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Frustration of Contracts of Affreightment in the Event of Capture of Merchant Ships by Pirates in Waters off Somalia

by

Aref Fakhry

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ABSTRACT

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FRUSTRATION OF CONTRACTS OF AFFREIGHTMENT IN THE EVENT OF CAPTURE OF MERCHANT SHIPS BY PIRATES IN WATERS OFF SOMALIA

Aref Fakhry

This thesis examines the application of the doctrine of frustration under the English private law of contracts to situations of capture of merchant ships for ransom by pirates operating according to the model which has developed in recent years off the coast of Somalia. The examination is centred on the question whether and how contracts of affreightment (or carriage of goods by sea) (including time and voyage charters as well as bills of lading) which may have been concluded by a captured ship would be terminated in the event of capture pursuant to the doctrine. The thesis analyses the wording of standard carriage contract forms and clauses, as well as the provisions of relevant international conventions and statutes, which could deal with the standing of contracts following a capture.

The outcome of the research is that standard contract and clauses often leave the question of the fate of the contract in the event of capture untouched with the result that the doctrine of frustration may apply by default. The contract will only be terminated, however, if an elaborately long detention of the vessel is anticipated, or the prospects of recovery, either against payment of a ransom or through forceful repossession, are very weak.

The thesis equally considers the application of the concept of self-induced frustration by taking several examples of actions or default by one of the parties to the contract of carriage which may have led to or exacerbated the capture scenario. The main findings are that it will usually be difficult to establish self-induced frustration in the event of capture.

An analysis is also made of the application of the concepts of actual and constructive total loss under English marine insurance law to a ship that has been captured by pirates according to the same model of operation.

The consequences of termination of the contract are not discussed in this thesis.

To the memory of my father

It is to be observed … that piracy has long ceased to be practised in any considerable extent. There is said to be a fashion in crimes; and piracy, at least in its simple and original form, is no longer in vogue.

Hercules (Chitty) (1819) 2 Dods 353, 165 ER 1511 (Sir W Scott)

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DECLARATION OF AUTHORSHIP

I, Aref Fakhry

declare that the thesis entitled

Frustration of Contracts of Affreightment in the Event of Capture of Merchant Ships by Pirates in Waters off Somalia

and the work presented in the thesis are both my own, and have been generated by me as the result of my own original research. I confirm that:

- this work was done wholly or mainly while in candidature for a research degree at this University;
- where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;
- where I have consulted the published work of others, this is always clearly attributed;
- where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;
- I have acknowledged all main sources of help;
- where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself;
- parts of this work have been published as: Aref Fakhry, 'Piracy across Maritime Law: Is There a Problem of Definition?' in Aldo Chircop and others (eds), *The Regulation of International Shipping: International and Comparative Perspectives; Essays in Honor of Edgar Gold* (Brill 2012).

Signed:

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The law is stated as at 20 December 2012.

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1. Introduction

This thesis in law explores some of the ways in which a contract of carriage of goods by sea may be discharged by the operation of the doctrine of frustration in the event that a merchant ship is captured and ransomed by pirates. The thesis focuses on the model of piracy which has emerged in recent years from Somalia (1.1).[1] The thesis is thus concerned with a fairly topical question and one that has received almost no study anywhere (1.2).

1.1. Piracy

In the last three decades, in certain parts of the oceans, piracy—in perhaps one of its strict senses as an instance of economically-motivated crime at sea (in contrast, particularly, to terrorism, which is not discussed per se in this thesis)—has re-emerged with much vigour to cause fear and death for seafarers, as well as disruption for shipping and maritime commerce.[2] From under 25 reported

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[1] It is not necessary to distinguish in this thesis between 'piracy' and 'armed robbery against ships at sea', or between 'piracy' and 'maritime terrorism'; instead, the thesis uses the term 'piracy' in its common, non-technical meaning, to mean any violence or depredations against a ship, wheresoever it is lying, by whomsoever it is committed and whatever the motives of the attack may be: see Aref Fakhry, 'Piracy across Maritime Law: Is There a Problem of Definition?' in Aldo Chircop and others (eds), *The Regulation of International Shipping: International and Comparative Perspectives; Essays in Honor of Edgar Gold* (Brill 2012). This meaning is at least sufficient to account for the instance of Somali piracy used as the backdrop to this thesis, in perhaps all its manifestations and notwithstanding its various justifications. It is observed, incidentally, that this meaning is akin to the definition of piracy adopted by Staughton J in *Athens Maritime Enterprises Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Andreas Lemos)* [1983] QB 647 (Com Ct) 658, a marine insurance case, although it is stressed again that there is no need to legally define the term for purposes of this thesis. On this case, see: David Cowley (1983) 47 JCL 158 (note); Julian Cooke and others, *Voyage Charters* (Lloyd's Shipping Law Library, 3rd edn, Informa 2007) para 26.14; *Halsbury's Laws* (5th edn, 2011) vol 60, para 331. See, however, a definitional discussion restricted to certain contractual terms: 91–94.

[2] On the re-emergence of piracy generally, see, among other studies and analyses: Eric F Ellen, 'Piracy' in Brian AH Parritt (ed), *Violence at Sea: A Review of Terrorism, Acts of War and Piracy, and Countermeasures to Prevent Terrorism* (ICC 1986); Peter Lehr (ed), *Violence at Sea: Piracy in the Age of Global Terrorism* (Routledge 2007); Martin N Murphy, *Contemporary Piracy and Maritime Terrorism: The Threat to International Security* (Adelphi Papers No

incidents worldwide throughout much of the eighties,[3] piracy attacks have markedly increased, reaching a peak of 471 incidents in 2000.[4] After a short-lived decline between 2003 and 2006, figures have soared once again, hitting new levels; last year, there were 544 attacks worldwide, representing an increase of 55 (11.3%) over the figure for 2010.[5] For 2012, the overall figures have somehow eased: thus, in the first two quarters, 212 attacks were reported, in comparison with 339 for the same period a year earlier.[6]

The threat of piracy has been in recent years focused in the media on the waters off Somalia; however, several hot spots for piracy exist elsewhere around the

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388, Routledge 2007) chs 1, 3; Wayne K Talley (ed), *Maritime Safety, Security and Piracy* (The Grammenos Library, Informa 2008) chs 6–7; Peter Chalk, *The Maritime Dimension of International Security: Terrorism, Piracy, and Challenges for the United States* (RAND Project Air Force, RAND 2008) ch 2; Patrice Sartre, 'La piraterie en mer' (2009) 410 Études 295; Robert Haywood and Roberta Spivak, *Maritime Piracy* (Global Institutions Series, No 63, Routledge 2012). Periodical statistical details are published by inter alia the International Maritime Organization (IMO) and the ICC International Maritime Bureau (IMB). On the history of piracy across the ages, see: Philip Gosse, *The History of Piracy* (reprint, Dover 2007); Angus Konstam, *Piracy: The Complete History* (Osprey 2008); James Kraska, *Contemporary Maritime Piracy: International Law, Strategy, and Diplomacy at Sea* (Praeger 2011) ch 1; Robert Haywood and Roberta Spivak, *Maritime Piracy* (Global Institutions Series, No 63, Routledge 2012) ch 2.

[3] IMO, MSC.4/Circ.180 'Reports on Acts of Piracy and Armed Robbery against Ships: Annual Report—2011' (1 March 2012) IMO Doc MSC.4/Circ.180, annex 4.

[4] IMO, MSC/Circ.991 'Reports on Acts of Piracy and Armed Robbery against Ships: Annual Report—2000' (31 March 2001) IMO Doc MSC.4/Circ.991, 1. The figure recorded by IMB for that year is 469: IMB, 'Piracy and Armed Robbery against Ships: Annual Report 1 January–31 December 2004' (IMB, 7 February 2005) 4. Discrepancies in the figures between IMO and IMB can be traced back to the different incident reporting mechanisms used: see Murphy, *Contemporary Piracy and Maritime Terrorism* (n 2) 22ff.

[5] IMO, MSC.4/Circ.180 'Reports on Acts of Piracy and Armed Robbery against Ships: Annual Report—2011' (1 March 2012) IMO Doc MSC.4/Circ.180, 2, annex 4. IMB has recorded 439 attacks for 2011: IMB, 'Piracy and Armed Robbery against Ships: Report for the Period 1 January–31 December 2011' (IMB, January 2012) 5–6, 24.

[6] IMO, *Global Integrated Shipping Information System (GISIS)* <http://gisis.imo.org> accessed 13 August 2012. IMB's figure is 177 for the same period: IMB, 'Piracy and Armed Robbery against Ships: Report for the Period of 1 January–30 June 2012' (IMB, July 2012) 5–6, 25.

globe. Trends of attacks in recent years show that piracy is a real threat in four main regions of the world, with varying rates of intensity across and within regions. Those regions are:

- Horn of Africa and wider north-western Indian Ocean
- West Africa
- Southeast Asia and Indian subcontinent
- South America and Caribbean

Although fluid and liable to evolve in relatively short time spans, a general description of the situation in each of the regions follows, with emphasis being placed on the first, as it constitutes the focus of this thesis.

1.1.1. Horn of Africa and Wider North-Western Indian Ocean (Somali Piracy)

Starting about the turn of the century, the waters around the Horn of Africa and in the wider north-western Indian Ocean have witnessed spiralling piratical activity at the hands of well-organised bandits based in Somalia.[7] The phenomenon has taken significant proportions, overshadowing to an extent other piracy hot spots in the world. As noted by Steel J in his judgment in *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)*:[8] 'The existence and nature of piratical attacks off Somalia is a matter of great notoriety and has claimed increasing column inches of headlines over the last two or three years.'

In the same judgment, Steel J said:

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[7] On Somalia-based piracy, see generally: Murphy, *Contemporary Piracy and Maritime Terrorism* (n 2) 28–31; European Union Committee, *Combating Somali Piracy: the EU's Naval Operation Atalanta* (HL 2009–10, 193); Bibi van Ginkel and Frans-Paul van der Putten (eds), *The International Response to Somali Piracy: Challenges and Opportunities* (Nijhoff 2010); Martin N Murphy, *Somalia: The New Barbary? Piracy and Islam in the Horn of Africa* (Columbia University Press 2011); Robin Geiss and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-piracy Operations in Somalia and the Gulf of Aden* (OUP 2011) pt 1, ch 1; Christopher L Daniels, *Somali Piracy and Terrorism in the Horn of Africa* (Global Flashpoints, Scarecrow 2012).

[8] [2010] EWHC 280 (Comm), [2010] 2 All ER 593 [12], affd [2011] EWCA Civ 24, [2011] 3 All ER 554.

> Somalia is a failed state with no effective government or law enforcement. It is also one of the poorest countries in the world. This provides a fertile breeding ground for piracy conducted by fishermen living along the lengthy seaboard of Somalia.[9]

Somali piracy has grown to such heights that there are estimated to be hundreds of pirates[10] roaming the waters off the Horn of Africa in the pursuit of a multi-million dollar business.[11]

Somali pirates are a threat to shipping over a large expanse of water stretching outwards from Somalia and covering the western Indian Ocean, including the Gulf of Aden, the Arabian Sea, down to the waters off Seychelles and Mozambique, and the waters along the coast of Kenya and Tanzania. To the north, the area reaches into the Red Sea.[12]

The area under threat from Somalia-based pirates comprises some of the world's major shipping routes, including the Bab-el-Mandeb, the Strait of Hormuz, the Mozambique Channel and the Suez Canal. Around 28,000 ships ply the region's waters annually.[13] In addition, much of the world's consumption of oil passes through the Arabian Sea and Gulf of Aden.[14]

Beginning with small, coastal fishing vessels and craft, Somali pirates have in recent years moved to operate out of large mother ships, often using for such

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[9] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2010] EWHC 280 (Comm), [2010] 2 All ER 593 [12].

[10] Foreign Affairs Committee, *Piracy off the Coast of Somalia* (HC 2010–12, 1318) 13.

[11] European Union Committee, *Combating Somali Piracy: the EU's Naval Operation Atalanta* (HL 2009–10, 193) 17.

[12] IMB, 'Piracy and Armed Robbery against Ships: Report for the Period 1 January–31 December 2011' (IMB, January 2012) 20ff; IMB, 'Piracy and Armed Robbery against Ships: Report for the Period of 1 January–30 June 2012' (IMB, July 2012) 21ff.

[13] Foreign Affairs Committee, *Piracy off the Coast of Somalia* (HC 2010–12, 1318) 15.

[14] See US Energy Information Administration, 'World Oil Transit Chokepoints' (22 August 2012) <http://www.eia.gov/countries/regions-topics.cfm?fips=WOTC>.

purpose captured vessels, with their crews remaining on board as human shields. These mother ships allow the pirates to operate for several consecutive days on the high seas. Pirates attack passing vessels using automatic weapons and rocket-propelled grenades. From the mother ships, they then close in and try to board target vessels by means of speedboats or skiffs. Electronic equipment to stalk the high seas is also used by pirates. Once the pirates have taken control of the ship, they sail it with the hostage crew to the Somali coastline or use it as a mother ship to attack other vessels.[15]

Pirates have been known to attack all sorts of vessels, stopping at no particular size, type, cargo, flag or nationality, while at the same time aiming for easier targets, a matter that is usually based on such factors as the ship's speed, manoeuvrability, freeboard, cargo and the number of people on board. As such, the pirates' behaviour is essentially an opportunistic one.[16]

Following capture, pirates usually engage in negotiations with shipowners and countries of origin of the hostages in order to secure the highest ransom possible. Steel J recorded this fact in his judgment in *The Bunga Melati Dua*:[17]

> It is clear that they [Somali pirates] take vessels in order to ransom them and invariably negotiate with the shipowner or other interested party for the release of the vessel, cargo and crew, in exchange for a payment which represents an economic proportion of the value of the property at stake.

As to the risks for ships, attacks by Somali pirates lead first and foremost to human hardship for the crews manning targeted vessels. This can take several forms: Aside from the trauma caused by such attacks, there have been instances

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[15] IMB, 'Piracy and Armed Robbery against Ships: Report for the Period 1 January–31 December 2011' (IMB, January 2012) 20ff; IMB, 'Piracy and Armed Robbery against Ships: Report for the Period of 1 January–30 June 2012' (IMB, July 2012) 21ff.

[16] European Union Committee, *Combating Somali Piracy: the EU's Naval Operation Atalanta* (HL 2009–10, 193) 10; IMB, 'Piracy and Armed Robbery against Ships: Report for the Period 1 January–31 December 2011' (IMB, January 2012) 20; IMB, 'Piracy and Armed Robbery against Ships: Report for the Period of 1 January–30 June 2012' (IMB, July 2012) 21.

[17] (n 9) [19].

of seafarers being killed, injured and ill-treated. There have also been numerous cases of varying lengths of detainments of seafarers as hostages. Somali piracy is also a threat to maritime navigation and trade. Ships, along with their cargoes and crews, have been abducted, often to be held at ransom. Some ships have disappeared. Although not a major trait of Somali piracy, depredation and theft of ship equipment, stores and cargo have also been reported. Furthermore, vessels have been delayed and subjected to additional expenses in taking longer routes or implementing precautionary measures. Piracy has also caused a hike in insurance premiums and outlays of ransom money.[18]

In figures, the year 2011 saw Somali pirates launching 237 actual and attempted attacks against ships, accounting for more than half of worldwide attacks; that figure compares with 219, 217, 102 and 51 in previous years, going backwards, representing 49, 53, 35 and 19 per cent of global attacks, respectively.[19] Statistics for 2011 also attribute to Somali pirates, 28 hijacked vessels out of a total of 45 for that year, yielding a success rate of 12 per cent;[20] in comparison, in the previous year, there were 49 hijackings by Somali pirates and the success ratio was higher at 22 per cent.[21] Accordingly, while the number of Somali

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[18] See: One Earth Future Foundation, 'The Economic Cost of Somali Piracy 2011: Working Paper' (2012) <http://oceansbeyondpiracy.org/sites/default/files/economic_cost_of_piracy_2011.pdf>; D Duda and K Wardin, 'Influence of Pirates' Activities on Maritime Transport in the Gulf of Aden Region' (2012) 6 International Journal on Marine Navigation and Safety of Sea Transportation 109.

[19] IMB, 'Piracy and Armed Robbery against Ships: Report for the Period 1 January–31 December 2011' (IMB, January 2012) 5–6. See also IMO, MSC.4/Circ.180 'Reports on Acts of Piracy and Armed Robbery against Ships: Annual Report—2011' (1 March 2012) IMO Doc MSC.4/Circ.180, 2, which accounts for 286 attacks by Somali pirates for the year 2011, while the 2010 figure is 172.

[20] IMB, 'Piracy and Armed Robbery against Ships: Report for the Period 1 January–31 December 2011' (IMB, January 2012) 8, 20. See also IMO, MSC.4/Circ.180 'Reports on Acts of Piracy and Armed Robbery against Ships: Annual Report—2011' (1 March 2012) IMO Doc MSC.4/Circ.180, 2, which records 33 hijackings and a success rate of 11.5 per cent.

[21] IMB, 'Piracy and Armed Robbery against Ships: Annual Report 1 January–31 December 2010' (IMB, January 2011) 19. See also IMO, MSC.4/Circ.180 'Reports on Acts of Piracy and Armed Robbery against Ships: Annual Report—2011' (1 March 2012) IMO Doc MSC.4/Circ.180, 2, which records 50 hijackings and a success rate of 29 per cent.

pirate-led attacks increased in 2011 from earlier years, their success rate dropped. In 2011, the same Somali pirates were blamed for 470 seafarers taken hostage, 10 others kidnapped, 3 injured and 8 killed.[22]

This year, figures seem to have dropped across the board. Between January and June 2012, Somali pirates were responsible for 69 ship attacks, 13 vessel hijackings, 217 hostage takings, one seafarer injured and two others killed.[23]

Overall, since 2008, Somali pirates have successfully hijacked 179 vessels.[24]

Turning to the context and mechanics of ransom negotiations with Somali pirates, Steel J said in *The Bunga Melati Dua*:[25]

> The absence of any national administration means that any attempt to intervene by diplomatic means is fraught with difficulty. Equally any concept of military intervention involves legal and technical difficulties, leaving aside the risk to captured crews. In short the only realistic and effective manner of obtaining the release of a vessel is the negotiation and payment of a ransom. The scale of the problem is startling. In the 12-month period to November 2008 some 30 vessels were seized and then released on payment of ransoms in excess of $60m.

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[22] IMB, 'Piracy and Armed Robbery against Ships: Report for the Period 1 January–31 December 2011' (IMB, January 2012) 20.

[23] IMB, 'Piracy and Armed Robbery against Ships: Report for the Period of 1 January–30 June 2012' (IMB, July 2012) 21. During the same time last year, the figures were as follows: 163 attacks; 21 hijackings; 361 hostage takings; 3 injured; 7 killed (IMB, 'Piracy and Armed Robbery against Ships: Report for the Period of 1 January–30 June 2011' (IMB, July 2011) 21).

[24] IMB, 'Piracy and Armed Robbery against Ships: Annual Report 1 January–31 December 2008' (IMB, January 2009) 22; IMB, 'Piracy and Armed Robbery against Ships: Annual Report 1 January–31 December 2009' (IMB, January 2010) 21; IMB, 'Piracy and Armed Robbery against Ships: Annual Report 1 January–31 December 2010' (IMB, January 2011) 19; IMB, 'Piracy and Armed Robbery against Ships: Report for the Period 1 January–31 December 2011' (IMB, January 2012) 20; IMB, 'Piracy and Armed Robbery against Ships: Report for the Period of 1 January–30 June 2012' (IMB, July 2012) 13.

[25] (n 9) [19].

> Bunga Melati Dua was the sixth ship to be hijacked in 2008. The seizure was in August. It was taken to a position off the coast at Eyl. The initial ransom demand was well in excess of $2m. But this was all of a piece with the process of Somali hijacking. Fortunately the process of negotiating such a demand and making an agreed payment had invariably led to the release of all vessels involved.[26]

Steel J accepted, furthermore, evidence in the form of a written memo emanating from an insurance broker, which described the process of ransom negotiations in the following terms:[27]

> 'The ship crew and cargo are taken to Somali waters and detained there. The hijackers then demand a ransom … Typically based on our knowledge the pirates ask for $3-4m and settle for a ransom of about $1-1.5m. The shipowners usually control the negotiations via their professional negotiators, and pay the ransom in the first instance … The negotiations usually take some time, between 6 & 8 weeks being the norm before the ship and cargo and crew are released. On the positive side, we are not aware of a case in the past with Somali hijackings where the ship and crew and cargo have not been released. The hijackers seems more interested in the ransom money than trying to sell the cargo or ship …'

An analysis of several cases of vessel hijackings and ransom negotiations was also presented by an expert witness before Steel J and was not challenged. Steel J summarised the analysis as follows:[28]

> (i) … Mr Wilkes records that 'there has yet to be a case where a merchant ship that has been hijacked by Somali pirates, where the ship, its crew and cargo (where laden) has not subsequently been released'. … (iii) Mr Wilkes's evidence was that there is a typical

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[26] ibid [13]-[14] (footnote omitted).

[27] ibid [22].

[28] ibid [26].

> profile for a Somali pirate seizure and that the 'safest, most timely and effective means to secure the release of a ship's crew in such circumstances has proven to be, in case after case, to negotiate and subsequently pay a ransom'. Mr Wilkes also states that the seizure of Bunga Melati Dua was consistent with the typical profile. (iv) Consistent with the typical profile, Mr Wilkes believes that the pirates made a ransom demand by 22–23 August 2008 and that ransom negotiations had started by 24 August 2008. The fact that a ransom demand was made and a negotiation would follow would mean, according to the typical profile, that the vessel and crew (and cargo) would be released on payment of the agreed ransom. (v) The Somali pirates would not be interested in keeping the cargo and there was no risk of the cargoes being discharged. As a result, there would be a 'high expectation' that upon the vessel being released, the cargoes would also be released. (vi) The presence of the Royal Malaysian Naval vessels in the area in early September 2008 would indicate that the ransom negotiations were drawing to a conclusion, for the purposes of delivering the ransom and escorting the released vessels. (vii) The vessel's detention for 41 days was close to the then average period of detention of 37 days and within the then known range of 21–68 days.

It is noteworthy that, since the hijacking of the *Bunga Melati Dua*, the situation has evolved.

In April 2011, a record ransom of $13.5 million was reportedly paid for the release of the *Irene SL*.[29] That same year, ransom payments reached a record high of around $130 million.[30]

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[29] Rory Lamrock, 'Evolution of Somali Piracy Will Be Closely Watched in 2012' (*Lloyd's List*, 5 January 2012) <http://www.lloydslist.com/ll/sector/regulation/article388010.ece>.

[30] ibid; Foreign Affairs Committee, *Piracy off the Coast of Somalia* (HC 2010–12, 1318) 55. See further Compass Risk Management, 'Ransoms—Six Ship Moving Averages' (31 July 2012) <http://www.compass-rm.com/piracystatistics/Ransoms-Six_Ship_Moving_Averages_31.07.12.pdf>.

Detention times have also increased with hijackings, in the majority of cases, well surpassing the 100-day mark.[31]

Furthermore, in some instances, negotiations were made more complex with crews being split up, and captors demanding the release of their fellow pirates, who were under arrest or even standing trial in other countries.[32]

In response, Somali piracy has been met with a cascade of countermeasures, ranging from multinational naval patrols and interception of suspect vessels—leading to hundreds of prosecutions in the region as well further afield—to transit corridors, convoys, registration of ship movements, reporting of incidents, as well as the adoption and dissemination of best management practices, through to, more recently, the deployment on board merchant ships of private armed security guards. There have also been military strikes at pirate bases on land.[33]

This impressive panoply of counter-piracy measures, as well as other factors pertaining to Somalia, may have had an impact on the recent abatement of the threat. Nevertheless, experts agree that no reasonable shipowner should consider the waters off Somalia as ridden of the piracy scourge. Pirates have indeed shown resilience and an ability to adapt to changing conditions.[34]

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[31] Compass Risk Management, 'Somali Piracy Durations 2008 and 2009' <http://www.compass-rm.com/piracystatistics/SOMALI_PIRACY_DURATIONS_2008_and_2009.pdf> accessed 21 September 2012; Compass Risk Management, 'Somali Piracy Durations 2010 and 2012' (31 July 2012) <http://www.compass-rm.com/piracystatistics/Somali_Piracy_Durations_by_Ship.pdf>.

[32] See, eg, 'S Korean Media to End Pirate Kidnapping Blackout' (*Voice of America*, 7 September 2012) <http://www.voanews.com/content/south-korean-media-to-end-blackout-on-pirate-kidnappings/1503481.html>.

[33] See: Kees Homan and Susanne Kamerling, 'Operational Challenges to Counterpiracy Operations off the Coast of Somalia' in van Ginkel (n 7); Per Gullestrup and May-Britt U Stumbaum, 'Coping with Piracy: The European Union and the Shipping Industry' in van Ginkel (n 7); Geiss (n 7) pt 1, ch 2; Claude Berube and Patrick Cullen (eds), *Maritime Private Security: Market Responses to Piracy, Terrorism and Waterborne Security Risks in the 21st Century* (CASS Series: Naval Policy and History, No 48, Routledge, 2012).

[34] European Union Committee, Combating Somali Piracy: the EU's Naval Operation Atalanta (HL 2009–10, 193) 5, 9–10, 19, 20; IMB, 'Piracy and Armed

The ransom-geared activities and scale of operations of Somali pirates contrast with other piratical hot spots in the world.

1.1.2. Other Piracy Hot Spots

Apart from Somalia-based piracy, the situation in the three other main piracy hot spots in the world may be summarised as follows:

- West Africa: The main hotspot is Nigeria. Vessels are at high risk along the coast, across the Niger Delta waterways and, increasingly, out at sea at great distances from the coast. Attacks have tended to be very aggressive, leading to capture, kidnappings, injuries and even death. Attackers often ransack the ships, stealing equipment, stores and cargo, mostly oil.[35]

- Southeast Asia and Indian subcontinent: For much of the nineties and well into the last decade, piracy was a real concern for shipping in the Strait of Malacca. In the early years of the new millennium, some 50 attacks were recorded yearly in the Strait.[36] As a result of heightened patrolling and cooperation by regional navies and coastguards, the problem has been subdued generally in the Strait. However, piracy remains a serious threat in waters across Indonesia, Malaysia, Vietnam and the South China Sea. The Bay of Bengal, particularly Bangladesh, and specifically Chittagong, remains also a risk area. Indian ports on both the eastern and western coasts have also witnessed attacks in recent years. Pirates across this region usually operate at a small scale and close to the coast, often around islands, in anchorages, and port areas and approaches. They deploy arms such as guns, knives and

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Robbery against Ships: Report for the Period 1 January–30 September 2011' (IMB, October 2011) 31–32; Rory Lamrock, 'Evolution of Somali Piracy Will Be Closely Watched in 2012' (*Lloyd's List*, 5 January 2012) <http://www.lloydslist.com/ll/sector/regulation/article388010.ece>.

[35] IMB, 'Piracy and Armed Robbery against Ships: Report for the Period of 1 January–30 June 2012' (IMB, July 2012) 22, 25; Liz McMahon, 'Increase in West Africa Pirate Attacks Hits Cargo Market' (*Lloyd's List*, 11 September 2012) <http://www.lloydslist.com/ll/sector/Insurance/article407165.ece>.

[36] IMO, MSC.4/Circ.180 'Reports on Acts of Piracy and Armed Robbery against Ships: Annual Report—2011' (1 March 2012) IMO Doc MSC.4/Circ.180, annex 4.

machetes. Fewer casualties have been reported in this region. Pirates are usually after small gains, but there have also been several serious cases.[37]

- South America and Caribbean: The threat of attack is localised in named port areas of certain countries.[38]

Although equally if not more violent than their Somali counterparts, pirates across these other hot spots have so far operated with little or no resort to the practice of ransom. There are fears that the Somali piracy model is copied, however, elsewhere in the world, and recent reports from West Africa seem to lend credence to such fears.[39] This brings the reader to the focus of this thesis on the Somali type of piracy and the elaboration of the legal question it poses as the centre stage of the underlying research.

1.2. Thesis Question, Contribution and Outline

From the above overview of the main piracy hot spots in the world, it may be seen that Somali piracy has constituted, for the global maritime business community, a notable risk in its own right. It is true that Somali pirates do not have the exclusive claim to ruthlessness or disruption of world shipping. It seems, however, that the Somali piracy model has been unique insofar as it has involved a level and scale in attacks that have sent real shockwaves across the global shipping community. Perhaps the key feature of the Somali pirates' 'success story' has been their emboldened ability to treat with the shipping community—shipowners, maritime employers, insurers—and even States, on an almost equal footing, imposing their own conditions for the release of hostage ships and crews, and running foul of a wide raft of anti-piracy measures involving the navies of so many nations. By being able to hold so many ships,

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[37] IMB, 'Piracy and Armed Robbery against Ships: Report for the Period of 1 January–30 June 2012' (IMB, July 2012) 22, 25. See generally on piracy in this area Murphy, *Contemporary Piracy and Maritime Terrorism* (n 2) 25–28.

[38] IMB, 'Piracy and Armed Robbery against Ships: Report for the Period of 1 January–30 June 2012' (IMB, July 2012) 24.

[39] European Union Committee, Combating Somali Piracy: the EU's Naval Operation Atalanta (HL 2009–10, 193) 5.

cargos and crews at ransom, it may be argued that Somali pirates have perfected an age-old practice.

Unlike other forms of piratical activity, a ship's hijacking prolongs ex hypothesi a limbo situation for the parties interested in the ship and its operations. In principle, the integrity of the ship, cargo and crew is not threatened by the captors. Ship and cargo interests are lured by the prospect of a release, which translates into damage containment. The payment of a ransom will save those interests a much larger loss represented in the non-release of their property and crew. The length of detention is, furthermore, an additional head of loss which ship and cargo interests will usually strive to limit. In this manner, the hijacking locks the private interests behind the ship and cargo into a grey area where release is likely, subject to negotiating an 'acceptable' ransom amount, and where the time of detention is elastic.

This locking of the private parties interested in the operations of a hijacked ship into a period of variable length, during which they are called upon to negotiate the terms of release, and which may or may not lead to a happy ending for the ship, cargo and crew, burdens the contractual relationships pre-existing between those parties at the time of the capture. This thesis sets about to answer one of the multiple legal questions that may arise in the event of the capture of a cargo-carrying vessel following the Somali style of piracy.

Aside from questions of liability for the capture, which parties to the contract of carriage by sea may raise against each other,[40] a fundamental question relates to

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[40] See, for instance: *Cosco Bulk Carrier Co Ltd v Team-Up Owning Co Ltd (The Saldanha)* [2010] EWHC 1340 (Comm), [2011] 1 Lloyd's Rep 187 (off-hire); *Osmium Shipping Corp v Cargill International SA (The Captain Stefanos)* [2012] EWHC 571 (Comm), [2012] 2 All ER (Comm) 197 (off-hire); *SH Tankers Ltd v Koch Shipping Inc*, No 12 Civ 00375(AJN), 2012 WL 2357314 (SDNY, 19 June 2012) (claim for ransom recovery by shipowner against time charterer); *Metall Market OOO v Vitorio Shipping Co Ltd (The Lehmann Timber)* [2012] EWHC 844 (Comm), [2012] 2 All ER (Comm) 577 (general average); *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ 24, [2011] 3 All ER 554 (total loss of cargo) . There may of course be other ways out of the legal conundrum. For instance, the cargo owner may refuse paying freight upon the non-delivery of the goods if the vessel is lost: *Anon* (1693) 2 Show KB 283, 89 ER 941; *Allison v Bristol Marine Insurance Co* (1876) 1 App Cas 209 (HL) 228–29 (Blackburn J); Paul Todd, 'Ransom, Piracy and Time Charterparties' (2012) 18 JIML 193, 198ff.

the continued validity or standing of the contract, particularly where the capture is prolonged in time.

Under English law—the subject matter of this thesis—the doctrine of frustration may be called to the rescue in situations where the continued standing of the contract has become untenable as a result of a 'radical change' in the operating circumstances. In such an event, the contract is deemed in law frustrated or discharged.

The doctrine is, nonetheless, difficult to apply and is imbricated into the specific contract's provisions as well as the parties' expectations.

No thorough study appears as yet to have been carried out of the operation of the doctrine of frustration in relation to contracts of affreightment in the context of the piratical capture of a vessel.[41]

There is only one case touching on the matter, *Petroships Pte Ltd v Petec Trading and Investment Corp (The Petro Ranger)*.[42] The decision was, however, on appeal from an arbitration award, and the Court, beyond confirming the correctness of the test to frustration applied by the tribunal, sent the case back to the tribunal, since the award was insufficiently reasoned.[43] Furthermore, frustration was invoked following recapture of the vessel from the pirates, rather than as a result of the initial capture. In addition, the pirates—operating in Southeast Asia—had a very different modus operandi from Somali pirates insofar as they took measures to conceal the true identity of the ship in order to operate it commercially themselves. The new name given to the ship by the pirates was thus overpainted on the *Petro Ranger*'s hull, false registration papers were placed on board, and false bills of lading for the cargo were created. There are therefore significant differences between that case and the Somali model of piracy studied for the purpose of articulating the doctrine of frustration in this thesis.

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[41] See however Paul Todd, *Maritime Fraud and Piracy* (Maritime and Transport Law Library, 2nd edn, Lloyd's List 2010) paras 1.108ff.

[42] [2001] 2 Lloyd's Rep 348 (Com Ct).

[43] ibid 353–55.

Aside from *The Petro Ranger*, the law of frustration is laid out in several cases dealing with various contracts and events. The doctrine is traced back to *Taylor v Caldwell*.[44] Much of the doctrine's development occurred in the aftermath of major wars and conflicts, but this does not mean that the doctrine is restricted to a particular type of event.

Textbooks on frustration analyse the reported cases, but fail to elaborate on the application of the doctrine in all its ramifications to individual and novel factual situations.[45]

The task of the lawyer faced with a piratical capture would consist of sifting through the cases and applying the principles and criteria they enunciate to the specific facts before him/her. This thesis aims to do just that.

Clearly, the doctrine of frustration as a self-standing set of principles and rules in English law, deserves a treatment in its own right, hence the genesis of this work.

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[44] (1863) 3 B & S 826, 122 ER 309.

[45] Ewan McKendrick (ed), *Force Majeure and Frustration of Contract* (Lloyd's Commercial Law Library, 2nd edn, LLP 1995); Guenter Treitel, *Frustration and Force Majeure* (2nd edn, Sweet & Maxwell 2004); HG Beale and others (eds), *Chitty on Contracts* (The Common Law Library, 31st edn, Sweet & Maxwell/Thomson Reuters 2012) vol 1, ch 23. See also Andrew Phang, 'Frustration in English Law—A Reappraisal' (1992) 21 Anglo-Am L Rev 278. For treatment within contracts of carriage, see: JGR Griggs, *Frustration in Relation to Contracts of Affreightment* (Gothenburg School of Economics Publications No 3, Gumpert 1959); Raoul Colinvaux (ed), *Carver's Carriage by Sea* (British Shipping Laws, 13th edn, Stevens 1982) ch 7; Nicholas Gaskell, Regina Asariotis and Yvonne Baatz, *Bills of Lading: Law and Contracts* (LLP 2000) ch 11; Keith Michel, *War, Terror and Carriage by Sea* (LLP 2004) ch 15; Julian Cooke and others, *Voyage Charters* (Lloyd's Shipping Law Library, 3rd edn, Informa 2007) ch 22; Terence Coghlin and others, *Time Charters* (Lloyd's Shipping Law Library, 6th edn, Informa 2008) ch 26; Keith Michel, 'War, Terror, Piracy and Frustration in a Time Charter Context' in D Rhidian Thomas (ed), *Legal Issues Relating to Time Charterparties* (Essential Maritime and Transport Law Series, Informa 2008); Andrew Tettenborn, 'Frustration in Voyage Charters—Silted-up Backwater or Vital Navigational Resource?' in D Rhidian Thomas (ed), *The Evolving Law and Practice of Voyage Charterparties* (Maritime and Transport Law Library, Informa 2009); Bernard Eder and others, *Scrutton on Charterparties and Bills of Lading* (22nd edn, Sweet & Maxwell 2011) paras 1-089ff. For older works on frustration, see, for instance: Rudolf Gottschalk, *Impossibility of Performance in Contract* (Stevens 1938); McNair and AD Watts, *The Legal Effects of War* (4th edn, CUP 1966) ch 5.

Admittedly, the Somali type of piracy bears its own characteristics and effects, which must be taken into consideration in the application of the principles and criteria set forth by the courts in the context of the operation of the doctrine of frustration. The specifics of Somali piracy will feature in all the discussions to be found in this work. This is a fundamental contribution which, in the light of the topicality of the subject of piracy, carries all the more interest.

Of course, the description made earlier of Somali piracy is not intended to account for all the possible manifestations and variations of piratical attacks which have occurred or could in the future be encountered in waters off Somalia. The phenomenon of piracy is ex hypothesi unlawful, so it is elusive and opportunistic. Somali pirates are likely to and have in fact taken to adapting and modifying their practices as and when needed by changes in their operating environments. Nevertheless, the description of the working parameters of Somali pirates above renders a good, basic and workable factual setting for considering the legal question which this thesis attempts to resolve.

Accordingly, the thesis does not discuss piratical models which prevail or may have prevailed in other areas, including the following:

- violence used by Nigerian pirates and aimed mainly at robbing property or cargo on board ships;[46]
- the practice known as phantom or ghost ships, formerly a major threat in Southeast Asia;[47]
- petty armed robbery and theft on board anchored ships, prevalent in such countries as Bangladesh.[48]

These practices are outside the main model of piracy used by Somali bandits and may give rise to other legal questions.

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[46] text to n 35.

[47] See eg Abby Tan, 'In Asian Waters, Sea Pirates Eschew Eye Patches, Steal Ships via Internet' *The Christian Science Monitor* (Boston, 13 June 1996) International 7.

[48] text to n 37.

The restriction of the scope of the thesis to the Somali model of piracy is thus justified by the unique nature and characteristics of the phenomenon, as contrasted with other triggering factors. Of course, piratical capture may be likened to other forms of detention, including requisition, and indeed the thesis draws on such cases. Ultimately, however, for the legitimate question posed at the opening of this thesis to be answered, the analysis should focus on the factual matrix within which capture operates, and Somali pirates have followed in this respect an identifiably consistent pattern.

Furthermore, the application of the doctrine of frustration must bear in mind the typical contracts and clauses on carriage of goods by sea, including the latest standard clauses on piracy. Such an analysis does not appear to have been done in a coherent and systematic manner anywhere, even outside the context of piracy.[49] One of the aims of this thesis is to fill this gap in the literature.

The thesis considers the main types of contracts of carriage of goods by sea, namely, time and voyage charters, as well as bill of lading agreements, which the ship may have concluded.

An examination is carried out of a selected number of popular standard charter and bill of lading contracts forms,[50] as well as the governing legislation and international treaties on such contracts.[51] In addition, key standard charter clauses dealing with general security matters[52] as well as more recent piracy-specific clauses[53] are studied.

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[49] See the references listed in n 45.

[50] For the list of standard contract forms examined in the thesis, see Appendix A. As far as charter forms are concerned, both generic and specialised tanker forms have been selected for examination.

[51] For the list of national statutes and international conventions applicable under UK law, see Appendix B(1). For comparative purposes, reference will also be made to international conventions on the matter not adopted under UK law (Appendix B(2)). Finally, reference will also be made to US legislation incorporated into a number of the chosen standard contract forms (Appendix B(3)).

[52] For the list of standard general security contract clauses examined in the thesis, see Appendix C(1). The so-called ISPS clauses, eg, BIMCO's ISPS/MTSA Clause for Time Charter Parties 2005 and ISPS/MTSA Clause for Voyage Charter Parties 2005, both published in BIMCO, 'BIMCO ISPS Clauses Revised' (BIMCO

While clearly frustration may also attain other contracts, eg, sale of goods, contracts for services requiring the supply of materials shipped by sea, the restriction of the scope of this work to contracts of affreightment is necessitated by the unique nature of each of these types of contracts, and the distinct standard contract forms and clauses used in relation to each. This does not mean that commonalities as to the effect of frustration on these various contracts should be ruled out; on the contrary, ultimately, the doctrine of frustration is the same for all contracts, but the point is that its specific application to each contract is dependent on the tenor of and the wording used to express the rights and obligations of the parties, which vary across standard forms and clauses—let alone different types of contracts. The very question lying at the core of this thesis is thus posed in Professor Todd's book in relation to the impact of piracy on contracts of carriage of goods by sea: 'In ransom piracies, of course, release negotiations can be extremely protracted, and a frustration argument is, at least in principle, possible.'[54] The question is, however, left open.

Still, frustration does not operate when the event relied upon as justifying the contract's termination was self-induced by the party invoking the doctrine. In this regard, the thesis will draw on the possible implications on the discharge of the contract stemming from fault by either party to the contract of carriage in precipitating the piratical capture and in failing to bring it to an end following its occurrence. The discussion will draw principally on the approach to self-induced frustration formulated by the Court of Appeal in *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)*.[55]

A particularly novel contribution brought about in this work is the interface between marine insurance and the doctrine of frustration. Although the thesis

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Special Circular No 5/2005, 15 June 2005), are omitted from the study, since they do not touch on the thesis question.

[53] For the list of standard piracy contract clauses examined in the thesis, see Appendix C(2). On these clauses, see Georgios Missailidis, 'Piracy Clause: A Contractual Solution?' (2009) 9(3) STL 1.

[54] Todd (n 41) para 1.139.

[55] [1990] 1 Lloyd's Rep 1 (CA).

does not tackle insurance aspects directly—the focus being on the contract of affreightment—questions of marine insurance are raised by at least one of the clauses in the contract (the so-called ship loss clause in certain standard time charters) with repercussions bearing on the operation of the doctrine. The examination of when a ship may thus be deemed lost under marine insurance principles becomes relevant to the continuance of the charter. This part of the thesis analyses the recent piracy case heard by English courts, *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)*.[56]

Following discharge by frustration, nothing will accrue under the contract, subject to the provisions of the Law Reform (Frustrated Contracts) Act 1943. The outcome of the frustration issue can thus be crucial for questions of liability. In a situation of capture, the continued standing of the contract takes on a significant meaning when resolving the question of payment of hire during the capture[57] or determining the type of liability owed by the shipowner or carrier towards the cargo carried on board the ship,[58] among other issues. This thesis is not intended, however, to deal with the effects of frustration.

It should also be added that, while it is true that, starting this year, the effectiveness of Somali pirates' attacks has been considerably curbed, thanks to the combined efforts of reinforced naval operations and the deployment on board merchant ships of privately contracted armed security guards,[59] this turning of the tide on the Somali piracy 'success story' does not detract from the relevance of the issues and concerns generated by the Somali crisis while it lasts. Even with the total eradication of the Somali piracy problem, it is likely that the questions it raises may be pertinent in relation to not only similar instances of piracy sprouting elsewhere, but also vis-à-vis other situations, whether or not security-related. It is significant in this regard that the doctrine of frustration,

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[56] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ 24, [2011] 3 All ER 554, affg [2010] EWHC 280 (Comm), [2010] 2 All ER 593.

[57] See Coghlin (n 45) paras 26.59–.63.

[58] See Cooke (n 45) para 22.36.

[59] See sub-sec 1.1.1.

which owes much of its development to armed conflicts, has proven of much wider application.

Thus, this thesis, while concentrating on a specific set of facts, should be taken as a contribution to the doctrine of frustration more generally.

In order to lay the ground for the discussion of frustration in relation to ship capture, it is necessary to schematise the typical scenarios involved. A capture incident in the studied model could lead to two possible outcomes identified as A and B as follows:

- Outcome A: The ship is recovered by its owners or operators. This may happen in two alternative ways:
    - Recovery method 1: The ship is released by the pirates against payment of a ransom.
    - Recovery method 2: The ship is forcibly recovered from the pirates with or without payment of a ransom.

  Following recovery, the ship may be found in either two situations:
    - Post-recovery situation 1 (outcome A1): *The ship is able to resume the contractual service.* This could present three possible scenarios:
        - The cargo is unharmed and arrives at destination without loss due to delay.
        - The cargo is unharmed, but as a result of the capture arrives at destination having suffered a loss due to delay.
        - The cargo suffers physical harm due to the capture, but can still be usefully delivered at destination, with or without an additional loss due to delay.
    - Post-recovery situation 2 (outcome A2): *The ship is unable to resume the contractual service.* This could be due to a number of reasons:
        - The ship is unseaworthy.
        - The cargo has been lost as a result of its perishing, theft or lack of care.

- Outcome B: The ship is not recovered by its owners or operators.

There is a further phase to be looked at. It is the one immediately following the capture and during which the realisation of either outcome A or B is an open question. This is a key phase.

The above scenarios will prove useful at various junctures throughout the thesis.

To recapitulate, the question posed in this thesis is: What is the immediate effect of the capture of a merchant ship with its crew following the Somali piracy model on the standing of the contract (or contracts) of carriage which may have been concluded by the ship?

Thus, in the interim phase of capture just referred to and pending ascertainment of the ultimate fate of the ship, which phase can take anywhere from a few hours to several months or even longer, the validity of the contract of carriage may be considered to be in a state of limbo. The ship is in fact no longer in the hands of its rightful owners or operators. The ship, the cargo and probably the crew are under the pirates' control. The execution of the contract of carriage is no longer possible, at least for the time being. If the ship, its cargo and crew were speedily recovered from the pirates, there could be a chance of getting on with the contract, despite the delay, but this is conjecturing. It might be that recovery never happens. Even if it did, the ship could be damaged upon recovery, making it impossible to go on with the voyage without carrying out repairs. The crew might furthermore have been killed by the pirates, or be injured or traumatised to the point of not being in a position to continue with the voyage, so that a replacement would be necessary. The cargo itself might have been stolen by the pirates in whole or in part, or have perished as a result of the delay. Alternatively, the cargo's market value might have diminished to the point of being of no or little value to its receivers.

Usually, the prognosis of the capture is not known with certainty. Can the parties to the contract consider themselves freed from its provisions while the ship and the goods are in the hands of the pirates? If the answer is no, what if the capture goes on for a long and indefinite period? Would a prolonged capture not necessitate a different answer?

In such a phase of uncertainty as to the final fate of the ship, described by Rix LJ in *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)*[60] as '"wait and see"'[61]—the expression was there used in the context of ransom negotiations with pirates—contractual clauses do not usually provide definite answers and the operation of the doctrine of frustration may be particularly arduous. It has thus been noted: 'Cases in which the supervening event is one involving delay, the extent of which is unpredictable, are certainly the most difficult to advise.'[62]

Then, what is the contractual situation once the ship is recovered (outcome A above) or, at the other end, when it is clear that it would not be recovered (outcome B above)? In either of these situations, the uncertainty typifying the interim phase discussed above is removed. Upon outcome A, the ship having been recuperated, further dealings with the cargo—or what remains of it, if any—may now be more easily decided upon. Likewise, upon outcome B, lack of recovery of the ship places the question of the survival of the contract beyond doubt.

The capture scenarios outlined above will thus form the basic matrix for analysing the question of the standing of the contract. There will, however, be an emphasis on the first phase of the capture, namely, the period beginning immediately upon capture and pending the realisation of either outcome A or B. In the aftermath of either of these two outcomes, questions of the standing of the contract, unless already resolved one way or another, are likely to be easier to tackle, as the element of uncertainty will ex hypothesi have disappeared.

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[60] [2011] EWCA Civ 24, [2011] 3 All ER 554.

[61] ibid [56]. In *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)*, [2007] EWCA Civ 547, [2007] 2 All ER (Comm) 634 [120], Rix LJ used the same expression 'wait and see' specifically in relation to the contract's frustration, arising in that case from the ship's detention by port authorities.

[62] JGR Griggs, *Frustration in Relation to Contracts of Affreightment* (Gothenburg School of Economics Publications No 3, Gumpert 1959) 12.

In line with the above rationale, the analysis of the application of the doctrine of frustration to contracts of carriage in the event of a piratical capture will begin by considering situations where the incident may have been provided for in the contract (ch 2) before turning to the converse scenario where the contract binding the parties is silent on the matter (ch 3). Chapter 4 will consider the question of self-induced frustration in this context. Finally, chapter 5 will examine the application of the concept of total loss in marine insurance law in relation to capture of the vessel; as already mentioned, this question is of immediate concern under one of the typical clauses inscribed in charterparties.

2. Event Provided for in Contract

This first substantive chapter out of a total of four carries out the first step in the process of examining whether, following capture of a vessel by pirates, contracts of carriage relating to the vessel and its cargo should be considered as extant or whether the capture event has brought about the termination of such agreements. The task consists of scrutinising the contract's terms to determine whether the matter is provided for. In all cases of frustration of contract, this is the primary part in the legal analysis. If the contract has dealt with the question at hand, namely, its own standing following the taking of the vessel by pirates, then the matter ends there, as the contract forms the law of the parties.

Studying the provisions of standard form contracts of carriage of goods by sea for such a task will therefore constitute the main aim of this chapter. In other words, do such contracts say something about the key question considered here? A wide array of clauses of relevance to this question are thus considered given that the matter is conspicuously absent in the wording of most contracts. In the newly adopted piracy-specific clauses, however, an attempt was made to provide for this, and the chapter will therefore include an analysis of these clauses.

Ultimately, if the question of the standing of the contract is resolved within the confines of its terms, the matter will end there. The central concern of this thesis will thus have been addressed by reference to the letter of the contract. However, as will appear further on, the question will almost always fall outside standard provisions, rendering it necessary to go through the next step in the examination of the applicability of the doctrine of frustration. Put differently, if the contract's terms are found to eschew dealing with the standing of the contract following capture, then attention will need to turn to the operation of the criteria laid down in the case law for deciding on the matter of frustration in the wake of the ship's capture. That will form the subject matter of the following chapter 3.

* * *

Accordingly, resolving the question of the standing of the contract of carriage, in the event of or following a piratical capture, requires in the first place

consideration of the governing contractual provisions, which constitute the law of the parties.[1] In the case of contracts of carriage by sea covered by a bill of lading, it is also imperative to consider the applicable legislation.

It is a fundamental principle that, if the contract has dealt with a particular situation, effect must be given to the arrangements agreed to. As stated by Cleasby B (dissenting on another point) in *Jackson v Union Marine Insurance Co Ltd*,[2] an early frustration case:

> The settled principle is, that, where in an agreement a provision is made applicable to a particular subject, that provision forms the agreement on that subject. The rule is, Expressum facit cessare tacitum. There is no further qualification or limitation to be implied. This is essential to all certainty in the obligations which persons place themselves under; or the agreement would be the uncertain conclusion of a particular jury as to what was reasonable or convenient.

This rule has been upheld in numerous cases where frustration was invoked by one of the parties to a contract. Courts have been keen to brush aside the doctrine of frustration and give effect to the provisions of the contract. As stated by Viscount Haldane in *Bank Line Ltd v Arthur Capel & Co*:[3]

> What is clear is that where people enter into a contract which is dependent for the possibility of its performance on the continued availability of the subject-matter, and that availability comes to an unforeseen end by reason of circumstances over which its owner had no control, the owner is not bound unless it is quite plain that he has contracted to be so.

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[1] *Cutter v Powell* (1795) 6 Term Rep 320, 101 ER 573.

[2] (1874) LR 10 CP 125 (Ex Ch) 128.

[3] [1919] AC 435 (HL) 445.

In *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd*,[4] Viscount Simon LC said: '[T]here can be no discharge by supervening impossibility if the express terms of the contract bind the parties to performance notwithstanding that the supervening event may occur.'[5]

The question that often arises is whether the contract does provide for the event that has taken place. The applicable test is whether the contractual provision provides completely for the event: if it does, frustration will not operate, and vice versa. This test was described by Lord Sumner in *Bank Line*:[6]

> The theory of dissolution of a contract by the frustration of its commercial object rests on an implication, which arises from the presumed common intention of the parties. 'Where the contract makes provision' (that is, full and complete provision, so intended) 'for a given contingency it is not for the Court to import into the contract some other and different provision for the same contingency called by a different name': Bailhache J. This is a matter of construction according to the usual rule. A contingency may be provided for, but not in such terms as to show that the provision is meant to be all the provision for it. A contingency may be provided for, but in such a way as shows that it is provided for only for the purpose of dealing with one of its effects and not with all.

In *Wates Ltd v Greater London Council*,[7] the question was whether a builder could invoke frustration of its contract with a local authority by reason of a

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[4] [1942] AC 154 (HL). See PH Winfield (1941) 57 LQR 300 (note); Glanville L Williams (1941) 5 MLR 135 (note); Julius Stone, 'Burden of Proof and the Judicial Process: A Commentary on *Joseph Constantine Steamship, Ltd* v *Imperial Smelting Corporation, Ltd*' (1944) 60 LQR 262.

[5] *Joseph Constantine* (n 4) 163. The ratio of this case concerned burden of proof, and the commentaries (see n 4) do not dwell much on this point, which was obiter.

[6] (n 3) 455–56, citing *Admiral Shipping Co Ltd v Weidner Hopkins & Co* [1916] 1 KB 429 (KB) 438, revd [1917] 1 KB 222 (CA). See also *Bank Line* (n 3) 462 (Lord Wrenbury).

[7] (1983) 25 BLR 1 (CA).

sudden hike in inflation rates, which, it was accepted by the Court of Appeal, made the remuneration method inserted in the contract unsatisfactory. The Court of Appeal, affirming the lower court's judgment, quashed the arbitrator's award favouring the builder on the grounds that, whatever the inconvenience to the builder, the contract provided sufficiently for the financial eventuality. Purchas LJ said:

> In my judgment, whilst having considerable sympathy with Wates because they undoubtedly suffered damage as a result of the postponement of proper adjustment of the certificated sums and would, had the contract been fully executed, still have suffered damage, it is not possible to say that the terms of the Supplemental Agreement did not in fact as a matter of law cover all the eventualities including that which occurred. Notwithstanding an increase in the rate of inflation unforeseen at the time of entering into the Supplemental Agreement and a temporary deviation by the Ministry from their system of regularly issuing housing cost yardstick circulars at periods related to the increase in inflation, all this fell within the provisions of the Supplemental Agreement.[8]

The same justification for maintaining the contract and denying frustration was expressed by Stephenson LJ:

> Things may have turned out differently from what the parties contemplated in that inflation increased not as a trot or a canter, but at a gallop. But that difference in degree and tempo was not so radical a difference from the inflation contemplated and provided for as to frustrate the contract. It could only frustrate the contract if it were coupled with the Departments' failure to keep up with it and provide for it by increasing the HCY or by some other method. And in fact the contract did provide for it by clause 3(6), though

[8] ibid 34.

> not as effectively as Wates would have liked it if they had contemplated it.[9]

It is arguable whether the above test of '"full and complete provision"' was affected by the liberal approach to contracts' interpretation initiated by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society*.[10] His Lordship formulated there 'the principles by which contractual documents are nowadays construed', namely:

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having 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.
>
> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. …
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely

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[9] ibid 35–36.

[10] [1998] 1 All ER 98 (HL) 114–15.

enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax.

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said:

> … if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.[11]

Lord Hoffmann added: 'Almost all the old intellectual baggage of 'legal' interpretation has been discarded.'[12]

Lord Hoffmann's statement has been generally considered as ushering a radically changed approach to contractual interpretation through its rejection of the *literal*, in favour of *contextual*, interpretation. As a main consequence of the new approach, the notion that words used in a contract carry unvaryingly intrinsic value and meaning has lost sway. Interpreting or construing a contract's terms requires their analysis in the overall background of the document at hand. The meaning of contract terms is subject to background or context. No interpretation of contract terms may thus be sustained without recourse to the contextual framework of the parties' relationship.

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[11] ibid (notes omitted).

[12] ibid 114.

This could have, of course, direct implications on the continued relevance of the test of 'full and complete provision' in relation to frustrating events in contracts, which was explained above. No case has, it should be pointed out, arisen on this very link yet. However, given Lord Sumner's affirmation in the passage quote above from *Bank Line* that '[t]his is a matter of construction according to the usual rule',[13] the subject matter might well, to that extent, be seen as coming under the purview of Lord Hoffmann's principles regarding the new approach to contract interpretation.

Does this new approach mean, however, that any analysis of contractual terms—in this instance to determine whether a frustrating event is sufficiently provided for in the contract—has become illusory in the abstract? In other words, does contextual interpretation render the study of the words used by the parties in their agreement futile, as any ultimate meaning of those words would have to be informed by the contract's background? Clearly, the answer is no. In the pursuit of contract interpretation, a necessary step must be to read those words and to lay forth their 'normal' meaning, keeping in mind the equally if not more important elucidation of their meaning in context. This necessary step is after all in line with Lord Hoffmann's principle no 5 in the passage quoted above from *ICS*. In *Bank of Credit and Commerce International SA v Ali*,[14] Lord Hoffmann returned to the issue and said: 'the primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage'.

The enduring importance of the 'usual' meaning of the terms takes on particular significance when it comes to commercial and standard form contracts, as is the case for much of the subject matter of this thesis. The generally held view in this regard is that such contracts owe a great part of their widespread acceptance to adherence to their letter in conformity with interpretative guides as established by a skilled body of case law developed over a long period of time.

It is not entirely settled whether the position on interpretation with respect to commercial standard form contracts is an exception to Lord Hoffmann's

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[13] text to n 6.

[14] [2001] UKHL 8, [2002] 1 AC 251 [39].

approach or rather an application of it on the footing that eminence of the meaning of the letter of those documents together with the authoritative conventions regarding their meaning constitute by themselves the context or at least an important part of it.

In returning to the test of 'full and compete provision', it may thus be said that, inasmuch as commercial standard form contracts are concerned, the exercise by which terms of the contract are vetted as against that standard so as to extricate a knock-on effect on the doctrine of frustration can continue to be deployed in the main, bearing in mind that the specifics of the contractual relationship at hand may require, in light of Lord Hoffmann's contextualist theory, reference to background material in order to further inform the outcome of such exercise.

On the other hand, it could well be argued that, inasmuch as the doctrine of frustration should no longer be seen to be embedded in a constructionist theory of the contract, the test of 'full and complete provision' should simply escape Lord Hoffmann's statement. Here is not the place to review the evolution over time of the doctrine and its successive characterisations as either a constructionist doctrine or one that is based on consideration or justice, to enumerate salient alternatives for its true nature. Suffice it to say that, in this author's view, this argument would be a weak one. Indeed, the point is not so much about the nature of the doctrine of frustration as it is about the legal exercise through which the contract is explored in the pursuit of a particular provision—which exercise is clearly one of interpretation. Hence the conclusion that Lord Hoffmann's statement controls the subject herein.

In *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage and Towage) Ltd (The Sea Angel)*,[15] Rix LJ articulated what has been referred to by Flaux J in *Bunge SA v Kyla Shipping Co Ltd (The Kyla)*[16] as 'the more flexible approach to the doctrine of frustration in the modem law [ie] … whether the contingency or event is provided for by the contract in terms of allocation of risk'.[17] Rix LJ's

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[15] [2007] EWCA Civ 547, [2007] 2 All ER (Comm) 634.

[16] [2012] EWHC 3522 (Comm), [2013] 1 Lloyd's Rep 565.

[17] ibid [69]. Flaux J added, however, in the same part of his judgment that the nuance between the test of full and complete provision, and allocation of risk is difficult to make out.

methodology, which is an all-encompassing approach to frustration and stretches beyond the question of contractual provision, will be considered in all its ramifications in chapter 3.

* * *

Reverting to the subject of this thesis, it is observed at the outset that none of the standard contracts considered[18] provide expressly for the case of capture of the vessel by pirates, either by maintaining, suspending or terminating the contract.

The same may be said about the Hague-Visby Rules, which are given the force of law by s 1(2) of the Carriage of Goods by Sea Act 1971 in relation to 'contracts of carriage covered by a bill of lading or any similar document of title. …'[19]

According to Slesser LJ in *Foscolo, Mango & Co Ltd v Stag Line Ltd*:[20]

> The rules which are by the statute [the predecessor to the Carriage of Goods by Sea Act 1971] to be applied to bills of lading are in effect implied terms thereof imported into the individual contract.

However, provisions are found in most standard contract forms and the Hague-Visby Rules regarding the fate of certain obligations under the contract in situations which could include a piratical seizure (2.1).

The introduction in the last few years of piracy clauses for certain parts of the industry, with specific provision addressing the standing of the contract in situations of capture, may be seen, however, as the beginning of the tide (2.2).

Nonetheless, whether it is a general contractual provision or one of the recently introduced piracy clauses, the term may not after all address all questions as to the standing of the contract.

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[18] For the list of standard contract forms examined in the thesis, see Appendix A.

[19] Hague-Visby Rules, art I(b). Neither do the Hamburg or Rotterdam Rules provide on the matter.

[20] [1931] 2 KB 48 (CA) 78, affd [1932] AC 328 (HL).

2.1. General Clauses

Apart from the specific piracy clauses introduced as of late in the shipping market and scrutinised further on,[21] examination of the potential applicability of the doctrine of frustration to piratical seizures of the ship requires consideration of 'general' clauses in standard carriage contracts, which, though not referring specifically to the matter, might still be held to cover such seizures and, for that matter, oust the operation of the doctrine, in accordance with the statement of Viscount Simon LC in *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd*.[22] The following types are perhaps the most pertinent of such clauses and are singled out for analysis here:

- cancelling clauses, found in most standard charter forms (2.1.1);
- deviation clauses, common to both charters and bills of lading (2.1.2);
- war risks clauses, typical to standard charter forms, and their rough equivalent in bills of lading, namely, hindrance clauses (2.1.3);
- off-hire clauses, unique to time charters (2.1.4);
- ship loss clauses, found in some time charter forms (2.1.5);
- exceptions clauses, found in almost all standard contracts, and the legislation and international conventions governing carriage of goods by sea by bill of lading (2.1.6).

2.1.1. Cancelling

A cancelling clause is usually inserted in the charterparty to the effect that, unless the chartered ship is delivered or is ready by a stated date, the charterer may cancel the contract.[23] The right to cancel operates regardless of the reason

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[21] See sec 2.2.

[22] [1942] AC 154 (HL) 163. See text to n 5. See as to this case's ratio on burden of proof: PH Winfield (1941) 57 LQR 300 (note); Glanville L Williams (1941) 5 MLR 135 (note); Julius Stone, 'Burden of Proof and the Judicial Process: A Commentary on *Joseph Constantine Steamship, Ltd* v *Imperial Smelting Corporation, Ltd*' (1944) 60 LQR 262.

[23] BALTIME 1939, cl 21; GENTIME, cl 1(d); NYPE 46, cl 14; NYPE 93, cl 16; INTERTANKTIME 80, part I(f); BPTIME3, cl 2; SHELLTIME4, cl 5; STB TIME, cl 5(b); GENCON, cl 9; TANKERVOY 87, cl 6; BPVOY4, cl 16; SHELLVOY 6, cl 11; ASBATANKVOY, cl 5; EXXONMOBIL VOY2000, cl 12.

for the delay and notwithstanding the lack of due diligence or fault on the part of the shipowner. In *Marbienes Compania Naviera SA v Ferrostaal AG (The Democritos)*,[24] Lord Denning MR said:

> [The] effect [of the cancelling clause] is that, although there may have been no breach by the owners nevertheless the charterers are, for their own protection, entitled to cancel if the vessel is not delivered in a proper condition by the cancelling date.[25]

Thus, if the vessel is delayed by piratical attacks, the charterer can still exercise the option to cancel, or maintain the contract.

To the extent that the ship, as a result of a piratical capture, misses the cancelling date, and opens the door for the charterer to cancel the contract, the doctrine of frustration might be seen to be superseded by the cancelling clause. However, a capture occurring following delivery or loading of the vessel will not give rise to the clause in question. Indeed, the application of the clause is limited to the early phases of the contract.

Thus, a serious obstacle in the way of the argument to the effect that the doctrine of frustration is supplanted by the cancelling clause is provided by the limited duration of the latter's application.

In other respects, the presence of a cancelling clause in the contract should not be seen as limiting the ability of the parties to rely on the doctrine of frustration. Thus held the House of Lords in *Bank Line Ltd v Arthur Capel & Co*.[26] In that case, a time charter was concluded in February 1915 for twelve months. The ship was to be delivered not before 1 April 1915. The charterer had the right to cancel the contract if the ship was not delivered by 30 April 1915, but never exercised that option. The ship was being readied for delivery when in early May it was requisitioned by the UK Government for the war. The shipowner got the ship back in September following by swapping it with another ship. The ship had been sold by then and the shipowner refused to honour the charterparty,

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[24] [1976] 2 Lloyd's Rep 149 (CA).

[25] ibid 152.

[26] [1919] AC 435 (HL).

arguing that it had been frustrated. The House of Lords decided in the shipowner's favour with one of the Lords dissenting.

The majority thought that, had the suspension due to the requisition gone on for three months or so, the charter would have still been alive, but by September any hiring of the ship had become a new one.[27]

The Lords also said that the doctrine of frustration could be implied in the contract even if express terms dealt with frustrating events. In addition to the cancelling clause referred to above, the charterer was indeed given an option to cancel the contract if the ship came to be commandeered by government during the charter. Furthermore, the contract excepted restraint of princes.

As to the first such clause (cl 26 of the charter), Lord Finlay LC said:

> It was urged for the respondents [charterers] that this clause meant that only the charterers could cancel in case of non-delivery, and that however long the owners might have been prevented from delivering by unforeseen circumstances beyond their control, they were bound to hold the vessel at the disposal of the charterers. I cannot read this clause as having any such effect. The charter was to be for twelve months from delivery, which the owners were to make by the end of April unless prevented by unforeseen circumstances, in which case the charterers had the option of cancelling, however short the delay. If, owing to unforeseen circumstances, it became impossible for the owners to deliver under the charterparty until many months after the end of April, the whole character of the adventure would be changed. A charter for twelve months from April is clearly very different from a charter for twelve months from September. In such a case the adventure contemplated by the charter is entirely frustrated, and the owner, when required to enter into a charter so different from that for

[27] ibid 443–44 (Lord Finlay LC), 448–50 (Lord Shaw), 451–55, 457–60 (Lord Sumner), 460–62 (Lord Wrenbury). Viscount Haldane, dissenting, took the view that the starting date of the charter had not been essential to the parties and that, looking at the appreciation made by the latter of the events, it was apparent that they had not considered the charter as having come to an end: ibid 445–48.

> which he had contracted, is entitled to say 'non hæc in fœdera veni.' In other words, the owner is entitled to say that the contract is at an end on the doctrine of the frustration of the adventure as explained in *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* It would be quite unreasonable to construe clause 26 as meaning that the owners are in such a case to hold the vessel at the disposal of the charterers for an unlimited period.[28]

The second clause referred to above and which the charterer relied on to oust the application of the doctrine of frustration was numbered 31 and read: '"Charterers to have option of cancelling this charterparty should steamer be commandeered by Government during this charter."' Lord Finlay LC said in relation to that clause:

> Clause 31 cannot be relied on on behalf of the respondents any more than clause 26. Clause 31 merely means that in case of the vessel being commandeered, the charterers might cancel at once without having to show that the detention was likely to last so long as to put an end to the contract within the meaning of the authorities.[29]

In conclusion, cancelling clauses seem to hardly pose any real challenge to the argument that the doctrine of frustration may still apply to a piratical capture of vessels and their cargoes, leaving aside perhaps the instance where capture occurs prior to the delivery or loading of the vessel, when the clause can still operate.

The issue of contract cancellation will be touched upon again in the next two sets of clauses considered, which provide for a host of liberties, including liberty to cancel.

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[28] ibid 442, citing *FA Tamplin Steamship Co Ltd v Anglo Mexican Petroleum Products Co Ltd* [1916] 2 AC 397 (HL). See also, to the same effect, ibid 444 (Viscount Haldane), 456–57 (Lord Sumner), 462 (Lord Wrenbury).

[29] *Bank Line* (n 26) 443. See also, to the same effect, *Bank Line* (n 26) 444 (Viscount Haldane), 456 (Lord Sumner), 462 (Lord Wrenbury). As to the restraint of princes exception, see text to n 235.

2.1.2. Deviation

Standard contracts of carriage often permit departures from their usual method of performance under so-called liberty clauses, whether in the face of difficulties or not. In charter forms, such clauses favour the shipowner; their bill of lading equivalent will benefit the carrier. The significance of such clauses for the subject under discussion may be put as follows: If a piratical capture is an extraordinary incident in the life of a contract of carriage, could any of the permissible departures from the contract provided for by liberty clauses cover such an incident, ousting in such a way the application of the doctrine of frustration?

Liberty clauses may generally be subdivided into two groups: On the one hand, clauses which require, in order to be brought into operation, the existence of particular difficulties in the way of performance (war risks, and hindrances clauses); such clauses are analysed further on.[30] On the other hand, general liberty clauses, also known as deviation clauses, and considered first, hereunder. This distinction was espoused in the following passage from Jenkin LJ's opinion in *GH Renton & Co Ltd v Palmyra Trading Corp of Panama*:[31]

> It seems to me that there is a material difference between a deviation clause purporting to enable the shipowners to delay indefinitely the performance of the contract voyage simply because they choose to do so, and provisions such as those contained in clause 14 (c) and (f) in the present case, which are applicable and operative only in the event of the occurrence of certain specified emergencies. The distinction is between a power given to one of the parties which, if construed literally, would in effect enable that party to nullify the contract at will, and a special provision stating what the rights and obligations of the parties are to be in the event of obstacles beyond the control of either arising to prevent or

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[30] See sec 2.1.3.

[31] [1956] 1 QB 462 (CA) 502, affd [1957] AC 149 (HL). See: RA MacCrindle (1956) 14 CLJ 5 (note) 6–7, entering some reservations on this distinction; KW Wedderburn (1957) 15 CLJ 16 (note) 19.

impede the performance of the contract in accordance with its primary terms.

The above passage was adopted by the House of Lords.[32] In the same decision, cases on deviation clauses were found to be unhelpful for the hindrance clause under examination, and Lord Tucker clearly warned against mixing up the cases.[33]

This distinction justifies the separate treatment of the two types of clauses in this study. It is nonetheless observed that the above broad classification does not account for all possible variations of clauses across standard forms. Indeed, a particular liberty may be found to appear in a general deviation type of clause, or else a hindrances clause, depending on the standard contract in question.

Turning to the first type, it is noted that general deviation clauses are common to all standard types of contracts.[34] As already indicated, such clauses are generally aimed at giving the shipowner or carrier liberties in carrying out its obligations, but do not require, for their coming into operation, the existence of specific difficulties; the shipowner or carrier is given discretion to exercise the stipulated liberties, or else is held to use them for 'reasonable' and other similar purposes.

Amongst the model forms used in this thesis, the following selection of quoted clauses tries to capture the various types of provisions which may be encountered.

In charterparties, typical wording is thus provided in the NYPE 46 form, which reads: 'The vessel shall have the liberty to sail with or without pilots, to tow and

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[32] *GH Renton & Co Ltd v Palmyra Trading Corp of Panama* [1957] AC 149 (HL) 164 (Viscount Kilmuir), 172 (Lord Tucker), 174 (Lord Somerwell).

[33] ibid 172.

[34] GENTIME, cl 18(a)(iii)(3); NYPE 46, cl 16; NYPE 93, cl 22; INTERTANKTIME 80, cl 28; BPTIME3, cl 26; SHELLTIME4, cl 27(b); STB TIME, cl 20(b)(vi); GENCON, cl 3; TANKERVOY 87, cl 21; BPVOY4, cl 26; SHELLVOY 6, cl 31; ASBATANKVOY, cl 20(b)(vii); EXXONMOBIL VOY2000, cl 27(b)(vi); CONLINEBILL 2000, cll 5-7; COMBICONBILL, cl 6; MULTIDOC 95, cl 6; Maersk MT B/L, cl 19; MSC B/L, cl 9; WWL B/L, cl 14; ACL B/L, cl 12.

to be towed, to assist vessels in distress, and to deviate for the purpose of saving life and property.'[35] The same idea is expressed differently in GENTIME:

> The Owners shall be liable for any Cargo Claim arising or resulting from …
>
> unreasonable deviation from the voyage described in the Contract of Carriage unless such deviation is ordered or approved by the Charterers …[36]

For its part, GENCON's deviation clause signals a more permissive approach towards the shipowner: 'The Vessel has liberty to call at any port or ports in any order, for any purpose, to sail without pilots, to tow and/or assist Vessels in all situations, and also to deviate for the purpose of saving life and/or property.'[37]

The following three clauses are in turn found in CONLINEBILL 2000:

> 5. The Scope of Carriage.
>
> The intended carriage shall not be limited to the direct route but shall be deemed to include any proceeding or returning to or stopping or slowing down at or off any ports or places for any reasonable purpose connected with the carriage including bunkering, loading, discharging, or other cargo operations and maintenance of Vessel and crew.
>
> 6. Substitution of Vessel.
>
> The Carrier shall be at liberty to carry the cargo or part thereof to the Port of discharge by the said or other vessel or vessels either belonging to the Carrier or others, or by other means of transport, proceeding either directly or indirectly to such port.

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[35] cl 16, 2nd para. See similar wording in: NYPE 93, cl 22; INTERTANKTIME 80, cl 28; BPTIME3, cl 26; SHELLTIME4, cl 27(b); STB TIME, cl 20(b)(vi); TANKERVOY 87, cl 21; BPVOY4, cl 26; SHELLVOY 6, cl 31; ASBATANKVOY, cl 20(b)(vii); EXXONMOBIL VOY2000, cl 27(b)(vi).

[36] cl 18(a)(iii)(3).

[37] cl 3.

> 7. Transhipment.
>
> The Carrier shall be at liberty to tranship, lighter, land and store the cargo either on shore or afloat and reship and forward the same to the Port of discharge.

A variant provision is found in COMBICONBILL cl 6, in the following terms:

> (1) The Carrier is entitled to perform the transport and all services related thereto in any reasonable manner and by any reasonable means, methods and routes.
>
> (2) In accordance herewith, for instance, in the event of carriage by sea, vessels may sail with or without pilots, undergo repairs, adjust equipment, drydock and tow vessels in all situations.[38]

This overview of deviation clauses should be complemented by the Hague-Visby Rules, given the force of law by the Carriage of Goods by Sea Act 1971.[39] The Rules apply to contracts covered by bills of lading.[40] Their article IV(4) provides:

> 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.[41]

The basic question asked here, is whether a piratical capture could be seen as falling within the purview of one or another of such liberties clauses, with the result that the doctrine of frustration is displaced in favour of a contractual clause, that is supposedly deemed to cater for the event. The question may be

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[38] See similar wording in MULTIDOC 95, cl 6. Multiple liberties are similarly granted in: Maersk MT B/L, cl 19; MSC B/L, cl 9; WWL B/L, cl 14; ACL B/L, cl 12.

[39] s 1(2).

[40] Hague-Visby Rules, art I(b).

[41] cf: Hamburg Rules, art 5(6); Rotterdam Rules, art 24.

put differently, as remarked by Greer LJ in *Foscolo, Mango & Co Ltd v Stag Line Ltd*:[42]

> In my view the liberties mentioned in the bill of lading are part of the description of the contract voyage, and any action of the ship within the prescribed liberties could not be described as deviation, but would be accurately described as acts in performance of the contract voyage.

It may be readily observed that it is difficult to see how, on close reading, any of the quoted deviation clauses above could account for the event with which this study is concerned. A liberty per se would be at odds with a capture, since the latter happens ex hypothesi against the will of the shipowner or carrier. As stated by Rowlatt J in *Hood v West End Motor Car Packing Co*,[43] in commenting on what liberties meant in a policy clause reading 'Including all liberties as per contract of affreightment':

> No doubt the putting of the car on deck is treated both in the original proposal of the terms of shipment and in the bill of lading itself as a matter which is at the option of the shipowner, and in that sense it is a liberty. …[44]

Furthermore, as pronounced by Lord Herschell LC in the leading case of *Glynn v Margetson & Co*:[45] '[I]t is to be observed that the liberty which is given is not a liberty simpliciter to proceed to those ports. Purposes are mentioned. …' Accordingly, there is a fundamental inadequacy for liberties, no matter how drafted, to cover instances of capture by pirates as they consist in a right to act or omit to act in furtherance of the shipowner or carrier's own convenience.

It should, moreover, be recalled that liberty clauses are to be interpreted strictly.[46] Reading in a piratical stunt with potentially catastrophic consequences

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[42] [1931] 2 KB 48 (CA) 65, affd [1932] AC 328 (HL).

[43] [1916] 2 KB 395 (KBD), affd [1917] 2 KB 38 (CA).

[44] *Hood v West End Motor Car Packing Co* [1916] 2 KB 395 (KBD) 401.

[45] [1893] AC 351 (HL) 356.

[46] *Cunard Steamship Co Ltd v Buerger* [1927] AC 1 (HL) 8–9 (Lord Sumner).

on the venture would require unwarranted intellectual approximations. As stated by Lord Sumner in *Cunard Steamship Co Ltd v Buerger*[47] in relation to one such liberty clause: 'In a clause, framed so arbitrarily in the company's favour, this further and equally arbitrary term cannot be implied.'[48] The term referred to by Lord Sumner was a liberty to overcarry the goods, but it can apply equally, it is submitted, to any other term.[49]

With frustration as a possible consequence of capture, it would be against yet another principle of interpretation of liberty clauses to read in a term having such a consequence. In *Frenkel v MacAndrews & Co Ltd*,[50] Viscount Sumner referred to the principle emanating from *Glynn*[51] as being 'that a liberty, however generally worded, could not frustrate but must be subordinate to the described voyage'.[52]

In *Connolly Shaw Ltd v A/S Det Nordenfjeldske D/S*,[53] the bill of lading was for the transport of a cargo of lemons from Palermo to London. On its way, the vessel deviated to Valencia to load potatoes and carried them to Hull. On arrival at London, the lemons had deteriorated. The liberty clause in the bill of lading read as follows:

> 'Nothing in this bill of lading (whether written or printed) is to be read as an engagement that the said carriage shall be performed directly or without delays, the ship is to be at liberty either before or after proceeding towards the port of delivery of the said goods, to proceed to or return to and stay at any ports or places whatsoever (although in a contrary direction to or out of or beyond

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[47] ibid.

[48] ibid 9.

[49] On the effect of deviation, which was the central finding in this decision, see '*Buerger v Cunard Steamship Co*' (1925) 159 LT 405 (note).

[50] [1929] AC 545 (HL).

[51] (n 45).

[52] *Frenkel* (n 50) 562.

[53] (1934) 49 Ll L Rep 183 (KBD).

> the route of the said port of delivery) once or oftener in any order, backwards or forwards, for loading or discharging cargo, passengers, coals, or stores, or for any purpose whatsoever, whether in relation to her homeward voyage, or to her outward voyage, or to an intermediate voyage, and all such ports, places and sailings shall be deemed included within the intended voyage of the said goods.'

Branson J applied Viscount Sumner's principle of interpretation stated above[54] to the clause at hand, saying: '[I]n construing this clause, I think it would be perfectly right to read it as allowing any of the liberties therein reserved to the extent to which they could be used without frustrating the contract.'[55]

Then, referring to the part of the clause following the last comma, Branson J said:

> It is argued by Mr. Miller [for the carrier] that that sentence, or that part of the sentence, so far affects the definition of the voyage that it is not possible to say that the contract voyage is a voyage from Palermo to London, but that you must say the voyage is from Palermo to such ports or places as the ship may choose to go, and finally to London. In my opinion, that clause does not really carry the argument any farther, for all the reasons which lead to the imposition of some limit upon the generality of the words in the other parts of the clause apply with equal force to this part of the clause, and if it be true to say that in construing this clause in a particular bill of lading you have to do so in relation to the nature of the cargo which is being dealt with, and that you must see that you do not allow one part of the contract of carriage to be frustrated by other provisions of the same contract, then I think that in the case of the carriage of a perishable cargo such as this it is impossible to extend beyond the limit which I have already sought to give expression the liberties which are reserved by this

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[54] text to n 52.

[55] *Connolly* (n 53) 190.

> clause. … If it is sought by the argument to say that these words have to be imported into the definition of the voyage, and therefore that the voyage is so extended as to include, if the ship wishes it, a voyage of circumnavigation repeated many times over, then it seems to me to be obvious that it would lead to an entire frustration of a contract the main object of which was the carriage of perishable goods, and, therefore, upon the principles which I have already sought to enunciate, I should be bound to hold that it did not apply, and could not be made to apply, to a case of the carriage of perishable goods.[56]

So, by no stretch of imagination, it is submitted, could cl 5 of the CONLINEBILL 2000, which is quoted above and is similar to the last segment of the clause considered by Branson J in *Connolly*, be taken to cover a potentially frustrating event such as a piratical capture, simply because the voyage is defined there as including all the time used up in the exercise of stipulated liberties. This is of course aside from the arguments already expounded which make a liberty or its exercise simply incompatible with the phenomenon of capture.

For all these reasons, it is concluded that typical liberties clauses do not have the potential of overriding the doctrine of frustration in the event of a piratical seizure of the vessel and cargo.

It is now possible to turn to the second type of liberty clauses outlined above, namely, war risks and hindrances clauses.

2.1.3. War Risks and Hindrances

In addition to general deviation clauses, just considered, standard contract forms usually contain another type of clause giving the shipowner or carrier extensive liberties, but only insofar as certain difficulties have arisen in the face of the normal performance of the contract. In time and voyage charterparties, this clause is usually known as a 'war risks' or, more simply, a 'war clause'.[57] A

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[56] ibid 190–91. See, approving the judgment's conclusions, (1934) 178 LT 107 (note).

[57] BALTIME 1939, cl 20; GENTIME, cl 21; NYPE 93, cl 31(e); INTERTANKTIME 80, cl 33; BPTIME3, cl 30; SHELLTIME4, cl 35; STB TIME, cl 21; CONWARTIME 2004;

rough correspondent of such a clause in bills of lading is what may be referred to as a 'hindrances clause', although names are varied.[58]

Generally speaking, the purpose of such clauses is to set forth a binding code of conduct for the parties to the contract in the event of the happening of certain eventualities, typically occurring outside the parties' control. It is noteworthy that, despite the nomenclature used, war clauses are not restricted to war situations. Importantly for the purpose of this thesis, the eventualities enumerated in a large number of such clauses include 'piracy' or 'acts of piracy'.[59] Thus, commenting on CONWARTIME 2004, Cooke J said in *Osmium Shipping Corp v Cargill International SA (The Captain Stefanos)*:[60] 'It sets out the rights, liberties and obligations of the parties in the circumstances set out, where the vessel might be exposed to such war risks, including piracy.' In the case of some other clauses, although no reference is made to piracy, the wording is wide enough to cover it.[61]

Overall, all such clauses typically give the shipowner, or carrier, liberties in order to avert the eventualities provided for. They also define the parties' liabilities in the presence of such eventualities. Thus, as observed by Cooke J in *The Captain Stefanos*[62] in relation to CONWARTIME 2004: 'The Conwartime clause does not

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GENCON, cl 17; TANKERVOY 87, cl 30; BPVOY4, cl 39; SHELLVOY 6, cl 34; ASBATANKVOY, cl 20(b)(vi); EXXONMOBIL VOY2000, cl 28; VOYWAR 2004.

[58] CONLINEBILL 2000, cl 14; COMBICONBILL, cl 8; MULTIDOC 95, cl 9; Maersk MT B/L, cl 20; MSC B/L, cl 19; ACL B/L, cl 11. As already mentioned (see 38), in some standard contract forms, certain liberties usually belonging to the notional hindrances type are to be found in general deviation clauses, eg: Maersk MT B/L, cl 19.1(f); MSC B/L, cl 9.1(e); WWL B/L, cl 14; ACL B/L, cl 12.

[59] BALTIME 1939, cl 20(A)(ii); GENTIME, cl 21(a)(ii); NYPE 93, cl 31(e)(i); INTERTANKTIME 80, cl 33(A); BPTIME3, cl 30.1.2; STB TIME, cl 21(a); CONWARTIME 2004, sub-cl (a)(ii); GENCON, cl 17(1)(b); BPVOY4, cl 39.1; EXXONMOBIL VOY2000, cl 28(a); VOYWAR 2004, sub-cl (a)(ii); CONLINEBILL 2000, cl 14(b). Piracy is, however, not specifically included in: SHELLTIME4, cl 35; TANKERVOY 87, cl 30; SHELLVOY 6, cl 34; ASBATANKVOY, cl 20(b)(vi).

[60] [2012] EWHC 571 (Comm), [2012] 2 All ER (Comm) 197 [12]. See (2012) 18 JIML 110 (note).

[61] COMBICONBILL, cl 8(2); MULTIDOC 95, cl 9(b); Maersk MT B/L, cll 19.1(f), 20; MSC B/L, cll 9.1(e), 19.1; WWL B/L, cl 14; ACL B/L, cll 11(1), 12.

[62] (n 60) [31]. See Bariş Soyer (2012) 18 JIML 276 (note).

deal with hire and off-hire, but allocates risks for additional costs if the vessel goes to a war zone (if the owners agree) or provides for the owners' right to refuse to go and liberty to take various steps in the circumstances referred to.' There are wide differences in the wording of war and hindrances clauses across different forms.

One of the liberties found in some voyage forms is for the shipowner to cancel the contract or to refuse to perform part of it; however, this liberty usually only operates prior to the commencement of loading. An example is found in sub-cl (b) of VOYWAR 2004:

> If at any time before the Vessel commences loading, it appears that, in the reasonable judgement of the Master and/or the Owners, performance of the Contract of Carriage, or any part of it, may expose, or is likely to expose, the Vessel, her cargo, crew or other persons on board the Vessel to War Risks, the Owners may give notice to the Charterers cancelling this Contract of Carriage, or may refuse to perform such part of it as may expose, or may be likely to expose, the Vessel, her cargo, crew or other persons on board the Vessel to War Risks; provided always that if this Contract of Carriage provides that loading or discharging is to take place within a range of ports, and at the port or ports nominated by the Charterers the Vessel, her cargo, crew, or other persons onboard the Vessel may be exposed, or may be likely to be exposed, to War Risks, the Owners shall first require the Charterers to nominate any other safe port which lies within the range for loading or discharging, and may only cancel this Contract of Carriage if the Charterers shall not have nominated such safe port or ports within 48 hours of receipt of notice of such requirement.[63]

A similar but wider liberty is provided to the carrier under some bill of lading forms. Thus, in COMBICONBILL, cl 8 reads:

> (2) If at any time the performance of the contract as evidenced by this Bill of Lading is or will be affected by any hindrance, risk,

[63] See similar wording in: GENCON, cl 17(2); BPVOY4, cl 39.2.

> delay, difficulty or disadvantage of whatsoever kind, and if by virtue of sub-clause 8(1) the Carrier has no duty to complete the performance of the contract, the Carrier (whether or not the transport is commenced) may elect to:
>
> (a) treat the performance of this Contract as terminated and place the goods at the Merchant's disposal at any place which the Carrier shall deem safe and convenient;
>
> or
>
> (b) deliver the goods at the place designated for delivery.
>
> (3) If the goods are not taken delivery of by the Merchant within a reasonable time after the Carrier has called upon him to take delivery, the Carrier shall be at liberty to put the goods in safe custody on behalf of the Merchant at the latter's risk and expense.
>
> (4) In any event the Carrier shall be entitled to full freight for goods received for transportation and additional compensation for extra costs resulting from the circumstances referred to above.[64]

A right to abandon carriage of the goods is likewise provided for under the Maersk MT B/L, cl 20:

> If at any time Carriage is or is likely to be affected by any hindrance, risk, danger, delay, difficulty or disadvantage of whatsoever kind and howsoever arising which cannot be avoided by the exercise of reasonable endeavours, (even though the circumstances giving rise to such hindrance, risk, danger, delay, difficulty or disadvantage existed at the time this contract was entered into or the Goods were received for Carriage) the Carrier may at his sole discretion and without notice to the Merchant and whether or not the Carriage is commenced either: …
>
> (c) Abandon the Carriage of the Goods and place them at the Merchant's disposal at any place or port which the Carrier may

[64] See similar wording in MULTIDOC 95, cl 9.

> deem safe and convenient, whereupon the responsibility of the Carrier in respect of such Goods shall cease. The Carrier shall nevertheless be entitled to full Freight on the Goods received for the Carriage, and the Merchant shall pay any additional costs incurred by reason of the abandonment of the Goods.
>
> If the Carrier elects to use an alternative route under clause 20(a) or to suspend the Carriage under clause 20(b) this shall not prejudice his right subsequently to abandon the Carriage.[65]

Another liberty granted under certain bill of lading forms allows the carrier to suspend carriage. Thus, under the Maersk MT B/L, it is provided in cl 20:

> If at any time Carriage is or is likely to be affected by any hindrance, risk, danger, delay, difficulty or disadvantage of whatsoever kind and howsoever arising which cannot be avoided by the exercise of reasonable endeavours, (even though the circumstances giving rise to such hindrance, risk, danger, delay, difficulty or disadvantage existed at the time this contract was entered into or the Goods were received for Carriage) the Carrier may at his sole discretion and without notice to the Merchant and whether or not the Carriage is commenced either: …
>
> (b) Suspend the Carriage of the Goods and store them ashore or afloat upon the Terms and Conditions of this bill of lading and endeavour to forward them as soon as possible, but the Carrier makes no representations as to the maximum period of suspension. If the Carrier elects to invoke the terms of this clause 20(b) then, notwithstanding the provisions of clause 19 hereof, he shall be entitled to charge such additional Freight and Costs as the Carrier may determine. …[66]

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[65] See similar wording in: MSC B/L, cl 19.1(c); ACL B/L, cl 11(1)(A). See also WWL B/L, cl 14.

[66] See similar wording in MSC B/L, cl 19.1(b).

It is noteworthy that liberty to cancel carriage under the above bill of lading forms carries also a liberty to discharge and place the goods at the cargo interest's disposal at any place.[67] In the case of the liberty to suspend, the carrier is entitled to store the goods ashore or afloat, without any stipulated restrictions.[68] Alongside these liberties, the cargo interest is made liable for the full freight as well as other expenses.[69]

Apart from the liberty to terminate or suspend the contract, war risks, hindrances and similar clauses may grant the shipowner or carrier several other liberties entitling it to divert from the usual manner of performance of the contract. As far as the risk of piracy is concerned, such liberties include:[70] avoiding[71] and exiting[72] areas; taking an alternative route;[73] complying with official orders, directions, recommendations or advice;[74] complying with orders,

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[67] Maersk MT B/L, cl 20(c); MSC B/L, cl 19.1(c); ACL B/L, cl 11(1)(A). See also WWL B/L, cl 14.

[68] Maersk MT B/L, cl 20(b); MSC B/L, cl 19.1(b).

[69] Maersk MT B/L, cl 20(b), (c); MSC B/L, cl 19.1(c), .2; ACL B/L, cl 11(1)(A).

[70] As already indicated (see 38), in some bill of lading forms, these liberties may be found in general deviation clauses.

[71] BALTIME 1939, cl 20(B); GENTIME, cl 21(b); NYPE 93, cl 31(e)(i), (ii); INTERTANKTIME 80, cl 33(A); BPTIME3, cl 30.2; STB TIME, cl 21(a); CONWARTIME 2004, sub-cl (b); GENCON, cl 17(3); BPVOY4, cl 39.3; EXXONMOBIL VOY2000, cl 28(a); VOYWAR 2004, sub-cl (c).

[72] BALTIME 1939, cl 20(B); GENTIME, cl 21(b); NYPE 93, cl 31(e)(ii); INTERTANKTIME 80, cl 33(A); BPTIME3, cl 30.2; STB TIME, cl 21(a), (b); CONWARTIME 2004, sub-cl (b); GENCON, cl 17(3); BPVOY4, cl 39.3; EXXONMOBIL VOY2000, cl 28(a), (b); VOYWAR 2004, sub-cl (c). See for an application of the BIMCO Standard War Risks Clause for Time Charters, 1993 (Code Name: CONWARTIME 1993), sub-cl (2), which is identical to BALTIME 1939, cl 20(B), in the context of Somali piracy, *Pacific Basin IHX Ltd v Bulkhandling Handymax AS (The Triton Lark)* [2011] EWHC 2862 (Comm), [2012] 1 All ER (Comm) 639 [35]ff. See further Paul Todd, 'Ransom, Piracy and Time Charterparties' (2012) 18 JIML 193, 195.

[73] GENCON, cl (4); BPVOY4, cl 39.4; VOYWAR 2004, sub-cl (d); Maersk MT B/L, cl 20(a); MSC B/L, cl 19.1(a); WWL B/L, cl 14.

[74] BALTIME 1939, cl 20(F)(i), (iii); GENTIME, cl 21(f)(i), (iii); INTERTANKTIME 80, cl 33(D); BPTIME3, cl 30.6.1, .3; CONWARTIME 2004, sub-cl (f)(i), (iii); GENCON, cl 17(5)(a), (c); BPVOY4, cl 39.5.1, .3; VOYWAR 2004, sub-cl (f)(i), (iii); CONLINEBILL 2000, cl 14(a); Maersk MT B/L, cl 19.1(f); MSC B/L, cl 9.1(e); ACL B/L, cl 12(1). In

directions or recommendations of (usually war risks) underwriters;[75] diverting to alternative ports to discharge the cargo;[76] loading different cargo and carrying it to other ports, where contractual cargo was not loaded or was discharged pursuant to a liberty under the clause.[77] Nevertheless, in giving these liberties, the clauses considered do not go as far as providing for the termination of the agreement. Importantly, however, a typical provision is to the effect that the exercise of any of these liberties should be considered as a due performance of the contract and not a deviation.[78]

As mentioned earlier, aside from liberties, war, hindrance and other germane clauses presently under discussion allocate liability for actions carried out and losses sustained by the parties in trying to avert the eventualities provided for. The charterer, or cargo interest, may thus be made liable towards the shipowner, or carrier, for the following:

- additional war risks insurance costs incurred in relation to areas that the ship has to go to or through, or remain in, according to charterer's

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The Captain Stefanos (n 60) [28], [30], Cooke J doubted that Somali pirates' acts could constitute 'orders, directions … as to departure, arrival, routes, sailing in convoy, ports of call, stoppages, destinations, discharge of cargo, delivery, or in any other way whatsoever, which are given by … any other … body or group whatsoever acting with the power to compel compliance with their orders or directions', pursuant to sub-cl (f)(i) of CONWARTIME 2004. See '*Osmium Shipping Corp v Cargill International SA (The Captain Stefanos)*' (2012) 18 JIML 110 (note).

[75] BALTIME 1939, cl 20(F)(ii); GENTIME, cl 21(f)(ii); INTERTANKTIME 80, cl 33(D); BPTIME3, cl 30.6.2; CONWARTIME 2004, sub-cl (f)(ii); GENCON, cl 17(5)(b); BPVOY4, cl 39.5.2; VOYWAR 2004, sub-cl (f)(ii); CONLINEBILL 2000, cl 14(a); Maersk MT B/L, cl 19.1(f); MSC B/L, cl 9.1(e); ACL B/L, cl 12(1).

[76] BALTIME 1939, cl 20(G); GENTIME, cl 21(g); CONWARTIME 2004, sub-cl (g); GENCON, cl 17(3); BPVOY4, cl 39.3; VOYWAR 2004, sub-cl (c); CONLINEBILL 2000, cl 14(b); WWL B/L, cl 14.

[77] GENCON, cl 17(5)(f); BPVOY4, cl 39.5.6; VOYWAR 2004, sub-cl (f)(vi).

[78] BALTIME 1939, cl 20(H); GENTIME, cl 21(h); INTERTANKTIME 80, cl 33(F); SHELLTIME4, cl 35(b), (c); CONWARTIME 2004, sub-cl (h); GENCON, cl 17(6); TANKERVOY 87, cl 30(c)(iii), (e); BPVOY4, cl 39.6; SHELLVOY 6, cl 34(2)(c), (4); ASBATANKVOY, cl 20(b)(vi); VOYWAR 2004, sub-cl (g); CONLINEBILL 2000, cl 14(d); Maersk MT B/L, cl 19.2; MSC B/L, cl 9.2; ACL B/L, cl 12(2). On deviation in the context of the threat of piracy, see Todd (n 72) 196.

orders[79]—whereas, pursuant to some forms, the cost of ordinary war risks insurance on the ship, its earnings, the crew and its protection and indemnity risks, is to be borne by the shipowner,[80] but other forms leave the point in doubt;[81]

- additional crew wages or bonus required to be paid under the terms of employment in respect of sailing into an area which is dangerous;[82]

- additional provisions and stores;[83]

- additional hire for time lost;[84]

- in the event of a change of course necessitated by covered risks or hindrances, additional freight or steaming time,[85] bunkers,[86] port, canal or waterway expenses,[87] and discharge expenses;[88]

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[79] BALTIME 1939, cl 20(D)(ii); GENTIME, cl 21(d)(ii); NYPE 93 cl 31(e)(ii), (iii); INTERTANKTIME 80, cl 33(B)(1), (C); BPTIME3, cl 30.4; STB TIME, cl 21(b), (c); CONWARTIME 2004, sub-cl (d)(ii); EXXONMOBIL VOY2000, cl 28(b), (c); VOYWAR 2004, sub-cl (e)(ii).

[80] BALTIME 1939, cl 20(D)(i); GENTIME, cl 21(d)(i); CONWARTIME 2004, sub-cl (d)(i); BPTIME3, cl 30.4; EXXONMOBIL VOY2000, cl 28(b), (c); VOYWAR 2004, sub-cl (e)(i).

[81] NYPE93 cl 31(e)(ii), (iii); INTERTANKTIME 80, cl 33(B)(1), (C); STB TIME, cl 21(b), (c).

[82] BALTIME 1939, cl 20(E); GENTIME, cl 21(e); NYPE 93, cl 31(e)(iii), (iv); INTERTANKTIME 80, cl 33(C); BPTIME3, cl 30.5; STB TIME, cl 21(c); CONWARTIME 2004, sub-cl (e); EXXONMOBIL VOY2000, cl 28(c).

[83] INTERTANKTIME 80, cl 33(C).

[84] INTERTANKTIME 80, cl 33(B)(2).

[85] GENCON, cl 17(3), (4); BPVOY4, cl 39.3, .4; VOYWAR 2004, sub-cll (c), (d).

[86] BPVOY4, cl 39.3, .4.

[87] BPVOY4, cl 39.3, .4.

- freight, additional freight, and extra expenses.[89]

It may be seen from the above that war risks, hindrances and germane clauses are quite elaborate on situations involving piracy or the threat thereof. As to whether these clauses should be deemed as supplanting the doctrine of frustration in the event of capture by pirates, it is first observed that little is there said about the standing of the contract of carriage. Even the following rare clause, taken from the ACL B/L, talks of the liability towards the cargo, not the contract of carriage, ceasing:

> The liability of the Carrier in respect of the goods shall cease on the delivery or other disposition of the goods in accordance with the orders or recommendations given by any government or authority or any person acting or purporting to act as or on behalf of such government or authority.[90]

It is true that, in certain voyage charterparties and bills of lading, the shipowner or carrier is given a liberty to cancel or suspend the contract. Nonetheless, this power is a preventive measure. It may be exercised so as to keep away from certain risks provided for. This is of course altogether different from the repercussions flowing *after* the occurrence of an event such as a piratical seizure. In addition, power to cancel is restricted in those voyage charters that provide for it to the phase before loading. Lastly, it is an option which inures only to one party to the contract. It is thus not difficult to conclude that the limited powers to cancel or suspend the contract are unlikely to be seen as constituting 'full and complete provision[s]' for the effects of an event in the category of a piratical seizure—to quote the words of Bailhache J in *Admiral Shipping Co Ltd v Weidner Hopkins & Co*[91].

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[88] GENCON, cl 17(3); BPVOY4, cl 39.3; VOYWAR 2004, sub-cl (c).

[89] CONLINEBILL 2000, cl 14(e); COMBICONBILL, cl 8(4); MULTIDOC 95, cl 9(d); Maersk MT B/L, cl 20; MSC B/L, cl 19; ACL B/L, cl 11(1).

[90] cl 11(2).

[91] [1916] 1 KB 429 (KBD) 438, revd [1917] 1 KB 222 (CA), approved in *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435 (HL) 455 (Lord Sumner).

The relationship between the allocation of liabilities under war risks clauses and the operation of the doctrine of frustration was considered in a series of cases. In *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes (The Evia (No 2))*,[92] the dispute concerned a time charter on the BALTIME 1939 form, as amended in 1950. The charter contained a war risks clause (cl 21) providing in its relevant parts as follows:

> '(A) The Vessel unless the consent of the Owners be first obtained not to be ordered nor continue to any place or on any voyage nor be used on any service which will bring her within a zone which is dangerous as the result of any actual or threatened act of war, war hostilities, warlike operations, acts of piracy or of hostility or malicious damage against this or any other vessel or its cargo by any person, body or State whatsoever, revolution, civil war, civil commotion or the operation of international law, nor be exposed in any way to any risks or penalties whatsoever consequent upon the imposition of Sanctions, nor carry any goods that may in any way expose her to any risks of seizure, capture, penalties or any other interference of any kind whatsoever by the belligerent or fighting powers or parties or by any Government or Ruler.
>
> (B) Should the Vessel approach or be brought or ordered within such zone or be exposed in any way to the said risks (1) the Owners to be entitled from time to time to insure their interests in the vessel and/or hire against any of the risks likely to be involved thereby on such terms as they shall think fit, the Charterers to make a refund to the Owners of the premium on demand; and (2) notwithstanding the terms of clause 11 hire to be paid for all time lost including any lost owing to loss of or injury to the Master, Officers or Crew or to the action of the Crew in refusing to proceed to such zone or to be exposed to such risks.'

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[92] [1983] 1 AC 736 (HL). See Charles GCH Baker and Paul David, 'The Politically Unsafe Port' [1986] LMCLQ 112, a thorough critique of the case, but which omits the point on frustration; cf Paul Todd, 'Safe Port Clauses in Time Charterparties' (1990) 8 OGLTR 35.

The ratio in *The Evia (No 2)* is that the above clause does not displace the doctrine of frustration.[93] The contract was there frustrated when it became clear that the ship's detention in Basrah as a result of the breaking out of hostilities between Iraq and Iran was going to be indefinite.[94]

It is observed that, under the above clause, maintaining the ship in an area exposed to war risks was made conditional upon the owners' consent. This provision was duly abided by in the case at bar. Basrah was a safe port when the ship arrived there on 1 July 1980.[95] Hostilities started abruptly on 22 September 1980, right after discharge of the cargo and the *Evia*, like numerous other vessels in the Shatt-al-Arab waterway, became trapped.

Moreover, under sub-cl (B), the charterer was made liable to pay insurance costs against war risks as well as hire money for delay incurred as described in para (2). These liabilities were not contested in principle by the charterer. The latter argued, however, that it was freed from the contract as a result of the charter having been frustrated on 4 October 1980.

For their part, the owners maintained the same argument at all stages of the case. The argument went as follows:

> The owners contend that cl. 21 envisaged and provided for the very situation which developed from *Evia* being directed to Basrah when she was. That clause it is submitted shows that the parties contemplated when the charter was entered into that *Evia* might be indefinitely delayed by detention in a port which had become a scene of hostilities. It would follow that the contractual rights

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[93] ibid 767 (Lord Roskill).

[94] *Kodros Shipping Corp v Empresa Cubana de Fletes (The Evia (No 2))* [1981] 2 Lloyd's Rep 613 (Com Ct) 61 (Goff J), revd on other grounds [1982] 1 Lloyd's Rep 334 (CA), affd [1983] 1 AC 736 (HL).

[95] *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes (The Evia (No 2))* [1983] 1 AC 736 (HL) 763 (Lord Roskill).

> defined by the charter survived and the owners were entitled to pursue them.[96]

The kernel of the owners' position was that cl 21(B)(2) disposed of the very matter which had arisen, namely, delay due to detention by war risks, by allocating the financial burden to the charterer. As recorded by Sir Sebag Shaw in the Court of Appeal: 'The argument for the owners was that cl. 21(B) was in itself a contractual arrangement to provide for the very contingency which arose.'[97] Ackner LJ put it as follows:

> Mr. Steyn, for the owners, contends that the vessel having been brought, with the consent of the owners, as was conceded to be the case, into a dangerous zone, and thus subjected to abnormal hazards, then hire is by virtue of cl. 21(B)(2) to be paid for all time lost. Thus, cl. 21 covers the event—time lost from Sept. 22, 1980, until the award in March, 1981, by reason of the vessel being ordered into the dangerous zone. He contends that cl. 21, by thus placing the risk of any resulting loss of time on the charterers, rules out any question of frustration.[98]

The House of Lords followed the views of all of the Court of Appeal judges as well as that of Goff J in the Commercial Court, who had rejected the owners' contention.[99] These views are set out here for completeness:

> When I look at cl. 21(B), I observe that it provides that '*notwithstanding the terms of Clause 11 hire to be paid for all time lost* …' The clause therefore refers back to the off hire clause (cl. 11), which provides that in certain events, including 'damage to hull or other accident either hindering or preventing the working of the vessel', no hire is to be paid in respect of—

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[96] *Kodros Shipping Corp v Empresa Cubana de Fletes (The Evia (No 2))* [1982] 1 Lloyd's Rep 334 (CA) 342 (Sir Sebag Shaw).

[97] ibid 343.

[98] ibid.

[99] *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes (The Evia (No 2))* [1983] 1 AC 736 (HL) 767 (Lord Roskill).

> … *any time lost lost thereby* during the period in which the Vessel is unable to perform the service immediately required.

The relevant part of cl. 21(B) is therefore concerned to prevent the application of the off hire clause in the circumstances specified in cl. 21. It provides that, in those circumstances, the vessel will not, despite cl. 11, go off hire; on the contrary, hire is to continue to be paid. Now hire is of course payable in accordance with the terms of the charter; and the obligation to pay hire presupposes that the charter continues to bind. As I read cl. 21(B), it is not concerned to legislate for the consequences of frustration, or to exclude frustration, nor is it inconsistent with the application of the doctrine of frustration; it simply provides that if, during the currency of the charter (during which, subject to the off hire clause, hire is payable) time is lost in the circumstances specified in cl. 21, hire will continue to be paid notwithstanding the off hire clause. I regard the point as a short point of construction; and for the reasons I have given, I conclude that, on a true construction of the clause in its context in the charter it is not intended to apply in circumstances which would, apart from the clause, have the effect of frustrating the contract, and so is not effective to exclude the operation of the doctrine of frustration. I therefore decide this point against the owners.[100]

+ + +

> Basrah was within a zone which was dangerous as a result of threat of warlike operations. The owners consented to the vessel being there. Clause 21(B) came into operation. …
>
> The owners took advantage of that clause. They did insure the vessel and obtained or were entitled to obtain, refund of the premium.

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[100] *Kodros Shipping Corp v Empresa Cubana de Fletes (The Evia (No 2))* [1981] 2 Lloyd's Rep 613 (Com Ct) 617 (Goff J) (emphasis in the original, repeated term in the original), revd on other grounds [1982] 1 Lloyd's Rep 334 (CA).

As I read that clause, if the vessel were damaged by shell-fire, the owners could recover the amount from the insurers. …

Then under cl. 21(B)(2), if the vessel lost time owing to the warlike operations, hire was still to be payable, notwithstanding the off-hire clause. That is a specific provision dealing with the effect of hostilities. …

… In framing these contracts these commercial men are providing for the way in which the risks of damage or loss of time are to be borne—most economically—usually by insurers. If they are to be borne by the shipowners, he will have to insure against them. If by the charterers, let them insure. Here the risk of damage due to warlike operations was clearly to be borne by the shipowners: and the risk of delay by the charterers.

But these clauses did not, I think, cover frustration. If and when frustration did occur it brought the whole contract to an end including cl. 21 itself. On this point I agree with Mr. Justice Robert Goff.[101]

+ + +

In this regard I entirely agree with the view expressed by the learned Judge. … It was not the true object of the charter to put the charterers under an obligation to pay money over a period to the owners of *Evia* but to pay it for her use. At whatever time the essential purpose of the charter could no longer survive so that the contract ceased to be a relationship of bilateral obligation and benefit, the charter was in a commercial as well as in the legal sense frustrated and ceased thenceforth to operate between the parties.

The argument for the owners was that cl. 21(B) was in itself a contractual arrangement to provide for the very contingency

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[101] *Kodros Shipping Corp v Empresa Cubana de Fletes (The Evia (No 2))* [1982] 1 Lloyd's Rep 334 (CA) 339 (Lord Denning MR) (citations omitted).

> which arose. It is however manifest that the provision for time lost contemplated a measurable interruption of the service the vessel was to provide and not the virtual termination of it. Here again I agree with the judgment of Mr. Justice Robert Goff. …[102]
>
> + + +
>
> Clause 21(B)(2) refers back to cl. 11, the off-hire clause, and its purpose in so doing is to prevent the vessel going off-hire in the circumstances which it specifies. I agree with Mr. Justice Robert Goff that this continued obligation to pay hire pre-supposes the continued existence of the charter-party. It is not concerned to provide for the consequences of frustration or to exclude frustration nor is it inconsistent with the doctrine of frustration. Much clearer words would be required to justify construing this sub-clause as a provision covering frustrating delay. I therefore also conclude that on a true construction of the clause in its context in the charter-party it is not intended to apply in circumstances which would, apart from the clause, have the effect of frustrating the contract. It is therefore not effective to exclude the operation of the doctrine of frustration.[103]

It should be noted that the provision in para (B)(2) of the war clause considered in *The Evia (No 2)* has been dropped from the current BALTIME 1939 form and CONWARTIME 2004. However, it is still to be found in slightly different terms in one of the time charter forms considered in this thesis.[104] Paragraphs (A) and (B)(1) of the clause in *The Evia (No 2)* have, for their part, been retained though in varied language in the current BALTIME 1939 form[105] and CONWARTIME 2004;[106] they also appear in other forms.[107]

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[102] ibid 343 (Sir Sebag Shaw).

[103] ibid 344 (Ackner LJ).

[104] INTERTANKTIME 80, cl 33(B)(2).

[105] cl 20(B), (D)(ii).

[106] sub-cll (b), (d)(ii).

In contrast, in *Kuwait Supply Co v Oyster Management Inc (The Safeer)*,[108] the shipowner was obeying the orders for discharge and delivery of the cargo given by the Iraqi authorities, following occupation of Kuwait, in pursuance of the war risks clause in the charter. That clause read in its relevant parts:

> (5)(a) The Vessel shall have liberty to comply with any directions ... as to ... discharge, delivery or any other wise whatsoever ... given by any Government or by any belligerent or by any organized body engaged in civil war, hostilities or warlike operations. ... If by reason of or in compliance with any such direction ... anything is done ... such shall not be deemed a deviation.

Rix J accepted the arbitrator's finding that misappropriation of the cargo by the Iraqi authorities would have frustrated the contract had it not been for the above clause.[109] It was also observed that there was no question of frustration by delay.[110] Rix J reasoned that the shipowner had executed what the contract had provided for in the relevant clause, which had the effect of supplanting the doctrine of frustration.[111]

Rix J distinguished *Kodros Shipping Corp v Empresa Cubana de Fletes (The Evia (No 2))*,[112] saying that the frustrating event there had sprung up outside the framework of the war risks clause. In the case at bar, however, the relevant clause captured the full extent of obedience to the Iraqi authorities' orders and the resulting conversion by those same authorities of the discharged goods.[113] Rix J said in this regard:

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[107] GENTIME, cl 21(b), (d)(ii); NYPE 93, cl 31(e)(i), (ii), (iii); INTERTANKTIME 80, cl 33(A), (B)(1), (C); BPTIME3, cl 30.2, .4; STB TIME, cl 21; GENCON, cl 17(3); BPVOY4, cl 39.3; EXXONMOBIL VOY2000, cl 28; VOYWAR 2004, sub-cll (c), (e)(ii).

[108] [1994] 1 Lloyd's Rep 637 (Com Ct).

[109] ibid 641–42 (Rix J).

[110] ibid 641 (Rix J).

[111] ibid 643–44 (Rix J).

[112] [1981] 2 Lloyd's Rep 613 (Com Ct).

[113] *The Safeer* (n 108) 643–44.

Delivery of the cargo to a party not entitled to it is therefore covered for the purpose of excusing breach, but not, it is suggested, for the purpose of frustration. In theory it is of course possible for a risk to be covered by express provision of the contract, but for the contract nevertheless to be frustrated when that risk materialises in some overwhelming form: *The Evia (No. 2)* is an example of that, as is *The Nema* itself. That situation occurs not uncommonly when the contrast is between events, such as war or strikes, causing mere delay and such events causing a frustrating delay. Where, however, the clause in question is to be construed as covering some event not merely in a more minor form but also in a major form (here, misdelivery of the cargo, which in a different context it is submitted frustrates the contract), it seems to me to be prima facie difficult to say that the parties have not made such specific provision for the eventuality in question as to exclude the operation of the doctrine of frustration.

In this connection the language 'liberty to comply' seems to me to be particularly strong. If the vessel has liberty to comply with a direction to discharge or deliver the goods to a party not entitled to them, why should the contract be frustrated while that liberty is being carried out? …

None of this is, however, necessarily to say that frustration may not operate in circumstances where sub-cl. (5)(a) takes effect. A vessel, having arrived at its bill of lading destination, may be ordered by the belligerent government of the country of that port to remain at anchor for an uncertain period. At some point the contract of carriage may become frustrated. … Or a vessel, having arrived at its bill of lading destination, may be ordered to depart with its cargo from that port for some other destination. … There again, it may be that at some point frustration overtakes the adventure before the cargo can be discharged. Where, however, the cargo is discharged, without a frustrating delay, at the contractual port of destination, in compliance with the orders of the belligerent power at that place, but the cargo gets stolen by that belligerent power, exercising the name, staff and property of the cargo-owners

> as a vehicle for handling goods, or even more blatantly than that, the shipowner is carrying out the agreed adventure, under an express liberty in his contract, and the doctrine of frustration in my judgment does not operate.[114]

A similar attempt to bring overriding factors caused by a ban on imports at the destination port into a war risks clause contained in a voyage charter (cl 29) was made in *Select Commodities Ltd v Valdo SA (The Florida)*.[115] The clause read in its relevant part:

> '(a) In any situation whatsoever and wheresoever occurring and whether existing or anticipated before commencement of or during the voyage, which in the judgment of the owner or Master is likely to give rise to risk of capture, seizure, detention, damage, delay or disadvantage to or loss of the Vessel or any part of her cargo, or to make it unsafe, imprudent, or unlawful for any reason to commence or proceed on or continue the voyage or to enter or discharge the cargo at the port of discharge, or to give rise to delay or difficulty in arriving, discharging at or leaving the port of discharge or the usual place of discharge in such port [1] the Owner may before loading or before the commencement of the voyage, require the shipper or other person entitled thereto to take delivery of the cargo at port of shipment and upon their failure to do so, may warehouse the cargo at the risk and expense of the cargo; or [2] the Owner or Master, whether or not proceeding toward or entering or attempting to enter the port of discharge or reaching or attempting to reach the usual place of discharge therein or attempting to discharge the cargo there, may discharge the cargo into depot, lazaretto, craft or other place; or [3] the Vessel may proceed or return, directly or indirectly, to or stop at any such port or place whatsoever as the Master or the Owner may consider safe or advisable under the circumstances, and discharge

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[114] ibid, citing: *The Evia (No 2)* (n 112); *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724 (HL) (further citation omitted).

[115] [2006] EWHC 1137 (Comm), [2006] 2 All ER (Comm) 493.

> the cargo, or any part thereof, at any such port or place or [4] the Owner or the Master may retain the cargo on board until the return trip or until such time as the Owner or Master thinks advisable and discharge the cargo at any place whatsoever as herein provided or [5] the Owner or the Master may discharge and forward the cargo by any means at the risk and expense of the cargo. [6] The Owner may, when practicable, have the Vessel call and discharge the cargo at another or substitute port declared or requested by the Charterer. The Owner or the Master is not required to give notice of discharge of the cargo, or the forwarding thereof as herein provided. When the cargo is discharged from the Vessel, as herein provided, it shall be at its own risk and expense; such discharge shall constitute complete delivery and performance under this contract and the Owner shall be freed from any further responsibility. For any service rendered to the cargo as herein provided the owner shall be entitled to a reasonable extra compensation.'[116]

On hearing the news of the ban, the charterers informed the owners that they considered the charter as at an end. This was before any presentation of cargo for loading.

Tomlison J recalled the owners' argument:

> 'The Owners said that there could be no frustration, caused by an intervening event between the charterparty date and the time of performance, when the contract itself contained provisions showing that the parties had contemplated the very event that occurred. Clause 29 provided a means of avoiding, in this case, committing an illegal act, by permitting an alternative means of performance.'[117]

His Lordship went on to state the question for decision:

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[116] (The numbers in square brackets were inserted by the judge for ease of reference.)

[117] *The Florida* (n 115) [4].

> [T]he question is whether cl 29(a) of this charter made full and complete provision for the effects of supervening illegality which, even before a cargo had been brought forward for loading, made discharge at the contractual destination impossible.[118]

It was held by Tomlison J that cl 29(a) had simply not been triggered, as no cargo had actually been presented by the charterers for loading following news of the ban. His Lordship said in this regard:

> I agree that cl 29(a) is not happily drafted. It is also pertinent to notice that it deals with circumstances which fall far short of those which would have the effect of frustrating the charterparty. The trigger for application of the clause is merely something which 'in the judgment of the Owner or the Master' is likely to give rise to a range of risks some of which could have the effect of frustrating the charter but which need not do so in order to give to the owners the wide liberties set out in the clause. On analysis, it can be seen that the clause is setting out in such circumstances to give to the owners a wide liberty as to how to deal with the cargo. In the passages which I have numbered [2]–[6] it is axiomatic that the clause envisages that there is on board a cargo in respect of which the owners need to make appropriate arrangements in the event that, for whatever reason, including frustration, it is not to be delivered at the contractual discharge port. The passage which I have numbered [1] on its true construction in my judgment presupposes that there is actually in existence a cargo which requires to be dealt with appropriately if it is not to be loaded on board. If the shipper or other person with title thereto declines to take responsibility for the cargo the owners are given liberty to warehouse the cargo at the risk and expense of the shippers or the person with title thereto. In my judgment this clause is intended to deal, amongst other things, with some of the practical problems which frustration of the charterparty may throw up in respect of disposition of cargo either loaded on board the vessel or

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[118] ibid [7].

> designated for loading thereon. In certain circumstances where freight has already been earned and frustration supervenes it may be that the clause could and would effectively deal with all the consequences thereof so far as concerns the owners' and the charterers' rights and liabilities. I do not need to decide that point and I would hesitate to do so upon the basis of a series of hypotheses as opposed to an actual set of facts. However in the case where performance is rendered impossible before even a cargo is designated and brought forward for loading, it seems to me that the clause by its terms has no application because there is in terms thereof no cargo for the disposition of which arrangements need to be made. In such circumstances there can be no 'discharge' of the cargo such as it is necessary to deem complete delivery and performance under the contract. In a clause which gives every appearance of being intended to deal with the practical problem of disposition of cargo, it is entirely unsurprising that no provision is made for the case where no cargo has been brought forward. The purpose of the clause is not to enable the owners to earn freight. It is to deal with the practical consequence of the owners exercising a liberty not to render performance.
>
> I need only consider the case where no cargo has been brought forward for loading, yet alone loaded, before what would otherwise be frustrating illegality supervenes rendering performance of the contractual adventure impossible. Clause 29(a) does not in my judgment make full provision for the effect thereof on the parties' respective rights and liabilities because on a true construction it makes no provision therefor at all.[119]

The cases on war and hindrances clauses—as well as, for that matter, those on deviation clauses, discussed earlier[120]—can be reconciled and understood by reference to the idea that, if the contract provides for a substituted method for its performance, then there is no need for the doctrine of frustration. That

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[119] ibid [11]–[12].

[120] See sec 2.1.2.

hindrances and war risks clauses provide for such 'substituted method of performing the contract' was recognised in *GH Renton & Co Ltd v Palmyra Trading Corp of Panama*.[121] In that case, cargo was shipped in Canada under bills of lading with London and Hull as the ports of destination. Owing to a strike in London, which was followed by a strike in Hull, the vessel proceeded to Hamburg and discharged the cargo there. No arrangements were made by the carrier to ship the cargo from Hamburg to London or Hull. The cargo was received in Hamburg under protest.

The bills of lading were made subject to the Chamber of Shipping War Risks Clauses Nos 1 and 2, which read:

> '(1) No bills of lading to be signed for any blockaded port and if the port of discharge be declared blockaded after bills of lading have been signed, or if the port to which the ship has been ordered to discharge either on signing bills of lading or thereafter be one to which the ship or shall be prohibited from going by the government of the nation under whose flag the ship sails or by any other government, the owner shall discharge the cargo at any other port covered by this charterparty as ordered by the charterers (provided such other port is not a blockaded or prohibited port as above mentioned) and shall be entitled to freight as if the ship had discharged at the port or ports of discharge to which she was originally ordered.
>
> (2) The ship shall have liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages, destination, delivery or otherwise howsoever given by the government of the nation under whose flag the vessel sails or any department thereof, or by any other government or any department thereof, or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risks insurance on the ship, the right to give such orders or

[121] [1957] AC 149 (HL).

> directions and if by reason of and in compliance with any such orders or directions anything is done or is not done, the same shall not be deemed a deviation, and delivery in accordance with such orders or directions shall be a fulfilment of the contract voyage and the freight shall be payable accordingly.'

Lord Morton said in relation to these clauses:

> To my mind, my Lords, by making the obligation to carry to London subject to the two clauses just quoted, the parties have inserted a proviso qualifying the obligation to carry the goods to London and providing a substituted method of performing the contract, and earning the freight, on the occurrence of the events specified in the war risks clauses. This must surely be the effect of the concluding words of each clause.[122]

In addition, cl 14 in each of the bills of lading contained the following passages:

> '(c) Should it appear that epidemics, quarantine, ice—labour troubles, labour obstructions, strikes, lockouts, any of which on board or on shore—difficulties in loading or discharging would prevent the vessel from leaving the port of loading or reaching or entering the port of discharge or there discharging in the usual manner and leaving again, all of which safely and without delay, the master may discharge the cargo at port of loading or any other safe and convenient port.
>
> (f) The discharge of any cargo under the provisions of this clause shall be deemed due fulfilment of the contract. If in connexion with the exercise of any liberty under this clause any extra expenses are incurred, they shall be paid by the merchant in addition to the freight, together with return freight if any and a reasonable compensation for any extra services rendered to the goods.'

Lord Morton commented on these provisions as follows: 'These two clauses, read together, constitute a further proviso, again providing a substituted

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[122] ibid 167.

method of performing the contract and earning the freight on the occurrence of the events therein specified.'[123]

It was held that the carrier's discharge in Hamburg was not a breach of contract since it was effected in pursuance of the above sub-clauses.[124]

It is submitted that this idea of the substituted method of performance of the contract would make it difficult for a typical war risks or hindrances clause to cover a piratical capture of ship and cargo. That is because, piratical capture is simply repugnant to the idea of a substituted performance of the contract, much like it is to a liberty in a deviation clause. Reference is made here to the discussion of the latter clause earlier in this chapter.[125] In *The Safeer*,[126] the doctrine of frustration gave way to the war risks clause, because the owners were performing the contract in one of the possible ways provided for by that clause. Orders by the Iraqi authorities for the discharge of the cargo, and its conversion by those same authorities fell within the clause. In contrast, there is nothing nearing the acceptable methods of performance of a contract of carriage in the ship's hijacking by pirates.

Moreover, on a strict construction basis, it seems that piratical seizure of a vessel and its cargo does not come under the purview of the vast majority of war risks and hindrances clauses analysed here. Indeed, none of the liberties granted to the shipowner (or carrier), or the costs and expenses for which the charterer (or cargo interest) is made liable, appear to be applicable during a capture. The only exception in that respect may be such provisions as cl 21(B) of the charter

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[123] ibid. See KW Wedderburn (1957) 15 CLJ 16 (note) 19, which in commenting on Jenkin LJ's description of these provisions, as adopted by the House of Lords (see text to n 31), writes that '[s]uch obstacles [as those triggering the application of war risk and hindrances clauses] need not amount to frustration'. Here, it was not argued that the delay imposed by the strike was of such a nature as to frustrate the bill of lading contracts: ibid 165 (Viscount Kilmuir LC), 173 (Lord Tucker). See also on this point RA MacCrindle (1956) 14 CLJ 5 (note) 57, criticising war and hindrances clauses. On the question of the substituted method of performing the contract, see (1957) 73 LQR 137 (note) 139.

[124] *GH Renton* (n 121) 165 (Viscount Kilmuir LC), 167–68 (Lord Morton).

[125] See 41.

[126] (n 108).

considered in *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes (The Evia (No 2))*,[127] and those provisions were held in that case as insufficient to supplant the doctrine of frustration. The provisions in question dealt with the charterer's liability for the costs of war risks insurance and for hire during delay caused by war risks. The remainder of the liberties or liabilities provided for under typical war risks and hindrances clauses seem to have very little bearing, if at all, on the situation where control of the vessel and cargo has left the hands of the shipowner (or carrier), and passed to the pirates.

In conclusion, it seems that war risks and hindrances clauses are very unlikely to have the effect of supplanting the doctrine of frustration in the scenario of capture used as the matrix for this thesis.[128]

While war and hindrance clauses, in much the same way as deviation clauses, provide primarily liberties to the shipowner or carrier to depart from the usual method of performing the contract, off-hire clauses also try to tackle certain difficulties occurring along the way of performance by suspending the time charterer's main obligation. Analysis of the main question posed here of the limits of the doctrine of frustration in standard contracts shifts now to that type of clause.

2.1.4. Off-Hire

Off-hire clauses are unique to time charters.[129] A typical clause is that of the NYPE 46 form, providing as follows:

> That in the event of the loss of time from deficiency of men or 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

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[127] [1983] 1 AC 736 (HL).

[128] See, of the same view, JGR Griggs, *Frustration in Relation to Contracts of Affreightment* (Gothenburg School of Economics Publications No 3, Gumpert 1959) 11. For a contrary but unsupported view, see Anna Wollin Ellevsen, 'A Contractual View on Piracy' (2009) 9(1) STL 1, 3.

[129] BALTIME 1939, cl 11(A); GENTIME, cl 9(a); NYPE 46, cl 15; NYPE 93, cl 17; INTERTANKTIME 80, cl 20; BPTIME3, cl 19.1; SHELLTIME4, cl 21; STB TIME, cl 11.

> bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost.

The above clause was examined in *Mareva Navigation Co Ltd v Canaria Armadora SA (The Mareva AS)*,[130] where Kerr J remarked:

> The owners provide the ship and the crew to work her. So long as these are fully efficient and able to render to the charterers the service then required, hire is payable continuously. But if the ship is for any reason not in full working order to render the service then required from her, and the charterers suffer loss of time in consequence, then hire is not payable for the time so lost.[131]

The crucial question asked here—as in the rest of this chapter—is whether an off-hire clause would displace the doctrine of frustration as afar as the impact of a Somali piracy type of capture on contracts of carriage is concerned. To answer that question, it is necessary to first determine whether off-hire clauses apply to the factual scenario envisaged.

In *Cosco Bulk Carrier Co Ltd v Team-Up Owning Co Ltd (The Saldanha)*,[132] the application of the off-hire clause in a slightly amended form to that considered in *The Mareva AS* was dismissed by the Court in a case of capture and detention of a merchant ship by Somali pirates.[133] The clause read as follows:

> 'That in the event of the loss of time from default and/or deficiency of men including strike of Officers and/or crew or deficiency of … stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, dry-docking for the purpose of examination or painting bottom, or by any other cause preventing

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[130] [1977] 1 Lloyd's Rep 368 (Com Ct).

[131] ibid 382.

[132] [2010] EWHC 1340 (Comm), [2011] 1 Lloyd's Rep 187. See Jason Chuah, 'Impact of Piracy on International Commercial Arrangements' (2010) 61 SLR 42.

[133] ibid [35].

the full working of the vessel, the payment of hire shall cease for the time thereby lost …'

The *Saldanha* was carrying a cargo of bulk coal from Indonesia to Koper in Slovenia when it was seized by Somali pirates in the Gulf of Aden on 22 February 2009. The pirates compelled the master to sail the vessel to the waters off the Somali town of Eyl where the vessel remained until 25 April when it was released by the pirates. The vessel reached an equivalent position to the location at which it was seized on 2 May.

The charterers attempted to invoke the off-hire clause for the period of time between 22 February and 2 May by arguing that one or another of the following three segments in the clause came into operation:

- 'detention by average accidents to ship or cargo'
- 'default and/or deficiency of men'
- 'any other cause'

These three segments were treated as Issues I, II and III by the Court.

As to Issue I, the charterers argued that 'average accidents' included detention by pirates as this was properly a marine insurance peril. This argument foundered on four accounts.

It was firstly pointed out by the Court that 'average accident' meant that there was damage to the ship, which was not the case of the *Saldanha*.[134]

Secondly, the piratical capture and detention could not be treated as an 'accident'.[135]

A third criticism of the charterers' argument lay in the fact that 'average accident' meant something other than total loss.[136] In obiter, Gross J, delivering the Court's judgment, found force in the arbitral tribunal's view which contrasted the wording in question in the off-hire clause with the ship loss

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[134] ibid [10]–[11].

[135] ibid [12]–[14].

[136] ibid [15].

clause[137] found in the same charter; however, the judge did not wish to rest his decision on this linkage between the two clauses.[138]

It was finally the Court's view that the risk of surplusage between the different segments of the off-hire clause did not help the charterers. The Court was there referring to the possible overlap between the meaning assigned to 'average accident' and the phrase 'damages to hull, machinery or equipment' in the same clause.[139]

Moving to Issue II, the charterers argued that the alleged fault of the shipowners' crew in failing to adequately prevent the pirates' attack constituted 'default and/or deficiency of men' pursuant to the off-hire clause. This contention was likewise rejected by the Court. The words under consideration meant refusal to work, not negligence, the Court affirmed.[140] While Gross J acknowledged that the literal meaning of 'default' helped the charterers, insofar as it covered negligence, authority on the particular wording in the clause stood against the charterers' contention. According to such authority, 'deficiency of men' did not include refusal to work, but simply an insufficient complement of crew. The term 'default' had been added to the clause to cater for refusal to work.[141] Furthermore, the additional wording 'including strike of Officers and/or crew' in the clause was a pointer that what was covered was insufficiency in the crewing or refusal to work, not negligence.[142] On the whole, the decisive factor standing in the way of the charterers' reliance on this segment of the off-hire clause lay in the allocation of the risk of delay under the time charter. If the charterers' view were accepted, then the ship would be off hire whenever there was negligence on the part of the shipowner.[143]

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[137] As to which, see sec 2.1.5.

[138] *The Saldanha* (n 132) [16].

[139] ibid [18].

[140] ibid [21].

[141] ibid [22]–[25].

[142] ibid [26].

[143] ibid [27].

Finally, turning to Issue III, it was the Court's view that the absence of a term such as 'whatsoever' following 'any other cause' was fatal to the charterers' argument on this segment of the clause. Without 'whatsoever', 'any other cause' must relate to what was enumerated in the clause, ie, ejusdem generis.[144] '[S]eizure by pirates [was] a "classic example" of a totally extraneous cause.'[145] Ultimately, the Court quoted approvingly the following excerpt from the arbitral tribunal's award on the overall treatment of the charterers' argument in relation to the words at hand:

> 'We cannot accept any of these permutations [ie, those contained in charterers' argument]. They all seemed to us to be attempts to avoid the well known consequences of the wording in the form agreed by the parties. This act of piracy was not *ejusdem generis*. It did not arise out of the condition or efficiency of the vessel, or the crew, or the cargo, or the trading history, or any reasonable perception of such matters by outside bodies. Unlike a trading history which gave rise to typhus or a well-grounded suspicion of typhus, it was a truly extraneous cause. The effect of the bargain contained within clause 15, construed in its general context, was that Owners did not take the risk of the full working of the vessel being prevented by an extraneous cause such as piracy. The Charterers … did assume that risk.'[146]

The ruling in *The Saldanha* has wide repercussions since all the standard time charter forms considered in this thesis adopt the model of the clause in question in that case.[147] For the immediate concerns of the question raised here, the upshot of the decision in *The Saldanha* is that, since that model is inapplicable to the piratical capture scenario being examined, the off-hire clauses in those standard forms cannot for that reason supplant the doctrine of frustration.

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[144] ibid [30]–[31].

[145] ibid [33] (Gross J).

[146] ibid [34].

[147] See n 129. See Paul Todd, 'Ransom, Piracy and Time Charterparties' (2012) 18 JIML 193, 204.

In *Port Line Ltd v Ben Line Steamers Ltd*,[148] the off-hire clause as contained in a time charter in the form approved by the New York Produce Exchange was noted by Diplock J to not include requisition.[149] In finding that no frustration had arisen upon the ship's requisition in the case, the judge emphasised the bearing of such omission from the off-hire clause, amongst other factors.[150]

In contrast to *The Saldanha*, a different outcome was reached in *Osmium Shipping Corp v Cargill International SA (The Captain Stefanos)*.[151] The off-hire clause in that case read as follows:

> 'Should the vessel put back whilst on voyage by reason of any accident or breakdown, or in the event of loss of time either in port or at sea or deviation upon the course of the voyage caused by sickness of or accident to the crew or any person onboard the vessel (other than supercargo travelling by request of the Charterers) or by reason of the refusal of the Master or crew to perform their duties, or oil pollution even if alleged, or 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 in the same or equidistant position in Charterers' option, and voyage resumed therefrom. All extra directly related expenses incurred including bunkers consumed during period of suspended hire shall be for Owners' account.'

It was held that the words 'capture/seizure' covered the hijacking of the vessel by Somali pirates for ransom for a period of just under three months.[152]

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[148] [1958] 2 QB 146 (QBD).

[149] ibid 157.

[150] ibid 162.

[151] [2012] EWHC 571 (Comm), [2012] 2 All ER (Comm) 197.

[152] ibid [33]. See (2012) 18 JIML 110 (note).

Incidentally, Cooke J, in rendering the Court's judgment, dismissed any aid on the issue of off-hire that could be sought in the war risks clause, drafted along the CONWARTIME 2004 model, and found in the charter.[153]

Reverting to the main question raised in this chapter, it could be argued that the off-hire clause examined in *The Captain Stefanos* may well override, to the extent that it is applicable to a piratical capture situation, the doctrine of frustration insofar as the time charter is concerned.

Yet, it becomes quickly apparent that an indefinitely long detention of ship and cargo by pirates is likely to stretch the bounds of even that off-hire clause. This is confirmed in a number of cases.

In *Admiral Shipping Co Ltd v Weidner Hopkins & Co*,[154] the outbreak of war between Germany and Russia resulted in Russian authorities refusing departure for vessels subject to two separate time charters for one Baltic round trip in the one case and one or two Baltic round trips in the other case. The Court of Appeal held unanimously that, two years on, the contracts had been frustrated[155] and that the cesser of hire clause was not a bar to discharge. Swinfen Eady LJ put it thus:

> It was contended that the charterparty in the present case contained a clause providing for the cesser of hire under certain circumstances, and that the effect of such a clause was to exclude any implication that the hire might cease under other circumstances. The answer to this argument is that the effect of what has happened is not merely to suspend liability to pay hire, but to dissolve the contract, and accordingly there is no longer any subsisting contract under which hire is payable.[156]

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[153] *The Captain Stefanos* (n 151) [27]–[28], [31]. See on this point: Todd (n 147) 204–05; Bariş Soyer (2012) 18 JIML 276 (note) 278.

[154] [1917] 1 KB 222 (CA).

[155] ibid 236–41 (Swinfen Eady LJ), 244–46 (Bankes LJ), 250–51 (Lawrence J).

[156] ibid 237. See also ibid 247 (Bankes LJ).

Similarly, in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (The Hongkong Fir)*,[157] the off-hire clauses contained in a time charter were held as covering delays of several weeks caused by machinery breakdowns resulting in the halting of the ship's service.[158] Yet, this was not a bar to the operation of the doctrine of frustration through delay. In delivering the judgment of the Queen Bench's Division, unanimously affirmed by the Court of Appeal, Salmon J said:

> [In considering the issue of frustration, t]he clauses dealing with off-hire [are not] of particular materiality. It is true that they show that some substantial periods for repairs and overhaul during the currency of the charter were contemplated and that these off-hire periods might, at the charterer's option, be added on to the charter time, but they do not mean that the parties intended the contract to bind, no matter how long the off-hire periods might last. These clauses would not have prevented the charterparty from being frustrated if, for example, the vessel had been out of commission for the whole of 1957.[159]

In contrast, in *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)*,[160] the fact that the off-hire clause covered the situation at hand, but was not relied on by the charterer, Tsavliris, stood amongst other factors in the way of the latter's claim for frustration. Unlike the scenario envisaged by Salmon J in the passage quoted from *The Hongkong Fir*, the facts in *The Sea Angel* did not rise to the requirements of a frustrating predicament. In other words, even though no reliance was placed on it, the off-hire clause was seen as catering for the circumstances at hand.[161] In his judgment for the Court, Rix LJ made it a point to

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[157] [1962] 2 QB 26 (CA).

[158] ibid 55 (Sellers LJ).

[159] *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (The Hongkong Fir)* [1962] 2 QB 26 (QBD) 39.

[160] [2007] EWCA Civ 547, [2007] 2 All ER (Comm) 634.

[161] ibid [47].

> emphasise that, generally speaking, the risk of delay under the charter was upon Tsavliris as charterers. This is because of the essential structure of a time charter, under which, absent express provision, time runs continuously against the charterer until redelivery. Thus an off-hire clause is the place to find exceptions against the incidence of a continuous liability for hire, but such a clause did not avail Tsavliris in this case, even though cl 21(a)(v) expressly deals with detention by authorities.
>
> The point is also illustrated by other provisions of the charter form. … Not of direct relevance, but again illustrative of the general point are specific provisions to deal with other circumstances in which detention of the vessel may arise. Thus constructive total loss of the vessel, which may arise from trapping, is specifically dealt with in cl 20.[162] Requisition, an old cause of dispute, is specifically dealt with in cl 32. Both these clauses are additional off-hire clauses which operate in circumstances of actual or potential frustration. Against this background, where the charterer assumes the general risk of delay, subject to express provision, it necessarily requires something special to frustrate the charter through mere delay: and a fortiori where, as here, the consequences of the delay are purely financial since the charter is over, save for redelivery, and the delay in question falls within a foreseeable risk of the salvage industry.[163]

In summing up, it appears that the few available off-hire clauses which would be apt to cover piratical captures would fall in the usual trap of having a limited effect in displacing the doctrine of frustration. This would be particularly so when capture takes on a relatively long duration and prospects of recovering the vessel weaken considerably.

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[162] That clause was entitled 'Loss of vessel' and is discussed in the next subsection (2.1.5).

[163] *The Sea Angel* (n 160) [130]–[131].

The more drastic clauses dealing with the ship's loss, already referred to in the passage quoted above from Rix LJ's opinion in *The Sea Angel*, are examined next.

2.1.5. Ship Loss

A number of standard time charter clauses provide for the situation where the ship is lost or goes missing.[164] As already indicated,[165] the concept of missing ships, though of relevance in certain piratical models, is excluded from the discussion in this thesis. The following analysis centres, therefore, only on ships that are lost pursuant to such clauses, referred to conveniently herein as 'ship loss clauses'.

Some of these clauses state simply that the charter will cease on the ship's loss. Thus, cl 20 of SHELLTIME4 reads:

> Should the vessel be lost, this charter shall terminate and hire shall cease at noon on the day of her loss; should the vessel be a constructive total loss, this charter shall terminate and hire shall cease at noon on the day on which the vessel's underwriters agree that the vessel is a constructive total loss. … Any hire paid in advance and not earned shall be returned to Charterers and Owners shall reimburse Charterers for the value of the estimated quantity of bunkers on board at the time of termination, at the price paid by Charterers at the last bunkering port.[166]

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[164] BALTIME 1939, cl 15; GENTIME, cl 10; NYPE 46, cl 16; NYPE 93, cl 20; INTERTANKTIME 80, cl 18; SHELLTIME4, cl 20; STB TIME, cl 3(d).

[165] text to n 47 in ch 01.

[166] See also GENTIME, cl 10. It is noteworthy that NYPE 46, cl 4 provides:

> hire to continue until the hour of the day of her re-delivery in like good order and condition, ordinary wear and tear excepted, to the Owners (*unless lost*) at ..... unless otherwise mutually agreed.

(Emphasis added.) See also NYPE 93, cl 10, similarly worded. There appear to be no cases or commentary targeting the emphasised words.

It is noteworthy that the above clause provides for the termination of the contract upon the ship's loss while also specifying the cessation of hire payments and the return of prepaid and unearned hire.

In other forms, the clause may, in the event that the ship is lost, only talk of the payment of hire. Clause 15 of BALTIME 1939 is noteworthy in this regard:

> Should the Vessel be lost … , hire shall cease from the date when she was lost. If the date of loss cannot be ascertained half hire shall be paid from the date the Vessel was last reported until the calculated date of arrival at the destination. Any hire paid in advance shall be adjusted accordingly.[167]

In providing for the cessation of hire or the reimbursement of its prepaid portion, such clauses should not be confused with off-hire clauses, which are not concerned as such with the situation of the ship being definitely lost, but rather with a temporary unavailability of the ship for its intended contractual service. As stated by Morris LJ in *Blane Steamships Ltd v Minister of Transport*:[168]

> Hire-money is payable for the hiring, and when hire-money ceases to be payable—as opposed to merely being in suspense—this is for the reason that the hiring has ceased and the charterparty has expired.

Ship loss clauses deal thus with the consequences of the ship being lost forever. The crucial question is whether they are as such sufficient to displace the doctrine of frustration.

In order to answer that question, it will first be necessary to examine whether a ship which is captured by pirates may be deemed to be a lost ship in accordance with those clauses. Such examination will be made in relation to three of the four scenarios identified at the outset of this work,[169] namely, where it is ascertained that the ship will not be recovered (outcome B), or where, upon

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[167] See also NYPE 46, cl 16; NYPE 93, cl 20; INTERTANKTIME 80, cl 18; STB TIME, cl 3(d). BPTIME3 has no clause regarding loss of the ship.

[168] [1951] 2 KB 965 (CA) 1000.

[169] See 20–21.

recovery, the ship is unable to resume the contractual service (outcome A2). In addition, in the interim phase, where the ship's ultimate fate is not clear, there may be situations where the ship could be considered a lost ship in accordance with the above clauses. The ship's constructive total loss, especially where that term is specifically used in the clause, will be particularly relevant; a sub-question will be whether constructive total loss could be read into those clauses that do not mention it expressly, but refer to loss of the ship generally.[170]

Then, in the second place, having established the applicability of ship loss clauses to piratical capture, it will be necessary to contrast ship loss clauses which expressly provide for the termination of the charter with those clauses that merely provide for the question of hire and, as to the latter, consider a few interpretation points which could place them on a par with the former.

Having answered those two preliminary points, the analysis will then turn to the central question posed here, namely, whether ship loss clauses can oust the operation of the doctrine of frustration on the premise that they provide completely for the loss of the ship.

Can a piratically captured ship be considered a lost ship under ship loss clauses?
As to this first preliminary question, for a piratically captured ship to be deemed as lost under a typical ship loss clause, it may be said that the ship would have to meet the requirements of a 'constructive total loss', if not an 'actual total loss'. The former term is taken from some of the ship loss clauses themselves,[171] though it—together with the latter term—really belong to the field of marine insurance law. As stated by Stable J in *Court Line Ltd v R (The Lavington Court)*,[172] a case involving a ship loss clause in a time charterparty:

> A constructive total loss is a conception peculiar to marine insurance, and one of the difficulties in deciding this case arises

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[170] The term 'constructive total loss' is used in the following clauses: GENTIME, cl 10; SHELLTIME4, cl 20; STB TIME, cl 3(d). The other clauses refer simply to the 'loss' of the ship: BALTIME, cl 15; NYPE 46, cll 4, 16; NYPE 93, cll 10, 20; INTERTANKTIME 80, cl 18.

[171] GENTIME, cl 10; SHELLTIME4, cl 20; STB TIME, cl 3(d).

[172] [1945] 2 All ER 357 (CA).

> from having to take definitions and conceptions regulating the rights and obligations as between an assurer and an assured and transposing them to a charterparty, where the rights and obligations are those of owner and hirer of the ship.[173]

The Court hastened to the view that the definition of 'constructive total loss' found in s 60 of the Marine Insurance Act 1906 controlled the meaning of the term in the charterparty.[174]

Moreover, in *Blane Steamships Ltd v Minister of Transport*,[175] a case concerning a demise charter with a comparable ship loss clause to the time charter clauses referred to above, the Court could not find sufficient evidence to establish that, on the relevant date, the ship could be considered an actual total loss or a 'constructive total loss', as the term was used in the relevant clause.[176] However, the report of the case relates the agreement of the parties to the dispute that s 60 of the Marine Insurance Act 1906 governed the definition of 'constructive total loss' under the clause.[177]

The application of total loss principles to outcomes A2 and B should raise no particular difficulties. Once the ship is recovered, it is unlikely to constitute a total loss except perhaps in the situation where the cost of repairs to damage sustained by the ship exceeds the ship's value,[178] but this is not so much of a common likelihood under the model of piracy studied, where ships suffer usually little or no physical harm from captors. For its part, outcome B would undoubtedly be a case of actual total loss.[179]

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[173] ibid 366.

[174] ibid 359–60 (Scott LJ), 364–65 (du Parcq LJ), 366 (Stable J).

[175] [1951] 2 KB 965 (CA).

[176] ibid 994 (Singleton LJ), 998 (Morris LJ). Cohen LJ, for his part, did not express any view whether there had been a loss in terms of the clause: ibid 990.

[177] ibid 972ff, 994 (Singleton LJ), 1002 (Morris LJ).

[178] Marine Insurance Act 1906, s 60(1), (2)(ii).

[179] ibid s 57(1).

In contrast, the application of total loss principles to a hijacked ship during the interim phase calls for a meticulous study. Reference is made to the discussion in chapter 5 of this particular question. To summarise, on the basis of recent authority,[180] it would appear to be quite difficult for a captured ship in the interim phase, that is, pending the realisation of outcome A or B, to meet the definition of either an actual or a constructive total loss, except in certain confined cases where recovery is almost impossible, as in the case of vessels converted by pirates for their own use.

This being said, it becomes necessary to address the sub-question whether a constructive total loss can be read into a ship loss clause which does not specifically use the term. A dictum of Rix LJ in *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)*[181] seems to suggest that it might be possible to do so. Although his Lordship was adamant that 'the doctrine of CTL is a special feature of marine insurance law and is not found outside marine insurance',[182] he also said:

> As will appear below, the doctrine of CTL in marine insurance law has meant that the test for an ATL has been applied with the utmost rigour: for an insured has always had the option of claiming for a CTL. Outside marine insurance, the doctrine of actual total loss may be found to be more flexible. Thus a motor-car may be treated as a total loss when it is not worth repairing.[183]

Accordingly, even though this could in theory open the door for reading the concept of constructive total loss into cl 15 of the BALTIME charter as well as equivalent clauses in other forms which simply talk of the ship being lost without expressly mentioning that concept,[184] as stated above, for the reasons

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[180] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ 24, [2011] 3 All ER 554, affg [2010] EWHC 280 (Comm), [2010] 2 All ER 593.

[181] [2011] EWCA Civ 24, [2011] 3 All ER 554.

[182] ibid [15].

[183] ibid [16].

[184] NYPE 46, cll 4, 16; NYPE 93, cll 10, 20; INTERTANKTIME 80, cl 18.

laid out elaborately in chapter 5, a piratically captured ship would be an unlikely candidate for constructive total loss—or indeed actual total loss—except in very few situations—at least when considering the case in the interim phase, pending determination of the outcome of the hijacking.

To conclude, therefore, it may be said in answer to the first preliminary question above that a piratically captured ship in the Somali model will in most cases fail to trigger ship loss clauses, apart from those instances spelled out in *The Bunga Melati Dua*, ie, where recovery of the ship is unlikely, as in the case of a ship converted for the pirates' own use. The foregoing applies to the capture interim phase. Upon the capture outcome being ascertained, it has been argued that only where the ship's recovery is definitely foreclosed (outcome B) will a ship loss clause find application.

Can ship loss clauses which provide only for hire be read as providing also for the charter's termination? Having thus concluded that ship loss clauses may be triggered in certain confined capture situations, it is now appropriate to turn to the second preliminary question identified above, namely, whether termination of the charter can be read into those clauses which do not provide expressly for it, but merely talk of the cessation or reimbursement of hire. It will be recalled that a category of ship loss clauses squarely provide for the termination of the charter on the ship being lost,[185] while another category speaks only of 'hire'.[186] The decision in *Blane Steamships Ltd v Minister of Transport*[187] articulates three arguments, all obiter, for the proposition that termination of the charter is actually provided for by the latter category of clauses.

As already mentioned, *Blane* concerned a ship loss clause forming part of a demise charter. The clause, numbered 8 in the charter, read:

> 'If the ship be lost, hire shall be paid up to and inclusive of the day of loss, or, if missing, up to and inclusive of the day last reported. Should the ship become a constructive total loss, such loss shall be

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[185] NYPE 46, cl 4; NYPE 93, cl 10; GENTIME, cl 10; SHELLTIME4, cl 20.

[186] BALTIME 1939, cl 15; INTERTANKTIME 80, cl 18; STB TIME, cl 3(d).

[187] [1951] 2 KB 965 (CA).

> deemed to have occurred on, and hire under this charterparty shall cease as from the day of the casualty resulting in such loss. In ascertaining whether the ship is a constructive total loss for the purpose of this clause, the insured value under cl. 7 shall be taken as the repaired value, and nothing in respect of the damaged or breaking up value of the ship shall be taken into account.'

The Court had to determine whether, at the relevant time, the charter was still in existence as it became clear that the ship, having grounded and suffered severe damage, could not be economically salvaged. The owner's case was that the contract had ended. One of the arguments supporting this view was that the word 'hire' in the second sentence of the clause quoted above meant in reality 'hiring', in contrast with the meaning of 'hire' in the first sentence, which was money payable under the charter. Morris LJ said:

> There is a contrast between the words 'hire shall be paid up to' which appear in the first sentence of cl. 8, and the words 'hire under this charterparty shall cease as from' which appear in the second sentence. It is arguable that the word 'hire' in the first sentence denotes hire-money, and that the word 'hire' in the second sentence, where it is followed by the words 'under this charterparty', denotes the hiring. Mr. Roskill submitted that the word 'hire' when used as a noun in this charterparty is simply used to denote hire-money. This submission is probably correct, and I propose to proceed on the basis that it is.[188]

The clause in *Blane* is very similar to those time charter ship loss clauses identified above which refer only to the payment of 'hire' and do not expressly provide for the termination of the contract.[189] Although transposing the principles from a demise charter context to a time charter context should be done with caution, the potential to read 'hire' in the first sentence of cl 15 of BALTIME 1939—or in its first mention in cl 18 of INTERTANKTIME 80 and,

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[188] ibid 999–1000.

[189] BALTIME 1939, cl 15; INTERTANKTIME 80, cl 18; STB TIME, cl 3(d).

likewise, in the first two sentences of cl 3(d) of STB Time—as meaning hiring is just as arguable as it appeared so to Morris LJ in the above passage.

Ultimately, this argument was rejected in principle by Morris LJ in the quoted passage above. The other two members of the Court did not refer to it.

Another interpretation was placed on the clause by the Court in *Blane* to the effect that it called for the termination of the charter on the ship's loss. Cohen LJ had this to say:[190]

> The construction of cl. 8 presents some difficulty. The judge, I think, regarded it only as putting an end to the liability of the charterers to pay hire-money as from the date of the casualty whether the loss be actual or constructive. I incline to the view that it has a wider effect. If its effect was limited as the judge thought, and incidentally Mr. Roskill argued, the words in the second sentence, 'such loss shall be deemed to have occurred on and', would be otiose. In my opinion the intention and effect of the clause was to place constructive loss on the same basis as actual loss. It is admitted that in the event of actual loss the charterparty would have been brought to an end and the option conferred by cl. 11 would no longer have been exercisable. I think the intention of cl. 8 was to produce the same result in the event of constructive loss. The point is by no means clear. …

It will be seen that Cohen LJ came close to saying that the clause in question *did* provide for the termination of the charter upon the ship's loss. Singleton LJ was more explicit:

> It is said by Mr. Roskill that this clause relates only to payments by way of hire, and that it is to enable the charterers in the event of loss or of constructive total loss to recover payments made in advance. That is a possible reading of it, though—a small point—it would make the words 'such loss shall be deemed to have occurred on and' surplusage. I am inclined to the view that the clause should

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[190] *Blane* (n 187) 986.

> be read as showing that the intention of the parties was that in the event of a constructive total loss of the vessel the charterparty should be deemed to have come to an end as at the date of the casualty. … The object of the clause I conceive to have been to enable both owners and charterers to know where they stood in the event of a constructive total loss. As from the date of the casualty it was to be just the same as it would have been in the case of an actual total loss. The charterparty does not say in so many words that in the event of the ship being lost the charterparty shall be at an end, though it does say that in such case hire shall be paid up to and inclusive of the day of loss. A constructive total loss is treated in the same way in cl. 8: it is provided that it shall be deemed to have occurred on the day of the casualty, which was the date of the stranding, September 5, and hire was to cease as from that day. It seems to me that the object of this is to give a date on which the charterparty is to be deemed to have expired, except in the case of something for which express provision is made, for example, in the case of the ship becoming a wreck or obstruction. … I recognize that cl. 8 is in somewhat ambiguous terms, but, as I have said, I consider that it was seeking to make the case of a constructive total loss analogous to that of a loss, and was fixing a date therefor.[191]

This interpretation may be appealing, but both their Lordships felt it to be unsettled. The third member of the Court, Morris LJ, did not partake in this reading of the clause and preferred to imply instead in it the requisite term: if, according to the clause, hire ceases to be payable upon the loss of the ship, then it follows by necessary implication from such a clause that the contract is meant to also come to an end on that occurrence. Morris LJ said:[192]

> If it is said that the parties have by cl. 8, in reference to the contingency of a constructive total loss following upon a casualty, merely provided for the cessation of hire, then certain questions

[191] ibid 994–95.

[192] ibid 1000.

> may arise to which in express terms the charterparty gives no answers. … I have come to the conclusion that it is necessary to imply a term in the charterparty to the effect that as from the time when hire-payments cease to be due the charterparty terminates. Such termination would end the hiring, and its date would mark 'the expiration' of the charterparty in substitution for the contemplated date at the end of a period of five years.

Because the case concerned a constructive total loss, Morris LJ added the following comments:[193]

> The parties further agreed that if a casualty resulted in a constructive total loss such loss should be deemed to have occurred on the date of the casualty. That date would then mark the end of the demise of the ship.

Put differently:[194]

> It was their common intention that hiring under the charterparty should cease as from that date, or, in other words, that the charterparty should expire. If the words of cl. 8 do not express this common intention, which is to be deduced from a consideration of the charterparty as a whole, then words must necessarily be implied which will clothe and formulate it.

Morris LJ was alone in implying such a term into the clause. His two colleagues on the bench felt disposed to imply instead a term for the ending of the charter in application of the doctrine of frustration. This brings the analysis back to the central question of this chapter.

Do ship loss clauses oust the doctrine of frustration? Without doubt, a ship loss clause which provides for the termination of the charter-party agreement will, if the requirements for its coming into effect are met, dispose at once of the question raised in this thesis. In other words, upon the ship's loss, the charter will be brought to an end and no issue of frustration will arise. In *Edwinton*

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[193] ibid 1001–02.

[194] ibid 1001.

Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel),[195] Rix LJ said that 'constructive total loss of the vessel … is specifically dealt with in cl 20 [of the SHELLTIME4 form]'[196] and that it '[is an additional] off-hire [clause] which [operates] in circumstances of actual or potential frustration'.[197]

It is in relation to ship loss clauses which do not expressly provide for the termination of the charter that the question of the operation of the doctrine of frustration will be a tricky one. Do such clauses displace the doctrine?

For both Cohen and Singleton LJJ in *Blane Steamships Ltd v Minister of Transport*,[198] the question was whether cl 8—and others—in the charter were complete provisions as far as the ship's loss was concerned so as to oust the operation of the doctrine of frustration. Clause 8 has already been quoted.[199] Both their Lordships held the clause not to bar the operation of frustration for commercial reasons if the ship came to be lost. Cohen LJ said:

> [T]here is nothing in cl. 8 which would exclude the implication of the clause required if the doctrine of frustration is to apply, namely, that the contract comes to an end, if the fulfilment of the commercial purpose of the charterparty is rendered impossible.[200]

He further observed:

> So far as hire-money is concerned, the implication of this clause merely adds an event to those specified in cl. 8 as putting an end to the liability to pay hire.[201]

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[195] [2007] EWCA Civ 547, [2007] 2 All ER (Comm) 634.

[196] ibid [131]. For the wording of the clause, see text to n 166.

[197] (n 195) [131].

[198] [1951] 2 KB 965 (CA).

[199] See 82.

[200] (n 198) 986.

[201] ibid 989.

To Cohen LJ, the implied term was seen as 'the natural corollary'[202] of cl 8.

Likewise, according to Singleton LJ:

> If … clause [8] merely relates to rent (or hire), and to nothing else, it is necessary to imply other terms into the contract between the parties. … It seems to me that one must imply into the contract between the parties that the ship must remain capable of carrying out the purposes for which she was hired; in other words, if her use for the purposes of the hire became impossible during the continuance of the term for which she was hired, the charterparty automatically came to an end. … There is nothing in this inconsistent with the terms of the charterparty itself. Indeed, cl. 8 supports the view I have formed.[203]

While Morris LJ took a different approach to reach the same result, namely, the ending of the charter on the ship's loss, he indicated his accord with his colleagues' conclusions on an alternative footing.[204]

In *Meling v Minos Shipping Co Ltd (The Oliva)*,[205] the Commercial Court had to consider cl 16 of the NYPE 46 form. That clause reads as follows:

> That should the Vessel be lost, money paid in advance and not earned (reckoning from the date of loss or being last heard of) shall be returned to the Charterers at once. The act of God, enemies, fire, restraint of Princes, Rulers and People, and all dangers and accidents of the Seas, Rivers, Machinery, Boilers, and Steam Navigation, and errors of Navigation throughout this Charter Party, always mutually excepted.

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[202] ibid.

[203] ibid 1002.

[204] ibid 995–96.

[205] [1972] 1 Lloyd's Rep 458.

> 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 ship was lost as a result of fire and an explosion in its engine-room. In rejecting the owner's argument that the charterer's claim for the return of prepaid and unearned hire under the first sentence of the above clause was affected by the second sentence establishing mutual exceptions, and thus affirming the autonomy of each of the two sentences, the Court said in obiter:

> it was eventually agreed by Mr. Bateson [for the owner] that the charterer would not need the second sentence to excuse him from continuing to pay hire after the loss of the vessel. *This would follow either on the basis of frustration or by reason of a necessary implication from the provisions of the first sentence of clause 16.*[206]

The Court of Appeal was later to revisit the issue in *Terkol Rederierne v Petroleo Brasileiro SA (The Badagry)*.[207] While all the Lord Justices agreed that the charter had terminated following the loss of the ship, a nuance arose between the opinions of Sir John Donaldson and Lloyd LJ, the one basing termination on the ship loss clause[208] and the other accepting frustration as an alternative ground.[209] None of the judges spelled out, however, exactly how termination resulted from the clause, that is, by its general scheme or through an implied term.

It may thus be concluded that while it is clear that a ship loss clause in the charter will not stand in the way of its termination where it is silent on the point, the exact legal foundation for such a rule is the subject of wavering between frustration and the operation of the clause itself, whether by its own letter or through an implied term.

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[206] ibid 461 (emphasis added). The autonomy of each of the sentences in cl 16 of NYPE 46 is confirmed by the fact that, in NYPE 93, the clause was split up into three (cll 20–22).

[207] [1985] 1 Lloyd's Rep 395 (CA).

[208] ibid 399 (Sir John Donaldson).

[209] ibid 401 (Lloyd LJ).

As for ship loss clauses which expressly provide for the charter's termination, it has already been explained that they do amount to a complete and full provision, supplanting the doctrine to that extent.

Nonetheless, as will transpire from chapter 5, the difficult application of the concept of total loss to a captured ship pending the happening of either outcome A or B[210] riddles the operation of ship loss clauses with further uncertainty. As a result, these clauses, while forming a natural contender for the displacement of the doctrine of frustration, may after all prove a lame duck in this regard.

The next subsection in this chapter will turn to another type of general clause common to all categories of charters as well as bills of lading.

2.1.6. Exceptions

Standard charter contracts usually provide for exemptions of the shipowner's or charterer's liability upon the occurrence of certain enumerated events, commonly known as 'exceptions'; the same device is used for the benefit of the carrier in standard bills of lading as well as in the legislation and international conventions governing such documents.[211]

In the first place, the applicability of such exceptions to the instance of a piratical capture of the vessel will be explored. Because of the usually elaborate enumerations of excepted perils and the frequent overlaps between them, however, the analysis will be limited to certain exceptions only. Any comprehensive discussion of the point would be unnecessary given the clear

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[210] See 20.

[211] BALTIME 1939, cl 12; GENTIME, cl 19; NYPE 46, cll 16, 24; NYPE 93, cll 21, 31(a); INTERTANKTIME 80, cl 28; BPTIME3, cl 35.1; SHELLTIME4, cl 27(a); STB TIME, cll 20(b)(i), 22(a); GENCON, cl 9; TANKERVOY 87, cl 26(a), (b), (c); BPVOY4, cl 38; SHELLVOY 6, cl 32(1), (3)(b); ASBATANKVOY, cll 19, 20(b)(i); EXXONMOBIL VOY2000, cll 27(b)(i), 29(a); CONLINEBILL 2000, cl 3(a), Additional Clause, sub-cl (i); COMBICONBILL, cll 9(3), 11, 24(1); MULTIDOC 95, cll 11, 25; Maersk MT B/L, cll 5, 6.1, .2(a), (c); MSC B/L, cll 5.1(b), (c), 6.1; WWL B/L, cl 9(a), (b); ACL B/L, cl 3(1), (2), (5); Harter Act (US), 46 USC § 30706 (2006); COGSA (US), 46 USC § 30701, note, § 4(2) (2006); Hague-Visby Rules, art IV(2); Rotterdam Rules, art 17(3).

position of the law on the main question considered below, namely, the impact of exceptions clauses on the operation of the doctrine of frustration.

At the outset, it should be noted that exceptions relating nominately to 'pirates' or 'piracy' are not common in charterparties or bills of lading.[212] Out of the standard contracts analysed in this thesis, the term is enumerated amongst exceptions in three charter forms only.[213] Likewise, piracy is not included in the Hague-Visby Rules' list of exceptions.[214] The Rotterdam Rules, in contrast, specifically provide for 'piracy'.[215]

There seems to be no direct authority in English law on the meaning of 'pirate' or 'piracy' in a carriage of goods case.[216] Definitions are usually fielded from the backdrop of insurance, criminal and public international law cases, or even the common meaning of the terms.[217] Thus, the following definition is found in *Carver's Carriage by Sea*: 'Piracy is forcible robbery at sea, whether committed by marauders from outside the ship, or by mariners or passengers within it.'[218] The definition provided in *Halsbury's Laws* could also be usefully brought to bear:

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[212] The ensuing discussion builds on Aref Fakhry, 'Piracy across Maritime Law: Is There a Problem of Definition?' in Aldo Chircop and others (eds), *The Regulation of International Shipping: International and Comparative Perspectives; Essays in Honor of Edgar Gold* (Brill 2012) 114–116.

[213] STB TIME, cl 22(a); ASBATANKVOY, cl 19; EXXONMOBIL VOY2000, cl 29(a).

[214] art IV(2). It is likewise absent from the exceptions in the Harter Act (US), 46 USC § 30706 (2006), and COGSA (US), 46 USC § 30701, note, § 4(2) (2006).

[215] Rotterdam Rules, art 17(3)(c).

[216] See Paul Todd, *Maritime Fraud and Piracy* (Maritime and Transport Law Library, 2nd edn, Lloyd's List 2010) paras 1.013, 1.108–109.

[217] See for a discussion of these various meanings Fakhry (n 212). The more prolific marine insurance authorities may be particularly relevant in the context of carriage of goods by sea.

[218] Raoul Colinvaux (ed), *Carver's Carriage by Sea* (British Shipping Laws, 13th edn, Stevens 1982) para 235. The quoted definition as appearing in an earlier edition of *Carver* was approved by Kennedy LJ in *Republic of Bolivia v Indemnity Mutual Marine Assurance Co Ltd* [1909] 1 KB 785 (CA) 802–3, a marine insurance case.

> The word 'pirates' must be interpreted in its popular sense and not as a technical term of English criminal law or international law. It applies to persons who are plundering indiscriminately for private gain and are not operating only against the property of a particular state for a political end. Wrongful seizure of the ship or cargo by such persons on the high seas will be within the exception.[219]

The meaning attributed by English courts to the excepting term 'robbers' could shed additional light on the meaning to be given to 'pirates'. In *De Rothschild v The Royal Mail Steam Packet Co*,[220] an action was brought by cargo owners against the shipowner following loss of part of the shipment covered by a bill of lading. The loss had occurred during the shipment's land transit from Southampton to its ultimate destination in London. The cargo consisted of gold dust shipped in Panama. The disappearance of the cargo appeared to be the work of thieves, but it was not clear how it had occurred. It was held that the loss was not covered by the 'robbers' exception as that meant theft by force, which was the technical as opposed to the looser popular meaning.[221]

The full exceptions clause in the above case read as follows: '"the act of God, the Queen's enemies, pirates, robbers, fire, accidents from machinery, boilers, and steam, dangers of the seas, roads, and rivers, of whatever nature or kind, excepted"'. The juxtaposition of the term 'pirates' alongside 'robbers'—or, in the standard forms considered in this thesis, alongside the comparable term 'assailing thieves',[222]—would, it is submitted, buttress the argument that pirates are similarly robbers on the sea.[223]

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[219] *Halsbury's Laws* (5th edn, 2008) vol 7, para 276 (footnotes omitted).

[220] (1852) 7 Ex 734, 155 ER 1145.

[221] *De Rothschild v The Royal Mail Steam Packet Co* (1852) 7 Ex 734, 742–43; 155 ER 1145, 1149.

[222] STB TIME, cl 22(a); ASBATANKVOY, cl 19; EXXONMOBIL VOY2000, cl 29(a).

[223] This is without prejudice to the possible argument that pirates could actually be considered as 'robbers' under the exception in question in *De Rothschild* (n 221) or, as 'assailing thieves'.

Such a view of piracy would accord with the meaning given to that term in *Athens Maritime Enterprises Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Andreas Lemos)*.[224] There, an action was brought by the shipowner against the mutual cover association where the ship had been entered for cover not included in the hull and machinery insurance policy. The vessel was anchored in the Chittagong roads 2.8 miles from the land, within the port limits and within the 12-mile breadth of the territorial sea. At night, a gang of men armed with knives took from the vessel equipment and materials and used force or the threat of force to make good their escape.

It was held that 'piracy' as used in the rules of the association could take place even near the shore,[225] but that there had to be use of force in the attack. In this case, force or threat thereof was used by the assailants upon their escape with their booty, not at the time of their attack. In this regard, Staughton J said:

> I conclude that the act of appropriation had finished in this case when the force or a threat of force was first used—or at any rate the contrary is not proved. The act of appropriation finished when the goods were thrown into the sea—presumably into or near a boat or boats which had brought the armed men. There was no loss by piracy.
>
> That conclusion seems to me to accord with the commercial sense of the matter. The association, by the word 'piracy,' insures the loss caused to shipowners because their employees are overpowered by force, or terrified into submission. It does not insure the loss caused to shipowners when their night-watchman is asleep (as might occur, although it did not in this case), and thieves steal clandestinely. The very notion of piracy is inconsistent with clandestine theft. Mr. Hallgarten described this as a prosaic form of piracy; a recent judge might have preferred the word 'anaemic.' It is not necessary that the thieves must raise the pirate

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[224] [1983] QB 647 (Com Ct). See: David Cowley (1983) 47 JCL 158 (note); Julian Cooke and others, *Voyage Charters* (Lloyd's Shipping Law Library, 3rd edn, Informa 2007) para 26.14; *Halsbury's Laws* (5th edn, 2011) vol 60, para 331.

[225] ibid 658.

> flag and fire a shot across the victim's bows before they can be called pirates. But piracy is not committed by stealth. This case is very near to the borderline; but it must not on that account be allowed to make bad law.[226]

These considerations would seem sufficient—without going further in the discussion, as this would fall outside the scope of this study—for advancing that the deeds of Somali pirates in capturing vessels for ransom fall as a matter of law under the term 'piracy' or 'pirates' in contracts of carriage, where that term is used.

In any case, loss by piracy has been held to fall under the perils of the sea exception.[227]

There is, furthermore, weighty opinion classifying piracy under the 'act of public enemies' exception provided for by art IV(2)(f) the Hague-Visby Rules.[228] Whether pirates are enemies of the Queen under the common law is, however, doubtful on authority.[229]

At all events, aside from questions of scope of application, the concern at this juncture is to determine whether exceptions clauses may have the effect of overriding the doctrine of frustration. The cases are clear. Exceptions clauses

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[226] ibid 660–61.

[227] *Pickering v Barkley* (1648) Sty 132, 82 ER 587; *Barton v Wolliford* (1686) Comb 56, 90 ER 341.

[228] Bernard Eder and others, *Scrutton on Charterparties and Bills of Lading* (22nd edn, Sweet & Maxwell 2011) paras 11–037, 20–073; *Carver's Carriage by Sea* (n 218) para 536; Guenter Treitel and FMB Reynolds, *Carver on Bills of Lading* (British Shipping Laws, 3rd edn, Sweet & Maxwell 2011) para 9–224; Julian Cooke and others, *Voyage Charters* (Lloyd's Shipping Law Library, 3rd edn, Informa 2007) para 85.303; *Halsbury's Laws* (n 219) para 276 fn 1. See also Comité Maritime International (CMI), *The Travaux Préparatoires of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 25 August 1924, the Hague Rules, and of the Protocols of 23 February 1968 and 21 December 1979, the Hague-Visby Rules* (CMI 1997) 408.

[229] *Russell v Niemann* (1864) 17 CBNS 163, 175; 144 ER 66, 72 (Byles J); *Forward v Pittard* (1785) 1 Term Rep 27, 34; 99 ER 953, 958 (L Mansfield CJ); *Carver's Carriage by Sea* (n 218) para 14; *Scrutton* (n 228) para 11–037.

have been held to absolve from liability, but they do not go so far as ending the contract.

In *Jackson v Union Marine Insurance Co Ltd*,[230] Bramwell B, speaking for the majority, said:

> The exception is an excuse for him who is to do the act, and operates to save him from an action and make his non-performance not a breach of contract, but does not operate to take away the right the other party would have had, if the non-performance had been a breach of contract, to retire from the engagement: and, if one party may, so may the other.[231]

The above passage was specifically approved by Lord Atkinson in *FA Tamplin Steamship Co Ltd v Anglo Mexican Petroleum Products Co Ltd*,[232] where he said in relation to a general exceptions clause:

> Article 20 saves each of the parties from a claim for damages for breach of contract at the suit of the other, but it does not deprive either of them of the right to free himself or themselves from the contract on the ground that the basis upon which it rested has been destroyed.[233]

Similarly, in *Bank Line Ltd v Arthur Capel & Co*,[234] to rebut frustration, the charterer invoked inter alia the restraint of princes exception (cl 14). Lord Sumner disposed of the argument as follows:

> When the Admiralty requisitioned her she became subject to a restraint of princes, one of the causes mentioned in clause 14, which says 'throughout this charter losses or damages, whether in respect of goods carried or to be carried or in other respects

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[230] (1874) LR 10 CP 125 (Ex Ch).

[231] ibid 145.

[232] [1916] 2 AC 397 (HL) 418.

[233] ibid.

[234] [1919] AC 435 (HL).

> arising or occasioned by the following causes, shall be absolutely excepted.' In the first place, I think this claim is not for 'loss or damage' within that clause, but in the second the meaning of such an ordinary clause of exception is well settled. It excuses breaches of the contract caused by matters which fall within its terms; it suspends the liability to pay hire without finally determining it; but relief from the liability to pay damages or hire and complete discharge from further obligation to perform the contract are different things. 'Restraint of princes throughout this charterparty always excepted' and 'the contract to be no longer binding if a restraint of princes frustrates its commercial object' are neither in my opinion mutually inconsistent clauses nor such that the expression of the first intimates an intention that restraint of princes is not to be dealt with further and otherwise, so as to preclude any implication on the subject.[235]

In summing up, several standard exceptions clauses may well cover piratical capture of the vessel. It remains, however, that such exceptions do not displace the operation of the doctrine of frustration.

* * *

The above review of general clauses in the contract has shown that, even where a given clause is found to cover piratical capture of the vessel, it is often unlikely to halt the operation of the doctrine of frustration. A possible exception is the time charter ship loss clause, but the analysis has brought to light the difficulties for a party to invoke such a clause in the post-capture phase when the ultimate fate of the ship and its cargo remains uncertain.

The application of the doctrine is of course a consequence flowing from the law, rather than the contract—irrespective of the theory used to justify frustration—. It was therefore not surprising, with the breathtaking rise of piracy in recent years in waters off Somalia, to expect the development by the industry of tailor-made clauses for the purpose of dealing with the aftermath of captures. The aim

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[235] ibid 456. See also, to the same effect: ibid 444–45 (Viscount Haldane); *Admiral Shipping Co Ltd v Weidner Hopkins & Co* [1917] 1 KB 222 (CA) 247 (Bankes LJ), 251 (Lawrence J).

of the next section in this chapter is to peruse the new clauses devised by the industry and examine their impact on the question of the contract's frustration.

2.2. New Piracy-Specific Clauses

In the last few years, piracy-specific clauses have been developed by industry associations, primarily BIMCO and INTERTANKO, for inclusion in charter-parties and other long-term agreements.[236] These clauses deal with several issues pertaining to the Somali type of piracy although they do not refer to any specific area of the world.

Given the findings of the previous section of this chapter, which demonstrated the considerably limited ability of clauses found in standard carriage contract forms to deal comprehensively with the consequences of a piratical capture so as to pre-empt the operation of the doctrine of frustration, consideration should naturally turn to the new piracy-specific clauses. The key question asked here is whether such clauses may amount to full and complete provisions on the subject of the piratical capture of the vessel, displacing the doctrine of frustration, pursuant to the principle enunciated by Lord Sumner in *Bank Line Ltd v Arthur Capel & Co.*[237]

In the time chartering business, the BIMCO Piracy Clause for Time Charter Parties 2009 and the INTERTANKO Piracy Clause—Time Charterparties contain provisions dealing, inter alia, with the continued standing of the contract in case of capture by pirates.[238] In the same vein, the BIMCO Piracy Clause for Consecutive Voyage Charter Parties and COAs[239] has a similar provision.[240]

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[236] For the list of standard piracy contract clauses examined in the thesis, see Appendix C(2).

[237] [1919] AC 435 (HL) 455. See text to n 6.

[238] Respectively, sub-cl (f) and para 3. On such clauses, see Paul Todd, 'Ransom, Piracy and Time Charterparties' (2012) 18 JIML 193, 205–07.

[239] According to its drafters:

> This Clause is designed to cover long term agreements rather than spot fixtures. These agreements may be in the form of a series of consecutive voyages or a contract for a volume of cargo or number of shipments (contract of affreightment (COA)).

Interestingly, the question of the continued standing of the contract in the event of piratical capture of the vessel constituted the main driving force behind the drafting of these Clauses, which deal, nonetheless with other issues.[241] In contrast, piracy clauses adopted for the voyage chartering sector do not typically touch on the matter while no clauses have been drafted for liner trades.

As it will be shown, however, the provisions of the above piracy clauses on the standing of the contract in the event of capture by pirates can hardly be seen as settling all legal questions on the matter.

Sub-clause (f) of the BIMCO Piracy Clause for Time Charter Parties 2009 provides:

> 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.

According to the above sub-clause, the time charter continues to operate throughout the duration of the pirates' seizure except for the suspension of hire payments as of the 91st day after the seizure. The drafters of the Clause have explained that the 90-day period 'is the current average period of time that vessels are held by Somalian pirates before release'.[242] Upon release of the

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BIMCO, 'BIMCO Piracy Clause for Consecutive Voyage Charter Parties and COAs' (BIMCO Special Circular, No 3/2009).

[240] sub-cl (d).

[241] Grant Hunter, 'BIMCO Piracy Clauses' (2009) 15 JIML 291, 291.

[242] BIMCO, 'BIMCO Piracy Clause for Time Charter Parties 2009' (BIMCO Special Circular, No 2/2009). See also ibid 292. In *Pacific Basin IHX Ltd v Bulkhandling Handymax AS (The Triton Lark)* [2011] EWHC 2862 (Comm), [2012] 1 All ER (Comm) 639 [32], Teare J said in relation to another BIMCO clause, CONWARTIME 1993, that the relevant explanatory BIMCO special circular 'may properly be

vessel, it is presumed that the charter is according to the sub-clause meant to resume as normal and the hire payments to become due once again.

The above sub-clause is in fact a revised version of sub-cl (e) of the earlier BIMCO Piracy Clause for Time Charter Parties,[243] which placed all time lost due to the pirates' capture of the vessel on the charterer's shoulders, without any cap, in the following terms:

> If the Vessel is attacked or seized by pirates any time lost shall be for the account of the Charterers and the Vessel shall remain on hire. If the Vessel is seized the Owners shall keep the Charterers closely informed of the efforts made to have the Vessel released.

It was mainly because of the criticism made by charterers, who saw the lack of a cap in the early version of the Clause as excessively favouring the owners, that BIMCO issued an amended version of the Clause.[244]

For its part, paragraph 3 of the INTERTANKO Piracy Clause—Time Charterparties reads:

> 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.

Like the superseded BIMCO time charter clause,[245] the INTERTANKO Piracy Clause—Time Charterparties does not provide for a cap on the continuation of hire following detention by pirates.

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taken into account in construing the clause because it is part of the background material reasonably available to both parties'.

[243] Published in BIMCO, 'BIMCO Piracy Clause for Time Charter Parties' (BIMCO Special Circular, No 1/2009).

[244] BIMCO, 'BIMCO Piracy Clause for Time Charter Parties 2009' (BIMCO Special Circular, No 2/2009); Hunter (n 241) 292.

[245] BIMCO Piracy Clause for Time Charter Parties 2009 (n 243).

As for the BIMCO Piracy Clause for Consecutive Voyage Charter Parties and COAs, its sub-cl (d) reads:

> If the Vessel is attacked or seized as a result of Piracy any time so lost shall be shared equally between the Owners and the Charterers. The Charterers shall pay the Owners an amount equivalent to half the demurrage rate for any time lost as a result of such attack or seizure. Such payments shall fall due day by day and be payable latest fifteen (15) days after receipt of the Owners' invoice or on completion of discharge, whichever occurs first. If the Vessel is seized the Owners shall keep the Charterers closely informed of the efforts made to have the Vessel released.

Pursuant to the above Clause, following capture by pirates, parties to the contract have to assume equally the burden of lost time. So the contract is in principle maintained during the seizure. Again, however, there is no ultimate cap provided for if capture goes on indefinitely.

The question that arises is: Pending the ascertainment of the fate of the ship and its cargo, is the contract to run indefinitely pursuant to the above Clauses? As explained above,[246] courts will generally give effect to the provisions agreed to by the parties in relation to a specified event, and frustration will not operate then. But for courts to do so, the provisions of the contract must truly deal with the situation that has arisen.

In *Pacific Phosphate Co Ltd v Empire Transport Co Ltd*,[247] a clause giving the parties the option to suspend a 4-year long contract of carriage in the event of a war engaging Great Britain and providing for the adding of any suspended time to the contract upon the termination of the war was found not to preclude the frustration of the contract altogether by the Great War. The report of the judgment rendered by Rowlatt J reads:

> [I]t was true that war of some kind was contemplated, but it was necessary to inquire not only whether such a war as that which

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[246] 24ff.

[247] (1920) 36 TLR 750 (KB).

> happened was contemplated, but whether the consequences of war which had followed were in the minds of the parties. Looking at the facts he thought that the parties had contemplated a state of affairs in which there would be some risk, but they never contemplated such a war as actually happened or its consequences. The whole shipping industry had been dislocated; the Government had taken control and shipowners were *de facto* not free.[248]

In *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*,[249] the sale contract contained a cl 7 providing for a limited interruption of its performance in the following terms:

> 'Should dispatch be hindered or delayed by your instructions, or lack of instructions, or by any cause whatsoever beyond our reasonable control including strikes, lock-outs, war, fire, accidents … a reasonable extension of time shall be granted.'

The appeal was formed by the Polish purchaser following declaration of Poland as enemy territory in the supervening World War. Viscount Simon LC recited the appellant's position on frustration before disposing of it:

> The appellants argued that there could be no frustration by reason of the war which broke out during the currency of the contract because this contingency was expressly provided for in cl. 7, and, therefore, there was no room for an implied term such as has often been regarded as a suitable way in which to express and apply the doctrine of frustration. I entirely agree with the Court of Appeal that in the circumstances of the present case this is a bad point. The ambit of the express condition is limited to delay in respect of which 'a reasonable extension of time' might be granted. That might mean a minor delay as distinguished from a prolonged and indefinite interruption of prompt contractual performance which the present war manifestly and inevitably brings about. … The

[248] ibid 751.

[249] [1943] AC 32 (HL).

> principle is that where supervening events, not due to the default of either party, render the performance of a contract indefinitely impossible, and there is no undertaking to be bound in any event, frustration ensues, even though the parties may have expressly provided for the case of a limited interruption.[250]

The rule applied by Viscount Simon LC, ie, the doctrine of frustration, is separate and distinct from the principle of supervening illegality which was also triggered in the above case, leading to the same result, ie, the termination of the contract.[251]

Going back to the BIMCO Piracy Clause for Time Charter Parties 2009, the INTERTANKO Piracy Clause—Time Charterparties and the BIMCO Piracy Clause for Consecutive Voyage Charter Parties and COAs, the question to answer is whether they provide completely for the event of capture by pirates so as to oust the operation of the doctrine of frustration. It is submitted that these Clauses cannot be taken as providing fully for a situation of capture which is prolonged indefinitely and, accordingly, that frustration may still operate. Hire and, in the case of the BIMCO Piracy Clause for Time Charter Parties 2009, off-hire, after the first 90 days, cannot go on forever. Provided the requisite circumstances are met,[252] a finding of frustration would be in line with the rationes in the two illustrative cases discussed above,[253] where it was held that, in spite of a suspension clause in the one and a reasonable extension clause in the other, detention of the vessel which went on for an inconsiderate time discharged the contract altogether. As expressed by Viscount Haldane in *FA Tamplin Steamship Co Ltd v Anglo Mexican Petroleum Products Co Ltd*:[254]

> There may be included in the terms of the contract itself a stipulation which provides for the merely partial or temporary

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[250] ibid 40.

[251] ibid 41 (Viscount Simon LC). See also ibid 83 (Lord Porter).

[252] See ch 3.

[253] *Pacific Phosphate* (n 247); *Fibrosa* (n 249).

[254] [1916] 2 AC 397 (HL) 406–07.

> suspension of certain of its obligations, should some event … so happen as to impede performance. In that case the question arises whether the event which has actually made the specific thing no longer available for performance is such that it can be regarded as being of a nature sufficiently limited to fall within the suspensory stipulation, and to admit of the contract being deemed to have provided for it and to have been intended to continue for other purposes. Although the words of the stipulation may be such that the mere letter would describe what has occurred, the occurrence itself may yet be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation. If the course of events can be regarded as consistent with the continuance of the contract, it will follow that when the event possesses the more limited character there will, under the terms of the special stipulation, be mere suspension of particular rights and duties which would otherwise arise under the general terms agreed on. … And where the interruption is simply one of an interim character and likely to cease so soon as to leave the rest of the period stipulated free for the revival of the rights and duties of the parties after what amounts to no more than a temporary cessation of the power of performance, then, not only where there is an express stipulation covering the case which has occurred, but possibly even where there is no such stipulation, the contract may be regarded as not becoming destroyed but only suspended. The question must always turn mainly on the facts. But if the facts be such that it appears that the power of performance has been wholly swept away to such an extent that there is no longer in view a definite prospect of this power being restored, then the contract must be looked upon as being wholly dissolved, and the Courts cannot take any course which would in reality impose new and different terms on the parties.

It is submitted that these authorities are quite dispositive of the issue as regards the new piracy clauses. A literal reading of these clauses would lead to no time

limit being placed on the continued standing of the contract, regardless of the duration of the seizure. Although this appears to be the intention of the drafters,[255] it is an untenable predicament.

As for voyage charters, bills of lading and other contracts of carriage for which the industry has not developed piracy-specific clauses, reliance will have to be placed on the general law, particularly the doctrine of frustration, for determining questions of the standing of the agreement in the event of a piratical capture.

* * *

The above review of standard contractual clauses in contracts of affreightment has demonstrated the inability of any particular clause to resolve all questions as to the standing of the contract. Even the recently introduced piracy-specific clauses appear to be geared towards partial solutions. It is thus clear that, in the presence of no or insufficient provisions in the contract, resort to general principles and rules is needed in order to dispose of the complex questions as to the continued validity of the contract in the event of a seizure of vessel and cargo by pirates.

[255] Hunter (n 241) 292.

3. Event Not Provided for in Contract— Frustration: A Question of Weighing Factors

This chapter carries forward the analysis of whether and when a contract of carriage should be considered as discharged in the event of a piratical seizure. It picks up the matter where the preceding chapter 2 left it: if the contract is silent or provides insufficiently as to the supervening scenario, then the law of frustration may be invoked. The assumption therefore, when embarking on this chapter, is that the contract has been studied and found to provide nothing or insufficiently for the consequences of the seizure.

The opening section in the current chapter begins by explaining the 'main test' for answering the question of the triggering of frustration, while the remainder of the chapter considers other important facets of the same test. Both the main test and those other factors form the bedrock of the operation of frustration in any particular case. The point of this chapter is to analyse their applicability to the model of capture regarded as the backdrop to the thesis.

* * *

So far in this analysis of what happens to the contract of carriage in the wake of a piratical capture, the discussion has centred on understanding and giving effect to the express will of the parties in the form of typical standard clauses. The upshot of the review of those clauses in the previous chapter is that there is rarely to be found any applicable contractual provision in relation to a long and indefinite detainment of the ship and cargo. In line with principles already explained, lack of comprehensiveness in providing contractually for a drastic eventuality befalling the transaction may well result in the doctrine of frustration being brought into operation.

But how does frustration operate, particularly in relation to the situation this thesis is concerned with? This part of the work deals mostly with answering that question, so as to ascertain in what circumstances the life of contracts of carriage may be held to have come to an end following assault of the ship by pirates.

At the outset, however, an explanation should be made of frustration.

General definitions were set forth by the House of Lords in *National Carriers Ltd v Panalpina (Northern) Ltd*.[1] Thus, according to Lord Simon:

> Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance.[2]

A more contextual explanation of frustration was given by Lord Roskill in the following terms:

> The extension in recent years of government interference in ordinary business affairs, inflation, sudden outbreaks of war in different parts of the world, are all recent examples of circumstances in which the doctrine has been invoked, sometimes with success, sometimes without. Indeed the doctrine has been described as a 'device' for doing justice between the parties when they themselves have failed either wholly or sufficiently to provide for the particular event or events which have happened. The doctrine is principally concerned with the incidence of risk—who must take the risk of the happening of a particular event especially when the parties have not made any or any sufficient provision for the happening of that event? When the doctrine is successfully invoked it is because in the event which has happened the law imposes a solution, casting the incidence of that risk on one party or the other as the circumstances of the particular case may require, having regard to the express provisions of the contract into which the parties have entered. The doctrine is no arbitrary

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[1] [1981] AC 675 (HL).

[2] ibid 700.

> dispensing power to be exercised at the subjective whim of the judge by whom the issue has to be determined. Frustration if it occurs operates automatically.[3]

This idea of the automatism of frustration distinguishes it from a mutual cancellation of the contract by the parties. In *Maritime National Fish Ltd v Ocean Trawlers Ltd*,[4] Lord Wright, delivering the judgment for the Privy Council, approved the Supreme Court of Nova Scotia En Banco's judgment 'that the discharge of a contract by reason of the frustration of the contemplated adventure follows automatically when the relevant event happens and does not depend on the volition or election of either party'.[5]

The apparent lucidity of the synoptic definitions of frustration given above suggests a difficult application of the doctrine in real terms. For frustration to operate is a fact-intensive exercise. The contract, the specific circumstances, whether known, foreseeable or even guessed, as well as the parties' objectives and the overall situation, are all part of the patchwork of facts to which an answer as to the continued standing of a previously agreed contractual arrangement should be welded. As expressed by Lord Roskill in *National Carriers*:

> [The] operation [of the doctrine of frustration] does not depend on the action or inaction of the parties. It is to be invoked or not to be invoked by reference only to the particular contract before the court and the facts of the particular case said to justify the invocation of the doctrine.[6]

For such a task, courts have developed some rough guidelines, which may help indicate in a particular factual setup what that answer should be. These guidelines are often expressed in terms of factors or pointers (3.2 to 3.8), the

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[3] ibid 712.

[4] [1935] AC 524 (PC).

[5] ibid 527.

[6] (n 1) 712.

relevance of which is not the least belied by a so-called main test of frustration (3.1).

However, before embarking on these matters, one further point should be clarified. In *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal (The Hannah Blumenthal)*,[7] Lord Brandon, delivering the principal speech in the House of Lords, said in relation to the nature of the supervening event:

> [T]here must be some outside event or extraneous change of situation, not foreseen or provided for by the parties at the time of contracting, which either makes it impossible for the contract to be performed at all, or at least renders its performance something radically different from what the parties contemplated when they entered into it.[8]

It should not be difficult to conclude that a piratical capture of the vessel would typically qualify as an extraneous event.

3.1. Main Test and Relevancy of Other Factors

In *Petroships Pte Ltd v Petec Trading and Investment Corp (The Petro Ranger)*,[9] the court considered the question of the frustration of a voyage charter following capture of the ship and its cargo by pirates, and recapture by government authorities. The judgment was delivered on an application for review of an arbitration award. The *Petro Ranger* was chartered for a voyage from Singapore to Ho Chi Minh City in Vietnam. The vessel departed with its cargo of gasoil and kerosene on 16 Apr 1998. The voyage was supposed to last a mere two days. However, the vessel was unheard of for several days until it was detected by the Chinese authorities on 26 April, that is, eight days after its supposed date of arrival at destination. The Chinese authorities detained the vessel together with a lighter to which some of the remaining cargo was being off-loaded. It turned out that pirates had taken hold of the ship and had forced it

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[7] [1983] 1 AC 854 (HL).

[8] ibid 909.

[9] [2001] 2 Lloyd's Rep 348 (Com Ct).

to deviate. The pirates had changed the ship's name and placed forged papers on board. They had also been reselling its cargo. The Chinese authorities held up the ship in Haikou for over two months until it was allowed to sail, but the cargo still remaining on board was emptied into shore tanks and auctioned off by the authorities.

Following news of the detection of the ship by Chinese authorities, the ship's owners and charterers joined efforts to obtain release of the ship and cargo. These combined efforts were sustained until 15 May 1998, when the owners, at a meeting with Chinese authorities at which the charterers were not present, took a different course in their approach. Subsequently, relations between the parties deteriorated, leading to a claim in arbitration by the charterers for the loss of the cargo.

In the arbitration proceedings, the owners made a plea for frustration of the contract on either 26 April or 14 May the latest. The arbitrators found that the charter had not been frustrated, rejecting the owners' argument. The arbitrators looked at the conduct of the parties up until 14 May, which was the latest day for the frustration to operate according to the owners. The arbitrators found that there had been no material development on 14 May. They considered therefore the owners' argument in terms of occurrences on the following day, that is, 15 May, when owners had cut the Gordian knot with the charterers. The conclusion reached by the arbitrators was that no frustration had occurred on 15 May, despite the change in course adopted by the owners.

In its judgment, frustration was directly considered by the court in reviewing the arbitration award. The court confirmed that the test of frustration was the test of radical change in the circumstances making the performance of the obligation different from the one contracted.[10] However, the court did not pronounce on the application of that test to the facts of the case; it ordered the arbitral tribunal to state its reasons before any further review on the point.[11]

It is true that the above case did not concern specifically frustration of the contract of carriage while the ship and its cargo were under detainment by

[10] ibid 354–55.

[11] ibid 355.

pirates. Both on 26 April and 14 May, the two dates considered for the application of the doctrine, the ship was in the hands of the Chinese authorities, which had recaptured it from the hands of the pirates. It is clear from the judgment, however, that recovery from the Chinese authorities of the vessel and cargo was not a given. The owners and charterers had to negotiate with the authorities the release of the property. The case could, therefore, it is submitted, be validly used by analogy for the analysis of frustration in the aftermath of a piratical capture.

The test of radical change which, according to *The Petro Ranger*, governs application of the doctrine of frustration may be traced to the opinion of Lord Radcliffe, rendered in *Davis Contractors Ltd v Fareham Urban District Council*.[12] His Lordship there said:

> [F]rustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do.[13]

The above case concerned delay in a building contract, but as in all other frustration cases, the ruling has application across contract law.

It is interesting to note that Lord Radcliffe's test of radical change can be traced to earlier cases.

In *Bank Line Ltd v Arthur Capel & Co*,[14] the appeal raised the question whether a government requisition, which lasted in the end result just under four months, without however any possibility of foreseeing its duration beforehand, had the effect of frustrating a 12-month time charter, which had been due to run starting in April/May 1915. Because of the requisition, the ship was never delivered. A

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[12] [1956] AC 696 (HL).

[13] ibid 729.

[14] [1919] AC 435 (HL).

majority of the Lords found in favour of frustration.[15] Lord Finlay LC said that 'the contract had come to an end as the detention had lasted so long that if the vessel were delivered in September it would be on a contract differing most materially from that provided for by the original charter'.[16] Lord Sumner agreed with this view, stating that 'the September to September employment would [not] be in substance the same employment as that from April to April'.[17] He added: 'I think that the uncertainties of the intervening period in time of war both emphasize the difference between the two and add to the gravity of the lapse of time taken by itself.'[18] The point may be summed up in a quote from Lord Dunedin's opinion in *Metropolitan Water Board v Dick Kerr & Co Ltd*,[19] which was followed by Lord Sumner in *Bank Line*:[20] 'an interruption may be so long as to destroy the identity of the work or service, when resumed, with the work or service when interrupted'.

In *Pacific Phosphate Co Ltd v Empire Transport Co Ltd*,[21] Rowlatt J found that a contract of carriage concluded before the Great War and providing an option by either party to suspend the contract in the event of war in which Great Britain was engaged was nonetheless frustrated altogether. The report of Rolwatt J's decision reads:

> [I]t was true that war of some kind was contemplated, but it was necessary to inquire not only whether such a war as that which happened was contemplated, but whether the consequences of war which had followed were in the minds of the parties. Looking at the

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[15] ibid 443–44 (Lord Finlay LC), 448–50 (Lord Shaw), 451–55, 457–60 (Lord Sumner), 460–62 (Lord Wrenbury). Viscount Haldane, dissenting, took the view that the starting date of the charter was not essential to the parties. Moreover, looking at the parties' appreciation of the events, it was apparent that they had not considered the charter as having come to an end: ibid 445–48.

[16] ibid 444.

[17] ibid 451. See also ibid 460 (Lord Sumner), 460–62 (Lord Wrenbury).

[18] ibid.

[19] [1918] AC 119 (HL) 128.

[20] (n 14) 460.

[21] (1920) 36 TLR 750 (KBD).

> facts he thought that the parties had contemplated a state of affairs in which there would be some risk, but they never contemplated such a war as actually happened or its consequences. The whole shipping industry had been dislocated; the Government had taken control and shipowners were *de facto* not free. … Here the change was so great that the doctrine of frustration applied. …[22]

The ratio in these two cases is but a precursor to Lord Radcliffe's test of radical change.

Ultimately, the test has found much favour. It was thus specifically preferred by Lord Hailsham and Lord Roskill in *National Carriers Ltd v Panalpina (Northern) Ltd*,[23] and the whole House in *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema).*[24] The value of the test is that it brought together the different pieces of the doctrine of frustration, which spans around a century and a half, having been first affirmed in *Taylor v Caldwell*.[25] Ever since that judgment, the doctrine has evolved in a somehow incremental yet atomised way. This can be seen in both the theories underpinning frustration and the factual elements triggering it.

On the one hand, various rationales have been set forth as underlying the doctrine. Lord Hailsham and Lord Wilberforce enumerated five of these in delivering their opinions in *National Carriers*, namely, the implied condition or term, lack of consideration, the demands of justice, frustration of the adventure and the construction theory.[26] Some of these theories are discussed further on in relation to the subject of piratical captures.[27]

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[22] ibid 751.

[23] [1981] AC 675 (HL) 688 (Lord Hailsham), 717 (Lord Roskill).

[24] [1982] AC 724 (HL) 738, 744 (Lord Diplock), 751–52 (Lord Roskill).

[25] (1863) 3 B & S 826, 122 ER 309.

[26] (n 23) 687–88 (Lord Hailsham), 693 (Lord Wilberforce).

[27] secs 3.2–3.8.

On the other hand, a number of variables have been considered by courts over the years in reaching their decision on the continued standing of the contract or its termination. Several of these are also discussed below insofar as they bear on the subject of this thesis.[28]

The House of Lords did not ultimately dismiss these different ways for approaching frustration. The words of Lord Wilberforce in *National Carriers* are telling:

> Various theories have been expressed as to its justification in law: as a device by which the rules as to absolute contracts are reconciled with a special exception which justice demands, as an implied term, as a matter of construction of the contract, as related to removal of the foundation of the contract, as a total failure of consideration. It is not necessary to attempt selection of any one of these as the true basis: my own view would be that they shade into one another and that a choice between them is a choice of what is most appropriate to the particular contract under consideration.[29]

In *Davis Contractors*, Lord Radcliffe himself had proffered his own remarks on the same point:

> It has often been pointed out that the descriptions vary from one case of high authority to another. … But the variety of description is not of any importance so long as it is recognized that each is only a description and that all are intended to express the same general idea.[30]

Further on, he said: 'So long as each theory produces the same result as the other, as normally it does, it matters little which theory is avowed.'[31]

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[28] ibid.

[29] (n 23) 693. cf *The Nema* (n 24) 752 (Lord Roskill).

[30] (n 12) 727.

[31] ibid 728 (footnote omitted).

Lord Radcliffe's test of radical change seems to offer in this regard an all-embracing explanation of why, under infinitely varying sets of circumstances, a contract should come to an end. Yet, it is clear that the different parameters used by the courts to reach their decisions on frustration continue to be relevant.

As a result, while radical change may well operate as the main test for reaching a decision on the continued operation of the contract, resort to other tests employed by the courts in more circumscribed factual setups should not be dismissed; indeed, Lord Wilberforce, in the quoted passage above from *National Carriers*,[32] specifically invited the use of these other considerations, subject to an understanding that the test of radical change may serve as a cross-check of any decision reached on frustration.[33]

As recently pronounced by Rix LJ in *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)*:[34]

> In the course of the parties' submissions we heard much to the effect that such and such a factor 'excluded' or 'precluded' the doctrine of frustration, or made it 'inapplicable'; or, on the other side, that such and such a factor was critical or at least amounted to a prima facie rule. I am not much attracted by that approach, for I do not believe that it is supported by a fair reading of the authorities as a whole. Of course, the doctrine needs an overall test, such as that provided by Lord Radcliffe, if it is not to descend into a morass of quasi-discretionary decisions. Moreover, in any particular case, it may be possible to detect one, or perhaps more, particular factors which have driven the result there. However, the cases demonstrate to my mind that their circumstances can be so various as to defy rule-making.

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[32] text to n 29.

[33] See *The Nema* (n 24) 752 (Lord Roskill).

[34] [2007] EWCA Civ 547, [2007] 2 All ER (Comm) 634 [110]–[111].

> In my judgment, the application of the doctrine of frustration requires a multi-factorial approach. Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances. Since the subject matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as 'the contemplation of the parties', the application of the doctrine can often be a difficult one. In such circumstances, the test of 'radically different' is important: it tells us that the doctrine is not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances.[35]

Indeed, in *The Sea Angel*, Rix LJ considered several factors in no particular order of preference.[36]

Nonetheless, it is clear that all these tests, including that of radical change, are subject to the ultimate appreciation of the court. Although each of them may be a pointer for or against frustration, a court will usually look at the overall picture. The criteria themselves being often qualitative rather than quantitative,

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[35] This multi-factorial approach has been applied in: *ACG Acquisition XX LLC v Olympic Airlines* [2012] EWHC 1070 (Comm) [179]ff (Teare J); *Bunge SA v Kyla Shipping Co Ltd (The Kyla)* [2012] EWHC 3522 (Comm), [2013] 1 Lloyd's Rep 565 [39]–[42] (Flaux J).

[36] (n 34) [117]–[133].

any guess of a court's determination is a tricky business.[37] In explaining his test, Lord Radcliffe in *Davis Contractors* went on to say:

> In the nature of things there is often no room for any elaborate inquiry. The court must act upon a general impression of what its rule requires. It is for that reason that special importance is necessarily attached to the occurrence of any unexpected event that, as it were, changes the face of things. But, even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.[38]

This view is echoed in the opinion of Lord Hailsham in *National Carriers*:

> In all fairness, however, I must say that my approach to the question involves me in the view that whether a supervening event is a frustrating event or not is, in a wide variety of cases, a question of degree, and therefore to some extent at least of fact. …[39]

Yet, as remarked by Lord Diplock in *The Nema*:

> [T]he question of frustration … is never a pure question of fact but does in the ultimate analysis involve a conclusion of law as to whether the frustrating event or series of events has made performance of the contract a thing radically different from that which was undertaken by the contract; however closely that conclusion of law may seem to follow from a commercial arbitrator's findings as to mercantile usage and the understanding of mercantile men about the significance of the commercial

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[37] See an illuminating expression of the contrast between quantitative and qualitative criteria in *National Carriers* (n 23) 707 (Lord Simon).

[38] ibid 729.

[39] (n 23) 688.

> differences between what was promised and what in the changed circumstances would now fall to be performed.[40]

Later on, nonetheless, in the same judgment, Lord Diplock, although addressing more general questions of law, warned against a tendency to look for solutions to legal questions in myriad individual cases. Eloquently, he underlined the need of 'bearing in mind always that a superabundance of citable judicial decisions arising out of slightly different facts is calculated to hinder rather than to promote clarity in settled principles of commercial law'.[41] The same point is echoed perhaps more emphatically in Lord Roskill's speech:

> It should therefore be unnecessary in future cases, where issues of frustration of contracts arise, to search back among the many earlier decisions in this branch of the law when the doctrine was in its comparative infancy. The question in these cases is not whether one case resembles another, but whether applying Lord Radcliffe's enunciation of the doctrine, the facts of the particular case under consideration do or do not justify the invocation of the doctrine, always remembering that the doctrine is not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains.[42]

Against this backdrop, how does a piratical capture fit with the 'main test' of frustration? It would seem a priori, lest a piratical detention of ship and cargo takes on an incommensurably protracted duration or chances of a successful recovery of the captive property—either through negotiation or forcefully—appear close to nil, that, following the conservative approach of English courts, the main test of frustration would be difficult to meet. Admittedly, many factors will play into any given situation, so general suppositions in this matter would appear quite rash.

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[40] (n 24) 738. See also, in the same judgment, 752–53 (Lord Roskill).

[41] ibid 743.

[42] ibid 752.

Yet it is quite impossible, it should be observed, let alone pretending to do so, to account for the endless variety of situations that could be involved in practice and to try to deal with each of those separately. Even if this extraordinary task were attempted, it would be pointless. As already stated, much depends in frustration cases on the overall assessment and appreciation of the particular facts and wider circumstances by the court, which is constituted of human persons with their own values and judgments.

To be achievable, the discussion of frustration in relation to the subject of this thesis should rather proceed to reduce the typical factual situation to its sub-facets and then confront these with guidelines developed by the courts. As already indicated, side by side with the 'main test' of frustration, there lies a spectrum of criteria which have been used, either conjointly or singly, by courts to reach a conclusion on the fate of contracts. The next sections of this chapter aim to examine such criteria as they relate to a detention of ship and cargo by pirates and their possible repercussions on the standing of contracts of carriage.

An attempt is made in the ensuing discussion to present those criteria in a logical order. Amongst those criteria, delay may perhaps stand out as the single most important factor (3.3). However, no hard and fast rules may be set forth in this regard, as ultimate decisions are often impelled by a unique mixture of individual facts, the importance of which may vary from one case to another. It is therefore not suggested that the adopted order reflects a general gradation of the importance of those criteria.

The panoply of criteria discussed reflects those found in judicial rulings. Nevertheless, the discussion is not intended to give the impression that courts would stop at those criteria; indeed, as realities and perceptions vary, so too do the factors and considerations intrinsic to judicial decision-making.

Lastly, it should be observed that certain criteria may be overlapping: for instance, delay can be looked at either by itself (3.3) or as a cause of financial loss (3.4). This reflects the inherent nature of the intellectual exercise at hand, namely, dissecting a single situation into its sub-facets.

3.2. Foreseeability of Event

One of the principal factors to have been considered in frustration cases is foreseeability of the supervening event. The point has been in part dwelt upon in the earlier discussion of contractual provisions which may be deemed to cover the piratical event and therefore make the case for frustration difficult.[43] However, even where no such provisions are to be found, the court may still take into account in denying frustration the fact that the parties, or one of them at least, foresaw the event. Alternatively, the court may even consider whether the event ought to have been foreseen by the parties.

Care should, nonetheless, be taken so as not to equate foreseeability in this regard with similar concepts found in other branches of private law, such as foreseeability of damage and its reparation under tort law. Frustration may operate even where the event was foreseen or else was foreseeable.

In *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage and Towage) Ltd (The Sea Angel)*,[44] Rix LJ identified foreseeability of the supervening event as a relevant factor. His Lordship said:

> In a sense, most events are to a greater or lesser degree foreseeable. That does not mean that they cannot lead to frustration. Even events which are not merely foreseen but made the subject of express contractual provision may lead to frustration: as occurs when an event such as a strike, or a restraint of princes, lasts for so long as to go beyond the risk assumed under the contract and to render performance radically different from that contracted for. However, … the less that an event, in its type and its impact, is foreseeable, the more likely it is to be a factor which, depending on other factors in the case, may lead on to frustration.[45]

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[43] ch 2.

[44] [2007] EWCA Civ 547, [2007] 2 All ER (Comm) 634.

[45] ibid [127].

In *The Sea Angel*, the question was whether the risk of detention by government or port authorities of a vessel chartered in by a salvor, Tsavliris, to unload oil from a stricken tanker spilling into the marine environment in the approaches of a port (Karachi) had been foreseen or foreseeable, and to what extent this had impacted on the charter's frustration, advocated by the salvor in a dispute with the vessel's owners, Global. Rix LJ came to the conclusion that the event had been both foreseen and foreseeable, not only by the parties themselves, but more generally by the salvage industry. He said:

> [T]he risk of detention by the littoral authorities arising out of a salvage situation where there was a concern about pollution was, at any rate in general terms, foreseeable. This remained the case even if … the particular form in which that risk showed itself in this case was unforeseeable, or only weakly foreseeable, or was even unprecedented. … [T]hat general risk was foreseeable by the salvage industry as a whole, and was provided for by the terms of that industry: see SCOPIC. … Indeed, in my view the particular risk which occurred was within the provisions of SCOPIC. As such, those matters were part of the matrix itself of the charter under inquiry. In this connection, I bear in mind that Global were not themselves part of the salvage industry: but they chartered the vessel to well-known international salvors, to perform salvage services directly to a casualty, at a high price which reflected the emergencies and risks of such services: and therefore the foreseeable risks of the salvage context, and the incidence of those risks subject to SCOPIC, are properly part of the matrix of the charter. In justice, they bear particularly on Tsavliris, the salvors, themselves.[46]

[46] ibid [119]. See also ibid [128]. In the above passage, SCOPIC stands for the Special Compensation Protection and Indemnity Clause, which formed part of the salvage agreement and which Rix LJ explained elsewhere in the judgment: ibid [49]ff.

It is noteworthy that foreseeability of the supervening event in Rix LJ's judgment stands in addition to his analysis of the contractual sphere of responsibility for delay.[47]

It has already been observed that most standard charterparties refer expressly to the risk of piracy—usually via their war risks clauses[48] and, sometimes, via their exceptions clauses.[49] In a way, this would make the case for the foreseen or foreseeable character of the risk difficult to rebut.

In contrast, piracy is usually not specifically referred to in bills of lading, nor does it appear in the applicable legislation.

Having said this, it would appear, bearing in mind Rix LJ's comments in *The Sea Angel* above, that the matter should be approached not so much in terms of these strictly textual considerations, but rather as an exploratory effort into the parties' true state of mind at the time of the conclusion of the contract.

Awareness of the risk of piracy would probably be gleaned from the parties' pre-contractual communications; however, much in the way of foreseeability would be a function of the currency of the threat of piracy as reported in the news and within the maritime industries.

It could thus hardly be denied by parties to a maritime venture having agreed to a transit of the vessel across much of the water space off the coast of Somalia that they stood unaware of the risk posed by Somali pirates in the area. The threat has indeed and continues to be a matter of significant public interest and notoriety, particularly in the maritime circles.

It would seem, therefore, that the foreseeability factor is likely, given the current situation off Somalia, to militate generally against a finding of frustration. As the threat may, however, recede with time, the foreseeability threshold could concomitantly increase.

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[47] ibid [129]–[130]. See 133–137.

[48] 45.

[49] 91.

One of the primary aspects of the threat in question is delay to the ship and cargo. Delay is the subject of much analysis in frustration cases, as will be seen next.

3.3. Delay

Delay is likely to pose as the central factor in a piratical capture situation supporting a possible contention that the contract of carriage may have ended by operation of the doctrine of frustration. There are many aspects to delay as a frustrating factor. The case law provides examples and benchmarks, but as with other factors and the general observations already made, it is often not possible to derive clear-cut rules regarding the effect that a particular instance of delay has on the continued standing of the contract. What the case law provides is rather, on the one hand, a model of analysis, almost always set against the context of the contract, the surrounding circumstances, the conduct of the parties as well as other relevant factors, including those considered in this work. Thus, quoting from the speech of Lord Radcliffe in *Davis Contractors Ltd v Fareham Urban District Council*,[50] 'delay, though itself a frequent cause of the principle of frustration being invoked, is only one instance of the kind of circumstance to which the law attends'.[51] For such a reason, a particular occurrence of delay can hardly always lead to the same result on frustration. On the other hand, it is possible from the case law to draw pointers for or against frustration as to delay.

As to the point in time when delay frustrates the contract, guidance may be sought in the following oft-quoted passage from Lord Sumner's opinion in *Bank Line Ltd v Arthur Capel & Co*:[52]

> The question must be considered at the trial as it had to be considered by the parties, when they came to know of the cause and the probabilities of the delay and had to decide what to do. … Rights ought not to be left in suspense or to hang on the chances

[50] [1956] AC 696 (HL).

[51] ibid 727.

[52] [1919] AC 435 (HL).

> of subsequent events. The contract binds or it does not bind, and the law ought to be that the parties can gather their fate then and there. What happens afterwards may assist in showing what the probabilities really were, if they had been reasonably forecasted, but when causes of frustration have operated so long or under such circumstances as to raise a presumption of inordinate delay, the time has arrived at which the fate of the contract falls to be decided. That fate is dissolution or continuance and, if the charter ought to be held to be dissolved, it cannot be revived without a new contract. The parties are free.[53]

Of course, there may be disagreement by the parties as to when, if at all, frustration would have been triggered. Thus, according to Rix LJ in the recent case of *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)*:[54]

> The particular problem of delay as a cause of frustration has to be tested as at the time it had to be considered by the parties, but on an objective basis. For these purposes past and prospective delay has to be taken into account.[55]

For purposes of this thesis, the implication is that, at any given time following a capture, it is open for parties to a contract of carriage to ponder on its fate. It may well be that, pending realisation of outcome A or B, as these have been defined,[56] taking into account both 'past and prospective delay', the prognosis of a long period of detention, involving 'inordinate delay',—to adopt the same terminology as in the passages quoted above—would lead a court to declare the contract to be frustrated.

Furthermore, as it appears from the above authorities, there is no rule conditioning frustration on delay having already accrued. In certain situations, it

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[53] ibid 454–55.

[54] [2007] EWCA Civ 547, [2007] 2 All ER (Comm) 634.

[55] ibid [89].

[56] 20–21.

may well be that frustration would be declared at the very start of an occurrence of delay considered prospectively at that instant to be sufficient to lead to the termination of the contract.

For instance, in *Jackson v Union Marine Insurance Co Ltd*,[57] the ship was chartered to proceed from Liverpool to Newport and there load rails for transport to San Francisco. After leaving Liverpool on 2 January 1872, the ship got aground on rocks on 3 January. The ship was got off and taken to a place of safety on 18 February. In the meantime, on 16 February, as it had become clear that some time would be required to repair the ship, and following refusal by the shipowners to substitute another vessel, the charterers had chartered another ship, by which they forwarded the rails. Repairs then took several months to complete. It was held that the charterers were entitled to refuse to load upon completion of the repairs. The charterers had validly repudiated the contract upon it appearing that the ship would not make it on time to Newport for the contemplated voyage, which was to supply rails needed to construct a railway in America.

Bramwell B, speaking for the majority of the Court, affirmed the almost immediate effect of frustration of the contract from the moment it appeared that an unreasonable period of time would be required to bring the ship back in service. He thus said:

> In considering this question, the finding of the jury that 'the time necessary to get the ship off and repairing her so as to be a cargo-carrying ship was so long as to put an end in a commercial sense to the commercial speculation entered into by the shipowner and charterers,' is all important. I do not think the question could have been left in better terms; but it may be paraphrased or amplified. I understand that the jury have found that the voyage the parties contemplated had become impossible; that a voyage undertaken after the ship was sufficiently repaired would have been a different voyage, not, indeed, different as to the ports of loading and discharge, but different as a different adventure,—a voyage for

[57] (1874) 10 CP 125 (Ex Ch).

> which at the time of the charter the plaintiff had not in intention engaged the ship, nor the charterers the cargo; a voyage as different as though it had been described as intended to be a spring voyage, while the one after the repair would be an autumn voyage.[58]

Yet, in other situations, past delay may not aid proponents of frustration at all. An example is provided by *The Sea Angel*,[59] where, five weeks following the stipulated date for the termination of a 20-day time charter, it was held that the contract subsisted and that frustration did not arise.

In the case of a piratical capture, this matter is highly significant. It means that nothing stands in the way of the frustration of the contract as soon as a capture has occurred provided delay is, for instance, foreseeably long enough.

In other respects, Rix LJ's words in the quoted passage above from *The Sea Angel*[60] provide guidance on the method by which further delay is to be predicted. This is to be done 'on an objective basis'. In *National Carriers Ltd v Panalpina (Northern) Ltd*,[61] Lord Simon stated:

> The matter must be considered as it appeared at the time when the frustrating event is alleged to have happened. Commercial men must be entitled to act on reasonable commercial probabilities at the time when they are called upon to make up their minds.[62]

Lord Simon was paraphrasing in the above passage Scrutton J in *Embiricos v Sydney Reid & Co*.[63] In that case, a charter for a voyage from the Sea of Azoff to the UK was declared frustrated by reason of the war between Turkey and Greece. The ship, being of Greek nationality, arrived at the loading port on 1 October

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[58] ibid 141.

[59] (n 54).

[60] text to n 55.

[61] [1981] AC 675 (HL).

[62] ibid 706 (citation omitted).

[63] [1914] 3 KB 45 (KBD).

1912. On 2 October, loading stopped for fears of the imminent war, which was declared on 18 October. On 21 October, the charterers purported to cancel the contract; the owners refused the cancellation. It is true that, for intermittent times, both prior to and following the war declaration, Turkey allowed Greek vessels to sail through the Dardanelles. Nevertheless, this fact was considered by Scrutton J to be too contingent to counteract the conclusion that war and the appurtenant risk of arrest and detainment by Turkish authorities had put an end to the contract. The judgment reads:

> I hold, therefore, that at the time of the breach alleged, October 21, an excepted peril, restraint of princes, prevented the shipowners from carrying out the charter by the vessel's proceeding on her voyage, and was, in the language of Lush J. in *Geipel v. Smith*, 'likely to continue so long, and so to disturb the commerce of merchants as to defeat and destroy the object of a commercial adventure like this.' If there is such a likelihood and probability the fact that unexpectedly the restraint is removed for a short time does not involve that the parties should have foreseen this unexpected event, and proceeded in the performance of an adventure which at the time seemed hopelessly destroyed. As Lord Gorell said in *The Savona*, 'I do not think this case can be decided by what happened afterwards, except as a test of what was the true state of things at the time when the question of breach has to be considered,' and the whole of his subsequent remarks are valuable on this point. Commercial men must not be asked to wait till the end of a long delay to find out from what in fact happens whether they are bound by a contract or not; they must be entitled to act on reasonable commercial probabilities at the time when they are called upon to make up their minds.[64]

Reference is also made to the excerpt of Lord Sumner's opinion set out above.[65]

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[64] ibid 54, citing *Geipel v Smith* (1872) LR 7 QB 404, 414; The *Savona* [1900] P 252, 259.

[65] text to n 53.

In *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)*,[66] Lord Roskill reaffirmed the principle:

> Whether or not the delay is such as to bring about frustration must be a question to be determined by an informed judgment based upon all the evidence of what has occurred and what is likely thereafter to occur. Often it will be a question of degree whether the effect of delay suffered, and likely to be suffered, will be such as to bring about frustration of the particular adventure in question. Where questions of degree are involved, opinions may and often legitimately do differ. Quot homines, tot sententiae. The required informed judgment must be that of the tribunal of fact to whom the issue has been referred. That tribunal, properly informed as to the relevant law, must form its own view of the effect of that delay and answer the critical question accordingly. Your Lordships' House in *Tsakiroglou & Co. Ltd. v. Noblee Thorl G.m.b.H.*, decided that while in the ultimate analysis whether a contract was frustrated was a question of law, yet as Lord Radcliffe said … in relation to that case 'that conclusion is almost completely determined by what is ascertained as to mercantile usage and the understanding of mercantile men.'[67]

Evidently, the point is again critical for matters of this study as projections of the duration of piratical hijackings off Somalia do exist and have been adduced in evidence in maritime cases by expert witnesses. Thus, in *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)*,[68] though a marine insurance decision, Steel J built up his estimate of the likely detention of the ship by Somali pirates using primarily the assistance provided by the expert evidence.[69] It is fair to assume that a court in a frustration case would similarly rely on this type of

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[66] [1982] AC 724 (HL).

[67] ibid 752, citing *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93, 124.

[68] [2010] EWHC 280 (Comm), [2010] 2 All ER 593, affd [2011] EWCA Civ 24, [2011] 3 All ER 554.

[69] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2010] EWHC 280 (Comm), [2010] 2 All ER 593 [24]–[27].

evidence to assess how lengthy a given detention should have been anticipated, 'on an objective basis', to quote again Rix LJ in *The Sea Angel*.[70]

Having examined those preliminary points as to delay, there remains the crucial and thorniest question: What type of delay frustrates the contract?

The moment at which delay intervenes in the life of the contract is an important consideration. In *Bank Line*,[71] delivery of the vessel under the charter did not occur, because of the ship's requisition. In other words, the performance of a major and inceptive obligation under the contract was prevented for a considerable time. The contract was held frustrated.

In contrast, once the ship has started its contractual service, a finding of frustration becomes more difficult. Yet, a distinction may still have to be made between situations of delay affecting a ship that is carrying cargo and those where a ship is under contract, but not in fact loaded, as where, for example, it is proceeding to its port of loading in view of performing its chartered voyage. Delay in these two situations has been said to require a different treatment when it comes to frustration:

> [I]t may be very material in considering the prospect of delay to know whether the ship is light or loaded. If loaded, delay is likely to be longer and more serious; but on the other hand, the prospect of ultimate fruition from the adventure, which is at any rate begun, is thus increased.[72]

In *The Sea Angel*,[73] Rix LJ also considered, amongst other factors, the moment at which the supervening event, in that case the detention of the salvage vessel, had occurred in the life of the contract. He said:

> [W]here, as in our case, the supervening event comes at the very end of a charter, with redelivery as essentially the only remaining

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[70] text to n 55.

[71] (n 52).

[72] ibid 455 (Lord Sumner).

[73] (n 54).

> obligation, the effect of the detention on the performance of the charter is purely a question of the financial consequences of the delay, which will fall on one party or the other, depending on whether the charter binds or does not bind. It is not like the different situation where the supervening event either postpones or, which may be even worse, interrupts the heart of the adventure itself: as, for instance, in the *WJ Tatem* case or *The Fjord Wind*. In our case, the purpose for which the Sea Angel had been chartered, namely the lightening of the casualty, had been performed.[74]

Rix LJ was referring there to the fact that, following completion of its salvage services, the *Sea Angel* had been under the grip of a port detention preventing it from getting on its voyage of redelivery and beginning on the sixth day prior to the stipulated expiry of the time charter.

One of the used tests is the ratio of the time of the suspension of the contract's performance over what remains of the time of the contract. In *Anglo-Northern Trading Co Ltd v Emlyn Jones & Williams*,[75] Bailhache J said in the context of a time charterparty: 'The main consideration is the probable length of the total deprivation of use of the vessel as compared with the unexpired duration of the charterparty.'[76]

Lord Sumner played down the test, however, in *Bank Line*,[77] saying 'I agree in the importance of this feature, though it may not be the main and certainly is not the only matter to be considered'.[78] Likewise, in *The Sea Angel*,[79] Rix LJ discounted the primacy of the test, saying that it was not 'the critical or main

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[74] ibid [118], referring to *WJ Tatem Ltd v Gamboa* [1939] 1 KB 132 (QBD) and *Eridania SpA v Oetker (The Fjord Wind)* [1999] 1 Lloyd's Rep 307 (Com Ct).

[75] [1917] 2 KB 78 (KBD), affd [1918] 1 KB 372 (CA).

[76] *Anglo-Northern Trading Co Ltd v Emlyn Jones & Williams* [1917] 2 KB 78 (KBD) 84.

[77] (n 52).

[78] ibid 454.

[79] (n 54).

and in any event overbearing test to apply'.[80] His Lordship added: '[The test] may be an important consideration, but it is, on our facts, only the starting point. … [T]he development of the law shows that such a single-factored approach is too blunt an instrument.'[81]

Often, delay takes the form of 'wait and see'. The expression denotes unclearness about the outcome of the predicament which has caused impossibility to perform. This type of situation was approached by the House of Lords in *Bank Line*,[82] although nowhere in the judgment is the term 'wait and see' used. In addition to the passage already quoted from Lord Sumner's speech,[83] reference is made to the following excerpt where his Lordship emphasised the indefinite duration of the requisition from the perspective of the parties:

> What is important is this. During all the months of the *Quito's* service for the Admiralty the charterers would not in the least know when, if ever, they would have her on their hands. They could not tell whether they might suddenly have to find employment for her, or whether they must make provision for the current necessities of their trade without counting upon her at all. In one respect they would be at an indubitable disadvantage. The postponement of the beginning of her hire at any rate brought nearer the end of the war, after which the charterers would have to pay war rates for the ship and only have the use of her in peace employment. In the latter respect the owners' position also would be one of indecision, for their business is one that requires that they should look ahead, and in doing so they could not tell when, if at all, they were to have the *Quito* once more on offer. These uncertainties in commerce are very serious.[84]

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[80] ibid [117]–[118].

[81] ibid [118].

[82] (n 52).

[83] text to n 53.

[84] *Bank Line* (n 52) 451. See also, in the same judgment, 460 (Lord Sumner).

The uncertainty as to the duration of the requisition was also echoed in Lord Shaw's speech:

> [I]t was a general requisition, that is to say, the ship might under it be put into the service of the Government for years, and remain in it until to-day. In those circumstances the parties, nonplussed as to the effect of the action of the Crown upon their own business arrangements with regard to the ship, would naturally be desirous to pause for a little before definitely treating the contract of affreightment as at an end. In my opinion this was exactly what they did. They agreed to wait for three months. That three months expired on August 11. By that time the vessel had not been released, and on that date it appears to me that both parties were free from their temporary arrangement and that their rights are to be determined on the footing that the transfer of the ship to the service of the Government was for an indefinite period.[85]

In contrast, in *Port Line Ltd v Ben Line Steamers Ltd*,[86] a vessel's requisition was thought likely to, and in fact did, last about three months. Diplock J held that this had not frustrated the time charter, which still had at the time of derequisition 10 months to run. The judge was mindful of the warning against using a single-test approach, however, and did examine the case in the light of the several criteria laid down by the authorities.[87]

More recently, in *The Nema*,[88] Lord Roskill employed explicitly the term 'wait and see' in relation to frustration:

> [I]n some cases where it is claimed that frustration has occurred by reason of the happening of a particular event, it is possible to determine at once whether or not the doctrine can be legitimately invoked. But in others, where the effect of that event is to cause

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[85] ibid 448–49.

[86] [1958] 2 QB 146 (QBD).

[87] ibid 162–63.

[88] (n 66).

> delay in the performance of contractual obligations, it is often necessary to wait upon events in order to see whether the delay already suffered and the prospects of further delay from that cause, will make any ultimate performance of the relevant contractual obligations 'radically different,' to borrow Lord Radcliffe's phrase, from that which was undertaken by the contract. But, as has often been said, business men must not be required to await events too long. They are entitled to know where they stand.[89]

In *The Sea Angel*,[90] as already mentioned, a 20-day time charter for a salvage vessel, the *Sea Angel*, was left hanging as of 13 or 17 October 2003, that is, five weeks after it should have expired according to its stipulated duration. This was because the *Sea Angel* had been held up, arguably quite unjustly, by the Karachi port authorities over claims of unsettled port dues. In reality, the port authorities were possibly eager to obtain security for pollution and wreck removal damages and expenses caused by an oil spill from a tanker, which the *Sea Angel* had been employed to lighten under the terms of a salvage agreement. The Court of Appeal dealt with the dispute on the time charter between the salving vessel's owners, on the one hand, and Tsavliris, the charterer and salvor, on the other hand. The *Sea Angel* was one of the vessels which Tsavliris had contracted in to perform its salvage services to the stricken tanker in the approaches to the port of Karachi. It was the charterer's claim that, as of 13 or 17 October 2003, the time charter was frustrated on the basis of both past and prospective delay.

Rix LJ said:

> [T]his is not a case like the *Anglo-Northern Trading Co* and *WJ Tatem* cases, where the charters were frustrated then and there by the supervening event. Ours is one of those 'wait and see' situations discussed in other authorities. In such situations, it is a matter for assessment, on all the circumstances of the case,

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[89] ibid 752.

[90] (n 54).

> whether by a particular date the tribunal of fact, putting itself in the position of the parties, and viewing the matter in the role of reasonable and well-informed men, concludes that those parties would or properly speaking should have formed the view that, in all fairness and consistently with the demands of justice, their contract, as something whose performance in the new circumstances, past and prospective, had become 'radically different', had ceased to bind.[91]

Wait and see is perhaps a defining term for a vessel capture in the Somali piracy model. It has thus been ruled in *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)*,[92] although the case concerned marine insurance. It is difficult, however, to see why the same description would not operate in the context of frustration of the contract of carriage.

In addition to the above factors as to delay, reference should be made in any particular instance to the contract. The proposition seems truistic, especially after the earlier exposition of the contractual terms which may bear on capture and delay.[93] However, the matter consists here of a general exegesis of the contract in relation to eventualities such as delay.

In *The Sea Angel*,[94] amongst the factors considered in assessing delay, Rix LJ queried who had assumed the contractual risk of delay. His Lordship analysed a series of clauses in the charter, which was on the SHELLTIME4 form, together with the fixture recap telex. This led him to find a 'sphere of responsibility' for delay centring on the charterer. Under the hire clause,[95] hire was payable by the charterer '"until the time and date of [the ship's] redelivery to Owners …"'. Rix LJ further observed that the off-hire clause[96] covered the situation at hand,

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[91] ibid [120], referring to *Anglo-Northern Trading* (n 76) and *WJ Tatem Ltd v Gamboa* [1939] 1 KB 132 (QBD).

[92] [2011] EWCA Civ 24, [2011] 3 All ER 554 [56] (Rix LJ).

[93] ch 2.

[94] (n 54).

[95] SHELLTIME4, cl 8.

[96] ibid cl 21.

although strikingly the charterer did not raise its applicability. In addition, the charter contained clauses relating to requisition[97] and loss of the vessel,[98] as well as an exceptions clause enumerating, inter alia, restraint of princes.[99] Rix LJ articulated the 'sphere of responsibility' factor as follows:

> The way I would therefore prefer to put the factor of the sphere of responsibility under the charter … is to emphasise that, generally speaking, the risk of delay under the charter was upon Tsavliris as charterers. This is because of the essential structure of a time charter, under which, absent express provision, time runs continuously against the charterer until redelivery. Thus an off-hire clause is the place to find exceptions against the incidence of a continuous liability for hire, but such a clause did not avail Tsavliris in this case, even though cl 21(a)(v) expressly deals with detention by authorities.
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> The point is also illustrated by other provisions of the charter form. Thus cl 27 expressly provides a mutual exception against liability for loss or damage arising from restraint of princes, but that does not avail to stop a liability for hire due to delay caused by such restraint. Restraint of princes is of course of direct relevance in this case. Not of direct relevance, but again illustrative of the general point are specific provisions to deal with other circumstances in which detention of the vessel may arise. Thus constructive total loss of the vessel, which may arise from trapping, is specifically dealt with in cl 20. Requisition, an old cause of dispute, is specifically dealt with in cl 32. Both these clauses are additional off-hire clauses which operate in circumstances of actual or potential frustration. Against this background, where the charterer assumes the general risk of delay, subject to express provision, it necessarily requires something special to frustrate the charter

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[97] ibid cl 32.

[98] ibid cl 20.

[99] ibid cl 27.

> through mere delay: and a fortiori where, as here, the consequences of the delay are purely financial since the charter is over, save for redelivery, and the delay in question falls within a foreseeable risk of the salvage industry.[100]

As part of the 'sphere of responsibility', Rix LJ also considered the charterer's contractual liability for port dues.[101] He discounted, however, its importance since the port authority's claim for port dues was arguably used as pretence to justify the detention of the *Sea Angel* while the port authority was really seeking to obtain security for pollution and wreck removal damages and costs. Rix LJ said:

> I think that the charterer's responsibility for port dues can be overstated. The issue raised by KPT [the port authority] was not really about port dues, it was … about KPT's determination to protect itself against its fears and the expenses of pollution damage and wreck removal. If the demands for port dues had been reasonable, but wrongly rejected by Tsavliris, then any consequent delay would have been for their account under the charter. I do not see why an unreasonable demand for port dues, a fortiori a demand for port dues as a pretence to cloak a claim against pollution damage caused by the casualty, should be regarded as falling within the charterer's sphere of responsibility. That remains the case even if it takes a little time to grasp the real nature of the reasons for the detention by the local authorities. Moreover, where the demand for port dues is made an unreasonable excuse for the unlawful detention of the vessel, I do not see why the responsibility for trying to extract the vessel from her situation is not prima facie as much that of her owners (and disponent owners) as her charterers. It is not as though her charterers have ordered the vessel into salvage services under some general discretion as to

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[100] *The Sea Angel* (n 54) [130]–[131].

[101] SHELLTIME4, cl 7.

her employment: she has been specifically contracted to such services at a price which is intended to reflect the risks.[102]

The attractiveness of Rix LJ's approach based on the contractual sphere of responsibility cannot be denied. Indeed, it appears as a cogent method by which delay as a frustrating factor is analysed not solely by reference to the detached facts of the case, or certain elements of the contract—as, for example, the ratio of the delay to the unexpired duration of the contract. Instead, according to the approach in question, due regard is given to the delicate and overall balance of rights and obligations under the contract in relation to delay. What is not spelled out in precise terms in the contract as to frustrating delay is derived from synthesising the various clauses and from the nature of the contract. Such an approach, it is submitted, ultimately achieves the will of the parties.

What Rix LJ said in relation to delay due to detention by authorities should be applicable to piratical capture with the difference that the risk of piracy may not have been contemplated at all by the parties, unlike the situation in *The Sea Angel*. There, Rix LJ held that the risk of detention by authorities had been accepted by both parties.[103]

The various clauses referred to by Rix LJ in the passage from his opinion quoted above[104] have been analysed in an earlier part of this thesis as they could bear on delay flowing from a piratical capture.[105] The force of Rix LJ's approach is that, rather than stopping at the realisation that those clauses are usually for the most part non-dispositive on the issue of frustration, they are—along with other clauses, such as requisition and war cancellation clauses—still taken into consideration in the elucidation of the bearing of a piratical capture on the continuance of the contract. The latter is thus taken as a whole.

In comparison with time charterers, voyage charterers and cargo interests in bill of lading contracts should arguably bear a lesser responsibility for delay, and

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[102] *The Sea Angel* (n 54) [129].

[103] ibid [119].

[104] text to n 100.

[105] sec 2.1.

should accordingly be subject to a lower threshold of frustrating delay than that used by Rix LJ above.

Having set out the way to approach delay in terms of frustration of the contract, it is time to move on to other factors that may also bear on the matter in a piratical capture situation.

3.4. Financial Loss

Apart from delay, an immediate consequence of capture is financial loss for both ship and cargo.

It has often been said in frustration cases that additional expense or onerousness in the performance of a contract is not by itself a frustrating cause of the contract.

Thus, in *Pacific Phosphate Co Ltd v Empire Transport Co Ltd*,[106] Rowlatt J stated: 'Increase in cost was not in itself a cause of frustration, but it could be looked at as an indication of the change in conditions generally.'[107]

In *Davis Contractors Ltd v Fareham Urban District Council*,[108] Viscount Simonds denied 'emphatically' the basis for 'the proposition that where, without the default of either party, there has been an unexpected turn of events, which renders the contract more onerous than the parties had contemplated, that is by itself a ground for relieving a party of the obligation he has undertaken'.[109]

In the same case, which concerned a construction contract the performance of which was delayed by a shortage of labour and materials, Lord Reid took pains to differentiate the risk of delay from that of the costs of delay. He said:

> In a contract of this kind the contractor undertakes to do the work for a definite sum and he takes the risk of the cost being greater or less than he expected. If delays occur through no one's fault that

[106] (1920) 36 TLR 750 (KB).

[107] ibid 751.

[108] [1956] AC 696 (HL).

[109] ibid 716.

> may be in the contemplation of the contract, and there may be provision for extra time being given: to that extent the other party takes the risk of delay. But he does not take the risk of the cost being increased by such delay. It may be that delay could be of a character so different from anything contemplated that the contract was at an end, but in this case, in my opinion, the most that could be said is that the delay was greater in degree than was to be expected. It was not caused by any new and unforeseeable factor or event: the job proved to be more onerous but it never became a job of a different kind from that contemplated in the contract.[110]

Lord Reid's statement is reminiscent of Rix LJ's explanation of the sphere of contractual responsibility for delay in *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)*.[111] Using Lord Reid's words, the charterer of the *Sea Angel*, Tsavliris, took the risk of both delay and increased cost although the off-hire clause applied, but was not invoked by the charterer.

The subsidiary role of increased expense to the parties or one of them has been reiterated in many other cases. For instance, in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (The Hongkong Fir)*,[112] Salmon J stated:

> I have every sympathy with the charterers in the natural irritation they must have felt at the inconvenience and possible hardship caused to them by this vessel's halting voyage to Osaka and the prospect of the vessel being detained there some months for further substantial repairs. Nevertheless, as Lord Radcliffe pointed out in *Davis Contractors Ltd. v. Fareham Urban District Council*: '… it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing

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[110] ibid 724.

[111] [2007] EWCA Civ 547, [2007] 2 All ER (Comm) 634 [129]–[130]. See 133–137.

[112] [1962] 2 QB 26 (QBD), affd [1962] 2 QB 26 (CA).

> undertaken would, if performed, be a different thing from that contracted for.' I appreciate also that there was a catastrophic fall in the freight market between February and June, 1957, and that it would only be natural in these circumstances for the charterers to wish to escape from the charterparty if they lawfully may. I do not think, however, that in considering the issue of frustration the fall in the market can be material.[113]

Thus, supposing that capture-related delay in the arrival of the goods under a bill of lading contract results in a significant loss for the cargo owner, such loss would not per se constitute a frustrating cause of the contract of carriage. Put differently, the cargo owner could not, simply because of its loss, invoke frustration in order to refuse paying freight upon the delayed delivery of the goods following recovery of the vessel from capture. This example highlights the importance, after all, of forecasting the chances of resumption of the contractual service, which is the next frustrating factor to be analysed.

3.5. Resumption of Contractual Service

While in the previous sections of this chapter, the focus has been primarily on delay per se, it is equally important to look beyond and consider the chances of resumption of the contractual service following cessation of the supervening event. Normally, the key concern in a capture scenario is whether the ship will be recovered from the hands of the pirates, whether through ransom negotiation or otherwise, and be in a position to carry on with the contracted services which were interrupted by the vessel's seizure.

In *Ullises Shipping Corp v Fal Shipping Co Ltd (The Greek Fighter)*,[114] a ship was detained in December 2001 by UAE authorities on suspicion of trading in Iraqi oil, then under an international embargo. Detention continued for 15 months until the ship was confiscated and sold at auction. The Court found that there had been no lack of hope in obtaining the release of the ship from governmental

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[113] *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (The Hongkong Fir)* [1962] 2 QB 26 (QBD) 39, quoting *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 (HL) 729. See also, in the latter case, 700, 707 (Lord Simon).

[114] [2006] EWHC 1729 (Comm), [2006] Lloyd's Rep Plus 99.

detention in January 2002, bearing in mind that the time charter could have extended until July 2003; accordingly, no frustration had arisen then or at any time prior to confiscation.[115] When confiscation was decreed, however, the question was no longer in doubt.[116]

In line with the ruling in *The Greek Fighter*, it would be difficult to conclude that the contract is frustrated where hope remains for the freeing of the vessel and its cargo, as well as the resumption of the ship's ability to perform the contract of carriage, albeit with a certain delay.

Another way of looking at chances of resumption of the contractual service is to consider what methods of ship recoverability are available. In *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)*,[117] a case where a time charter was allegedly frustrated as a result of the ship's detention by the Karachi port authorities, Rix LJ earmarked access to the courts and negotiation as a factor militating against frustration, and distinguished the cases on requisition and trapping. He said that 'the requisition, seizure or trapping of a vessel in the course of a major conflict are quite unlike the present case. One cannot negotiate or litigate one's way out of such consequences of war.'[118] In contrast, 'the consequences of the detention by the port authorities remained very much a matter for inquiry, negotiation, diplomacy, and, whatever the ordering of the tactics, legal pressure'.[119]

In the case of piracy, access to the courts to liberate the ship is of course out of the question, but negotiation is the method usually adopted for such purpose. In addition, there remains a limited possibility of forceful recovery by means of the navy or other military or even paramilitary methods.

It is also necessary, in a piratical capture instance, to consider to what extent, even assuming that the capture were to end, there would be a chance for the

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[115] ibid [336]–[338].

[116] ibid [338].

[117] [2007] EWCA Civ 547, [2007] 2 All ER (Comm) 634.

[118] ibid [98].

[119] ibid [118].

ship to complete its contractual service. Not unrelated to this question is the nature of the cargo. If perishable, the goods may simply, past a certain delay, render the situation hopeless and frustration of the contract inescapable. In such a case, it is indeed loss of the goods itself which would justify frustration of the contract.[120]

Assessment of the chances of resumption of the contractual service is perhaps aided by considering how the parties to the contract have reacted to the supervening event, as will be seen next.

3.6. Parties' Calculations as to Future Performance

It is not absolutely clear whether conduct of the parties following the occurrence of a potentially frustrating event is a relevant factor in coming to a conclusion as to the continued standing or termination of the contract. Dicta, especially in the more recent case law, suggest that this is one of the aspects courts do look at, although it does not seem that to be a determining factor. Often, judges rely on the conduct of the parties in order to comfort their conclusions, arrived at by other means.

In *Bank Line Ltd v Arthur Capel & Co*,[121] all the Lords looked at how the parties had reacted to the alleged frustrating event, a requisition which had rendered the delivery of a vessel under a time charter impossible. Lord Sumner said:

> We find the parties themselves apparently impressed with the idea that any long suspense was intolerable, and that, if the ship could not be promptly released, the engagement must be considered as at an end. Their communications with one another ceased early in June; apparently each was waiting to see if something would turn up. So I read their correspondence. The charterers' agent actually spoke to the owners' representative in the sense that, if the *Quito* was to be released, he would be prepared to consider a new charter, and although the brokers deprecated what he had done, it was not so much that they differed from him in thinking that the

[120] *Taylor v Caldwell* (1863) 3 B & S 826, 833–34; 122 ER 309, 312.

[121] [1919] AC 435 (HL).

> old charter was dead as that they thought it better not to say so except without prejudice. The owners left the matter there, but presently they sold the *Quito*. They did so without communication with the charterers. It is more reasonable to refer that they also thought the old charter was dissolved than that, thinking it to be alive, they hoped to escape disputes with the charterers by trying to keep secret what they were doing.[122]

Similarly, in *Davis Contractors Ltd v Fareham Urban District Council*,[123] Lord Reid examined the reaction to delay by the parties as part of his construction of the contract and its surrounding circumstances.[124]

In *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)*,[125] following capture of a merchant ship by Somali pirates, the shipowner diligently pursued ransom negotiations in order to free the vessel. The cargo owner took an observer stance, but, a month into the detention, claimed for a total loss from its insurers. The ship was released by its captors some 11 days later.

It is likely that a court of law would have considered the conduct of the parties as a factor against frustration of their mutual contract. As it was made clear in the judgments of both the first instance and appeal courts, there was always a good chance of recovering the ship.[126] The parties' conduct reflected such prospect. The filing of a total loss claim may have had its own motives, but it should not be allowed to break the continuum of the parties' expectations of recovering the ship, as ascertained from their broad behaviour.

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[122] ibid 451–52. See also ibid 446–47 (Viscount Haldane), 460 (Lord Sumner), 443–44 (Lord Finlay LC), 448–49 (Lord Shaw), 461–62 (Lord Wrenbury).

[123] [1956] AC 696 (HL).

[124] ibid 722–23.

[125] [2011] EWCA Civ 24, [2011] 3 All ER 554.

[126] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ 24, [2011] 3 All ER 554 [10]–[11], affg [2010] EWHC 280 (Comm), [2010] 2 All ER 593 [23], [27].

The consideration of the above individual factors in the determination of frustration cases paves the way for discussing their overall assessment under a separate head.

3.7. Overall Assessment

As already explained, the several factors of frustration analysed above should not be viewed separately from each other.[127]

In *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)*,[128] the question for the Court was whether a salvage vessel's detention, which had gone on for over five weeks, had led to the demise of the time charter under which the vessel had been deployed in the port.

Speaking for the Court, Rix LJ translated the correct approach to be taken in the following words:

> [T]he critical question was whether, as of 13 October, (or 17 October, and for present purposes I am content to adopt either date), the delay which had already occurred and prospective further delay would have led the parties at that time to have reasonably concluded that the charter was frustrated.[129]

Rix LJ then adopted a 'multi-factorial approach'[130] to frustration, stating that 'the development of the law shows that … a single-factored approach is too blunt an instrument'.[131] He considered, inter alia, the time at which the detention had occurred in the life of the contract, the sphere of responsibility for delay under the charter, the specificity of a 'wait and see' situation, the foreseeability of the detention, and the ability to rectify the detention by such means as court access

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[127] 115.

[128] [2007] EWCA Civ 547, [2007] 2 All ER (Comm) 634.

[129] ibid [117].

[130] ibid [111].

[131] ibid [118].

or negotiation.[132] Ultimately, Rix LJ concluded that no frustration had arisen in the case at hand.

This part of the process of decision-making on frustration is perhaps more difficult to rationalise than the individual factors discussed already. The exercise is after all one of the court's judicial discretion. Nevertheless, it allows the court to set a broad view on the case and the concoction of all the elements for or against frustration.

Another type of wide vista that cases teach should be cast over the factual situation allegedly founding a contractual frustration is considered in the next and final part of this discussion.

3.8. Dictates of Justice

The case-specific nature of the factors of frustration so far considered should not overshadow the general purposes of the doctrine which is at stake. Recently, Rix LJ said in *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)*:[133]

> What the 'radically different' test, however, does not in itself tell us is that the doctrine is one of justice, as has been repeatedly affirmed on the highest authority. Ultimately the application of the test cannot safely be performed without the consequences of the decision, one way or the other, being measured against the demands of justice. Part of that calculation is the consideration that the frustration of a contract may well mean that the contractual allocation of risk is reversed. A time charter is a good example. Under such a charter, the risk of delay, subject to express provision for the cessation of hire under an off-hire clause, is absolutely on the charterer. If, however, a charter is frustrated by delay, then the risk of delay is wholly reversed: the delay now falls on the owner. If the provisions of a contract in their literal sense

[132] Reference is made to the previous sections in this chapter where Rix LJ's various factors are analysed.

[133] [2007] EWCA Civ 547, [2007] 2 All ER (Comm) 634 [112].

> are to make way for the absolving effect of frustration, then that must, in my judgment, be in the interests of justice and not against those interests. Since the purpose of the doctrine is to do justice, then its application cannot be divorced from considerations of justice. Those considerations are among the most important of the factors which a tribunal has to bear in mind.

Later on in his judgment, Rix LJ concluded on the basis of his multi-factorial approach that the time charter in *The Sea Angel* had not been frustrated as advocated by the charterer (Tsavliris), which had contracted in the vessel from its opponents in the appeal, the vessel owners. His Lordship ultimately turned to assess his conclusion in light of the requirement of justice in the application of the doctrine of frustration and had this to say:

> [The dictates of justice] is not an additional test, but it is a relevant factor which underlies all and provides the ultimate rationale of the doctrine. If one uses this factor as a reality check, its answer should conform with a proper assessment of the issue of frustration. If it does not appear to do so, it is probably a good indication of the need to think again. The question in this case is whether it would be just to relieve Tsavliris of the consequences of their bargain, or unjust to maintain the bargain, in a situation where they have assumed the general risk of delay, and have done so in a specific context where the risk of unreasonable detention is foreseeable and has at least in general been actually foreseen, as demonstrated by SCOPIC which, subject to the limits of frustration, protects the salvor from the financial consequences of the delay; where from the very beginning a solution was considered to be possible rather than impossible or hopeless, but only after a period of some three months, and where that solution, although not entirely or even mainly in Tsavliris' own control, was achievable with the co-operation of the owners of the casualty and their club, known to be in principle available, and the assistance of legal action in the local courts; and where the outcome has confirmed

> the calculations of the objectively reasonable participants in the events.[134]

Rix LJ was of the view at the end that the holding of Tsavliris liable for the delay fitted with the requirements of this ultimate test and that 'the [lower] judge's conclusion, that the charter had not been frustrated … shows the doctrine [of frustration] working justly, reasonably and fairly'.[135]

The assumption of risks referred to by Rix LJ above gives a concrete measure of this ultimate check on frustration cases.

* * *

This chapter has set forth the gamut of considerations which should be brought to bear on the issue of frustration in a capture case. An attempt was made to point out some of the most relevant factors and criteria which should guide decision-making on the matter. It would appear overall that the question is a complex one and that a large amount of appreciation resides with the tribunal of fact. Protracted detention and dim chances of recovery of the vessel would seem to constitute the principal factors in favour of frustration. This could well mean, for instance, that the conversion of a capture ship by pirates for their own use as a mother ship should lead to the almost immediate conclusion that contracts of carriage affecting the ship are discharged, especially if the prospects of forceful recovery appear weak. Similarly, past a certain detention time, contracts should be considered as dead. It should, furthermore, be stated that the criteria for time charters are generally more stringent than those applying to voyage charters and bill of lading agreements.

* * *

The above criteria and factors on which the case for frustration is built must, however, yield to an overriding principle, namely, that actions or omissions of a party to the contract cannot be used to help it get out of the agreement. The rules regarding self-induced frustration, to which the focus will turn in the next

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[134] ibid [132]. SCOPIC refers to the Special Compensation Protection and Indemnity Clause.

[135] ibid [133].

chapter, can be seen as the other side of the requirement discussed above that frustration should arise from an extraneous supervening event.

4. Self-induced Frustration

As the antithesis of the previous chapter 3, the current chapter explores the situations where the operation of the main test and/or the other relevant factors for frustration in a particular piratical instance will be negated by the requirements of a basic rule of justice, namely, that one may not benefit from one's own wrongdoing. In terms of the doctrine at hand, this is called self-induced frustration.

Concrete scenarios of wrongdoing by either party to the contractual relationship forming the backdrop of the thesis question—that is, carriage of goods by sea, will be considered. Thus, a first part of the chapter will examine instances of fault by either the shipowner/carrier or the charterer in causing or contributing to the piratical capture. The implications of this sort of fault will be studied in their effect on the doctrine of frustration. In a second part of the chapter, the focus will turn to analysing in the same way allegations of fault in protracting the capture ordeal. Before delving into these illustrations of self-induced frustration, however, the chapter will begin by summing up the contours and meaning of the latter concept.

* * *

So far, the discussion of frustration has proceeded in abstraction of the fact that the new situation potentially calling for the ending of the contractual relationship may have been brought about by the doings or misdoings of either party to the contract. Capture could indeed have been precipitated by the ship's incautious navigation in piracy-stricken waters. The crossing of these waters may have been in answer to the charterer's specific orders, or it may be viewed as a reckless and unconsidered decision on the part of the master or its principals in charting the ship's route. The ship may furthermore have failed to implement the minimum recommended anti-piracy measures. Any or all of these factors as well as others involving actions or omissions on the part of either party to the contract of carriage may be put in question as the real cause of the piratical capture. Turning to the capture aftermath, it could likewise be found that its prolongation—one of the key factors in triggering the frustration of the contract—was due to the mishandling of the negotiations for the vessel's release by the owners. Again, in such a scenario, the impact of one of the parties'

conduct on the origination of the arguably frustrating event—the ship's protracted detention—may be called into question by the party opposing frustration.

Self-induced frustration is in this respect an important bulwark against using the doctrine for untoward purposes. As stated by Diplock LJ in his comments in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*[1] in relation to frustrating events:

> Where the event occurs as a result of the default of one party, the party in default cannot rely upon it as relieving himself of the performance of any further undertakings on his part, and the innocent party, although entitled to, need not treat the event as relieving him of the further performance of his own undertakings. This is only a specific application of the fundamental legal and moral rule that a man should not be allowed to take advantage of his own wrong.

The rule may be traced to a dictum of Lord Sumner in *Bank Line Ltd v Arthur Capel & Co*:[2]

> One matter I mention only to get rid of it. When the shipowners were first applied to by the Admiralty for a ship they named three, of which the *Quito* was one, and intimated that she was the one they preferred to give up. I think it is now well settled that the principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side. Reliance cannot be placed on a self-induced frustration; indeed, such conduct might give the other party the option to treat the contract as repudiated. Nothing, however, was made of this in the courts below, and I will not now pursue it.

The House of Lords was dealing in that case with the frustration of a chartered vessel by requisition of the Admiralty.

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[1] [1962] 2 QB 26 (CA) 66.

[2] [1919] AC 435 (HL) 452.

Having posed the principle, it remains that its precise limits still need to be identified. Diplock LJ talked of 'default', while Lord Sumner adopted the terms 'blame', 'fault' and 'self-induced'. The question presently arising is the extent to which a party's conduct should be deemed as self-inducement in pursuance of Lord Sumner's dictum. For instance, should the effect of frustration be debarred only for a party's deliberate conduct or should the same follow in the case of mere negligence or want of care? It may also be asked whether self-induced frustration should target, in addition to breach of contract or actionable negligence, conduct which is not objectionable in legal terms. The question assumes importance in the current discussion of scenarios leading up to and following a piratical capture, where decisions of the parties, both in planning the voyage and in dealing with a crisis, may provide fertile ground for allegations of fault on either side of the contract of carriage.

The question was approached in a series of dicta in *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd*.[3] In that case, a ship suffered an explosion for an unknown reason while waiting to proceed to its berth to load a cargo under a voyage charter. The subsequent delay in repairing the vessel was admittedly a frustrating cause of the adventure. The case really concerned the burden of proof in relation to self-induced frustration. The case's ratio is that it is up to the party opposing the argument of frustration to prove, once the other party has established a frustrating event, that it is due to the latter's default, in which case frustration will not operate.[4]

As to what self-induced frustration amounts to, Lord Russell highlighted the fact that '[t]he possible varieties are infinite'.[5] His full statement reads:

> My Lords, I desire to add a word in relation to the phrase 'self-induced frustration.' No question arises on this appeal as to the

[3] [1942] AC 154 (HL). See: PH Winfield (1941) 57 LQR 300 (note); Glanville L Williams (1941) 5 MLR 135 (note); Julius Stone, 'Burden of Proof and the Judicial Process: A Commentary on *Joseph Constantine Steamship, Ltd* v *Imperial Smelting Corporation, Ltd*' (1944) 60 LQR 262.

[4] ibid 163–66 (Viscount Simon LC), 169–76 (Viscount Maugham), 177–79 (Lord Russell), 182–96 (Lord Wright), 203–05 (Lord Porter). Hence, most of the commentaries (see n 3) concentrate on burden of proof.

[5] ibid 179.

> kind or degree of fault or default on the part of the contractor which will debar him from relying on the frustration. The possible varieties are infinite, and can range from the criminality of the scuttler who opens the sea-cocks and sinks his ship, to the thoughtlessness of the prima-donna who sits in a draught and loses her voice. I wish to guard against the supposition that every destruction of corpus for which a contractor can be said, to some extent or in some sense, to be responsible, necessarily involves that the resultant frustration is self-induced within the meaning of the phrase.[6]

The other Lords were more forthright. Thus spoke Viscount Simon LC:[7]

> I do not think that the ambit of 'default' as an element disabling the plea of frustration to prevail has as yet been precisely and finally determined. 'Self-induced' frustration, as illustrated by the two decided cases already quoted, involves deliberate choice, and those cases amount to saying that a man cannot ask to be excused by reason of frustration if he has purposely so acted as to bring it about. 'Default' is a much wider term and in many commercial cases dealing with frustration is treated as equivalent to negligence. Yet in cases of frustration of another class, arising in connection with a contract for personal performance, it has not, I think, been laid down that, if the personal incapacity is due to want of care, the plea fails. Some day it may have to be finally determined whether a prima donna is excused by complete loss of voice from an executory contract to sing if it is proved that her condition was caused by her carelessness in not changing her wet clothes after being out in the rain. The implied term in such a case may turn out to be that the fact of supervening physical incapacity dissolves the contract without inquiring further into its cause, provided, of course, that it has not been deliberately induced in order to get out of the engagement.

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[6] ibid.

[7] ibid 166–67.

Lord Porter agreed that negligence should be targeted. He said:[8]

> A contractor who negligently destroys the subject-matter of the contract is not free from blame and in some cases may not be within the exception 'without default' as used in the cases, but I prefer to leave the question for determination until it comes directly in issue.

For his part, Lord Wright expressed the view that mere negligence was beyond the bounds of self-induced frustration. He said:

> The Court of Appeal do not define what in this context is the meaning of 'fault' or 'default.' In the Sale of Goods Act, 1893, the word 'fault' (as used in ss. 6 and 7) is defined as meaning 'wrongful act or default.' That is not perhaps very helpful, but in *Sailing Ship Blairmore v. Macredie* Lord Watson observed: 'The rule of law applicable to contracts is that neither of the parties can by his own act or default defeat the obligations which he has undertaken to fulfil.' Willes J., in the passage already cited, gave as an instance of a party preventing performance the case of a man poisoning before delivery a horse which he had promised to deliver. Lord Sumner, in speaking of a self-induced frustration, has clearly in mind positive acts against the faith of the contract which amount to a repudiation and would justify rescission. This test would apply to *Mertens v. Home Freeholds Co.*, and to *Maritime National Fish Co. Line v. Ocean Trawlers*. On the other hand, mere negligence seems never to have been suggested as sufficient to constitute 'fault' in this connection. In *Taylor v. Caldwell*, where the fire was described as accidental, no one suggested an inquiry whether any servant of the defendant had negligently caused the fire, and in the cases of personal incapacity defeating a contract for personal service, like *Poussard v. Spiers & Pond*, no investigation seems ever to have been suggested whether the party claiming to be excused was careful of his or her health. But even there a case

[8] ibid 205–06.

> of gross delinquency might perhaps be construed as amounting to a repudiation of the obligations of the contract. I do not here think it necessary to attempt the definition.[9]

Excepting the prima donna references, typical of contracts requiring a specific person for their execution,[10] it would seem that the development of the law of frustration, at least in the commercial sphere, has tended to support an expansive view of self-induced frustration, covering all types of conduct enumerated above, whether deliberate,[11] negligent,[12] an unintentional breach of duty,[13] or even legally unobjectionable.[14] In a way, such categorising of conduct may be beside the point, as manifested in the more recent pronouncements on the matter.

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[9] ibid 195–96, citing: *Mertens v Home Freeholds Co* [1921] 2 KB 526 (CA); *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524 (PC); *Taylor v Caldwell* (1863) 3 B & S 826, 122 ER 309 (other citations omitted).

[10] See eg *FC Shepherd & Co Ltd v Jerrom* [1987] QB 301 (CA).

[11] *Mertens* (n 9) 536 (Lord Sterndale MR), 539–40 (Warrington LJ); *Maritime National Fish* (n 9) 527, 529–31 (Lord Wright); *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 QB 699 (CA) 725 (Salmon LJ), 736–37 (Harman LJ); *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal (The Hannah Blumenthal)* [1983] 1 AC 854 (HL) 910 (Lord Brandon), 919–20 (Lord Diplock); *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep 1 (CA) 9–10 (Bingham LJ), 13–14 (Dillon LJ).

[12] *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1989] 1 Lloyd's Rep 148 (Com Ct) 156 (Hobhouse J), affd [1990] 1 Lloyd's Rep 1 (CA).

[13] *Kodros Shipping Corp v Empresa Cubana de Fletes (The Evia (No 2))* [1982] 1 Lloyd's Rep 334 (CA) 342 (Sir Sebag Shaw), 350 (Ackner LJ), affd [1983] 1 AC 736 (HL). See Charles GCH Baker and Paul David, 'The Politically Unsafe Port' [1986] LMCLQ 112, 114, 124, for some very cursory remarks on the treatment of self-induced frustration in this case; see also Paul Todd, 'Safe Port Clauses in Time Charterparties' (1990) 8 OGLTR 35, 38–39. cf Andrew Tettenborn, 'Frustration in Voyage Charters—Silted-up Backwater or Vital Navigational Resource?' in D Rhidian Thomas (ed), *The Evolving Law and Practice of Voyage Charterparties* (Maritime and Transport Law Library, Informa 2009) paras 16.36–37.

[14] *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep 1 (CA) 10–11 (Bingham LJ), 13–14 (Dillon LJ), affg [1989] 1 Lloyd's Rep 148 (Com Ct) 156 (Hobhouse J). cf Tettenborn (n 13) paras 16.36–37.

In *The Hannah Blumenthal*,[15] Lord Brandon, delivering the leading opinion in the case, approved the review of the authorities on self-induced frustration made by Griffiths LJ,[16] whose dissenting judgment was upheld by the Lords. In a commentary on those authorities, Griffiths LJ said:

> This last case best illustrates what is meant by default in the context of frustration. The essence of frustration is that it is caused by some unforeseen supervening event over which the parties to the contract have no control, and for which they are therefore not responsible. To say that the supervening event occurs without the default or blame or responsibility of the parties is, in the context of the doctrine of frustration, but another way of saying it is a supervening event over which they had no control. The doctrine has no application and cannot be invoked by a contracting party when the frustrating event was at all times within his control: still less can it apply in a situation in which the parties owed a contractual duty to one another to prevent the frustrating event occurring.[17]

Griffiths LJ was there referring to the case of *Denmark Productions*,[18] where the defendants, acting as personal managers to a group of pop musicians, retained the services of the plaintiffs as co-managers of the group. Following disagreement between one of the plaintiffs' directors and the group, the defendants were quick to help the latter sever any existing relationship they had with the plaintiffs by introducing them to a solicitor for the purpose. The solicitor wrote to the plaintiffs determining their relationship with the group. He also wrote to the defendants terminating their managers' duties, but suggested the negotiation of a fresh contractual relationship provided any obligations to the plaintiffs were renounced. The Court of Appeal held that the defendants

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[15] (n 11).

[16] ibid 909.

[17] *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal (The Hannah Blumenthal)* [1983] 1 AC 854 (CA) 882.

[18] (n 11).

were debarred from claiming that their contract with the plaintiffs had been discharged on account of the group's actions, which, the Court said, had been brought about by the defendants themselves.[19]

Going back to *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal (The Hannah Blumenthal)*,[20] that case concerned the defence of frustration of a contract to arbitrate where the litigants, both parties to the contract, had caused delays in the handling and preparation of the dispute for a hearing. Lord Brandon spelled out what should govern discharge of a contract in the context of allegations of self-induced frustration:

> [T]here are two essential factors which must be present in order to frustrate a contract. The first essential factor is that there must be some outside event or extraneous change of situation, not foreseen or provided for by the parties at the time of contracting, which either makes it impossible for the contract to be performed at all, or at least renders its performance something radically different from what the parties contemplated when they entered into it. The second essential factor is that the outside event or extraneous change of situation concerned, and the consequences of either in relation to the performance of the contract, must have occurred without either the fault or the default of either party to the contract.[21]

Lord Brandon went on to say:

> I turn now to consider whether what I have described as being, on the authorities, the two factors essential to the frustration of a contract are present in this case. As to that, I agree with Griffiths L.J. that neither such factor is present. In the first place there has been in this case no outside event or external change of situation affecting the performance of the agreement to refer at all, and no

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[19] ibid 725 (Salmon LJ), 736–37 (Harman LJ).

[20] [1983] 1 AC 854 (HL).

[21] ibid 909.

> one, as far as I can see, has been able to put forward an argument that there has. In the second place the state of affairs relied on as causing frustration is delay by one or both of the parties of such a length as to make a fair, or as I prefer to call it satisfactory, trial of the dispute between the parties no longer possible. That delay, however, on the facts as I have stated them earlier, was clearly itself caused by the failure of both parties to comply with what your Lordships' House in *Bremer Vulkan* decided was their mutual contractual obligation owed to one another, namely (after taking the necessary steps to have a third arbitrator appointed), to apply to the full arbitral tribunal as then constituted for directions to prevent the very delay which is now sought to be relied on by the sellers as having frustrated the agreement to refer.
>
> Whatever may be the precise ambit of the expression 'default' in this context, and whether it would or would not apply to the case of the prima donna postulated by Viscount Simon L.C. in the part of his speech in *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd.* which I quoted above, it is not, in my view, necessary to determine. It is not necessary because I entertain no doubt whatever that the conduct of the parties in the present case, in failing to comply with what this House has held to be their mutual contractual obligation to one another, comes fairly and squarely within such expression.[22]

In *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)*,[23] Wijsmuller entered into a contract with Lauritzen for the transportation of a rig belonging to the latter from Japan to the North Sea by either one of two of its tugs, the *Super Servant One* and the *Super Servant Two*. The *Super Servant Two* was lost on a job prior to the scheduled transportation under the contract. In a trial of preliminary issues, Wijsmuller argued that the contract had been frustrated. The

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[22] ibid 910, citing *Joseph Constantine* (n 3) 166 (other citation omitted).

[23] [1990] 1 Lloyd's Rep 1 (CA). See: Ewan McKendrick, 'Self-induced Frustration and *Force Majeure* Clauses' [1989] LMCLQ 3; PA Chandler, 'Self-induced Frustration, Foreseeability and Risk' (1990) 41 NILQ 362.

Court of Appeal was asked to determine whether, on a submission by Wijsmuller, assuming the loss of the tug had been neither negligent nor deliberate, the frustration should not be considered as self-induced. The Court held, in agreement with Hobhouse J in the lower court, in favour of Lauritzen.[24] In his reasons, Bingham LJ quoted the above passage from Griffiths LJ's opinion in *The Hannah Rosenthal*,[25] and went on to reject any strict categorising of conduct, based on whether it is deliberate, legally actionable or neither of these.[26] Adopting Hobhouse J's paraphrase that '"in some respects the doctrine of frustration and the concept of 'self-inducement' are simply opposite sides of the same coin', Bingham LJ said:[27]

> Wijsmuller's test would, in my judgment, confine the law in a legalistic strait-jacket and distract attention from the real question, which is whether the frustrating event relied upon is truly an outside event or extraneous change of situation or whether it is an event which the party seeking to rely on it had the means and opportunity to prevent but nevertheless caused or permitted to come about. A fine test of legal duty is inappropriate; what is needed is a pragmatic judgment whether a party seeking to rely on an event as discharging him from a contractual promise was himself responsible for the occurrence of that event.
>
> Lauritzen have pleaded in some detail the grounds on which they say that *Super Servant Two* was lost as a result of the carelessness of Wijsmuller, their servants or agents. If those allegations are made good to any significant extent Wijsmuller would … be precluded from relying on their plea of frustration.

Causation and responsibility: two words which a commentator has stopped at in the above passage to suggest that '[t]he result, therefore, is not dependent on

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[24] ibid 10–11 (Bingham LJ), 13–14 (Dillon LJ).

[25] text to n 17.

[26] *The Super Servant Two* (n 23) 10.

[27] ibid.

the state of mind of the party per se but is premised, rather, more on the notion or concept of causation or responsibility'.[28]

It is submitted that Bingham LJ's approach provides an all-embracing test for self-induced frustration. For piratical captures occurring in the course of the performance of a contract of carriage, the implications will be discernible in the discussion of allegations of self-induced frustration in relation to the two broadly defined factual situations outlined above, namely, prevention of the capture (4.1) and protraction of the detention period (4.2).

It should be said, however, as a warning to the reader, that the aim of this chapter is not to discuss what actionable conduct should or should not cover in the context of a piratical capture of the cargo-carrying vessel. That discussion is outside the framework of this study. Instead, it will suffice to review selected cases which have addressed liability for loss or damage in consequence of pirates' misdeeds in the context of maritime contracts, with special emphasis laid on recent decisions focusing on piracy off Somalia. A reference to other cases on broader issues, which can also apply to the piracy situation, will also be included. It will then be sought to ascertain how the rules of self-induced frustration could be applied in such settings, used as factual models and as illustrations, by no means intended to be exhaustive, of the general problem.

4.1. Fault in Inducing Capture

The law of self-induced frustration finds its first illustration in this section dealing with the occurrence of the piratical capture per se, away from the study of the protraction of the capture and allegations of self-induced frustration which may be tabled in relation to that phase.[29]

As outlined above, the happening of a piratical capture may prove a battlefield for mutual allegations of fault between the parties to the contract as to their respective roles in precipitating the catastrophe. Whether it is, on the one hand,

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[28] Andrew Phang, 'Frustration in English Law—A Reappraisal' (1992) 21 Anglo-Am L Rev 278, 298. See also McKendrick (n 23) 5–6. For a critical take on the judgment, see Chandler (n 23).

[29] See sec 4.2.

in walking straight into the jaws of the pirates, so to speak, as in ordering the ship through a dangerous zone, or, on the other hand, in failing to preventively protect the ship from the risk of attack through, for instance, the deployment on board of armed guards or perhaps other more basic measures, there will usually hardly be a shortage of accusations of blame against either side of the maritime adventure in the litigants' armoury.

Accordingly, the shipowner's or carrier's fault in failing to prevent piratical depredations will serve as the first subject of examination in considering self-induced frustration contentions that could be raised by the other party to the contract of affreightment (4.1.1). Conversely, the charterer's own choice of trading ports or areas for the vessel could give the shipowner ammunition for the same argument in return (4.1.2). Faced with the threat of piracy, the shipowner or carrier may refuse altogether to proceed to certain ports or waters; such refusal could by the same token be labelled as a self-induced frustration of the contract, calling for its own separate treatment (4.1.3).

4.1.1. Shipowner or Carrier's Fault

Morse v Slue[30] is an early decision on the liability of the ship's master for the robbing of cargo by thieves. There was no capture of the vessel in the case. The malefactors went on board the ship as it was lying in the Thames. The owners of the cargo sued the master. It was held that the master had been negligent in not placing guards for the cargo, and not only the ship. Today, the claim would have been brought against the carrier, and the latter would have been held vicariously liable for the master's negligence.

According to the case report, the court entered a caveat in relation to pirates, saying, 'but it is otherwise of enemies; so the master is not chargeable, where the ship is spoiled by pirates'.[31] It could be understood that the court did not treat robbers as pirates, since the theft occurred *infra corpus comitatus*.[32] It is questionable, however, whether the Queen's enemies exception of the common

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[30] (1672) 1 Vent 238, 86 ER 159.

[31] *Morse v Slue* (1672) 1 Vent 238, 239; 86 ER 159, 160.

[32] *Morse v Slue* (1672) 1 Vent 238, 238; 86 ER 159, 159.

carrier's liability for goods under the common law would cover pirates. There is no authority on this point, but in *Forward v Pittard*,[33] Lord Mansfield CJ said:

> If an armed force come to rob the carrier of the goods, he is liable: and a reason is given in the books, which is a bad one, viz. that he ought to have a sufficient force to repel it: but that would be impossible in some cases, as for instance in the riots in the year 1780. The true reason is, for fear it may give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil.[34]

Similarly, in *Phillips v Clark*,[35] Willes J quoted the following commentary from Lord Tenterden's *Treatise on Shipping*[36] on *Morse* 'in which the owners were held responsible for goods taken by robbery from the ship in the river Thames within the body of a county':

> 'Chief Justice Hale took notice of this doctrine, and said, "by the civil Admiral law, the owners are not responsible for a robbery by pirates at sea." This, however, is to be understood only in case the ship does not fall into the hands of pirates by any neglect or fault of the master.'[37]

Contemporary authors are, for their part, in doubt on the matter.[38] The association of pirates with the Queen's enemies in *Morse* could, therefore, be treated as a mere dictum.

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[33] (1785) 1 Term Rep 27, 99 ER 953.

[34] *Forward v Pittard* (1785) 1 Term Rep 27, 34; 99 ER 953, 958. See also *Russell v Niemann* (1864) 17 CBNS 163, 175; 144 ER 66, 72 (Byles J).

[35] (1857) 2 CBNS 156, 140 ER 372.

[36] 386.

[37] *Phillips v Clark* (1857) 2 CBNS 156, 164; 140 ER 372, 377.

[38] Raoul Colinvaux (ed), *Carver's Carriage by Sea* (British Shipping Laws, 13th edn, Stevens 1982) para 14; Bernard Eder and others, *Scrutton on Charterparties and Bills of Lading* (22nd edn, Sweet & Maxwell 2011) para 11-037.

As a result, it is quite arguable that the general rule given by *Morse* as to what the master or carrier should do to protect the ship's cargo applies equally to robbers as well as pirates at sea.

Reverting, however, to the subject of this chapter, it may be said that the attribution of liability for the loss of goods in the above case as a result of the master's negligence in failing to adequately protect the cargo would probably provide, in appropriate circumstances, grounds for the application of the doctrine of self-induced frustration. This stems from the discussion set out at the opening of this chapter.[39] It is further submitted that, even if an exception to the carrier's liability were to apply, be it the Queen's enemies of the common law or any other potentially applicable exception to the instance of the pirates' misdeeds,[40] the doctrine of self-induced frustration would still operate in the basic factual matrix provided by the above case. As stated earlier, it does not matter whether conduct precipitating the allegedly frustrating event was intentional, negligent or even non-actionable.

Morse is useful in providing the matrix for the general and basic factual setup with respect to the carrier's responsibility for the consequences to the cargo of piratical assaults. It is easy to see how the facts in that case could be transposed and built upon in the modern conditions of piracy off Somalia. There are a plethora of preventive measures that could be taken today to avoid an attack by pirates in that part of the world. These range from safe corridor transits, appropriate navigation patterns, defensive on-board equipment, through to armed guards, to name but a few.

The intricacy of piracy off Somalia was the subject of a foreign case, which has seen Danish courts analyse specifically the liability in contract and tort of the owners and managers of a merchant ship, the *Danica White*, vis-à-vis the crew, following capture and hijacking.[41] Because it tackles directly liability issues, and is one of the very few cases decided by the courts so far on the matter, the

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[39] 150–158.

[40] text to nn 227–228 in ch 2.

[41] Case No B-2403-09, 6 October 2010, OE(L), affg Case No BS 38A-189/2008, 26 August 2009, B(R); Case No BS 38A-3025/2008, 26 August 2009, B(R).

decision is analysed here. Although the liability addressed is towards the crew, the reasoning may be quite useful in the framework of a carriage contract. The *Danica White* case may be seen as a transposition of the matrix of *Morse* into the Somali piracy situation.

The Danish-flagged *Danica White*, laden with a cargo of drill pipes and drill cement, was travelling from Sharjah in the United Arab Emirates to Mombasa in Kenya with a crew of five men when it was attacked on 1 June 2007 by Somali pirates 205 nautical miles (nm) off the coast of Somalia. Pirates demanded that the ship be sailed to the coast of Somalia, where it laid anchor pending ransom negotiations. The ship and crew were ultimately released against payment of a ransom on 22 August 2007.

The *Danica White* had a normal speed of 9–9.5 knots, but in the prevailing navigation conditions on the particular voyage, including southerly winds and a northerly current, its speed was reduced to between 5.5 and 7.5 knots. Freeboard was relatively low at 1–1.5 metre. The ship was owned by Partsrederiet Invest VI. It was managed by Rederiet H Folmer & Co I/S.

The master was originally intent on charting a course down the Indian Ocean at approximately 140 nm off the Somali coast, but was instructed by the ship owners or managers to keep away at 200 nm at least. These instructions had been passed on by the vessel's time charterer. The instructions were based on a general recommendation issued by the Maritime Liaison Office (MARLO) Bahrain[42] in autumn 2005 and reiterated in a MARLO Advisory Bulletin dated 20 May 2007 following a number of piratical attacks off Somalia in that year. Several of these attacks took place at a fair distance from the coast, hence the recommended minimum distance. The master changed the ship's route accordingly. The vessel was set on a south-western course for its destination at a slight angle from the Somali coast. Thus, between 28 May and 1 June, the day of the attack, the ship's distance from the coast was gradually brought down from 303 to 205 nm.

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[42] MARLO provides a link between the US naval forces and the shipping community in the Middle East. See MARLO, 'MARLO' <http://www.cusnc.navy.mil/marlo/> accessed 18 December 2012.

In accordance with statutory requirements, the *Danica White*'s minimum safe manning consisted of at least four crew members. The ship had in practice six members on board, but on the particular voyage there were only five.

Because of personal disagreements, the master had, furthermore, on this voyage, done away with the permanent sea watch by the ordinary seamen on board. Only the navigator on duty—alternating between the master and the chief officer—was, therefore, present on the bridge.

Turning to the *Danica White*'s equipment, a Ship Security Alert System (SSAS) was fitted. The SSAS may be activated for any emergency, including a pirate attack. In the case of Danish ships, the SSAS signal is sent to the Danish Navy Operative Command, as well as the ship's owner or manager. The ship had no special anti-piracy equipment.

As far as preparations for and awareness of piratical attacks were concerned, despite several warnings issued and relayed by various organisations in the maritime industry regarding the threat of piracy—and even though the ship's Safety Management System contained a procedure on piracy—neither the owners, managers nor master appeared to be particularly cognizant of the risk of attack off Somalia's coastline, or at least in the remote position from the coastline sailed at. Although the MARLO Advisory Bulletin dated 20 May 2007 regarding the recommended minimum distance was relayed by Danish maritime associations to their members, which included the *Danica White*'s owners and managers, it seems that decision to act upon it was prompted solely after receipt of the charterer's instructions.

The attack occurred in broad daylight and clear weather. As already stated, because of wind and current conditions, the *Danica White* was navigating at a low speed of approximately 5 knots. The master was alone on the bridge. The four other crewmembers were under deck. The pirates came, fully armed, in three fibreglass dinghies. They climbed on board the ship from astern using ladders. They surprised the master in the wheelhouse. According to the master's statements, he managed to raise the SSAS alarm by pressing the button, but in fact no message was transmitted. The other crewmembers made statements denying their knowledge of how to activate the SSAS or where the buttons were located on board, so none of them made any attempt at activating it. The master informed the pirates that he and the crew would do as they said.

The ship was taken by the pirates with its five crew members to a hideout on the Somali coastline. On 2 June, the ship anchored in Somali territorial waters. On its way, the *Danica White* was approached by a US warship, which tried to free the vessel, but the pirates held the crew at gunpoint as human shields and thus dissuaded the US marines. Ransom negotiations ensued and concluded with the release of the vessel and crew on 22 August 2007.

An investigation into the hijacking was carried out by the Danish Maritime Authority's (DMA) Division for Investigation of Maritime Accidents.[43] In its judgment, the District Court of Copenhagen quotes the report in extenso. DMA's investigation concluded, inter alia, the following:

> The master had not received any clear instructions from the shipping company or the charter regarding the route at the passage off the coast of Somalia. …
>
> Under these circumstances, navigating in waters where there is a risk of encountering pirates, the watch in DANICA WHITE was insufficient. …
>
> Neither the shipping company nor the charterer had provided the master with clear instructions regarding this navigation or about the precautions against piracy in connection with the navigation. …
>
> The master did not take any additional precautions—such as increased lookout. …
>
> If there had been proper lookout from DANICA WHITE, the pirate boats could have been spotted app. 30 minutes before they reached DANICA WHITE. However, due to the slow speed of the ship, DANICA WHITE could not have sailed away from the pirates, but the crew would have been able to raise the alarm in time and shown the pirates that they had been spotted. …

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[43] For the official English translation, see DMA, Division for Investigation of Maritime Accidents, 'Danica White Pirate Attack and Hijacking on 1 June 2007: Marine Accident Report; Investigation of the Time Leading Up to the Pirate Attack and Hijacking on 1 June 2007' (16 November 2007) <http://www.dma.dk/SiteCollectionDocuments/OKE/List-marine-accident-reports-per-year/danicawhiteoversat.pdf>.

> The master acted correctly by following the orders of the pirates. In doing so, he ensured the crew's safety in the best possible way. …
>
> Neither SOK nor the shipping company received the SSAS alarm from the ship on 1 June. …
>
> The master's statement concerning the SSAS alarm indicates a lack of knowledge about the functioning of the alarm. Therefore, the possibility that the master may have raised the alarm incorrectly cannot be excluded. …
>
> Apart from the lack of reception of the alarm on 1 June, there are no indications of technical defects in the SSAS.[44]

Although the investigation report highlighted deficiencies on the part of the master and the shipping company in the events leading up to the hijacking of the *Danica White*, as it transpired from official correspondence laid out in the District Court's judgment, DMA decided not to send the case to the police for prosecution. DMA justified its decision in this regard by reference to its practice in not indicting persons who had come to suffer harm, noting that the master had been held hostage for 81 days. With regard to the possible prosecution of the shipping company, DMA referred to the lack of clear rules regarding the company's obligations with respect to the prevention of piratical attacks, and that the matter was to be addressed to an extent in a tightening of technical regulations.

Civil proceedings were subsequently brought on behalf of the released crew members, excluding the master, against the ship's owners and managers. It was alleged by the plaintiffs that the owners and managers were to blame for the hijacking and for its prolongation.[45] Damages were claimed for mental hardship and other monetary losses.

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[44] ibid 4–5 ('SOK' stands for Søværnets Operative Kommando (Danish Navy Operative Command)). In the report, the 'shipping company' is identified as H Folmer & Co.

[45] Submissions regarding prolongation of the duration of captivity are discussed in sec 4.2.

The District Court dismissed the action. While the Court accepted that the master and the defendants had been negligent to a certain extent, it was not convinced that such negligence was causally related to the piratical capture.

In its judgment, the Court began by clarifying who the party liable was. Partsrederiet Invest VI was the owner and operator of the *Danica White*, and as such owed pursuant to the Danish Merchant Shipping Act[46] § 151 vicarious liability for the errors or omissions of the master or the other defendant, Rederiet H Folmer & Co I/S. That provision reads: 'The shipowner shall be liable for damage caused through fault or negligence in their service by the master, crew members, pilot or others who carry out work in the service of the ship.'[47] The Court also confirmed that, under the Merchant Shipping Act § 105, the managers, Rederiet H Folmer & Co I/S, could be sued on behalf of the owner of the ship, but said that whether they owed a self-standing liability depended on proof of their own negligence.

Moving to analyse the conduct of the *Danica White*'s master, the Court felt that he could be blamed for doing no more towards countering the threat of piracy than navigating the vessel at more than 200 nm from the Somali coast. The master was also negligent in failing to arrange for a sufficient watch, including an intensified lookout, in the dangerous waters the ship was in. It could be supposed in this respect that the primary reason that the pirates managed to get on board without being seen was that the master was the only one on the bridge and at least partly engaged in paperwork.

Moreover, the Court found it unclear why the ship had not been registered with the Navy Operational Command or whether the master had activated the SSAS. However, the Court did address criticism to the master for having failed to ensure, before the ship had approached waters under the threat of piracy, that

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[46] Lovbekendtgoerelse nr 538 af 15.6.2004 om søloven *som aendret ved lov nr 1172 af 19.12.2003, bekendtgørelse nr 1042 af 28.10.2004, lov nr 599 af 24/06/2005, lov nr 526 af 07.06.2006, lov nr 538 af 08.06.2006, lov nr 1563 af 20.12.2006, lov nr 349 af 18.04.2007, lov nr 523 af 06.06.2007 og lov nr 507 af 17.06.2008*.

[47] Translation by DMA at <http://www.dma.dk/SiteCollectionDocuments/Legislation/Acts/2010/LBK-856-01072010-s%C3%B8loven.pdf> accessed 18 December 2012.

the rest of the crew had precise knowledge of where in the ship the SSAS button which was not on the bridge was located, and how it could be activated in the event that there were pirates on the bridge, as in the present instance.

On the question whether any criticisms could be directed against the ship managers, Rederiet H Folmer & Co I/S, the Court noted that the *Danica White* had been manned in accordance with the applicable legislation, and was not satisfied that there had been errors or defects in the ship's safety systems, including the SSAS. Neither was it demonstrated to the Court that the ship's supply of relevant regulations and recommendations, including the International Maritime Organization recommendations on piracy, was deficient or inaccessible to the master. In this regard, it was noted that it was thanks to an email sent by the managers to the vessel on the basis of a MARLO recommendation dated 20 May 2007 and directing the master to take a longer route to Mombasa as a result of the high risk of pirates along the coast of Somalia that the master had modified the voyage plan so that the *Danica White* had never been less than 200 nm off Somalia's coast. The Court could not accede to the view that the managers were to blame for failing to instruct the master to stay at an even greater distance from the coast. It was affirmed by the Court that it was the master and not the shipping company that was responsible for ensuring that a proper lookout was kept, and the Court did not consider it to be the fault of the company that the master failed to see to it that there was a sufficient watch and a sharper lookout in waters under threat of piracy, and to ensure that the crew were duly informed of the location of the SSAS. Moreover, the Court was unable to find anything to blame the managers for in the course of the hijacking and up until the ship's release, including the negotiations phase with the pirates. There was accordingly no basis for holding Rederiet H Folmer & Co I/S to an independent liability vis-à-vis the plaintiffs.

The Court affirmed that the main reason why the plaintiffs had suffered losses in connection with the hijacking of the *Danica White* was that the ship had been attacked by heavily armed pirates and forced to sail towards the Somali coast. The question for the Court was whether the master's negligence as proven justified the imposition of joint and several liability against Partsrederiet Invest VI, alongside the responsibility which lay incontestably on the pirates. Although it was accepted that the *Danica White*'s crew should have detected the pirates before they had gone on board, and additionally should have made sure to alert

the authorities and other ships of the situation, the Court was of the opinion that the plaintiffs had failed to show how concretely the *Danica White*, through lookout and preparedness in the circumstances, could have prevented or delayed the pirate attack. It was significant that the USS *Carter Hall*, which had arrived on the scene some six hours before the *Danica White* had crossed Somalia's 10-nm limit, had been unable to prevent the ship's progress into Somali waters, after the pirates had taken out the ship's crew and posted them as human shields on the bridge wings. On the whole, therefore, the plaintiffs had failed to discharge their burden of proof that the master's negligence had been the cause of their losses in connection with the *Danica White*'s hijacking.

On appeal, the District Court's ruling was confirmed by the Eastern High Court, which adopted, however, a more lenient stance vis-à-vis the ship's master.

Specifically, the High Court could see no basis for holding the *Danica White*'s master negligent for having omitted to sail at more than 205 nm from the coast of Somalia. In this respect, the Court referred particularly to the MARLO Advisory Bulletin of 20 May 2007, which warned inter alia of the threat of piracy and reiterated a MARLO recommendation of 2005 to sail at least at 200 nm from the coast. That recommendation was circulated by the Danish Shipowners' Association on 22 May 2007. The Court added that the ship's relatively small size, slow speed and low freeboard did not call for a different assessment of the case pursuant to the MARLO recommendation referred to.

Nonetheless, the Court was of the view that, in the circumstances, the master should have established an intensified lookout during the ship's passage in the waters subject to the threat of piracy alongside the coast of Somalia, in accordance with Executive Order No 1758 of 22 December 2006 relating to watchkeeping on board ships.[48]

As for the SSAS, it was recalled that the system had been tested both before and after the piratical seizure and had been found to be working well on both occasions. The Court opined that, notwithstanding that the master's explanations might have demonstrated his lack of knowledge of the working of the alarm and that he might therefore have activated it incorrectly, the

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[48] Bekendtgoerelse nr 1758 af 22.12.2006 om vagthold i skibe.

proceedings did not clarify why the Naval Operative Command and the ship's owner or operator had not received the alarm signal. However, the High Court agreed with the District Court that the master should have ensured that the whole crew had knowledge of the exact location of the second alarm button in the storage space, and should have instructed the crew on its activation when needed.

Moving to the crucial and dispositive part of the High Court's judgment, it was held that, notwithstanding the insufficiency of the lookout and the instructions to the crew with respect to the alarm system, there was no legal justification for imposing liability on Partsrederiet Invest VI for compensation in connection with the piracy attack. Even with a better lookout, the crew could only have detected the pirates arriving in three high-speed boats just before the attack, and it was understood, on the basis of the evidence, that not even a timely alert through SSAS would have prevented the hijacking. In this respect, it was noteworthy that the US warship which had been on the scene the day after the hijacking, and had followed the *Danica White* for approximately six hours up to the 10-nm limit of Somali waters, had been forced to refrain from rescuing the ship out of fear for the safety of the crew.

In further explanation of its ruling, the High Court pointed out in relation to the burden of proof that the failure to observe the above precautions did not mean that Partsrederiet Invest VI had to prove that the piracy attack could not have been prevented. Accordingly, since the plaintiffs-appellants had not shown that the insufficient lookout and instructions concerning the alarm system were the reason why the *Danica White* had been captured, there was no valid claim against Partsrederiet Invest VI.

In summary, while both courts accepted that the master's conduct had been faulty, they were not convinced that such conduct was causally related to the piratical capture. It would seem, in light of the principles expounded above, that the factual premises found by the courts in this case would not fit in with the applicable test of self-induced frustration. The capture of the *Danica White* by Somali pirates seems to constitute a typical example of the extraneous supervening event which would be necessary to discharge a contract, provided other conditions for frustration to operate are also met. The attack was viewed by both the District Court and the High Court as insurmountable given the ship's

speed and freeboard, and importantly because of the use of the crew as human shields by the pirates. It was the firm belief of both courts that nothing could have been done by the crew in this particular case to avoid or thwart the capture and subsequent hijacking. This contrasts with the old case of *Morse*,[49] where it was clear to the court that, had enough guards been provided on board the ship, the robbery would have been prevented.

The facts of Somali piracy have evolved since the *Danica White* case. Today, there is a significantly increased presence of navies in the Indian Ocean as well as a host of other anti-piracy measures which are available to transiting vessels. While the risk of attack has therefore decreased, the expectations for navigators' preparedness, awareness and caution have correlatively increased. At the time of the *Danica White*'s hijacking, the state of the maritime industry's preparedness was still in its infancy, so the non-attribution of responsibility could possibly be understood.[50] Today, it is likely that courts will require from transiting ships more than what the Danish courts thought that the master of the *Danica White* should have done, and more than what was considered to be sufficient from the shipping company's side in that case. It is suggested therefore that, alongside the lowering of the responsibility threshold in relation to piratical captures, self-induced frustration would be easier to establish in appropriate circumstances.[51]

Thus concludes this part of the analysis devoted to imputability of the piratical capture to the shipowner or carrier.

4.1.2. Safe Port

For its part, the cargo interest has its own responsibility.[52] This takes prominence in the ability of the charterer to give orders as to the ship's

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[49] (n 30).

[50] For a critical view of the *Danica White* judgments, see Graham Caldwell, 'Piracy and the Zero Incentive Approach' (2012) 12(3) STL 1, 2–3.

[51] See the discussion of what constitutes self-induced frustration at 150–158.

[52] See, for an analogy, *Ullises Shipping Corp v Fal Shipping Co Ltd (The Greek Fighter)* [2006] EWHC 1729 (Comm), [2006] Lloyd's Rep Plus 99 [360], finding—though in obiter—self-induced frustration by the charterer following confiscation of the vessel as a result of trading with illegal cargo.

destinations and voyages. The shipowner must send the ship to ports for loading and unloading in accordance with the terms of the charter agreement. The latter may nominate such ports or it may give the charterer the right to nominate or order them at some point after the conclusion of the contract.[53] There is, in this respect, often inscribed in the contract a safe port undertaking.[54] As stated by Roskill LJ in *Unitramp v Garnac Grain Co Inc (The Hermine)*:[55]

> [T]he main purpose of [the] warranty of safety in a charter-party is to ensure that a charterer, who has an otherwise unfettered right to nominate a port or berth, does not do so in such a way as to imperil the shipowner's ship, or, it may be, the lives of the shipowners' servants, by putting that ship or those lives in danger and thereby impose upon the shipowner the risk of financial loss. This limitation upon the charterer's right of nomination is of crucial importance to the shipowner because, by the terms of the contract of affreightment, whether it be a charter-party for time or for voyage, the shipowner has contracted with the charterer that his servants, that is, the master, officers and crew, will comply with the charterer's orders, so long as those orders are within the terms of the charter-party.

The subject of safe ports has been addressed in a number of cases, and analogies can be drawn with the questions posed in this thesis.

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[53] See: *Halsbury's Laws* (5th edn, 2008) vol 7, paras 208–09, 243, 403, 517, 520; Bernard Eder and others, *Scrutton on Charterparties and Bills of Lading* (22nd edn, Sweet & Maxwell 2011) para 80.

[54] BALTIME 1939, cl 2; GENTIME, cl 2(a); NYPE 46, lns 27, 31; NYPE93, cll 5, 12; INTERTANKTIME 80, cl 5; SHELLTIME4 cl 4(c); BPTIME3, cl 17.1; SHELLTIME4, cl 4(c); STB TIME, cl 6(b); GENCON, cl 1; TANKERVOY 87, cll 2–3; BPVOY4, cll 3.1, .3, 5.1; SHELLVOY 6, cll 3(1), 4; ASBATANKVOY, cll 1, 9; EXXONMOBIL VOY2000, pt I(C), cl 16(a), (b). In the absence of an express term, the safe ports undertaking may be sometimes implied: *Mediterranean Salvage and Towage Ltd v Seamar Trading and Commerce Inc (The Reborn)* [2010] 1 All ER (Comm) 1 [21]–[37], [50]–[62], reviewing previous cases and authorities.

[55] [1979] 1 Lloyd's Rep 212 (CA) 214.

It should, however, be constantly borne in mind, as already expounded at the outset of this chapter,[56] that the test for self-induced frustration would not necessarily coextend with the treatment of the fine points of legal liability in those cases for the unsafety of the port. In other words, if the charterer is cleared from liability for breach of the safe port undertaking, this does not mean that, where frustration would have otherwise operated, the conclusion that it was self-induced should be automatically ruled out.

It is true that, in *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes (The Evia (No 2))*,[57] unsafety of the port was associated automatically with self-induced frustration.[58] It is observed, however, that there was no discussion of the self-induced frustration question in the House of Lords. The lower courts, following the umpire's holdings, did, however, make the automatic association.[59] Sir Sebag Shaw thus said:

> [T]he charterers were not, in my view, in breach of cl. 2 in its true meaning and operation. If there was a frustration, it was not 'self-induced'.[60]

It is submitted that the automatic association between the notions of breach and self-induced frustration may now have to be reconsidered in light of the Court of Appeal's judgment in *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)*[61] and its test of responsibility, as explained in this chapter's opening. The point does not seem to have been directly questioned at either stage of *The Evia (No 2)* proceedings. Ackner LJ, while dissenting on the absolute meaning of safe

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[56] 150–158.

[57] [1983] 1 AC 736 (HL).

[58] ibid 752 (Lord Roskill).

[59] *Kodros Shipping Corp v Empresa Cubana de Fletes (The Evia (No 2))* [1981] 2 Lloyd's Rep 613 (Com Ct) 616 (Goff J), revd on other grounds [1982] 1 Lloyd's Rep 334 (CA) 342 (Sir Sebag Shaw), 346–49 (Ackner LJ), affd on other grounds [1983] 1 AC 736 (HL).

[60] *Kodros Shipping Corp v Empresa Cubana de Fletes (The Evia (No 2))* [1982] 1 Lloyd's Rep 334 (CA) 342.

[61] [1990] 1 Lloyd's Rep 1 (CA).

ports, made the same association in reverse, saying that breach led automatically to self-induced frustration.[62] His Lordship did cite, however, the early authorities on self-induced frustration and wondered whether, because the breach of the safe port undertaking had been, to his mind, unintentional, the effect should be, presumably in line with *FC Shepherd & Co Ltd v Jerrom*,[63] to disentitle the charterer from relying on self-induced frustration as a defence to a claim for damages for breach of contract, but nevertheless discharge the contract for other purposes.[64]

If the question arose for discussion today, it is submitted that, in line with the analysis appearing earlier on in this chapter, the correct view should be that breach by the charterer of the safe port undertaking in an unintentional manner is not necessarily a bar to the contract's frustration.

As to what 'safe port' embraces and its possible implications to the topic at hand, it is necessary to consider the basic authorities. The classic definition of 'safe port' was given by Sellers LJ in *Leeds Shipping Co Ltd v Societe Francaise Bunge*:[65]

> 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, it would probably meet all circumstances as a broad statement of the law.

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[62] (n 60) 346ff.

[63] [1987] QB 301 (CA) 319 (Lawton LJ), 325 (Mustill LJ). See Charles GCH Baker and Paul David, 'The Politically Unsafe Port' [1986] LMCLQ 112, 114, 124, for some very cursory remarks on the treatment of self-induced frustration in *The Evia (No 2)*. See also Paul Todd, 'Safe Port Clauses in Time Charterparties' (1990) 8 OGLTR 35, 36, 38.

[64] *Kodros Shipping Corp v Empresa Cubana de Fletes (The Evia (No 2))* [1982] 1 Lloyd's Rep 334 (CA) 350–51.

[65] [1958] 2 Lloyd's Rep 127 (CA) 131.

To ‘abnormal’ in the above definition, Lord Roskill added the word ‘unexpected’ in *The Evia (No 2).*[66] Furthermore, ‘[i]n each case [port safety] is a question of fact and a question of degree.’[67]

Importantly, political safety is included in the concept, just like natural or nautical safety:[68] ‘the action either of nature or man may render a port unsafe’.[69] Thus, a port may be unsafe as a result of a risk of destruction or trapping by warfare.[70] Safety from the risk of piracy should thus be deemed included too.

However, an undertaking that the place to which the ship is ordered must be one ‘“where the vessel can always lie safely afloat”’ was held to be ‘concerned exclusively with the marine characteristics of the … place, and requires that the vessel shall at all times be water-borne and shall be able to remain there without risk of loss or damage from wind, weather or other craft which are being properly navigated’; the clause was held immaterial for purposes of the port’s security, which was affected by war at the time.[71]

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[66] (n 57) 760. See the critique of this House of Lords decision in Baker & David (n 63); cf Todd (n 63).

[67] *Palace Shipping Co Ltd v Gans Steamship Line* [1916] 1 KB 138 (KBD) 141 (Sankey J).

[68] ibid; *The Evia (No 2)* (n 57) 765 (Lord Roskill); *Pearl Carriers Inc v Japan Line Ltd (The Chemical Venture)* [1993] 1 Lloyds Rep 508 (Com Ct) 517 (Gatehouse J).

[69] *Palace Shipping* (n 67) 141 (Sankey J).

[70] eg ibid; *The Evia (No 2)* (n 57) 756 (Lord Roskill); *Uni-Ocean Lines Pte Ltd v C-Trade SA (The Lucille)* [1984] 1 Lloyd’s Rep 244 (CA) 247 (Kerr LJ); *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga)* [1990] 1 Lloyd’s Rep 391 (HL) 397 (Lord Goff); *The Chemical Venture* (n 68) 518 (Gatehouse J). As to delaying features of the port or its approaches, see *The Hermine* (n 55) 217–19 (Roskill LJ), 220 (Geoffrey Lane), 220 (Sir David Cairns); but the judgment does not decide to what extent the delaying features—in that case, the silting-up propensities of the Mississippi River—should be part of the characteristics of the port or its approaches so as to involve a breach of the safe port undertaking, and is thus of limited application to the subject of piracy, which cannot be said to target each and every vessel, even in peak times. It is submitted that the governing test in that regard should be the above statement of Sellers LJ, as complemented by Lord Roskill in *The Evia (No 2)*: text to nn 65–66.

[71] *Vardinoyannis v The Egyptian General Petroleum Corp (The Evaggelos TH)* [1971] 2 Lloyd’s Rep 200 (Com Ct) 204.

In *Palace Shipping Co Ltd v Gans Steamship Line*,[72] the time charter contained a stipulation that upon any breach of the undertaking of safe ports the owners were at liberty to withdraw the vessel from the charterers' service. Germany had just declared the waters around the British Isles as a military area and every hostile merchant vessel subject to destruction. The charterers ordered the ship, which was at Havre, to Newcastle-upon-Tyne. It was held that, because the risk of attack, though in hindsight, was very low, namely, for the month in question, ie, February 1915, three vessels were lost or damaged from enemy causes comparatively with 752 overall arrivals and sailings, the port was safe.[73] It was also held that the voyage to and from the port had to be safe; in this regard, Sankey J said in a passage which could very well find application to the situation of navigation off Somalia in the wider Indian Ocean:

> There does not appear to be any sound distinction between a port to which a vessel is proceeding with a liability to be sunk or confiscated by enemy vessels lying thereat or in the approaches thereto and a port to which a vessel is proceeding with a liability to be sunk or confiscated by enemy vessels at a greater distance. Modern inventions like wireless telegraphy and submarines have quite altered old rules and old conceptions, and I am of opinion that dangers likely to be incurred on a voyage to a port may be taken into account in considering the question whether such port is safe to go to or not. In each case it is a question of fact and a question of degree.[74]

In the instant case, proceeding to and from the port was considered safe.

In the leading case of *The Evia (No 2)*,[75] the dispute centred on frustration of a time charter as a result of the trapping of the vessel in Shatt-al-Arab due to the outbreak of hostilities between Iraq and Iran. There was a debate whether the charterer had, by ordering the ship to be sent to Basrah, breached its safe port

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[72] [1916] 1 KB 138 (Com Ct).

[73] ibid 141–42 (Sankey J).

[74] ibid 141.

[75] (n 57).

warranty under cl 2, which provided that '[t]he Vessel to be employed … only between good and safe ports or places …'. It was only following the ship's entry into the port that it became unsafe. It was held by the House of Lords that the charterer had not breached the safe port undertaking since the port had to be prospectively safe at the time that the order to proceed to the port had been given and the port of Basra had been prospectively safe when the vessel had been ordered there, but it had become trapped by supervening and unexpected hostilities.[76] Lord Roskill spoke thus:

> The charterer's contractual promise must, I think, relate to the characteristics of the port or place in question and in my view means that when the order is given that port or place is prospectively safe for the ship to get to, stay at, so far as necessary, and in due course, leave. But if those characteristics are such as to make that port or place prospectively safe in this way, I cannot think that if, in spite of them, some unexpected and abnormal event thereafter suddenly occurs which creates conditions of unsafety where conditions of safety had previously existed and as a result the ship is delayed, damaged or destroyed, that contractual promise extends to making the charterer liable for any resulting loss or damage, physical or financial.[77]

Lord Roskill added that the above statement operates in principle for both time and voyage charters.[78]

Furthermore, it is clear from Lord Roskill's opinion that, in line with the ratio in *Palace Shipping*,[79] it is not only the port or place to be traded at which needs to be safe, but that approaches to that port or place must also be safe.

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[76] ibid 763.

[77] ibid 757. According to Lord Roskill, there may be a further obligation on the part of the charterer to cancel an earlier nomination if the port conditions have in the meantime deteriorated; the charterer may also be under a duty to provide a fresh nomination: ibid 763–65. For a strong critique of Lord Roskill's approach based on 'prospective' safety, see Baker & David (n 63). See also Todd (n 63).

[78] *The Evia (No 2)* (n 57) 763. cf Baker & David (n 63) 118, 121.

[79] text to n 74.

In *K/S Penta Shipping A/S v Ethiopian Shipping Lines Corp (The Saga Cob)*,[80] the question on appeal was whether the port of Massawa, located at the time in the Eritrean region of Ethiopia, was safe when the charterer ordered the vessel to proceed there from Assab, also part of the same region, on 26 August 1988. At the time, Ethiopian government forces were fighting with Eritrean liberation movements. The ship was attacked, while at anchorage in the roads of Massawa on 7 September 1988, by Eritrean guerrillas in motor boats using heavy machine guns and rocket grenades. The Court of Appeal, in concluding that the port was safe, reversed the finding of the lower court judge, who had said:

> In the result I find that by Aug. 26, 1988 it was a characteristic of the port of Massawa that vessels proceeding to or from the port or lying at anchor outside the port could be subject to seaborne attack by the EPLF. This characteristic may not have involved a high degree of risk but equally the risk cannot properly be regarded as negligible. In these circumstances I have no hesitation in finding that by reason of this characteristic the port of Massawa was prospectively unsafe and that it was this sort of unsafety that resulted in the damage to the vessel.[81]

In his analysis, Parker LJ rejected the sparsity of attacks as constitutive of unsafety. He said in this regard: 'There are in essence only a very few incidents from which it could, even possibly, be concluded that on Aug. 26, the port was prospectively unsafe.'[82] Apart from hostilities inland, there was an attack on 23 April 1988 by an EPLF guerrilla force launched from a boat on an oil refinery at Assab. A convoy system was thereafter instituted by the Ethiopian naval authorities for some vessels proceeding to or from Assab, particularly those carrying overtly military cargoes. On 31 May 1988, the vessel *Omo Wonz* was attacked by a guerrilla force using three speed boats while at sea some 65

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[80] [1992] 2 Lloyd's Rep 545 (CA).

[81] *K/S Penta Shipping A/S v Ethiopian Shipping Lines Corp (The Saga Cob)* [1991] 2 Lloyd's Rep 398 (Com Ct) 408 (Diamond J) (EPLF stands for Eritrean People's Liberation Front).

[82] *K/S Penta Shipping A/S v Ethiopian Shipping Lines Corp (The Saga Cob)* [1992] 2 Lloyd's Rep 545 (CA) 549.

nautical miles south of Massawa. The vessel was part of a convoy, which included the *Saga Cob*. Thereafter, the naval escort service was only sporadically offered to vessels. The master of the *Saga Cob* himself did not request it. Parker LJ summed up the situation, stating:

> Between the attack on May 31, and Aug. 26, no further relevant incident occurred. There was no incident between Aug. 26 and the attack on Sept. 7. Furthermore there was no further attack of any kind on shipping thereafter until January/February, 1990 and it was not until January, 1990 that war risk underwriters required additional premiums in respect of vessels operating off the coast of Ethiopia.[83]

Parker LJ's conclusions were as follows:

> What then does all this amount to? There was known guerilla activity on land and in April there had been a guerilla attack on the refinery as Assab in which a boat had been used. Taken alone this is in our judgment of no significance. Next the naval authorities had both prior to and after the *Omo Wonz* incident considered there was sufficient risk to take precautions. This cannot in our view be significant. What would be significant is the adequacy or inadequacy of the precautions. If a port authority appreciates that there is some navigational hazard in the port which creates a risk and takes precautions which will result in a properly handled vessel being able to avoid the risk, the taking of precautions cannot be relied on to show that the port was unsafe. Furthermore, if a hazard is, for example, properly lighted but for some extraneous reason e.g. because the power supply was suddenly cut by guerilla action the lights fail, it cannot in our judgment be said that the port was prospectively unsafe or that the unlighted hazard was a normal characteristic of the port.
>
> What then of the precautions? Those in force prior to the *Omo Wonz* attack did not prevent it. From the evidence it appears

[83] ibid 550.

that this was because the escort frigate and *Omo Wonz* had got too far apart. This however cannot in our judgment demonstrate the inadequacy of the precautions. Just as charterers are entitled to assume that vessels entering a port will be properly handled so also it appears to us they must be entitled to assume that a safety system will be properly carried out.

Be that as it may, there is no evidence whatever that the system introduced after the *Omo Wonz* had any defects until the attack on *Saga Cob* itself when at anchor four or five miles outside the port. This cannot in our judgment be regarded as other than an abnormal and unexpected event unless it is to be said that as from the *Omo Wonz* incident, any vessel proceeding to or from Assab or Massawa was proceeding to an unsafe port. This in our judgment is untenable. The situation in this case was drastically different from that in *The Lucille* when the Shatt-al-Arab had become the centre of hostilities. All that can be said in this case is that since a guerilla attack may take place anywhere at any time and by any means, that the guerillas had two boats and that they had made one seaborne attack 65 miles away, it was foreseeable that there could be a seaborne attack either en route from Assab to Massawa or in the anchorage at Massawa. If this were enough it would seem to follow that, if there were a seaborne guerilla or terrorist attack in two small boats in the coastal waters of a country in which there had been sporadic guerilla or terrorist activity on land and which had many ports, it would become a normal characteristic of every port in that country that such an attack in the port or whilst proceeding to it or departing from it was sufficiently likely to render the port unsafe. This we cannot accept. *Omo Wonz* was itself clearly an isolated abnormal incident and, until the order to proceed to Massawa almost three months later, nothing further had occurred to suggest that the risk of further attack on the Assab/Massawa voyage or in the anchorage at Massawa had not been contained. In such circumstances, to say that such an attack or even the risk of such an attack was a normal characteristic of the port, is in our view impossible. …

> We further consider that what occurred subsequently is relevant on the question whether Massawa was a safe port.
>
> We accordingly hold that on the Aug. 26, 1988 Massawa was a safe port.[84]

It would seem, on the whole, arguable, whether there would, under current conditions, be a breach of the safe port undertaking in sending a ship to a destination bordering the north-western waters of the Indian Ocean—apart of course from Somali harbours and ports—because of the risk of piracy there. It could be well said that the rate of attacks remains on the whole relatively low, harking back to the figures commented upon in *Palace Shipping*.[85] The diffusion and disparateness of the attacks are also reminiscent of the view of the Court of Appeal in *The Saga Cob* holding that Massawa and its approaches could not be deemed as unsafe.[86] For instance, as stated by Parker LJ in that case and substituting Somali pirates in the Indian Ocean for the facts there, it could be said that 'a [pirate] attack may take place anywhere at any time and by any means'.[87] It is noteworthy that Somali pirates, like the Eritrean guerrillas in the attack on the *Saga Cob*, also use typically motorboats together with heavy machine guns and rocket grenades. Additionally, as in *The Saga Cob*, naval escort is in place in certain parts of the Gulf of Aden and is provided on request to merchant ships in transit. Furthermore, it could be asserted that the panoply of recommended anti-piracy measures constitutes a mass of 'good navigation and seamanship' skills which, if properly implemented by the ship, may be effective in avoiding the risk of capture, in line with Sellers LJ's definition.[88]

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[84] ibid 550–51, citing *The Lucille* (n 70).

[85] text to n 73.

[86] text to n 84.

[87] *The Saga Cob* (n 82) 550.

[88] text to n 65.

On the other hand, the conditions of the vessel itself—as in the case of the *Danica White*[89]—may make it more vulnerable to capture than others; it is recalled that the safety of the port is vessel-specific.[90] Furthermore, it may be said that several of the anti-piracy measures recommended by the industry are inadequate to fully abate the risk of attacks and captures, which is one of the criteria of port unsafety established in *The Saga Cob*.[91]

As already explained,[92] breach of the safe port undertaking may be relied on by the shipowner against the charterer to counter the contract's discharge following a piratical capture, if it occurs as a result of that breach. The point was, however, made that self-induced frustration should not follow automatically from breach and that, conversely, absence of breach should not be taken as dismissing per se the self-induced frustration argument. It could, nonetheless, be said that a case of non-breach makes the argument of self-induced frustration all the more difficult and vice versa.

This difficulty in reaching a definite conclusion on the effect of breach of the safe port undertaking on the prospects of self-induced frustration may best be illustrated in the context of safe port clauses couched in terms of a duty of care. The following clause is an example taken from *The Saga Cob*:

> 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 except for loss or damage caused by their failure to exercise due diligence as aforesaid …

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[89] Case No B-2403-09, 6 October 2010, OE(L), affg Case No BS 38A-189/2008, 26 August 2009, B(R); Case No BS 38A-3025/2008, 26 August 2009, B(R).

[90] text to n 65.

[91] *The Saga Cob* (n 82) 550.

[92] 172-173.

Under the above clause, in order to establish the charterer's liability, the port has first to be proven to be unsafe and, second, the charterer must have failed to exercise due care. In that case, Parker LJ, speaking for the Court, said:

> It was submitted that if … Massawa was … unsafe it must follow that since charterers knew all the facts they had failed to exercise due diligence. We do not accept that this necessarily follows. In our view if a charterer knows all the facts and orders the vessel to a port which is regarded generally by owners of vessels to be safe, he might well be protected.
>
> Suppose a charterer was uncertain of the position and enquired of a number of owners who used the port whether it was in their view safe and received replies from all of them 'We regard it as safe; of course it is possible that a guerilla attack could happen but we pay no attention to it'. Could it be said the charterer had failed to exercise due diligence? We doubt it. Due diligence is the same as reasonable care and in such circumstances we would find it hard to accept that the charterer had not exercised reasonable care. There is, moreover, a difference between physical danger, such as a sand bank or reef, and political danger where what has to be assessed is necessarily subjective. In such case, if a charterer comes to a reasonable conclusion as to the safety of the port, why should he be said to have failed to exercise due diligence? We make no decision on the point and make the above observations in case it should be said in the future that we have by silence accepted the Deputy Judge's conclusions that on the facts known the charterers should have concluded that there was small but nevertheless appreciable risk that a vessel might be subject to seaborne attack and had therefore failed to exercise due diligence. There is in our judgment at least a strong argument that the test should be expressed thus—'if a reasonably careful charterer *would* on the facts known have concluded that the port was prospectively unsafe'.
>
> In the present case even after the attack on Sept. 7, Massawa continued to be regularly used by shipping for another

> year and a half without incident. This is in our view relevant on the question of exercise of due diligence.[93]

The above passage from Parker LJ's opinion is obiter, since the only question the Court of Appeal finally determined is the safety of the port of Massawa.

In *The Chemical Venture*,[94] Gatehouse J declared himself not bound by the same passage, but nevertheless followed it, saying:

> From this and the example given, it seems to me that the Court is saying in terms that, on the given facts the case is one of res ipsa loquitur unless the charterer adduces evidence to justify his order.
>
> Secondly, it will not apparently be sufficient for the charterer to adduce some opinions that the port is safe if there is evidence that other users, qualified to give an opinion, hold a contrary view.
>
> Thirdly, events subsequent to the casualty in question are relevant, also, to the question of due diligence.[95]

Gatehouse J went on to conclude that the facts surrounding the unsafety of the approach to Mina Al Ahmadi in Kuwait in 1984, at the time of the Iran/Iraq war, spoke for themselves and that the charterers were in breach of their duty of care.[96]

To an extent, a finding of breach under a safe port clause worded in due diligence terms should reinforce the charterer's responsibility for the unsafety of the port, making the case of self-induced frustration all the more strong. In *The Saga Cob*,[97] Parker LJ referred to the safe port clause in *The Evia (No 2)*, comparing it with the due diligence clause before him. He said: 'On its face this imposes a higher obligation upon charterers than the present clause which

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[93] *The Saga Cob* (n 82) 551.

[94] (n 68).

[95] ibid (citation omitted).

[96] ibid 520.

[97] (n 82).

requires them only to use due diligence to ensure that the vessel is so employed.'[98]

To what extent, however, can the shipowner be deemed to have assumed the risks of unsafety of the port, including its approach and departure voyages? The answer may, it is suggested, bear directly on the success prospects of the argument of self-induced frustration against the charterer. Pursuant to the governing criterion established in *The Super Servant Two*,[99] self-induced frustration is primarily measured by the responsibility of each of the parties to the contract for the frustrating event. If the charterer can assert that the shipowner accepted the risks of the port, it may be entitled to disclaim responsibility for piratical incidents which may have arisen on the voyage, and enhance its defence on the possible self-induced frustration argument set up against it.

The question arose in *Leeds Shipping*.[100] The voyage charter provided as follows: 'That the said vessel shall proceed to one or two safe ports in Morocco or so near thereto as she may safely get and lie always afloat, and there load a full and complete cargo. …' The charterers nominated for loading the Moroccan port of Mogador. The vessel proceeded there and got aground. The lower court granted the shipowners damages for their loss on account of the unsafety of the port. The appeal raised inter alia the following three questions:

1. Was Mogador a safe port for the *Eastern City* when she arrived there?

2. If it was at that time an unsafe port, were the shipowners debarred from attributing the loss they had suffered to the breach of contract by reason of the doctrine of *volenti non fit injuria*?

3. Was the stranding of the *Eastern City* due to the unsafety of the port or to negligence of its master and crew?

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[98] ibid 547.

[99] (n 61).

[100] (n 65).

After enunciating the above quoted definition of 'safe port',[101] Sellers LJ, speaking for the Court, went on to say:

> The vital factors of unsafety in the present case, however, were the lack of reliable holding capacity for an anchor in the anchorage area, the lack of shelter and the liability to the sudden onset of high wind which could not be predicted and which might quickly cause an anchor to drag, and, in the circumstances, the restricted area of the anchorage and its close proximity to the rocks and shallows with a high wind or gale from the south or somewhere to the west of south.[102]

The answer to the first question was that the port was unsafe.

As to the second question, the Court opined that a shipowner may not hold the charterer liable where it decides to send its ship to an unsafe port knowing the full dangers, and that in this case the master knew that he would have to take his vessel out of the anchorage each evening, but he did not fully appreciate the difficulty of the operation that involved in bad weather, so the shipowners could not be said to have brought upon themselves the injury voluntarily, and the answer to the second question was no.[103]

Turning to the third question, it was held that the stranding was due to the unsafety of the port, since the master and the crew's actions from the time the vessel arrived until it stranded in the port were seamanlike.[104]

The point was revisited in *The Kanchenjunga*.[105] The voyage charter defined the loading ports as one/two safe ports in the Arabian Gulf. On 20 November 1980, just a month after the outbreak of the Iran-Iraq war, the charterers ordered the vessel to Kharg Island, which was already at risk of Iraqi air raids. The owners

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[101] text to n 65.

[102] *Leeds Shipping* (n 65) 136.

[103] ibid 136–37.

[104] ibid 137–44.

[105] (n 70).

instructed the master to proceed as per the order. The master protested to his owners about the unsafety of the port, but the owners did not raise any issue with the charterers. Upon arrival at Kharg Island, the ship served notice of readiness and got in line awaiting berthing. Before this could be done, however, an air raid on Kharg Island forced the vessel to weigh anchor and proceed away. Ensuing communications between the owners and charterers culminated in mutual accusations of repudiatory breach. It was held per curiam that the owners' conduct amounted to a waiver of their right to reject the charterers' order to load on grounds of the unsafety of the port. This waiver was, however, without prejudice to the owners' right to claim damages for breach of the contract.[106]

Similarly, in *The Chemical Venture*,[107] the time charter included a safe port undertaking. The ship was ordered to load in the Kuwaiti port of Mina Al Ahmadi just before Iran started shooting at merchant ships using Arab states in the Gulf. The crew initially refused to proceed to Kuwait, but following pressure from shipowners, they finally accepted to comply with the order in return for a war bonus which the charterers agreed to pay. The ship was shot at by an Iranian jet and became a total loss. It was held that the port was unsafe[108] and that the shipowners had implicitly waived their right to claim damages for breach of the charterers' safe port undertaking.[109] Gatehouse J said:

> It is self-evident that the owners did not say expressly that they would waive their right to claim damages should the vessel be attacked en route for the Kuwait terminal. But construing the telex exchanges objectively (as I think the Court is required to do) I conclude that a reasonable person in the charterers' position would understand the owners' various messages as conveying the following: — (i) That although cl. 36 conferred a right on either the

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[106] ibid 393 (Lord Brandon), 400 (Lord Goff). See Paul Todd, 'Ransom, Piracy and Time Charterparties' (2012) 18 JIML 193, 199.

[107] (n 68).

[108] ibid 520.

[109] ibid 521–22. See Todd (n 106) 199.

> master or owners or both to refuse to go to a port which they considered unsafe, only the master and his crew were so refusing: the owners were not; (ii) that the owners were taking the charterers' side in trying to persuade the crew to accept charterers' order. The charterers looked to the owners in the first place to persuade the crew to accept the order and, later, to try and renegotiate the claim downwards to minimize the bonus payment; (iii) that the owners eventually asked the charterers to deal directly with the master 'as this is a matter between you and the shipcrew.' (iv) The owners gave no hint that they themselves regarded a Kuwait terminal as unsafe and they did not reserve their rights.
>
> So it seems to me that by a combination of what they said, and more particularly what they did not say taken in context, owners made an unequivocal representation. They either waived their right to contend that charterers were in breach or they were estopped from so contending.[110]

It may be difficult for the shipowner to argue, given these cases, that, by accepting to send the ship through the north-western Indian Ocean waters, on the assumption that there would be a breach to the safe port undertaking, it may have overlooked the conditions and implications of piracy there—in the absence of an 'unexpected and abnormal' development in the situation, to use the terms of Lord Roskill.[111] After all, the facts surrounding piracy in that part of the world are of public notoriety and are widely disseminated within the shipping industry.[112] A fortiori, the shipowner's prospects in maintaining a case of self-induced frustration would appear to be weak.[113]

Given that the test of self-induced frustration is in the nature of responsibility rather than actionable breach, it would follow that the fact that the shipowner,

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[110] *The Chemical Venture* (n 68) 521.

[111] text to n 77.

[112] See for a similar conclusion Todd (106) 199–201. See also Georgios Missailidis, 'Piracy Clause: A Contractual Solution?' (2009) 9(3) STL 1, 2.

[113] See the discussion of what constitutes self-induced frustration at 150–158.

having accepted the risks of the unsafe port, may be protected by the contract, typically by way of a war risks clause,[114] and now a piracy-specific clause,[115] in subsequently refusing to navigate in the area in question should, it is further submitted, be of no relevance.

The shipowner's refusal to send the ship to a piracy-stricken area may, nonetheless, provide the grounds for another type of self-induced frustration that could be tabled against it, rather than the charterer, as will be seen next.

4.1.3. Shipowner or Carrier's Refusal to Proceed to Piracy-Stricken Waters

Aside from the instances of responsibility for a ship capture by pirates, there is one further aspect to self-induced frustration which could come to bear. This would involve deliberate choice by the shipowner or carrier not to perform the contract of carriage in order to avoid a capture. This would perhaps be one of the most striking examples of risk prevention. For purposes of this chapter, the question would be whether, assuming other conditions for frustration are met, the shipowner or carrier could successfully resist a self-induced frustration argument based on its refusal to perform the contract.

Such a factual situation was alluded to in *Pacific Basin IHX Ltd v Bulkhandling Handymax AS (The Triton Lark)*.[116] The judgment concerned the manner in which the master should exercise the discretion granted under the CONWARTIME 1993 clause in refusing the time charterer's order to sail through the Gulf of Aden, at the time (November 2008) subject to a heightened piracy threat.

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[114] As was held, for instance, in: *The Evia (No 2)* (n 57) 767 (Lord Roskill); *The Kanchenjunga* (n 70) 401. In the former case, the clause in question was held to have the additional crucial effect of protecting the charterer from liability for breach of the safe port clause: *The Evia (No 2)* (n 57) 766–67 (Lord Roskill). See a strong criticism of this ruling in Baker & David (n 63) 117–20, 127–28; cf Todd (n 63) 37–38.

[115] BIMCO Piracy Clause for Time Charter Parties 2009, sub-cl (a); INTERTANKO Piracy Clause—Time Charterparties, sub-cll (1), (2)(c); BIMCO Piracy Clause for Consecutive Voyage Charter Parties and COAs, sub-cl (a); BIMCO Piracy Clause for Single Voyage Charter Parties, sub-cl (a); INTERTANKO Piracy Clause—Voyage Charterparties, sub-cl (1)(c).

[116] [2011] EWHC 2862 (Comm), [2012] 1 All ER (Comm) 639.

In that case, a sub-sub time charter was entered into between Pacific and Bulkhandling, disponent owner of the *Triton Lark.* Bulkhandling acted in fact as a conduit between Pacific and the owner, who retained the decision-making in relation to the vessel's safety. The conflict arose out of an order given by Pacific for the ship to transport cargo from Hamburg to China. Pacific insisted on the ship going through the Suez Canal and on to the Gulf of Aden. The ship's crew together with the owner refused, invoking the risk of pirate attacks in the Gulf of Aden and the discretion granted to the master under the above clause, part of the time charter concluded between Pacific and Bulkhandling. Pacific categorically refused the route alternative round the Cape of Good Hope. Ultimately, despite Pacific's opposition, the ship circumnavigated the African continent.

The Court gave Bulkhandling satisfaction in its dispute with Pacific. In delivering the Court's judgment, Teare J said that, had Bulkhandling refused to perform Pacific's voyage instructions either via Suez or through the alternative Cape route, it would have been in breach of its duty to prosecute the voyage to China with due despatch.[117]

In *Taokas Navigation SA v Komrowski Bulk Shipping KG (GmbH & Co)*,[118] a similar sub-sub charter was in dispute. The lead shipowner refused to perform instructions given by the sub-sub charterer, Solym, for the first voyage. Those instructions were for the ship to proceed to load a cargo at Hoping in Taiwan and carry it to Mombasa in Kenya. The instructions were refused on the basis of the CONWARTIME 2004 clause, given the risk of piracy in the waters off Kenya.

It is true that in both *The Triton Lark* and *Taokas Navigation*, the Court reasoned in terms of refusal to perform the time charterer's voyage instructions, which is not the same as refusal to perform the contract altogether. However, it could be envisaged that, at some point, refusal to perform voyage instructions may turn into a refusal to perform the whole contract. To take a simpler example, refusal to perform the voyage could be imagined in the context of a

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[117] ibid [60]. See Paul Todd, 'Ransom, Piracy and Time Charterparties' (2012) 18 JIML 193, 194–97, discussing all these points as well as deviation in such circumstances.

[118] [2012] EWHC 1888 (Comm).

voyage charter or bill of lading contract. Thus, it may be useful for the sake of argument to twist some of the facts in *Taokas Navigation*. It could first be assumed that the contract was a charter for the specified voyage to Mombasa, instead of a time charter. It could also be supposed, for instance,—just as it was attempted to be proven for another reason[119]—that a radical change in the conditions of piracy in the approach waters to Mombasa had intervened between the time of the conclusion of the charter and the time falling for its performance under the contract. On that basis, the owner could argue that the contract was discharged. Solym could then counter that the owner's deliberate choice in refusing to perform the contract amounted to self-induced frustration. It is noteworthy that, in *Taokas Navigation*, following the owner's refusal to perform the voyage, Solym had to charter another vessel for the shipment. The question posed above, ie, whether refusal to perform the contract by the owner may be deemed as a self-induced frustration, could therefore have genuine implications.

There are two leading cases on self-induced frustration stemming from deliberate choice, in addition to *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)*.[120]

In *Mertens v Home Freeholds Co*,[121] delays by a house builder in executing the construction project were aimed at ruining the chances of obtaining the necessary permission for the continuation of the works from the Minister of Munitions, exercising oversight powers under the Defence of the Realm (Consolidation) Regulations 1914. The builder's plans were fulfilled when permission was refused and construction of the house had to be halted. It took some three years before the owner was able to obtain the government's permission to carry on the project himself, as the contract allowed him to do. By that time, the cost of labour and materials had gone considerably higher. The Court of Appeal's decision concerned the measure of damages. By adjudging these at the level of the costs prevailing at the time of the cessation of the impossibility of performance, the Court of Appeal made it clear that the contract

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[119] ibid [9].

[120] [1990] 1 Lloyd's Rep 1 (CA).

[121] [1921] 2 KB 526 (CA).

continued to operate and that any frustration was self-induced by the builder. Lord Sterndale MR said:

> But the building owner must set to work to build his house at a reasonable time and in a reasonable manner, and is not entitled to delay for several years and then, if prices have gone up, charge the defaulting builder with the increased price. I quite agree with what Mr. Matthews says, that a man is not entitled to gamble on the chance of getting the work done cheaper, and then when it proves to be dearer turn round and charge the defaulter with the enhanced price. That is not what the plaintiff did here. He did his best to begin at once to complete the building of the house. He was not able to complete it, because he was not allowed to do so under the Defence of the Realm Regulations. That being so, the question is whether the defaulting builder is entitled to say that the building owner cannot charge him with an increase of price caused by a delay resulting from the interference of a third person, a superior authority, which has prevented the building owner from doing the work. … The Divisional Court have decided the matter in this way. They have held that both the building owner and the builder would have been entitled to say that this contract was frustrated by the action of the Government in preventing the work going on for so long. … But, so far as I know, it has never been held that a man is entitled to take advantage of circumstances as a frustration of the contract if he has brought those circumstances about himself.[122]

In *Maritime National Fish Ltd v Ocean Trawlers Ltd*,[123] a charter was taken by the appellants on a fishing vessel, the *St Cuthbert*, which could only operate as a trawler with an otter trawl. When time came to apply for the requisite fishing licences in respect of their fleet, the appellants nominated three of their vessels, excluding the *St Cuthbert*. The appellants had decided to drop the *St Cuthbert* from their application upon being informed by the Minister of Fisheries that only

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[122] ibid 535–36. See also ibid 539–40 (Warrington LJ).

[123] [1935] AC 524 (PC).

three licences per company would be granted. Thereupon, the appellants claimed that they were no longer bound by the contract and, to an action claiming the charter hire, they pleaded that the contract had been frustrated as a result of impossibility of performance. It was held by the Privy Council:

> [T]he case could be properly decided on the simple conclusion that it was the act and election of the appellants which prevented the *St. Cuthbert* from being licensed for fishing with an otter trawl. It is clear that the appellants were free to select any three of the five trawlers they were operating and could, had they willed, have selected the *St. Cuthbert* as one, in which event a licence would have been granted to her. … What matters is that they could have got a licence for the *St. Cuthbert* if they had so minded. If the case be figured as one in which the *St. Cuthbert* was removed from the category of privileged trawlers, it was by the appellants' hand that she was so removed, because it was their hand that guided the hand of the Minister in placing the licences where he did and thereby excluding the *St. Cuthbert*. The essence of 'frustration' is that it should not be due to the act or election of the party.[124]

To these cases should be added *The Super Servant Two*,[125] where, on the premise that the decision to allocate either of two tugs specified in the transportation contract for a rig rested entirely with the defendant carriers, the latter could not avoid the consequence that their allocation of one of the tugs, which foundered on an earlier mission, was a self-induced frustration of the contract.[126]

It is hard to see, in an attempt to dispose of the question raised at the outset of this part how any of the above cases could be held up against the owner who refuses to perform the voyage out of fear for the safety of the ship from pirates' attacks. In all those cases, the demise of the contract could be said to have been actively or, to say the least, consciously sought by the party seeking frustration

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[124] ibid 529–30 (Lord Wright).

[125] (n 120).

[126] ibid 9 (Bingham LJ), 13–14 (Dillon LJ).

and it was the latter party's actions that led to the contract becoming impossible to perform. In contrast, the owner in the scenario under consideration would have done nothing to induce that predicament, which would have resulted entirely from the heightening of the piracy threat. It is accordingly concluded that it would be difficult to countenance a self-induced frustration argument based on refusal to perform the contract in the face of a high incidence of the risk of piracy attacks, at least in the example canvassed above.

* * *

So far, this section has shown how self-induced frustration could provide, in appropriate circumstances, an answer to the contract's discharge, for instance, in situations where it may be proved that the one of the parties to the contract of carriage negligently or deliberately exposed the ship to the risk of piratical attack. A discussion of a prominent foreign case, *The Danica White*,[127] has shown, however, that establishing liability in maritime contracts for the pirates' depredations is not a straightforward task. It has also been argued that the threshold for responsibility and, as a corollary, the success of self-induced frustration on the same facts, is likely, nonetheless, to have been eased in the wake of the foray of measures established by the international maritime community in combating the piracy scourge in waters off Somalia.

It will be of interest, to complete the discussion of self-induced frustration, to consider implications of fault in the phase following capture.

4.2. Fault in Dealing with Capture Aftermath

In chapter 3 of this thesis, it was shown how the detention of the ship by pirates could provide one of the grounds for treating the contract of carriage as frustrated, particularly if the detention goes on for a long time and it is difficult to ascertain if and when it may end. Just like the piratical attack and capture could, as it was shown in the previous section of this chapter, give rise to instances of responsibility and liability as between the parties to the contract of carriage, a matter that may be translated, in the battle for the frustration of the

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[127] Case No B-2403-09, 6 October 2010, OE(L), affg Case No BS 38A-189/2008, 26 August 2009, B(R); Case No BS 38A-3025/2008, 26 August 2009, B(R).

contract, in terms of allegations of self-induced frustration, the same may be said in relation to the aftermath of the capture. The post-capture phase may indeed prove a fertile ground for criticising the shipowner or carrier's conduct in negotiating with the pirates or otherwise dealing with the crisis in order to secure recovery of the ship and cargo. Such criticism may in turn found a chance to launch a self-induced frustration argument in answer to allegations that the ship's detention has resulted in the contract's discharge.

The *Danica White* case,[128] already referred to,[129] provides an example of allegations of fault addressed by a party to a private maritime contract—employment—against the other party in the post piratical capture phase. In that case, civil proceedings were brought before Danish courts on behalf of four crewmembers (excluding the master) against the ship owners and managers, following their abduction along with the ship off the coast of Somalia by pirates from that country. The action was for damages in compensation of mental hardship and other monetary losses sustained by the plaintiffs as a result of their kidnapping at the hands of the pirates.

It will be important to refer extensively to the facts and submissions in the case as they offer a valuable insight into the post-capture events, which often occur behind the scenes, and give shape to the discussion at hand. It is also noteworthy that the reasoning of the court's decision at both the first instance and appeal levels is considerably brief.

It emerged from the trial of the case that the ship owners had become aware of the hijacking one day after its occurrence. The information first arrived from a US warship that had met up with the captured ship, but had been unsuccessful in foiling the pirates' plan. The owners had not sought cover against hijackings. Two days later, the ship owners were contacted by telephone by the hijackers. An initial ransom demand of $1.5 million was made. Soon after, a temporary office was established at the Danish police headquarters and the owners received instructions from the police.

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[128] Case No B-2403-09, 6 October 2010, OE(L), affg Case No BS 38A-189/2008, 26 August 2009, B(R); Case No BS 38A-3025/2008, 26 August 2009, B(R).

[129] 161-170.

A week later, a professional negotiating team was set up with the help of a British firm specialised in crisis management, Control Risks. The constitution of the team was due in part to the perceived 'high professionalism' of the pirates. The team was comprised of representatives of the owners and insurers. It was assisted by the police and the Ministry of Foreign Affairs, which did not participate, however, in the negotiations.

Prior to this, 3F Sømændene, the Danish seamen's union representing three of the kidnapped crewmembers, had pressed the ship owners to speed up the settlement of the pirates' demands, fearing for the well-being and safety of the crew. At one point, 3F had even offered to pay—with help from the International Transport Workers' Federation—up to DKK8 million, the equivalent of roughly $1.3 million, of the ransom money. When the negotiating team was constituted at the lead of the specialised firm, Control Risks, 3F was generally rebuffed from partaking in the negotiations with the pirates. The court was told by a witness on behalf of the ship owners that it was felt that the inclusion of 3F in the negotiating team would add nothing and that 3F's offer would turn out to be disastrous for negotiations if it were leaked to the press. 3F admitted in court that it had no task force group set up for dealing with pirates' demands.

In any case, the negotiating group offered to hold a weekly meeting with 3F, and gave an assurance that the interests of the captives and their relatives were looked after by the whole of the group. This meant that the crew's safety and speedy release had the highest priority.

The negotiating team asked 3F to refrain from making comments in the press. For a time, 3F complied. Later on, however, 3F insisted that, unless it was included in the negotiating team, it would deal directly with the pirates in order to secure its own members, ie, not the entire crew. The owners purportedly found this approach unacceptable.

In court, the owners' witness emphasised their expressed desire to settle the hijacking as soon as possible. Hijacking was a psychological and financial burden. Daily expenses amounted to DKK40,000. Because of the monsoon, the ship's engines had to be kept running at all times. The witness further stated that negotiations with the pirates had never been protracted for financial reasons. The negotiating team followed the advice it was given by Control Risks. This included trying to find the pirates' pain threshold. Witnesses for the owners

agreed that 3F's payment offer, which had been reported by the press, had not been helpful to the release, though it was admitted that in the end it had not prolonged the detention period.

As for the general conduct of the negotiations, testimony from the owners' witnesses recorded in the court's judgment offers enlightening insights. What the media said was sometimes a distortion of the truth and could have had a significant bearing on the negotiations. For instance, the owners criticised a report in the local press stating that the owners feared for the hostages. The owners stated in court that this was not a truthful representation of their position. They admitted, however, having stated that they lacked the requested ransom money. This statement was intended to send a message to Somalia that the pirates had not seized a 'golden bird'.

With the formation of the negotiating team at the lead of the specialised firm, the necessary funds were secured with help from insurance companies. Control Risks advised against immediate payment, however, as this would have suggested to other groups that the company had enough money. If the negotiating team took the wrong action at the wrong time, it could have disastrous consequences. During the negotiations, a week could elapse between the making of an offer by the negotiating team and the pirates' response.

There were other sources of interference. The negotiating team was at one point approached by a local militia offering to take over the ship and release the crew, but the offer was turned down as it was deemed too dangerous.

At any one point, the team was nervous, because it did not know whom to pay, just as it was unsure whether the crew and the ship would be released upon payment. It was important, therefore, that there was no leaking of information that could pass to the hijackers.

In support of their action, the plaintiffs submitted that the defendants' shortcomings had led not only to the success of the hijacking of the ship by the pirates—a submission which, as explained earlier, was rejected by both the District and High Court[130]—but, in addition, had resulted in the hijacking taking

[130] 166ff.

an excessively long duration (83 days). The plaintiffs argued that it was particularly aggravating for the defendants' case that their approach following the capture had been mainly driven by their desire to defend their own economic interests rather than caring for the crew's welfare, the whole in breach of their employment relationship, which placed on the defendants a special duty to protect and free the crewmembers from the traumatic and stressful predicament they had been put into. It was further argued that the master, and through him, the defendants, carried a special responsibility, because he had given the latter the green light to drag the negotiations with the pirates in order to minimise the amount they would have to pay. One of the plaintiffs' further grievances against the defendants was the latter's refusal to deal positively with the offer made by 3F to pay the ransom money in the early stages of the hijacking in order to free up the captives. Finally, the plaintiffs contended that the defendants had failed to meet requests by the plaintiffs for clarification of the facts in connection with the negotiations, including any offers and acceptances made in the process with the hijackers.

The defendants denied any wrongdoing and, at all events, any causal connection between their handling of the case, assuming they had faulted, and the capture aftermath. Following the hijacking, a negotiating team consisting of a representative of the shipping company and a representative of the company's insurers had been set up and worked in close cooperation with the Ministry of Foreign Affairs and the police. The negotiating team was complemented by foreign experts with special expertise in kidnapping situations. There was no evidence that the negotiations had not been carried out professionally and competently; on the contrary, they had ended—fortunately—with the release of the crew physically unharmed. Neither was there any evidence that 3F could have contributed in a way to a quicker release. On the contrary, there was a significant risk that an unprofessional intervention could worsen the situation. As such, a quick offer to pay what the pirates demanded would hardly lead, it was argued, to an immediate release, but would more probably prod the pirates to heighten their demands, rendering the release even more difficult.

The defendants also rebutted in their defence their liability to compensate the crewmembers for their mental hardship resulting from their kidnapping and subsequent detention. According to the Danish Liability for Damages Act:

> A person who is responsible for the unlawful violation of another party's freedom, peace, honour or person shall pay the aggrieved party compensation for injury to feelings or reputation.[131]

The defendants submitted that the person responsible for the unlawful violation under the above provision could only be the pirates.

The District Court of Copenhagen rejected the claim. Reference is made to the account of the judgment rendered earlier.[132] It is recalled that the Court found no negligence in the master's behaviour or in that of the ship managers, whether prior to, during or following the hijacking of the ship, and through to its release, which was demonstrated to have caused the losses complained of.

On appeal, the District Court's judgment was affirmed by the Eastern High Court. As regards the negotiations following capture of the vessel, the High Court was of the view that no negligence had been established by the plaintiffs-appellants. Accordingly, the claim fell through as against both of the defendants-respondents.

It is submitted that the facts and the conclusions of both courts in the *Danica White* case would make it hard to support an argument of self-induced frustration against the owners with respect to the protraction of the hijacking period. The judgments in both courts make it clear that, aside from reservations on some preventive measures that could have been taken by the ship prior to the incident, the capture was an insurmountable event which neither the *Danica White* crew nor naval warships patrolling in the Indian Ocean waters could have overcome. Accordingly, the ship owners and managers had no other recourse but to negotiate with the pirates. To that end, they employed a specialised firm and followed the police instructions. They were, therefore, professionally advised at each stage of the difficult and stressful process as to the actions they

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[131] Lovbekendtgoerelse nr 885 af 20.9.2005 om erstatningsansvarsloven [Liability for Damages Act No 885 of 20 September 2005] *som aendret ved lov nr 1545 af 20.12.2006 og lov nr 523 af 06.06.2007*, § 26 (translation by Patientforsikringen at <http://www.patientforsikringen.dk/en/Love-og-Regler/Lov-om-klage-og-erstatningsadgang/Behandlingsskader.aspx> (23 February 2010)).

[132] 166–168.

should adopt. There is little that a court could find in the way of self-induced frustration, if the argument had to be raised in appropriate circumstances.

Nor would the scarce authority on this particular issue appear to help the cargo interest in this respect.

In *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage and Towage) Ltd (The Sea Angel)*,[133] the Court of Appeal seems to have taken a more restrictive approach than the Commercial Court towards an argument of self-induced frustration in circumstances that may be comparable to the instance of piratical capture. A vessel was chartered in for 20 days by Tsavliris on salvage work off Karachi to a stricken oil tanker. As Tsavliris was preparing to redeliver the vessel after completion of the work, the Karachi port authority (KPT) refused on 9 September 2003 to issue the 'no demand certificate', which was a pre-requisite to port clearance. The vessel was therefore effectively detained, officially for non-payment of port dues, but this was a false pretext. In reality, KPT wanted security for pollution and wreck removal costs and expenses. Tsavliris tried initially with other interested parties to reach an amicable solution to the situation with KPT. Ultimately, the vessel disponent owners instituted court proceedings in Pakistan. A judge in Karachi held that KPT's refusal to issue the 'no demand certificate' was unjustified, and directed it to issue the required certificate. The vessel was released on 26 December 2003 and was redelivered over three months late. The main question was whether the charterparty was frustrated. The owner argued that any frustration of the time charter stemmed from Tsavliris' approach in preferring negotiation over to court relief in the early stages of the crisis generated by the vessel detainment.

Gross J in the lower court felt that there could have been scope in the self-induced argument had frustration been accepted as having occurred on the later dates suggested by Tsavliris, that is, 13–18 October 2003, but definitely not on the earlier alternative, namely, on or about 19 September 2003.[134] This is

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[133] [2007] EWCA Civ 547, [2007] 2 All ER (Comm) 634, affg [2006] EWHC 1713 (Comm), [2007] 1 All ER (Comm) 407.

[134] *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage and Towage) Ltd (The Sea Angel)* [2006] EWHC 1713 (Comm), [2007] 1 All ER (Comm) 407 [117].

understandable: Tsavliris could not have been blamed for having given negotiation a chance in the first days following the detention; however, the same could not necessarily be said well over a month into the detention.

The judge went to on to state three reasons why he felt that Tsavliris could be seen as having self-induced the assumed frustration of the charter:

> First, I have earlier concluded that the availability of effective and timely relief could be anticipated from the Pakistani court and that the Karachi proceedings played a material role in securing the release of the vessel. If that be right, then there was scope for argument that proceedings commenced sooner could have been expected to bring forward the likely date of the vessel's release.
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> Secondly, I take as my guide the observations of Bingham LJ, set out above in *The Super Servant Two*; what is needed is a pragmatic judgment; the essential question is whether the frustrating event relied upon—
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> > 'is truly an outside event or extraneous change of situation or whether it is an event which the party seeking to rely on it had the means and opportunity to prevent but nevertheless caused or permitted to come about.'
>
> Thirdly, I accept that Tsavliris did not have the means and opportunity of preventing the KPT from detaining the vessel in the first place. But, thereafter, Tsavliris' choice as to whether and, if so, when to have recourse to the Pakistani court to seek the release of the vessel could not be ignored in considering the vessel's continued detention and the extent of the prospective delay. Here too, I would not have been minded to view the matter as one of criticism or breach of duty; it is, instead, a question of choices and consequences. The doctrine of frustration exists to do justice. If and in so far as Tsavliris relied on delay resulting from the vessel's continued detention as constituting the frustrating event, there would be force in the argument that it had the means and

> opportunity of doing something about that detention but it had not or not yet done so.[135]

It is observed that the second reason above is more a reference to the applicable principle of self-induced frustration rather than a real reason. For their part, the first and third reasons are the application of that principle in the eyes of the judge.

Ultimately, Gross J concluded that there was no frustration.[136]

The Court of Appeal did not revisit the issue fully, as in affirming the ultimate decision of Gross J, Rix LJ felt it unnecessary to deal with the self-induced frustration argument. In a terse remark, Rix LJ appeared to find little merit in the argument. He said:

> It is … unnecessary to deal with the respondents' detailed notice. I would merely say that, if this appeal had prima facie succeeded thus far, I would be surprised if the additional matters raised in the respondents' notice would have made the difference. We did not ask Mr Hamblen to reply on issues of self-induced frustration or safe port warranty of due diligence.[137]

In other words, Rix LJ doubted that self-induced frustration could have been set up against Tsavliris, as suggested by Gross J. In effect, Rix LJ appeared thus to be clearing Tsavliris from any blame for preferring to postpone court proceedings rather than emphasise a commercial solution with KPT, at least for purposes of self-induced frustration.

It would appear that this greater flexibility shown by Rix LJ on the question makes sense. In the difficult predicament Tsavliris found itself in, it surely was not easy to gauge the propriety and impact that a drastic court action could have on the amicable settlement solution it favoured. A number of parties were also

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[135] ibid [118]–[120], quoting *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep 1 (CA) 10.

[136] *The Sea Angel* (n 134) [106].

[137] *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage and Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, [2007] 2 All ER (Comm) 634 [134].

involved in the struggle to get the vessel released and Tsavliris must have borne in mind the comparative chances of success of court proceedings brought by other parties.[138]

It is noteworthy that the views of both Courts in *The Sea Angel* are obiter and should not therefore be taken as providing a definitely binding precedent. Once again, as with other frustration matters, the question is heavily fact-dependent. This is recognised explicitly by Gross J himself.[139]

The considerations attributed to Rix LJ's greater leniency on the subject of self-induced frustration are perhaps even more pertinent to the question of Somali piracy where, in comparison with *The Sea Angel*, lives are at stake, making the situation much more stressful to the shipowner. The alternative recourse to litigation against the pirates or the Somali government is furthermore theoretic at best. The prospects of commando operations against the captors are equally often speculative with the risks to the lives of hostages often prohibiting any attempt. All these factors must have been present in the minds of Danish judges in the case of the *Danica White* in their refusal to put blame for the conduct of the hijacking crisis on the shipowner and operator.

* * *

This chapter has attempted to discuss how self-induced frustration could be played out in the context of the piratical scenario underlying this work. The few judicial pronouncements on maritime contracts stumbling in the wake of the Somali pirates' threat seem to point away from the attribution of responsibility for pirates' attacks or detention of the ship to shipowners or operators. This, it has been argued, would limit correlatively the ability of the charterer or cargo owner to invoke self-induced frustration against the shipowner or carrier. On the other hand, whereas the safe port undertaking could be breached by the charterer in situations where the vessel is ordered to waters under threat of attack, it has been contended that the shipowner's acceptance of the risks would

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[138] See, in particular, ibid [36]–[40], [122]–[126].

[139] *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage and Towage) Ltd (The Sea Angel)* [2006] EWHC 1713 (Comm), [2007] 1 All ER (Comm) 407 [117].

often take away the necessary ammunition for self-induced frustration based on that breach. The result would appear to be a tie between the parties to a charter agreement and, in the majority of cases overall, frustration not easily being proven to be self-induced.

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The discussion of the law of frustration having thus been completed with this chapter in its application to the Somali piracy capture model, an incidental matter—insurance—may now be turned to in the following chapter.

5. Captured Ship as Total Loss in Marine Insurance

The question dealt with in this chapter is whether a captured ship constitutes a total loss. This question is directly relevant to the discussion raised in chapter 2 as to the applicability of so-called ship loss clauses contained in standard time charter agreements.[1] It is recalled that those clauses typically provide—whether expressly or impliedly—that the charter is to terminate upon the ship's loss. Ship loss clauses were thus seen as a strong contender for supplanting the operation of the doctrine of frustration. The reader should revert to the discussion in that chapter on this matter.

It was, however, indicated there that ship loss clauses fundamentally resort to the concept of total loss in marine insurance law. In other words, the chartered ship is considered as lost—thus triggering the termination of the contract—if it qualifies either as an actual total loss or a constructive total loss pursuant to marine insurance principles.[2] Hence the need for this chapter.

As stated in the relevant discussion under chapter 2, the determination of total loss may be quite straightforward in two out of the three pertinent scenarios of the Somali piracy ship capture model.[3] Thus, when, upon its release from hijackers, the ship is unable to resume the contractual service under the charter (outcome A2), it was suggested that at most a constructive total lost could be found, though unlikely since Somali pirates usually do not inflict damage on the vessel. The point was also made that, upon the ship's recovery from captors turning out as definitely doomed (outcome B), the conditions for an actual total loss appeared satisfied. A question mark was raised, however, in relation to the phase following upon the capture and during which the ultimate fate of the ship remains unascertainable (the interim phase); it was intimated that the labelling

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[1] sec 2.1.5.

[2] See further 79–82.

[3] For a further clarification of these various scenarios, see 20–21.

of the ship then as a total loss required a thorough discussion, hence this chapter.

It will appear from an analysis of the recent case of *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)*[4] that the merits of a total loss, whether actual or constructive, are often difficult to establish in this interim phase of captivity of the vessel. As such, the position of the law in relation to total loss could provide one of the crucial keys to answer the basic question raised by this thesis as to when a contract of carriage should be deemed frustrated.

Accordingly, this chapter will examine the merits of a claim for total loss of the ship in the interim phase, firstly in terms of actual total loss (5.1) and, secondly, as a constructive total loss (5.2).[5]

5.1. Actual Total Loss

The main question dealt with in this part is whether a piratically captured ship could be considered an actual total loss. As already explained, the analysis is restricted to the phase prior to the ascertainment of the ship's ultimate fate (interim phase).

The concept of actual total loss is defined in s 57(1) of the Marine Insurance Act 1906 as follows:

> Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof, there is an actual total loss.[6]

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[4] [2011] EWCA Civ 24, [2011] 3 All ER 554, affg [2010] EWHC 280 (Comm), [2010] 2 All ER 593.

[5] On the relationship between total loss, particularly constructive total loss, and frustration of a charterparty agreement, see *Bunge SA v Kyla Shipping Co Ltd (The Kyla)* [2012] EWHC 3522 (Comm), [2013] 1 Lloyd's Rep 565 [43]ff. This chapter is restricted to studying the determination of total loss in a capture scenario. The thesis does not delve into the (direct) effect of such a determination on the contract's frustration other than through the implement of a standard ship loss clause, as discussed in sec 2.1.5.

According to *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)*,[7] the answer to the above question is necessarily 'fact-sensitive'.[8] In that case, Rix LJ said:

> There is no rule of law that capture or seizure is an ATL. The subject-matter is not amenable to a rule of law at all: it is all ultimately a question of fact.[9]

The particular instance concerned Somali pirates and it was found by the court, after studying their modus operandi and bearing in mind the information available at the relevant time, that no case of actual total loss, in the sense of irretrievable deprivation of the subject-matter insured, as provided for under the above-quoted section, had been made against the insurer. In Rix LJ's words:

> In the light of all this material, I conclude that … piratical seizure in the circumstances of this case, where there was not only a chance, but a strong likelihood, that payment of a ransom of a comparatively small sum, relative to the value of the vessel and her cargo, would secure recovery of both, was not an actual total loss. It was not an irretrievable deprivation of property.[10]

Rix LJ went on to give, however, an example of a situation where piratical capture could lead to an actual total loss automatically:

> Piratical seizure, in the absence of a policy of ransom, may amount to an ATL, where the pirates escape with their prize for their own

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[6] The case of missing ships which, by virtue of s 58 of the Marine Insurance Act, are presumed as actual total losses after a reasonable time where no news is received of them, is excluded from this discussion. See text to n 47 in ch 1.

[7] [2010] EWHC 280 (Comm), [2010] 2 All ER 593, affd [2011] EWCA Civ 24, [2011] 3 All ER 554. See Jason Chuah, 'Impact of Piracy on International Commercial Arrangements' (2010) 61 SLR 42

[8] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2010] EWHC 280 (Comm), [2010] 2 All ER 593 [39], [49].

[9] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ 24, [2011] 3 All ER 554 [56].

[10] ibid.

> use and there is no prospect whatever of finding or recovering vessel or cargo: but where a chance of recapture remains even such a seizure will not give rise to an immediate ATL. …[11]

It may be instructive to place the ratio of *The Bunga Melati Dua* in the context of some of the earlier authorities on actual total loss.

It is submitted that, with respect to the question of actual total loss, Rix LJ's judgment is correct and in line with precedent. Actual total loss has been accepted to occur upon capture in situations of clear non-recoverability of the subject matter insured. In other, less clear-cut capture cases, the issue gave rise at best to a constructive total loss. Rix LJ reviewed several authorities to substantiate his decision.[12] Perhaps the submission of one of the lawyers in the leading case of *Polurrian Steamship Co Ltd v Young*,[13] which was implicitly approved by Rix LJ,[14] formulates the essence of Rix LJ's conclusion: 'There is no case which lays down that capture is of itself an actual total loss. … The question is whether there is a constructive total loss. …'[15]

In addition to the authorities discussed by Rix LJ, reference can also be made to an old capture case, *Kulen Kemp v Vigne*,[16] where Lord Mansfield CJ declared in obiter in relation to a wagering policy on goods, by virtue of which the event insured against was the non-arrival of the ship at the destination port:

> A necessary consequence of this being a wagering policy is, that the insured cannot abandon: but, even supposing it to be a policy on interest, it is enough to say, that in this case the parties never did abandon. In effect, there was only a temporary capture, and though by construction a temporary capture is such a loss, as that

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[11] ibid.

[12] ibid [19]–[55].

[13] [1915] 1 KB 922 (CA).

[14] *The Bunga Melati Dua* (n 9) [45].

[15] *Polurrian* (n 13) 925 (citations omitted).

[16] (1786) 1 Term Rep 304, 99 ER 1109.

> an assured upon interest is warranted in abandoning at the time, if he please, yet we must consider what the truth of the case was between these parties: now this was a wagering policy, and in such case there can be no abandonment.[17]

It is submitted that, by conditioning a claim for total loss following temporary capture on abandonment, Lord Mansfield CJ, who credited himself, not without merit, for having laid down 'the whole law between insurers and insured as to the consequences of capture and recapture …',[18] may be seen as having ruled out the occurrence of what would be today referred to as an actual total loss in a temporary capture context, preferring to view it as a possible case of constructive total loss. There is a reason for this: the outcome of a temporary capture is unknown, so the chance of recovering the subject matter insured should be pursued, which means that, in the event that the insured wishes to claim on the policy, it must abandon its interest to the insurer. As for an actual total loss, there is by definition nothing worth pursuing.

The same point was expressed by Buller J, who sat with Lord Mansfield CJ in *Kulen Kemp v Vigne*:[19]

> This then is a wagering policy, and that circumstance alone is decisive upon the ground of merits. The cases of wagering policies, and policies upon interest, have been confounded in the argument. In the latter case, if the voyage be lost, it is not necessary for the assured to proceed on with the hulk of the ship; for they are at liberty to abandon; but then there must be an abandonment in point of fact. Therefore, in this case, it is enough to say, that even if the parties could have abandoned, they have not done it.

In any case, the Court of Appeal's decision in *The Bunga Melati Dua* seems to have settled a point of law which was not clear earlier. The point was whether the capture of a vessel should be constitutive per se of an automatic actual total

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[17] *Kulen Kemp v Vigne* (1786) 1 Term Rep 304, 308; 99 ER 1109, 1111.

[18] *Milles v Fletcher* (1779) 1 Doug KB 231, 232; 99 ER 151, 152.

[19] (1786) 1 Term Rep 304, 310; 99 ER 1109, 1112.

loss. This confusion was described by Porter J in *Marstrand Fishing Co Ltd v Beer*[20] in a passage which was quoted by Rix LJ in *The Bunga Melati Dua*:[21]

> First of all, with regard to an actual total loss, it is said … that capture is an actual total loss, though that loss may be redeemed by a recapture. I doubt if this ever was the true question. I think it was always a question of fact whether capture was an actual total loss or merely a possible constructive total loss. Capture followed by condemnation no doubt was actual total loss, but that was because the vessel had in fact been condemned; the war was supposed to last indefinitely, and, therefore, there was no chance within any reasonable time of the ship being restored. The capture alone I do not think was ever necessarily an actual total loss. It is possible that if the vessel had been carrying contraband and that condemnation was certain, she might be held to be an actual total loss, but I do not think it is certain, even then, that that result would follow. Normally, I think capture is a constructive total loss, and the confusion which has arisen, with regard to whether it is an actual or a constructive total loss, arose merely because, in the earlier cases, the distinction between those two classes of loss was not kept clear.

Having demonstrated that the ratio in *The Bunga Melati Dua* is in line with precedent on the question of actual total loss, it remains to be seen whether the decision fits into the Somali piracy situation. In *The Bunga Melati Dua*, as negotiations between the shipowner and the pirates unfolded, there appeared to be a very good chance for the release of the ship and cargo in return for the payment of a relatively small amount of ransom.[22] So it was proper for the court to rule out a case of actual total loss.

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[20] [1937] 1 All ER 158 (KBD).

[21] (n 9) [47].

[22] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ 24, [2011] 3 All ER 554 [10]–[11], affg [2010] EWHC 280 (Comm), [2010] 2 All ER 593 [23], [27].

Nonetheless, in the Somali piracy model, there could always be a basis for automatic actual total loss, as envisaged by Rix LJ.[23] That scenario is where pirates capture a vessel and operate it as their mother ship. For several years, these mother ships have tended to be beyond the means of navies to recapture them. The ruthlessness of pirates, their use of heavy weaponry and ruse consisting of placing hostages on board as human shields have tended to dissuade recaptors. Pirates themselves were not interested in releasing these mother ships in return for ransom money. As long as such vessels remain impregnable, there is probably a case for considering them as actual total losses following capture, as intimated by Rix LJ.

Since *The Bunga Melati Dua*, however, the Somali piracy situation has evolved in an appreciable manner. Beginning in 2011, a number of recaptures have successfully been undertaken by naval forces against vessels hijacked by Somali pirates, including vessels that were being operated as pirate mother ships.[24] As a result, it appears that the scenario described by Rix LJ for automatic actual total loss might not adequately reflect the Somali situation. Although several vessels continue to be held at ransom on the Somali coastline, to the accustomed system of ransom negotiations has been added the improved ratio of forceful seizure by naval forces, with the result that the chances of recovery of captured vessels and cargoes have arguably been enhanced. This is likely to make the case for automatic actual total loss following capture even weaker. As indicated earlier, 'it is all ultimately a question of fact'.[25]

The Bunga Melati Dua illustrates, in the scenario of a piratical capture, the proximity of actual total loss and constructive total loss allegations. The latter's merits are examined in the next part.

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[23] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ 24, [2011] 3 All ER 554 [56].

[24] See, eg: 'Nato Seizes "Pirate Mother Ship" off Somalia' (BBC News, 13 February 2011) <http://www.bbc.co.uk/news/world-africa-12442330>; 'Danish Navy Frees Hostages from Pirates off Somalia' (Reuters, 12 April 2012) <http://www.reuters.com/article/2012/04/12/piracy-africa-denmark-idUSL6E8FC4SG20120412>.

[25] *The Bunga Melati Dua* (n 23) [56].

5.2. Constructive Total Loss

If, as shown above, actual total loss is difficult to establish following capture by pirates, but prior to the determination of the ultimate fate of the ship, a potentially easier course could be to invoke the concept of constructive total loss. It would appear, nonetheless, on the basis of the same case considered in the previous section,[26] that the chances of success of such a claim are perhaps just as weak.

The definition of constructive total loss found in s 60 of the Marine Insurance Act 1906 reads:

> (1) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.
>
> (2) In particular, there is a constructive total loss—
>
> (i) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship or goods, as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or
>
> (ii) In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired,
>
> In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general

[26] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ 24, [2011] 3 All ER 554, affg [2010] EWHC 280 (Comm), [2010] 2 All ER 593.

> average contributions to which the ship would be liable if repaired. …

On authority,[27] it may be stated that sub-s (2) is not a mere application of the rules contained in sub-s (1), but stands on its own. In other words, the enumerated categories of constructive total loss throughout section 60 are independent of each other.

As such, each subsection within section 60 lays down a number of routes for establishing a constructive total loss. Thus, in contrast to the more generic category of constructive total loss provided for under the first limb of sub-s (1), the second limb measures loss in economic terms solely. For its part, sub-s (2)(i) deals with deprivation of possession of the subject matter insured, and is split into two paragraphs: under para (a), constructive total loss is a function of the chances of recoverability of the subject matter, while loss under para (b) hinges on the recovery's cost versus value ratio.[28] Finally, sub-s (2)(ii) relates to cases of damage to the ship.

It is observed that the piratical capture scenario considered in this thesis would be likely to come primarily under the first, rather than the second limb of section 60(1). Indeed, the ransom negotiated with Somali pirates is usually a small fraction of the value of the hijacked vessel; the shipowner has thus, at least in economic terms, every reason and interest in trying to meet the pirates' demands, as stated in *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)*.[29] Accordingly, in this thesis, only the first limb of section 60(1) is analysed in its application to the piratical scenario under examination (5.2.1). For the same reasons, the study will not extend to section 60(2)(i)(b), but will be limited to para (a) (5.2.2). The case of damage to the ship is also excluded from

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[27] *Robertson v Petros M Nomikos Ltd* [1939] AC 371 (HL) 382 (Lord Wright), 392 (Lord Porter); *Rickards v Forestal Land, Timber and Railways Co Ltd* [1942] AC 50 (HL) 84 (Lord Wright); *Court Line Ltd v R (The Lavington Court)* [1945] 2 All ER 357 (CA) 368 (Stable J).

[28] On this distinction between the two limbs of each of sub-ss (1) and (2)(i), see *The Lavington Court* (n 27) 362–63 (Scott LJ).

[29] [2011] EWCA Civ 24, [2011] 3 All ER 554 [54], affg [2010] EWHC 280 (Comm), [2010] 2 All ER 593 [19], [30], [45].

the analysis, as the hijacking model under consideration does not involve damaging the ship.

5.2.1. MIA 1906, s 60(1), First Limb

To start with, looking at the provision contained in the first limb of s 60(1) of the Marine Insurance Act 1906, it is recalled that it is there laid down that constructive total loss arises 'where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable …'.

The application of the above provision was considered by the first instance court in *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)*.[30] Somali pirates seized the *Bunga Melati Dua* and held it for ransom. A month into the detention, while ransom negotiations were still underway between the shipowner and pirates, the cargo owners claimed a constructive total loss against their insurers on the basis of the above quoted provision. The claim was rejected: Steel J found in this regard that the ship and cargo had, on the one hand, never been abandoned[31] and that, on the other hand, 'there was no reasonable basis for regarding an ATL as unavoidable'.[32]

As to abandonment, Steel J said the following:

> [T]he vessel and its cargo were not abandoned in the relevant sense. What is required is not a notice of abandonment in the sense of ss 61, 62 and 63 of the 1906 Act but the abandonment of any hope of recovery.[33]

As far as the second point is concerned, Steel J stated that his reasons for dismissing the actual total loss argument applied equally for denying the existence of a constructive total loss under the first limb of s 60(1) of the Marine

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[30] [2010] EWHC 280 (Comm), [2010] 2 All ER 593, affd [2011] EWCA Civ 24, [2011] 3 All ER 554. See Jason Chuah, 'Impact of Piracy on International Commercial Arrangements' (2010) 61 SLR 42.

[31] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2010] EWHC 280 (Comm), [2010] 2 All ER 593 [55]–[56].

[32] ibid [57].

[33] ibid [55].

Insurance Act.[34] Those reasons included fundamentally the high probability that, at the conclusion of a round of negotiations with pirates, a 'reasonable' amount of ransom would be agreed upon and paid in return for the release of the ship and its cargo.[35]

At the Court of Appeal, the constructive total loss claim was dropped by the cargo owners although Rix LJ did indicate in obiter that a constructive total loss was out of the question.[36] Rix LJ's opinion should be seen, however, as agreeing with Steel J's decision only on the result, since the reasoning adopted by Rix LJ proceeded on section 60(2)(i)(a), not section 60(1).[37] The Court of Appeal judgment adds therefore little to Steel J's treatment of the point.

In order to analyse Steel J's conclusions, it is important to consider the authorities.

In the leading case *Court Line Ltd v R (The Lavington Court)*,[38] the ship, under requisition and operation by the Crown pursuant to a time charter agreement, was torpedoed on 18 July 1942 by the Germans while in convoy. The ship suffered significant damage and was shortly afterwards abandoned by the master and crew, but the master went back to the ship with some crew the following day (19 July) in order to investigate the extent of damage and prospects of saving the ship. There was an omnipresent risk of further torpedoing by German warships and naval vessels were on short supply, so the ship had to be left unmanned pending its towage. Tugs sent some time later had to look for the ship which was adrift. Towage proceeded for 600 miles whereupon the ship suddenly foundered, probably as a result of bad weather, on 1 August. The owner sued the charterer (Crown) for hire between 18 July and 1 August. The charterer rebutted the claim on the basis of, inter alia, the ship loss clause in the charter. That clause read:

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[34] ibid [57].

[35] ibid [30].

[36] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ 24, [2011] 3 All ER 554 [56].

[37] ibid.

[38] [1945] 2 All ER 357 (CA).

> 'If the ship be lost, hire shall be paid up to and inclusive of the day of loss, or if missing, up to and inclusive of the day last spoken. Should the vessel become a constructive total loss such loss shall be deemed to have occurred and the hire under this contract shall cease as from the day of the casualty resulting in such loss.'

Bearing in mind that the term 'constructive total loss' as used in the above clause was stated to be the same as that defined under the Marine Insurance Act 1906,[39] the Court had to consider whether the *Lavington Court* had, on the relevant date, met the requirements of the first limb of section 60(1). In the second place, the applicability of section 60(2)(i)(a) was analysed.[40]

The central question was whether the shipowner, through the agency of the master and crew, had abandoned the ship pursuant to section 60(1). In defining, firstly, abandonment under the provision, Scott LJ and Stable J equated it with abandonment of a derelict ship occurring in the law of salvage:

> When the ship is spoken of as abandoned because of 'its actual … loss appearing unavoidable,' the word is used in nearly the same sense as when, according to the law of salvage, the ship is left by master and crew in such a way as to make it a derelict, which condition confers on salvors a certain, but not complete, exclusiveness of possession, and a higher measure of compensation for salvage services. But to constitute the ship a derelict, it must have been left (a) with that intention (*animo derelinquendi*) … ; (b) with no intention of returning to her; and (c) with no hope of recovering her.[41]

Scott LJ proceeded to examine the actions of the master in the context of a convoy under naval escort, the impending danger of attack by German submarines, the need to safeguard the lives of the crew and the weather conditions. He concluded:

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[39] See 80.

[40] See 225–226.

[41] *The Lavington Court* (n 38) 362 (Scott LJ) (citation omitted). See also, in the same judgment, 367 (Stable J).

I do not think the master left, after the daylight examination on July 19, *animo derelinquendi,* i.e., of leaving the ship for good and all: or *sine animo revertendi,* in the sense of intending that neither he, nor the naval authorities, nor his owner should return to the ship: or *sine spe recuperandi,* in the sense of abandoning all hope of his owner recovering the ship. And that is the time when the outlook has to be appraised, and appraised on the basis of the then known facts … :

'However, one must not judge by the result, but from the probabilities as they would have appeared to a reasonable assured at the moment when he knew of his loss and could have given notice of abandonment—had notice been required.'

He may have had his private meteorological opinion that continuing fine weather could not be counted on for a long tow, but I am convinced that he was by no means without hope. Had salvors come along they would have been entitled to take possession, but their right of possession would have been only their maritime lien as salvors upon an unnamed ship. The position seems to me to have been the same legally as if, by arrangement with the naval authorities the master had been allowed to send his own S.O.S. to the salvage tugs at Gibraltar. I cannot see that he ever gave up possession of the ship, except in the barest physical sense, and that was by enemy compulsion and involuntarily. I concede without hesitation the contention of the Solicitor-General that the master had general authority, as master, to 'abandon' in the sense of sect. 60(1) if, in his discretion, he had thought it right and the circumstances had warranted it; but, in my view, he did not think they did. I, therefore, conclude that there was no abandonment.[42]

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[42] ibid 363, citing *Rickards v Forestal Land, Timber and Railways Co Ltd* [1942] AC 50 (HL) 110 (Lord Porter).

For his part, Stable J, while adopting, as mentioned above, the same test of abandonment as Scott LJ, arrived at the opposite conclusion, finding that the master and crew had effectively abandoned the ship on 18 July. In his opinion:

> I entertain no doubt that the master and crew abandoned the ship either shortly before or after midnight of July 18, when, having taken to the boats and been picked up by one of the escort vessels, they were transferred to other ships in the convoy. … It has not been, and indeed could not be contended, that the decision taken and acted on was not reasonable. The action of the master, in my judgment, negatives the existence of any *animus revertendi.* It remains to consider whether the evidence indicates a *spes recuperandi.* … In a sense some fragment of hope may remain in any set of circumstances until the final catastrophe is complete. It is never easy, even if it is possible, to express the varying shades of a condition of mind in words, but in the present context I think '*spes recuperandi*' is more than a bare hope that something may turn up, a condition of mind hardly distinguishable from wishful thinking, and requires something in the nature of an intention present in the mind of the person concerned—in this case the master of the ship—in certain events to take some action himself or by his agents deputed by him for that purpose to recover actual possession of the ship for his owners.[43]

In the same case, du Parcq LJ defined abandonment, perhaps more tersely, as follows:

> [T]he word 'abandon' must refer to something done by the shipowner or his agent with his authority, and I would add that the master may often be an agent of necessity. I understand 'abandon' to mean 'give up for lost,' and when I say give up for lost I mean that the owners are renouncing all their rights in the ship except the right to recover insurance.[44]

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[43] *The Lavington Court* (n 38) 367–68.

[44] ibid 365.

Applying his own test of abandonment, du Parcq LJ found ultimately, in concurrence with Scott LJ, against abandonment. He had this to say:

> Of course the master may … abandon the ship on behalf of the owners, but in order to prove that he has done so, it is not enough to show that he and the crew left the ship temporarily to her fate, or that, having left her, he had grave doubt whether she would be recovered or ultimately saved. It must, I think, be made clear that he so acted as to show an intention to renounce all the owners' (his principals') rights in the ship, their right to property as well as to possession. Taking this view of the section, I do not see my way to differ from the opinion of Tucker, J., that there was no abandonment on July 18 or 19.[45]

In addition to the concept of abandonment, the Court in *The Lavington Court* discussed the meaning of the phrase 'its actual total loss appearing to be unavoidable' in the same s 60(1) of the Marine Insurance Act 1906. The judges' determination on the former concept seems to have foretold their conclusions on the latter point. Scott LJ opined:

> [E]ven if … [the master's] action had been sufficient to constitute abandonment *per se,* it would not have satisfied subsect. (1), because I cannot draw the necessary further inference that he thought 'a total loss unavoidable.' It did not so appear to him any more than to Lieut.-Commander Segrave, who at once sent the wireless telegram, actually received at 10.25 a.m., asking for tugs.[46]

According to du Parcq LJ:

> Even if there had been an abandonment, I think … that the underwriters might have urged with force that the evidence was insufficient to show that on July 19 the actual total loss of the ship appeared to be unavoidable, and that it was on that account that

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[45] ibid.

[46] ibid 363–64.

> she was abandoned. It would not, in my opinion, have been reasonable to assume that the efforts of the Royal Navy to find the ship would be unavailing, and if she were once found there was at least a reasonable prospect that she might be safely towed to a British port. It is very difficult to decide in any given case what was probable on a particular date in the past; and the task is not rendered more easy by the fact that we know what did in fact happen. If the question be what is possible, the fact that an event happened undoubtedly proves that event to have been possible, but the same fact does not prove the event to have been probable. The forecasts of the wisest and best-informed of men are often falsified by events, yet what they honestly foretell must be deemed to be probable. It is, not, in my opinion, legitimate to attach any more importance to the fact that the ship eventually became a total loss than would have been attributable to the fact that she had survived if, given favourable weather, she had been towed to safety. The question of fact is no doubt a difficult one. I am by no means satisfied that the judge's answer to it was wrong.[47]

Only the minority judge, Stable J, subjected the phrase 'its actual total loss appearing to be unavoidable' to a potent analysis, but he omitted to choose between an objective and a subjective standpoint in relation to the appearance of unavoidability of the actual total loss.[48]

It may be difficult, given the above divergence of opinions, to extract the ratio of the judgment on the meaning of abandonment. The majority's view that, ultimately, the master did not abandon the ship is perhaps in itself the key point. This, along with the same majority's holding as to the phrase 'its actual total loss appearing to be unavoidable', would tend, on the one hand, to favour the position of the insurer in a particular risk situation by making it difficult to claim a constructive total loss; on the other hand, the need for owners to expend every possible effort to save their property is perhaps reinforced by the decision.

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[47] ibid 365–66.

[48] ibid 368.

Following this review of *The Lavington Court*, two remarks may be addressed at the decisions of both the Commercial Court and the Court of Appeal in *The Bunga Melati Dua* on the issue of constructive total loss under s 60(1) of the Marine Insurance Act 1906.

Firstly, Steel J's decision can be readily endorsed: the chances of recovery of the ship and cargo in return for the payment of a proportionately moderate ransom were seen as quite good by the judge, so there could be no basis for reasonably abandoning the subject-matter insured on account of its actual total loss appearing to be unavoidable.

Secondly, it seems that the rigidity of the test under the first limb of section 60(1), as reflected in the majority judgment in *The Lavington Court*, was followed in Steel J's decision, which denied the applicability of the provision to a month-long seizure of ship and cargo by pirates.

The odds standing as it seems against a determination of total loss under the first limb of section 60(1), it is apposite to consider now section 60(2)(i).

5.2.2. MIA 1906, s 60(2)(i)(a)

As stated above, a close match to the constructive total loss provided for under the first limb of s 60(1) of the Marine Insurance Act 1906 is s 60(2)(i)(a), which reads:

> In particular, there is a constructive total loss—
>
> (i) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship or goods, as the case may be. …

This provision may be taken as one of the most relevant to capture cases,[49] although by no means, as stated earlier, sub-ss (1) and (2) are mutually exclusive.[50]

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[49] FD Rose, *Marine Insurance: Law and Practice* (2nd edn, Informa 2012) para 23.34.

[50] text to n 27.

In *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)*,[51] a marine cargo insurance case involving capture of a vessel by Somali pirates, this type of constructive total loss was contracted out in the policy.[52] However, Rix LJ pronounced himself, albeit in obiter, on the application of the above provision to the case.[53] It is recalled that the ratio of the judgment is that actual total loss cannot be invoked automatically in the event of a piratical capture involving ransom negotiations.[54] Furthermore, at first instance, Steel J denied the availability of constructive total loss in terms of section 60(1).[55] Rix LJ said: 'The facts would not even have supported a claim for a CTL, … the test of [which] is … unlikelihood of recovery.'[56]

It should be said in this regard that there was no argument on appeal in *The Bunga Melati Dua* on constructive total loss, but solely on actual total loss.[57] This is because the appellant dropped the former head of loss at the appeal hearing.[58] Furthermore, at first instance, Steel J's reasoning on constructive total loss is restricted to the first limb of section 60(1), given that section 60(2)(i) was excluded by the policy. Accordingly, Rix LJ did not have the benefit of the parties' arguments or the lower court's pronouncement on the relevant provision.

How does Rix LJ's dictum tie nonetheless with the authorities on section 60(2)(i)(a)?

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[51] [2011] EWCA Civ 24, [2011] 3 All ER 554.

[52] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2010] EWHC 280 (Comm), [2010] 2 All ER 593 [7]–[8], affd [2011] EWCA Civ 24, [2011] 3 All ER 554.

[53] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ 24, [2011] 3 All ER 554 [56].

[54] ibid.

[55] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2010] EWHC 280 (Comm), [2010] 2 All ER 593 [55]–[57].

[56] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2011] EWCA Civ 24, [2011] 3 All ER 554 [56].

[57] ibid [2].

[58] ibid.

In the leading case of *Polurrian Steamship Co Ltd v Young*,[59] it was held by the Court of Appeal that, to found a constructive total loss case under that provision, the assured had to

> establish fully (1.) that at the date of the commencement of this action they were deprived of the possession of the [ship]; and (2.) that it was not merely quite uncertain whether they would recover her within a reasonable time, but that the balance of probability was that they could not do so.[60]

In that case, the Court could see that recovery of the ship from capture might, at the time of the commencement of the action, have seemed difficult and unclear, but that was not sufficient for establishing a case of constructive total loss.[61]

The test in *Polurrian* was applied in *Roura & Forgas v Townend*[62] to a case of capture by the German Navy. The *Igotz Mendi* had sailed from Delagoa Bay on 4 November 1917 and should have arrived in Calcutta during the first week of December. The ship had in fact been taken as prize by the *Wolf*, an armed merchant raider of the German Navy. Up until 27 February 1918, there was no news of the ship. On that day, the Germans abandoned the ship in a grounded condition in Denmark, and news reached the owners and the plaintiff charterers. The following statement of facts appears in the reasons of Roche J:

> The *Igotz Mendi* was of obvious use to the Wolf as a collier consort and as a relief carrier of the numerous passengers or prisoners, 700 in number, collected by the *Wolf* from her sunk prizes. She was therefore disguised by a new coat of paint of the Allies' grey colour, and the two vessels voyaged to various places, sometimes in company and sometimes separate. At one point in the voyage, which was now directed towards the coast of Norway and thence to

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[59] [1915] 1 KB 922 (CA).

[60] ibid 937 (Kennedy LJ), approved by *Rickards v Forestal Land, Timber and Railways Co Ltd* [1942] AC 50 (HL) 85–87 (Lord Wright).

[61] *Polurrian* (n 59) 937–38 (Kennedy LJ).

[62] [1919] 1 KB 189 (KBD).

> Germany through the North Atlantic, vessels were sighted which gave rise to some expectation of recapture. The Spanish mate was thereupon emboldened to throw overboard the bombs which had been put on board of the *Igotz Mendi* by the Germans, to be used if required for the destruction of the prize. The mate was sentenced to a long term of imprisonment in Germany and to a fine. The prize crew was strengthened and a new supply of bombs was placed on board. The fog and ice of the Arctic Circle were braved to avoid the blockading squadrons and patrols, and internment in Germany, which was now announced as the destination, of captives on board of the *Igotz Mendi* seemed their imminent fate, when, on February 24, fog and a grounding in Danish territorial waters and the intervention of the Danish authorities secured the release of the passengers. The *Wolf* herself had by this time arrived at Kiel, and on February 27, as it would rather seem in the expectation that salvage could not be effected owing to the prevailing bad weather, the German prize crew left the *Igotz Mendi,* as indeed did the Spanish crew after re-hoisting the Spanish flag. A salvage company was employed by the shipowners, and succeeded in refloating the vessel on March 9. She was considerably damaged, and was under temporary and permanent repair in Denmark and Spain until the month of September, 1918.[63]

The charterers had taken out a policy for profit on their charter. On 23 February 1918, they claimed for a constructive total loss and, on 14 March 1918, instituted court proceedings. In upholding the claim, Roche J, after referring to the *Polurrian* case, said:

> I, of course, act upon that decision. It was conceded that in this case the ship was out of the owners' possession for 3½ months, but it was contended that it was never securely in the possession of the Germans. It was asserted, I hope and believe with truth, that the squadrons and patrols of the navies of Great Britain, her allies and associates, were numerous and vigilant, and that recapture

[63] ibid 191–92.

> was probable or not unlikely. On the other hand, it is to be remembered that the seas are wide and the nights were dark and long during the critical stages of this voyage, and apart from any knowledge which may be permitted to a Court with regard to German practice in the destruction of merchant shipping, the evidence as to the sinking of all other prizes by the *Wolf* and as to the placing of bombs on board of the *Igotz Mendi* convinces me that the *Igotz Mendi* would not, save by some unexpected accident, have survived to be recaptured. I regard her actual recovery as due to a somewhat surprising combination of circumstances, and I find that the test laid down by Kennedy L.J. in *Polurrian Steamship Co.* v. *Young* is satisfied; and I hold that it was not merely uncertain whether her owners would recover her in a reasonable time, but that the balance of probability was that they would never recover her at all.[64]

In *Rickards v Forestal Land, Timber and Railways Co Ltd*,[65] the House of Lords held that British-owned cargo had become a constructive total loss under s 60(2)(i)(a) of the Marine Insurance Act 1906 upon the German government, following the outbreak of the Second World War, giving orders for all carrying German merchant ships to be diverted to Germany or, if necessary, to be scuttled, and the masters of such ships abiding by such orders. From that moment, the insured parties were deprived of the possession of the goods as the masters of the carrying ships ceased to be bailees of the goods for their owners and became servants and agents of the German government.[66] Thus, in the words of Lord Wright:

> In the present case, in my opinion, it was unlikely that the goods would be recovered. The odds were all against it. When the *Minden* sailed from Rio under the orders of the German government it was, I think, not merely uncertain that she would evade the British

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[64] ibid 193–94 (footnote omitted).

[65] [1942] AC 50 (HL).

[66] ibid 63–64 (Viscount Simon LC), 73–74 (Viscount Maugham), 83–88 (Lord Wright), 110–12, 114 (Lord Porter).

> blockade. It was, in my opinion, unlikely. If she had been captured it was, no doubt, likely that the assured would have regained possession of their goods, but the orders of the German government had provided against that contingency by requiring the master to scuttle the ship, as he in fact did. … If, on the other hand, she ran the blockade and reached a German port, the assured would presumably be irretrievably deprived of his goods, which is an actual total loss.[67]

In *Court Line Ltd v R (The Lavington Court)*,[68] the ship foundered after a tow, several days following its torpedoing by the German Navy. The Court was called upon by the charterer to determine whether the ship had been a constructive total loss, as that expression was used in the charterparty. The Court held that the meaning of the term was the same as under the Marine Insurance Act 1906.[69] Aside from the applicability of the first limb of section 60(1) of the Act,[70] the Court considered the applicability of section 60(2)(i)(a) to the case. It is noteworthy that the reasoning followed by the judges under both provisions was largely the same, leading to the same split in conclusions. The majority view denying the existence of constructive total loss was carried through under both provisions. Scott LJ dealt with the point as follows:

> The above considerations also, for two reasons, dispose of subsect. (2): (i) the owner was never 'deprived of possession' within the meaning of that subsection; and (ii) even if that view be wrong, the second statutory condition was not fulfilled, for although it was 'uncertain' it was not 'unlikely' that the owner would recover possession. Even looking at the prospect at the time when Lieut. Commander Segrave's telegram for tugs was being despatched, recovery could not be said to be 'unlikely'; for no insurer would have accepted a notice of abandonment at that

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[67] ibid 87–88.

[68] [1945] 2 All ER 357 (CA).

[69] See 80.

[70] See 215–219.

> stage; he would have said 'wait and see,' and in six days his refusal would have been justified by the success of the tugs in getting hold of her. There could not be a position, within the charterparty, equivalent to a constructive total loss at a time when, if notice of abandonment had been given, the insurer could properly have rejected it as premature.[71]

For his part, du Parcq LJ said:

> [T]he first part of sect. 60(2)(i) … seems to be intended to deal with a case in which the ship is lost in the sense that, though she is still in being, she has been taken out of the possession of the assured, such a case, for instance, as that of *Pollurian S.S. Co.* v. *Young*. I doubt whether it is appropriate to the present case. If it is to be applied to it, I am not prepared to say that the judge ought to have held that it was at any time 'unlikely' that the owners would recover the ship down to the moment when she sank and became a total loss. The question is one of fact and essentially one which a jury might have been called upon to answer. When weighing the probabilities they would have been entitled, in an action fought between assured and underwriters, to take into consideration all those facts which were known to, or reasonably ascertainable by, the parties at the date of the alleged constructive total loss. In my judgment, a decision in favour of underwriters on this issue would have been reasonable and, on the whole right.[72]

In *The Bamburi*,[73] the vessel was immobilised in an Iraqi port by order of the local authorities at the start of the Iran-Iraq war. A skeleton crew was maintained on board the ship by the owner, but there was not much the owner could do with the ship. On the one hand, the arbitrator held that the insured, the shipowner, had been deprived of the possession of the ship pursuant to s

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[71] *The Lavington Court* (n 68) 364.

[72] ibid 366, citing *Polurrian* (n 59). See also ibid 368–70 (Stable J) for the minority view.

[73] [1982] 1 Lloyd's Rep 312 (Arb Trib).

60(2)(i) of the Marine Insurance Act 1906.[74] The fact that the ship was still under time charter was of no relevance.[75] On the other hand, it was the view of the arbitrator that the ship had turned into a constructive total loss upon it becoming unlikely to see the situation returning to normal within a reasonable time, set by the arbitrator at 12 months.[76]

In conclusion, it would seem that the rigidity of the test of unlikelihood of recovery under s 60(2)(i)(a) of the Marine Insurance Act 1906 as evidenced by the case law has transpired in Rix LJ's dictum in *The Bunga Melati Dua* to the effect that the facts there did not give rise to a constructive total loss.

The only tenable application of the above provision to a case of routine ship capture by Somali pirates would be with regards to instances where there is no prospect of recovery in a reasonable period of time. In *The Bunga Melati Dua*, average detention time was 37 days.[77] It was therefore well within the limits posed in *The Bamburi*. Even today, ship detentions by those same pirates rarely exceed the 300-day mark.[78]

Before closing this section, it may be added that the category of constructive total loss just analysed would seem to cover a fortiori the situation of automatic total loss described by Rix LJ in *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)*,[79] where pirates capture a vessel for their own use, since in that case the vessel is deemed beyond recapture. Nonetheless, in the Somali

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[74] ibid 317–20.

[75] ibid 317.

[76] ibid 321–22.

[77] *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)* [2010] EWHC 280 (Comm), [2010] 2 All ER 593 [26].

[78] Compass Risk Management, 'Somali Piracy Durations 2008 and 2009' <http://www.compass-rm.com/piracystatistics/SOMALI_PIRACY_DURATIONS_2008_and_2009.pdf> accessed 21 September 2012; Compass Risk Management, 'Somali Piracy Durations 2010 and 2012' (31 July 2012) <http://www.compass-rm.com/piracystatistics/Somali_Piracy_Durations_by_Ship.pdf>.

[79] [2011] EWCA Civ 24, [2011] 3 All ER 554 [56].

piracy case, as already indicated,[80] recent prowesses by navies off Eastern Africa have challenged the formerly assumed impregnability of pirates' base vessels—although a number of these continue to operate—. The result is that the case for putting forward a constructive total loss in those mother ship cases has been rendered all the more difficult, as was stated in relation to actual total loss.[81]

* * *

In wrapping up the examination of the application of total loss in marine insurance to piratical captures, it may be said that the case for such an application appears to be quite weak insofar as the main model of Somali piracy operations is concerned—setting aside instances of the conversion of a captured vessel for the pirates' own use—. This would obviously have repercussions on the issue of frustration of the contract of carriage. It is recalled, as set out at the opening of this chapter, that resort by a particular type of clauses in standard time charters to the concept of total loss in marine insurance provided the justification for this discussion in the first place.

The path taken slightly outside the core theme of frustration in this chapter beckons matters to be now finally concluded.

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[80] See 210.

[81] ibid.

6. Conclusion

At the commencement, there is a contract formed between a shipowner or carrier and a charterer or cargo interest for the use of a ship for transportation services. What happens afterwards in the life of the contract may have repercussions on the manner and cost of its performance, as things may not have been fully foreseen at the time of contracting. But whether a particular instance of events can lead to the contract's severance from any continued existence is perhaps the ultimate test of contractual flexibility.

This thesis has set out to test the flexibility of the contract of affreightment for accommodating the potentially drastic exigencies which may be posed by Somali pirates' hijacking of a merchant vessel for ransom in waters around the Horn of Africa. The vessel's detention, no matter how short, will always lead to disruption of the normal economic benefits and exposures contemplated by the parties, but there is a measure of difficulties which is foreseen or foreseeable in any contract. Standard carriage contract forms contain indeed an abundance of clauses providing for the impact of various events on the economic bargain of the contract. Certain events may signal, however, a point of no return. A contract has been tested to its limits and it is the law that to the impossible no one is held.

The subject of frustration is little dwelled upon by authors. As to the application of the law to the piratical capture scenario outlined above, no study has as yet been carried out on the matter. This thesis attempts an inroad into the literature in those two respects.

First, it is not as if frustration is beyond any methodological assessment. While it is true that courts in frustration cases have often navigated with subtle and frequently competing factual sensors, a clearly defined matrix for frustration does exist. Nonetheless, interest in this area of the law has remained relatively weak in the literature.

Second, for the international maritime lawyer, the re-emergence of piracy may come across as a singular newsfeed in an otherwise overregulated sector with a distinct fixation over security. Instinctively, the reflex is to foretell a quick demise of the re-emerging phenomenon. However, Somali piracy and, before it,

other geographical genres, have proven their resilience—at least for a few years until they are determinedly overpowered by countervailing forces. This tipping point may have commenced for Somali piracy. Nevertheless, the basic and old-time practice of hijacking for ransom cannot be shied away from as a defunct threat: its relevance and modern application have been a key feature of the Somali pirates' modus operandi and the latter is bound to inspire others sooner or later. This opens the door for studying the impact of such a practice on trade.

In testing the limits of the contract's validity in the event of the piratical capture of a merchant ship according to the above scenario, this thesis has embarked on the seldom-charted field of security within private law. When it comes to piracy, the subject's topicality accentuates an otherwise scarce literature. For its part, frustration has received one or two sentences, at the most. The thesis is thus novel and original in its concept.

The thesis follows the matrix for frustration set forth by the case law. Whether a capture has or not a frustrating effect on the contract is determined first by reference to the contract (chapter 2). If the contract is silent on the matter, resort may then be had to the tests and criteria which courts have used and refined, in the pursuit of the proper answer to the above question (chapter 3). These two chapters constitute the core of the subject, as this is where litigants will dig to support their basic contentions.

However, the story will be half told if it is thus restricted. A defining element of frustration is that it should not be self-induced by a party to the contract. Where a party has caused the very situation calling for a discharge of mutual contractual obligations, there is breach, not frustration (chapter 4). This exploration of the borderline of frustration is key as it helps understand where the basic question posed in this thesis is likely to be relevant.

The thesis ends by examining the question of constructive total loss under marine insurance principles in the capture scenario referred to. Chapter 5 carries out this necessary determination in pursuance of certain clauses in time charters (section 2.1.5).

This skeleton of four constitutive chapters needs further elaboration at this juncture, in order to both sum up the main findings of the work and reflect on their implications.

The crux of chapter 2 is that standard contracts may well cover piracy, either directly or indirectly, through a plethora of clauses, but that the issue of frustration is often left untouched, beckoning thus the application of the doctrine of frustration. To reach that conclusion, chapter 2 analyses one by one all the possibly relevant clauses found in 21 standard popular contract forms used in global trades, comprising 8 time charters, 6 voyage charters and 7 bills of lading. Only one possible exception is identified: a clause inserted in some time charters referring to the total loss of the ship, hence the need for examining that marine insurance concept in chapter 5. The clause is, however, often drafted in incomplete terms to provide for the termination of the contract, and the case law offers in this regard some guidance to read such termination in, without full certainty, however.

Incidentally, it was this particular question of the continued standing of the contract in the event of a piratical capture that drove the development of piracy-specific clauses for charter agreements in recent years, when hijackings by Somali pirates started piling up in the dozens. Nevertheless, the five leading piracy clauses developed by the market conspicuously eschew the point, dealing instead with other matters relevant to the charter while the ship is detained by pirates.

So whether it is the cancelling, deviation, war risks and hindrances, off-hire, general exceptions, or ship loss clauses in the contract—subject to what was stated above in relation to the latter—or else the newly drafted piracy clauses, the result is the same: the law of the parties does not stand in the way of the operation of the doctrine of frustration in the event of a capture, provided the requirements of the doctrine are met.

It should be said that this type of analysis does not seem to have been done so far, not even in relation to more general frustration issues. Nowhere has a study been made of the relationship between the doctrine of frustration and individual clauses found in standard contracts of carriage in such a systematic and comprehensive manner. The value of the work goes therefore, beyond the piracy model considered here, to fill an appreciable gap in the wider literature on carriage and frustration law.

Having perused the contract, then begins the difficult exercise in chapter 3 of thinning the mesh of criteria used by the courts in acceding to requests for declaring contracts as discharged or not under the doctrine. The analytical reader will at once notice the relevance of the cases reviewed to the Somali piracy model at hand. Nevertheless, the analogy soon shows its limits: at the end, frustration will be the summation of all factors, and the result will yet have to be lit up by the court's own judgment, guided not the least by considerations of justice. What was therefore attempted as a rationalisation of the process of the operation of the doctrine turns out to be a field where predictions are characterised by guesses. The benefit of chapter 3 is in this respect to make those guesses as informed as possible. By focusing on such key criteria as the foreseeability of the event—in other words, the parties' actual or imputed state of mind as to the risk—delay—perhaps the single most relevant factor in a capture scenario—financial loss—a factor of lesser, but yet no negligible relevance—the prospects of resumption of the contract's performance, and the conduct of the parties themselves following capture, the thesis offers an analytical study of what matters the most under the case law with respect to the facts on hand.

Two conclusions could be made in this regard: frustration will arise in capture situations when an elaborately long detention is anticipated, or the prospects of recovery, either against payment of a ransom or through forceful repossession, are very weak. In both instances, the assessment should be taken as an objective one, bearing in mind, however, the parties' contemplations and conduct in the circumstances. In a way, such conclusions beg the thesis question, but here lies the difficulty of the chosen subject. Those conclusions could not have been drawn without the benefit of the analysis undertaken, and such analysis cannot substantiate broader or bolder conclusions. The common law shows here its full power as a fact-responsive instrument for allocating justice in private dealings.

Here again the thesis goes into the uncharted. No serious and systematic study appears as yet to have been carried out of the frustration of contracts of affreightment in capture situations, whether piratically-induced or otherwise, in relation to the 'multi-factorial approach' advocated as of late by Rix LJ in *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd*

(The Sea Angel).[1] Indeed, there is yet to be found any methodical academic examination of frustration as it applies to contracts of affreightment in general.

Leaping into the discussion of total loss in chapter 5, the thesis shows how marine insurance law has tried to deal with capture scenarios. The recent English courts judgments in *Masefield AG v Amlin Corporate Member Ltd (The Bunga Melati Dua)*[2] are analysed.

What is left in the work is the complex question of self-induced frustration. Before any attempt to venture into applications of this exception to frustration in the piracy model scenario, the concept per se is elucidated. The analysis of the most recent Court of Appeal pronouncement on the matter in *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)*[3] leaves matters as widely defined as the criteria for frustration itself. What emerges from that decision is the concept of responsibility for the supervening event. Ejected are thus the fine legal distinctions of fault between intentional breach, breach of duty and non-actionable breach. Self-induced frustration appears as an ogre standing just behind the scene whenever the doctrine is invoked and ready to sweep away its effects on the basis of the least causative responsibility for the supervening impossibility to perform the contract. How can this invite any systematic analysis? The answer is offered in the discussion occurring in chapter 4 of key examples of self-induced frustration which may arise in the factual scenario chosen for study here. By approaching self-induced frustration not so much in terms of liability, but responsibility in a wider yet legal sense, the chapter shows how the Court of Appeal's decision in *The Super Servant Two* can in practice work. The result is that, far from displaying the characteristics of a rough justice mechanism, self-induced frustration impels a no-nonsense examination of the facts and brings matters to the real bottom line of frustration: justice.

Not only is this chapter, it is submitted, original in its attempt to link up fault of parties to the contract of affreightment with capture, by considering cases old

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[1] [2007] EWCA Civ 547, [2007] 2 All ER (Comm) 634 [111].

[2] [2011] EWCA Civ 24, [2011] 3 All ER 554, affg [2010] EWHC 280 (Comm), [2010] 2 All ER 593.

[3] [1990] 1 Lloyd's Rep 1.

and new, but fundamentally through its attempt to apply in a fairly precise set of circumstances the arguably daunting test of self-induced frustration, as articulated in *The Super Servant Two*.

In the end result, what characterises this thesis is its focus on one of the most complex factual situations, wait and see, in relation to an equally nebulous chapter of the law, frustration. Its practical benefit is to show in relation to a topical phenomenon, piracy, what the implications could be not only for contracts of carriage, but also marine insurance, flowing from the hijacking of the vessel for ransom. Of course, frustration is only one of the questions bearing on the matter, but, as this thesis has demonstrated, it is by no means an easy one to resolve. Yet, frustration is so fundamental that, even if it did not exist, it would have to be found.

Whereas research for this thesis commenced at a time when Somali piracy made the headlines, by the time of its completion multiple factors seemed to be cutting away at its intensity and effectiveness. It may be that this species of a much older and wider criminal behaviour will die out sooner or later. Here is not the point of this work. The hijacking of merchant ships for ransom raises quintessential questions of contract law, which are perhaps common to all frustration cases. Piracy in certain areas of the world may come and go. The law of contract persists, however, as the kingpin of our societies. The examples of this thesis may thus offer an understanding of the future evolution of the law.

APPENDIX A. LIST OF STANDARD CONTRACT FORMS EXAMINED

1. Time Charters

- BIMCO (The Baltic and International Maritime Council), 'BIMCO Uniform Time-Charter (As Revised 2001) (Code Name: BALTIME 1939)' (BIMCO 2001)
- BIMCO, '"GENTIME" General Time Charter Party' (BIMCO 1999)
- 'Time Charter: Government Form' (New York Produce Exchange approved, 1946) (NYPE 46)
- Association of Ship Brokers and Agents (ASBA), 'Time Charter: New York Produce Exchange Form (Code Name: "NYPE 93")' (ASBA 1993)
- INTERTANKO, 'INTERTANKTIME 80 Tanker Time Charter Party' (INTERTANKO 1980)
- BP Shipping, 'BPTIME3 Time Charterparty' (BP Shipping 2001)
- Shell, 'Time Charter Party (Code Word: "SHELLTIME4")' (2003)
- 'Tanker Time Charter Party (Code Word: STB Time)'

2. Voyage Charters

- BIMCO, 'Uniform General Charter (As Revised 1922, 1976 and 1994) (Code Name: "GENCON")' (BIMCO 1994)
- INTERTANKO, 'Tanker Voyage Charter Party TANKERVOY 87' (INTERTANKO 1987)
- BP Shipping, 'BPVOY4: Voyage Charter Party' (BP Shipping 1998)
- 'Voyage Charter Party (Code Word: "SHELLVOY 6")' (2005)
- ASBA, 'Tanker Voyage Charter Party (Code Word: ASBATANKVOY)' (1977)
- ExxonMobil, 'Tanker Voyage Charter Party: ExxonMobil VOY2000'

3. Bills of Lading

- BIMCO, 'BIMCO Liner Bill of Lading (Code Name: "CONLINEBILL 2000") (BIMCO 2000)
- BIMCO, 'Negotiable Combined Transport Bill of Lading (Revised 1995) (Code Name: "COMBICONBILL")' (BIMCO 1995)

- BIMCO, 'Negotiable Multimodal Transport Bill of Lading (Issued 1995) (Code Name: "MULTIDOC 95")' (BIMCO 1995)
- Maersk Line, 'Multimodal Transport Bill of Lading' (Maersk MT B/L)
- Mediterranean Shipping Company SA, 'Bill of Lading (Standard Edition: 08/2009)' (MSC 2009) (MSC B/L)
- Wallenius Wilhelmsen Logistics, 'Bill of Lading' (1 January 2006) (WWL B/L)
- Atlantic Container Line AB, 'Bill of Lading' (revised January 2007) (ACL B/L)

APPENDIX B.

LIST OF NATIONAL STATUTES AND INTERNATIONAL CONVENTIONS EXAMINED

1. National Statutes and International Conventions Applicable under UK Law

- Carriage of Goods by Sea Act 1971
- International Convention for the Unification of Certain Rules relating to Bills of Lading (signed 25 August 1924, entered into force 2 June 1931; ratified by the UK 2 June 1930, entered into force for the UK 2 June 1931, denounced by the UK 13 June 1977) 120 LNTS 155, 1412 UNTS 380, UKTS 17 (1931), Cmd 3806, amended by: Protocol to Amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed at Brussels on 25 August 1924 (adopted 23 February 1968, entered into force 23 June 1977; ratified by the UK 1 October 1976, entered into force for the UK 23 June 1977) 1412 UNTS 128, UKTS 83 (1977), Cmnd 6944; Protocol amending the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 25 August 1924, as Amended by the Protocol of 23 February 1968 (adopted 21 December 1979, entered into force 14 February 1984; ratified by the UK 2 March 1982, entered into force for the UK 14 February 1984) 1412 UNTS 146, UKTS 28 (1984), Cmnd 9197 (Hague-Visby Rules)

2. International Conventions Referred to by Way of Comparison

- United Nations Convention on the Carriage of Goods by Sea, 1978 (adopted 30 March 1978, opened for signature 31 March 1978, entered into force 1 November 1992) 1695 UNTS 3 (Hamburg Rules)
- United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (adopted 11 December 2008, opened for

signature 23 September 2009, not entered into force) UNGA Res 63/122 (11 December 2008) UN Doc A/RES/63/122 (Rotterdam Rules)

3. US Statutes Incorporated into Standard Contract Forms

- Carriage of Goods by Sea Act, 46 USC § 30701, note (2006) (COGSA)
- Harter Act, 46 USC §§ 30701–07 (2006)

APPENDIX C.

LIST OF STANDARD CONTRACT CLAUSES EXAMINED

Some of the following clauses may be found as part of the standard contract forms listed in Appendix A, but they are referred to separately in the thesis as they may still be appended to older forms.

1. General Security Clauses

- BIMCO, War Risks Clause for Time Charters, 2004 (Code Name: CONWARTIME 2004) (this clause updates the earlier Conwartime 1993, being clause 20 of BALTIME 1939), published in BIMCO, 'BIMCO War Risks Clauses 1993 Revised' (BIMCO Special Circular No 5/2004, 3 December 2004)
- BIMCO, War Risks Clause for Voyage Chartering, 2004 (Code Name: VOYWAR 2004) (this clause updates the earlier Voywar 1993, being clause 17 of GENCON), published in BIMCO, 'BIMCO War Risks Clauses 1993 Revised' (BIMCO Special Circular No 5/2004, 3 December 2004)

2. Piracy Clauses

- BIMCO, BIMCO Piracy Clause for Time Charter Parties 2009, published in BIMCO, 'BIMCO Piracy Clause for Time Charter Parties 2009' (BIMCO Special Circular No 2/2009, November 2009)
- INTERTANKO, INTERTANKO Piracy Clause—Time Charterparties, published in INTERTANKO, 'INTERTANKO Provides Model Piracy Clauses' (Press Release, 5 February 2009)
- BIMCO, BIMCO Piracy Clause for Consecutive Voyage Charter Parties and COAs, published in BIMCO, 'BIMCO Piracy Clause for Consecutive Voyage Charter Parties and COAs' (BIMCO Special Circular No 3/2009, November 2009)
- BIMCO, BIMCO Piracy Clause for Single Voyage Charter Parties, published in BIMCO, 'BIMCO Piracy Clause for Single Voyage Charter Parties' (BIMCO Special Circular No 4/2009, November 2009)

Appendix C

- INTERTANKO, INTERTANKO Piracy Clause—Voyage Charterparties, published in INTERTANKO, 'INTERTANKO Provides Model Piracy Clauses' (Press Release, 5 February 2009)

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