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When Reality Bites: Terrorism, Frustration and Termination – A Comment

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Anthony Groom, in his comprehensive paper on force majeure clauses, clearly outlines the principles of and rational for force majeure. Simple as it seems, this basic principle bears repeating: "The purpose of a force majeure clause is to relieve a party of liability for inability to discharge its contractual obligations due to circumstances beyond that party's control, or beyond its reasonable control". In recent years I have seen many companies try to produce a list of events that are force majeure whether beyond their reasonable control or not! I know that many companies look into different aspects of force majeure but the fundamental principle is, at times, in danger of being overlooked. Whilst the whole paper should be of interest to industry, the section on allocation covers an area that many may not have previously considered in this detail.

Although aware that piracy happens, I think that Lee Cordner's paper will be an eye opener to most of us.

It is not uncommon to read reports of piracy and most shipping lawyers would be aware that piracy had become a serious threat. However, it still comes as a shock to see the actual data on the incidents of piracy in the waters of our region. It seems to the experts, that piracy has become so common it is to be expected as a regular occurrence. The problem is immediate. There is only slight comfort in expert assessment that most acts of piracy are carried out without harm to the crew and are done solely for the purpose of robbery rather than ransom or violent intent.

So much of our resource trade involves carriage by sea that it seems that we should all be considering how this affects us. If the number of violent acts and ransom situations is increasing do we need to consider whether or not we should stop trading with certain areas? But, then we may still have to ship, or have buyers ship our products through those areas. As an ex merchant seaman, I find it difficult to think only in terms of risk management. We can use the appropriate force majeure clause and we can insure ships and cargo but when does the risk of piracy affect whether or not seamen are working in a safe working environment?

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Does the master of a ship that is passing through known areas of pirate activity have any choice of action? The lore of the sea has been that one seafarer always puts the lives of other seafarers above all commercial considerations. Indeed this is in accordance with the law that governs Australian shipping.

Section 265 of the *Navigation Act* 1912 (Cth) requires a master to go to the assistance of persons on or from a ship or aircraft with a penalty of $10,000 for not doing so. The section goes further and allows the master of a ship or aircraft in distress (do aircraft have masters) to requisition a ship that responds to a distress call. The penalty for not responding to the requisition with all practicable speed is $20,000. Of course, there is some latitude in that the master is relieved from such obligations if he or she, in the special circumstances of the case, considers it unreasonable or unnecessary to render assistance.

Section 317A, of the same Act imposes a greater penalty. A 10 year stretch in prison may face a master of a ship who does not "as far as he or she can do so without serious danger to his or her ship, its crew and passengers (if any) render assistance to any person, even if such person be a subject of a foreign State at war with Australia, who is found at sea in danger of being lost". The risk of serious danger to his, or her, ship does not appear to be enough to relieve the master of the obligation to render assistance.

In all, the master may be faced with a difficult decision.

A ship was recently passing through Indonesian waters when the officer of the watch noticed a small vessel where the crew appeared to be trying to attract attention. The master was concerned for safety. He did not approach too close but launched his rescue boat with an Indonesian speaker, fortunately on board, to act as interpreter. The rescue boat tried to communicate from a safe distance. Of course, it may not be possible to communicate, without electronic aids, at a safe distance from a machine gun! The crew of this vessel claimed to be innocent fishermen whose boat had broken down. The master was then in the position of having to decide whether or not to take the risk of picking the "fishermen" up. At that moment another ship came over the horizon which, much to the relief of the master, turned out to be an American warship that took over the handling of the situation.

As far as is known about this particular incident, this was a situation of innocent fishermen who had broken down. What would have been the situation if the "fishermen" had been pirates luring someone into gunshot range to be held to ransom? The ship was carrying a Delivered Ex Ship cargo so that the seller would only complete its obligations, by passing title and risk to the buyer, at the discharge point. There can be little doubt that any delay or failure to deliver the cargo would be covered by a reasonable force majeure clause. Do we doubt that such delay would have been caused by an event beyond the reasonable control of the seller and its transporter? Perhaps some would argue that the act of going to investigate was preventable. My opinion is that as the law required the master to investigate and if he formed the view acting reasonably that he would not imperil

his own crew then he would need to comply. The matter was an event beyond the reasonable control of a party which by the exercise of reasonable care the party is not able to prevent or overcome.

The issue is then one of assessing whether the master formed that view acting reasonably and in turn whether he was provided with adequate resources to undertake that action. For example, if a shipper represents to its customers that it has all of the appropriate facilities to provide the services of transportation and that extends to relevant equipment to enable a master to properly assess risks in approaching ships, but in reality such equipment is not available or faulty – then will the shipper be able to rely on a force majeure clause if it defaults on time for delivery?

So, our situation does not offer much assistance for the master but we can see that force majeure may apply in respect of claims from the cargo receiver where the test is satisfied.

INSURANCE

Part of a risk management strategy requires a consideration of insurance policies. The Institute time Clauses Hull or the new International Hull Clauses will cover damage to the ship's hull and machinery arising from piracy but not from terrorism. Acts of terrorists and people acting from political motive are not covered under normal hull terms. However, the cover is available but requires additional premium.

Cargo insurance policies are similar to hull insurances. In other words piracy is covered but, without extra cover, terrorism is not.

Indeed, while terms and conditions for insurance cover may vary it is interesting to note that some policies contain the proviso that the insurer is able to cancel the terrorism cover with suitable notice to the insured and reinstatement at a premium to be agreed. If, in our case example above, the ship had succumbed to a terrorist act, then it may have had the benefit of insurance cover but other ships in the area may have had the potential peril of insurance cover being modified.

The terms "terrorism" and "piracy" are identified in the industry but the dividing line is not always appreciated. We may not always find the definition in the terms of our insurance policies and hence turn to common law definitions or statutory definitions for assistance.

If we consider the term piracy as it was assessed in the 1982 case of *Athens Maritime Enterprises Corporation v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Andreas Lemos)*[1] the court held that "the insurer, by the words piracy insures the loss caused to shipowners because their employees are overpowered by force, or terrified into submission. It does not insure the loss

[1] [1982] 2 Lloyd's Rep 483.

caused to ship owners when the nightwatchman is asleep and thieves steal clandestinely. The very notion of piracy is inconsistent with clandestine theft. It is not necessary that the thieves must raise the pirates flag and fire a shot across the victims bows before they can be called pirates".

So under this definition, if a master and crew failed to take appropriate steps in relation to the protection of the ship and its cargo, it may not immediately constitute piracy; the shipper could not simply rely upon a force majeure argument and may not always be afforded the protection of insurance.

The definition of terrorism is equally difficult to ascertain with clarity however, if we turn to recent legislation, this can provide assistance. For example the *Terrorism Insurance Act* 2003 defines terrorist act in s 5 as including an action or threat of action where it is made with the intention of advancing a political, religious or ideological cause.

The apparent difference between piracy and terrorism is the motivation of personal gain in the former and the advancement of a cause in relation to the latter.

CONCLUSION

The prospect of piracy and terrorism at sea presents difficult challenges for a ship's master. Perhaps it would be possible to draw up guidelines to assist in situations where ship masters might be called upon to decide whether to act with the best humanitarian motives and potentially risk their ships and crew without having to balance the prospect of 10 years in prison and a $20,000 fine.

It seems that not even the Australian Maritime Safety Authority (AMSA) has considered a position such as that above with a view to establishing some guidance for masters who might find themselves faced with such a situation. Until further notice, they can only caution, "Be careful"!

This commentary deals with reality so let us be realistic and accept that there is probably little help or guidance that AMSA can offer. Perhaps relevant sections of the *Navigation Act* could be amended or suspended in the waters that are deemed too dangerous for honest mariners to offer assistance. A nation that has its waters so designated would be putting its national fishermen at risk by not adequately policing its waters. However, it is likely that even without the threat of penalties most masters would find it difficult to pass a vessel that appeared to be in distress. Standing off at a safe distance until the authorities arrive could be an alternative. Would delay caused by such a wait be force majeure? It would seem that we must look to the wording of our clauses.

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