge from ships, which may contain foreign marine organisms affecting the local marine environment.

Additionally, other fishing associations are following the details of this legal case in the Suez Court.

Stay tuned for more updates as this significant case unfolds, impacting maritime law and the marine environment.

Breaking News in the Maritime World

After 13 years of rigorous legal battles, on February 10, 2024, the Ismailia Economic Court has made a landmark ruling in case No. 131-Economic of 2021. The court has firmly rejected the appeal by the owners of the INCEPTION YM vessel to nullify a bank guarantee of approximately \$10.27 million issued in favor of our clients.

This guarantee was put in place by the vessel's owners back on June 21, 2011, as a contingency against a potential seizure sought by our clients. The dispute

stems from an incident in July 2009 when the INCEPTION YM was involved in causing oil pollution at the East Port of the Suez Canal.

This ruling upholds the environmental accountability standards essential to our maritime industry and keeps our waterways protected.

Additional Landmark Ruling

On March 19, 2023, the court delivered another pivotal verdict in favor of our clients. The lawsuit involved an enforcement seizure case worth approximately \$4.73 million on the YM SUCCESS vessel. The court steadfastly rejected the owners' plea to annul the seizure initiated in September 2020. Furthermore, the court dismissed the compensation claim filed by the vessel's owners for the seizure at Port Sokhna in Suez, ensuring our clients' interests remained protected .

Incident Report: CLAUDIA GAS Grounding

On April 12, 2024, the Liberian-flagged vessel, CLAUDIA GAS (IMO 8813087), encountered a significant grounding incident in the Ras Nasrani area, located north of Sharm El Sheikh, on the western coast of the Gulf of Aqaba and the Strait of Tiran in South Sinai. This unfortunate event resulted in the destruction of five distinct coral reef areas, covering a combined total of approximately 1,030 square meters. The estimated time for these coral reefs to fully regenerate to their pre-incident state is around 100 years. In response, the Environmental Affairs Agency has placed a precautionary arrest on the vessel to secure compensation for the environmental damages caused.



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Defining a Ship:

The “Eco Spark” Conundrum

by Rafizah Gaffoor & Emma Ng, JTJB (Singapore)

In the recent case of Vallianz Shipbuilding & Engineering Pte Ltd v Owner of the vessel “ECO SPARK”, [2023] SGHC 353, the High Court of Singapore was faced with the question of whether a floating fish farm is considered a “ship” within section 2 of the High Court (Admiralty Jurisdiction) Act (“HCAJA”) which renders it liable to be arrested for maritime claims.

The vessel was formerly a barge known as “WINBUILD 73” and underwent conversion into a “Special Service Floating Fish Farm.” The claimant was engaged to carry out the conversion. The vessel was launched in Batam in February 2022. The vessel was then towed by an ocean tug to Singapore. Disputes subsequently arose as to the sums payable to the claimant.

The claimant filed an admiralty originating claim in rem against the vessel and the vessel was arrested. The defendant disputed that the vessel was a “ship” within section 2 of the HCAJA and sought release of the vessel from arrest along with damages for wrongful arrest. The defendant argued, among others, that the vessel's conversion and stationary position rendered it immovable and ineligible for classification as a ship.

The court considered as a starting point the definition of a ship under the HCAJA. “ship” is defined as “includes any description of vessel used in navigation”. No definition of “vessel” is however found in the HCAJA. The court then turned to the Interpretation Act (“IA”). The IA defines certain terms and expressions used in the written law of Singapore. The definitions therein are to apply unless there is something in the subject or context inconsistent with such construction or unless it is therein otherwise expressly provided in the written law. Under the IA, “vessel” is defined as “includes floating craft of every description”.

The court proceeded to embark on a comprehensive examination of various factors, including the vessel's actual use, classification, registration, and physical characteristics. The court outlined several factors for consideration and held that, "The inquiry is necessarily multi-factorial". The more characteristics that a vessel can check against them, the more likely the vessel is a ship. At the same time, the failure to tick some of the boxes does not necessarily mean that the vessel cannot constitute a ship. Some of these factors are discussed below.

Actual Use and Capability for Navigation

One of the central issues addressed by the court was the vessel's actual use and its capability for navigation i.e., whether she is navigable and built to withstand the perils of the sea, irrespective of its actual use. The court emphasized that the vessel's capability for navigation, rather than its frequency of use, was paramount. The court stated, "The question is whether the degree of stationariness of a vessel is such as to render the vessel incapable of being used in navigation."

In this instance, while the vessel is currently being spudded down into the seabed, the court found that the spuds are removable and retractable such that the vessel is not permanently stationary. The defendant has also been able to move other similar floating fish farms to another site by de-spudding them.

Characteristics of the Vessel

The court meticulously examined the physical attributes of the vessel, including its past use as a barge and subsequent conversion into a floating fish farm. Despite lacking traditional navigational features, the vessel retains its structural integrity and capability for navigation as evidenced by its past voyages and certifications. The court emphasized, "The installation of the 'Special Service Floating Farm' atop the barge structure did not result in such a significant change to the physical structure or design of the Vessel such as to render the Vessel (post-conversion) to no longer be navigable."

Classification and Certification

The court also considered the vessel's classification and certification, viewing them as essential indicators of its status as a ship. The court noted, "The undisputed evidence is that when the Vessel was undergoing her voyage under tow from Batam to Singapore in February 2022, she was classed with BV and flew the Singapore flag." While the vessel subsequently did not maintain her class status, this was found to be attributable to the defendant's failure to do so and not because the vessel is incapable of being classed.

Registration and Flag

While registration to a flag state was not deemed determinative, it served as an important factor in the vessel's classification. The court recognized the significance of flag registration in maritime law, as it signifies a vessel's adherence to regulatory frameworks and international conventions. The court emphasized, "The fact that the MPA (as the maritime and port regulator) required the Vessel to be classed and maintained in class...point[s] to the Vessel being a ship for the purposes of s 2 of the HCAJA."

Conclusion

Having considered the various factors, the court found that the vessel was a ship within the meaning of section 2 of the HCAJA. Although the vessel did not possess some of the 'usual attributes' associated with a ship, the absence of these attributes did not represent a drastic departure to disqualify the vessel from being considered as a "vessel used in navigation" and thus a "ship" under section 2 of the HCAJA. The defendant's application to set aside the arrest was accordingly dismissed.

The Singapore court's analysis sheds light on the complexities of defining a vessel's status. By considering various factors such as past use, physical structure, navigability, and regulatory compliance, the court ensures a nuanced understanding of each vessel's unique circumstances. This approach fosters flexibility, allowing for the inclusion of diverse maritime structures under admiralty jurisdiction while upholding

legal standards. It underscores the importance of a case-by-case evaluation and stakeholders are advised to consider the potential implications that might attract a particular sea-going structure.



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	Wednesday 13 November
19:00	Welcome Reception @ Bar'Oro The Nile Ritz-Carlton Attire: Smart Casual
	Thursday 14 November
9:00	Conference held @The Nile Ritz-Carlton Address: 1113 Nile Corniche, Ismailia, El Nil, Cairo Governorate 11221, Egypt Attire: Business
19:30	Closing Dinner on The Nile Attire: Smart Casual
	Friday 15 November
9:00 - 17:00	Leisurely Networking Day (*optional*) Guided Tour of Pyramids of Giza (Great Pyramid of Khufu, the Pyramid of Khafre, and the Pyramid of Menkaure), the Sphinx and the Valley Temple, lunch at Khufu's Restaurant overlooking the pyramids, followed by a visit to explore the Grand Egyptian Museum. Attire: Casual & comfortable shoes!
	Times are approximate.

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