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The 'Refugee Clause'

Why Contractual Allocation of Rescue Costs is Critical During Periods of Mass Migration at Sea

Richard L Kilpatrick Jr^{*}

In recent years merchant ships have been called to assist distressed migrant vessels at unprecedented rates. Pursuant to moral and legal obligations arising under international law, merchant shipmasters and crews have courageously responded by rescuing thousands of migrant seafarers. These rescues unfortunately are very expensive undertakings affecting shipping interests both in the form of direct expenditures and indirect losses flowing from commercial delays. With these challenges as the backdrop, this Article examines the commercial implications of merchant vessel participation in large-scale humanitarian rescues. First, it outlines the scope of the legal obligations imposed on private shipmasters to render assistance to distressed vessels. Next, it surveys the language of popularly used shipping contracts, such as the New York Produce Exchange (NYPE) time charterparty forms, and evaluates problems of rescue cost allocation by analysing relevant court opinions and arbitration awards from both the United States and England. Finally, drawing from the shipping industry's experience in modifying contracts in response to pressing challenges such as maritime piracy, it argues new contract clauses should be adopted by industry participants to more precisely address rescue risk.

Keywords: Maritime law, international law, contract, charterparty, deviation, off-hire, search and rescue, refugee, migrant crisis.

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1 Introduction

The recent surge in maritime migration across the Mediterranean Sea has placed an unprecedented Search and Rescue (SAR) burden on merchant shipping.¹ As human smugglers pack economic migrants and refugees by the hundreds onto unseaworthy vessels lacking the capacity to safely complete the treacherous sea crossings from North Africa and the Middle East to European shores, courageous commercial shipmasters and crews have regularly served as first responders to requests for assistance.² While these acts of heroism have been lauded as compliant with entrenched moral and legal obligations, it is often overlooked that they have also come at great expense to shipping industry participants.³

During the most taxing stretches from 2014 to the present, commercial vessels have been summoned to aid distressed migrants on a near daily basis.⁴ These rescues have often required perilous embarkation of hundreds of people at a time, followed by navigational diversions and complex coordination with coastal authorities to determine an appropriate place of disembarkation.⁵ The direct and indirect costs arising out of these operations can be staggering. Shipping interests have routinely reported losses running into the tens and even

¹ See International Chamber of Shipping, 'Mediterranean Migrant Crisis' <[http://www.ics-shipping.org/key-issues/all-key-issues-\(full-list\)/mediterranean-migrant-crisis](http://www.ics-shipping.org/key-issues/all-key-issues-(full-list)/mediterranean-migrant-crisis)> accessed August 10, 2017; United Nations High Commissioner for Refugees (UNHCR), '2016 Deadliest Year Ever for Migrants Crossing Mediterranean – UN Agency' <<http://www.un.org/apps/news/story.asp?NewsID=55919#.WctSYDOB33Q>> accessed January 6, 2017; International Organization for Migration, 'Mediterranean Update, Migration Flows Europe: Arrivals and Fatalities Infographic' <http://migration.iom.int/docs/MMP/070717_Mediterranean_Update.pdf> accessed August 8, 2017.

² International Chamber of Shipping, 'Mediterranean Migrant Crisis' <[http://www.ics-shipping.org/key-issues/all-key-issues-\(full-list\)/mediterranean-migrant-crisis](http://www.ics-shipping.org/key-issues/all-key-issues-(full-list)/mediterranean-migrant-crisis)> accessed August 10, 2017.

³ Emma Diltz, 'Death and Desperation Taint Mediterranean Shipping Routes: Commercial Shippers Bear the Psychological and Financial Brunt of Rescuing Asylum Seekers at Sea' *Politico* (25 May, 2017); Sara Sjolín, 'Shipping Industry Braces for Costs from Migrant Crisis: International Conventions Require Vessels to Help Distressed Migrant Boats' *Market Watch* (9 September, 2015); Jonathan Saul, 'Commercial Ships Scoop Up Desperate Human Cargo' *Reuters* (21 September, 2015); Terry Donaghy, 'Migrant Crisis Prompts Trade and Insurance Questions' *Lloyd's List* (30 August, 2015); Max Tingyao Lin, 'Latest Tragedy Shows Why Merchant Shipping Should Not Be Main Rescuer for Mediterranean Migrant' *Lloyd's List* (20 April, 2015); James Politi and Joel Lewin, 'Shipping Companies Warn of Migrant Rescue Risks' *Financial Times* (18 January, 2015).

⁴ 'Mediterranean Migrants Crisis: Shipping Cannot Cope Alone' *Lloyd's List* (4 March, 2015); Craig Eason, 'Migrants in the Med: Shipping Will Continue to Respond, but It Cannot Solve the Problem' *Lloyd's List* (4 September, 2015).

⁵ *Ibid.* As the mass arrival of migrants in Europe sparks political backlash, industry stakeholders have voiced concern that coastal states may change their policies and become less willing to allow disembarkation from merchant ships. 'Italy Threatens to Turn Away Foreign Ships with Rescued Migrants' *Deutsche Welle* (28 June, 2017).

hundreds of thousands of US dollars per day.⁶ In response, industry stakeholders have repeatedly urged coastal states and supranational organizations to more effectively lead SAR functions, yet dependence on commercial resources persists.⁷

International law is unequivocal that commercial shipmasters are obliged to render assistance to distressed vessels without any promise of compensation.⁸ Unfortunately, the language of popularly used shipping contracts allocating who among the relevant shipping interests must absorb rescue costs is far less clear.⁹ For instance, the decades-old but ever-popular New York Produce Exchange (NYPE) 1946 time charterparty form produced by the Baltic International Maritime Council (BIMCO) remains in widespread commercial use in the dry-cargo trade,¹⁰ yet it is silent on relevant rescue-related liabilities.¹¹

This Article focuses on this contractual uncertainty over of humanitarian rescue costs. First, it outlines the legal obligations imposed on private shipmasters to render assistance to distressed vessels and discusses the related commercial consequences.¹² Next, it examines the language of popularly used shipping contracts and evaluates deficiencies regarding rescue cost allocation, including an in-depth analysis of relevant court opinions and arbitration awards from both the United States and England.¹³ Finally, drawing from the shipping industry's experience in modifying contracts in response to pressing challenges such as

⁶ Liam Moloney and Costas Paris, 'Europe's Cargo Ships Diverted to Sea Rescues' *Wall Street Journal* (26 March, 2015); Jonathan Saul, 'Commercial Ships Scoop Up Desperate Human Cargo' *Reuters* (21 September, 2015).

⁷ 'ICS Calls on UN to Act on Migrant Deaths' *Lloyd's List* (17 February, 2017); Janet Porter, 'German Shipowners Call for Massive Expansion of Rescue Efforts' *Lloyd's List* (22 April, 2015); Craig Eason, 'Shipping Bodies Urge the International Community to Stop Boat Migrants' *Lloyd's List* (18 December, 2014); Fanny Carrier, "'We Locked Ourselves In' – a Captain's Migrant Log' *Agence France Presse* (31 May, 2017); Lizzie Dearden, 'Migrant Boat Crisis: Human Smugglers 'Throwing Pregnant Women and Children Overboard to Drown to Force Commercial Ships to Rescue Them'' *The Independent* (2 June, 2015); Craig Eason, 'Mediterranean Trafficking Gangs Dump Boat People Near Passing Ships' *Lloyd's List* (26 September, 2014).

⁸ See section 2.

⁹ See sections 2 and 3.

¹⁰ See Paul Todd, 'NYPE 2015: Wholesale Reform or an Invitation to Cherry-pick?' [2015] LMCLQ 306, 307 (discussing industry reluctance to adopt updated iterations of the NYPE forms designed to reflect modern commercial practices).

¹¹ See section 3.

¹² See section 2.

¹³ See section 3.

maritime piracy, it argues that new contract clauses should be developed and adopted to more precisely address rescue risk.¹⁴

Note that, for purposes of continuity in exploring contract language, this Article focuses on the language of NYPE time charterparty forms, in particular the NYPE 1946 form.¹⁵ The continued commercial importance of the NYPE 1946 form and the jurisprudence it has produced make discussion of its terms practically significant and may also serve as a valuable illustration exposing problems arising under other widely used forms.¹⁶ For the sake of brevity and clarity, related issues connected to voyage charterparties, bills of lading, and other contracts of carriage are largely neglected.¹⁷

2 The Legal Obligation to Rescue and Its Impact on Merchant Shipping During Periods of Mass Migration at Sea

To fully appreciate the impact of maritime migration on the shipping industry, it is first important to examine the scope of the search and rescue obligations imposed on private shipmasters. This section explores the principles arising under international law obliging shipmasters to render assistance to distressed vessels and coordinate with sovereign authorities to ensure rescued persons are delivered to a place of safety. It then evaluates possible financial losses flowing from compliance with these obligations, setting the stage for examining allocation of rescue costs.

¹⁴ See sections 4 and 5.

¹⁵ New York Produce Exchange Form (1946), reprinted in Terence Coghlin et al, *Time Charters* (7th edn, Informa Law 2014) F1, 774-777.

¹⁶ See Coghlin (n 15) 1 (describing the NYPE 1946 form as ‘the most important standard form for dry cargo charters’); BIMCO, ‘NYPE 2015 Time Charter Party Explanatory Notes’ (‘The 1946 edition is arguably still the most commonly used version of the NYPE charter...’).

¹⁷ For an overview of related issues arising out of migrant rescues, see Kathleen S Goddard, ‘Rescuing Refugees and Migrants at Sea: Some Commercial Shipping Implications’ (2015) 21 JIML 352.

2.1 The Scope of the Shipmaster Obligation to Rescue at Sea

The long-standing practice of seafarers assisting one another in distress situations is a maritime tradition with deeply-rooted humanitarian underpinnings.¹⁸ Over the centuries, through widespread recognition, this practice formed customary international law obliging shipmasters, including those operating vessels for commercial purposes, to altruistically perform rescues at sea without the expectation of compensation in return.¹⁹

During the 20th century, this customary norm was codified through international agreements, which today articulate the scope of this duty in more precise terms. Following the tragic sinking of the *Titanic*, in which more than 1,500 civilian passengers perished, the international community responded by promulgating the Safety of Life at Sea Convention (SOLAS Convention), which expressly recognizes the duty to rescue at sea.²⁰ The SOLAS Convention has since been revised and amended, with the current iteration containing the following language: '[t]he master of a ship at sea which is in a position to be able to provide assistance, on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance ...'.²¹ This shipmaster duty is similarly defined by international instruments governing marine salvage, including both the Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea (Brussels Convention) and the more recent International Convention on Salvage (Salvage Convention).²² The applicable language of the Salvage Convention reads, '[e]very master is

¹⁸ See generally Steven F. Friedell, 'Compensation and Reward for Saving Life at Sea' (1978-1979) 77 Michigan LR 1218.

¹⁹ Customary international law derives from 'a general and consistent practice of states followed by them from a sense of legal obligation.' *Restatement (Third) of Foreign Relations Law of the United States* (1987) s 102(2).

²⁰ See Jeffrey Maltzman and Mona Ehrenreich, 'The Seafarer's Ancient Duty to Rescue and Modern Attempts to Regulate and Criminalize the Good Samaritan' (2015) 89 Tulane LR 1267 (discussing public outcry over the *SS California's* alleged refusal to render assistance to the capsized *Titanic*); See also Friedell (n 18).

²¹ International Convention for the Safety of Life at Sea, Nov 1, 1974, 32 UST 47, ch V, reg 33.1 (hereinafter 'SOLAS Convention').

²² Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea, September 23, 1910, 37 Stat 1658 (hereinafter 'Brussels Convention'). Article 11 of the Brussels Convention reads, 'Every master is bound, so far as he can do so without serious danger to his vessel, her crew and her passengers, to render assistance to everybody, even though an enemy, found at sea in danger of being lost ...'

bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea'²³

Private shipmasters, of course, do not bear the sole responsibility to facilitate maritime search and rescue. The international legal framework instead imposes primary rescue responsibility on state actors. The United Nations Convention on the Law of the Sea (UNCLOS) requires Contracting States on the coasts to, 'promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea'²⁴ The International Convention on Maritime Search and Rescue (SAR Convention) further obliges coastal states to establish Rescue Coordination Centres (RCCs) to monitor distress signals and direct rescue responses with ships operating in nearby waters.²⁵ The SAR Convention also identifies the broad scope of this obligation by requiring that rescuers deliver rescued persons to a 'place of safety.'²⁶ In fulfilling this duty, the SAR Convention contemplates a cooperative effort between RCCs and private vessels.²⁷ In fact, the accompanying Guidelines on the Treatment of Persons Rescued at Sea issued under the auspices of the International Maritime Organization in 2004 acknowledge that it may be the assisting private ship that actually transports survivors to the place of safety under the direction of the RCC.²⁸

This interplay between the state responsibility to oversee SAR functions and the private obligation to assist is further established through treaty provisions addressing shipmaster compliance. Under UNCLOS, Contracting States are obliged to enforce private shipmaster obligations by 'requiring' the master of ships flying their flag 'to render assistance to any person found at sea in danger of being lost' and 'to proceed with all possible speed to the

²³ International Convention on Salvage, April 28, 1989, S Treaty Doc No 102-12, 1953 UNTS 165 (hereinafter 'Salvage Convention').

²⁴ United Nations Convention on the Law of the Sea, UN Doc A/CONF 62/122, December 10, 1982, 1833 UNTS 397 (hereinafter 'UNCLOS') art 98.

²⁵ International Maritime Organization, International Convention on Maritime Search and Rescue, April 27, 1979, 1403 UNTS 97 (hereinafter 'SAR Convention'), s 2.1.3.

²⁶ Ibid s 1.3.2.

²⁷ Ibid s 2.1.9.

²⁸ 'Guidelines on the Treatment of Persons Rescued at Sea' IMO Resolution MSC.167(78) 6.18 ('Often the assisting ship or another ship may be able to transport the survivors to a place of safety. However, if performing this function would be a hardship for the ship, RCCs should attempt to arrange use of other reasonable alternatives.').

rescue of person in distress, if informed of their need for assistance.²⁹ The Salvage Convention employs similar language mandating that State Parties ‘adopt measures necessary to enforce’ the shipmaster’s duty to render assistance.³⁰ Domestic legislatures have generally followed suit, producing statutes providing for civil and criminal penalties against shipmasters failing to respond to requests for assistance.³¹

Notably absent from this legal framework is any exception for shipmasters operating vessels for commercial purposes.³² These obligations are therefore presumed to apply to shipmasters operating private vessels of all types, including bulk carriers, container vessels, tankers, fishing vessels, and cruise liners alike. Despite the glaring differences between the physical characteristics of these vessels and their feasibility for use in rescue operations, the legal obligations placed on the shipmasters operating them at sea is fundamentally the same.

2.2 The Costs of Commercial Vessel Contributions to Large-Scale Rescues

Using commercial vessels for large-scale rescues is both dangerous and remarkably costly.³³ Some of the direct costs include humanitarian provisions, additional wages and stores, extra fuel consumed during and after the rescue, port charges assessed during disembarkation of

²⁹ UNCLOS art 98(1).

³⁰ Salvage Convention art 10.

³¹ For example, in the United States, 46 USCS s 2304 provides:

- (a) (1) A master or individual in charge of a vessel shall render assistance to any individual found at sea in danger of being lost, so far as the master or individual in charge can do so without serious danger to the master's or individual's vessel or individuals on board.
- (2) Paragraph (1) does not apply to a vessel of war or a vessel owned by the United States Government appropriated only to a public service.
- (b) A master or individual violating this section shall be fined not more than \$ 1,000, imprisoned for not more than 2 years, or both.

England, Italy, Greece, Malta, and others have adopted similar legislation. See Merchant Shipping (Distress Messages) Regulations 1998, No 1691 (UK); Italian Code of Navigation, art 1158; Greek Code of Public Maritime Law, art 227; Malta Merchant Shipping Act, Chapter 234, ss 305-306.

³² Nevertheless, the IMO ‘Guidelines on the Treatment of Persons Rescued at Sea’ s 6.3 reads, ‘[a] ship should not be subject to undue delay, financial burden or other related difficulties after assisting persons at sea; therefore coastal States should relieve the ship as soon as practicable.’

³³ For a more thorough examination of the dangers associated with using commercial vessels for large-scale rescues, see Richard L Kilpatrick Jr and Lt Adam Smith, ‘The International Legal Obligation to Rescue During Mass Migration at Sea: Navigating the Sovereign and Commercial Dimensions of a Mediterranean Crisis’ 28 *University of San Francisco Maritime LJ* 142-194 (2016); See also International Maritime Organization, UN High Commissioner for Refugees, and International Chamber of Shipping, ‘Rescue at Sea: A Guide to Principles and Practice As Applied to Refugee and Migrants’ (2015).

rescued persons, and repairing, restocking, and cleaning the vessel itself. The indirect costs are likely to be even more substantial. If the vessel deviates from its intended voyage, embarks rescued persons, and then proceeds to actually transport the rescued persons to a safe port, this is likely to generate substantial loss of time for which the vessel cannot fulfil its scheduled commercial activities. Such delays may impact a variety of actors with an economic stake in the underlying voyage, including shipowners, charterers, cargo interests, and insurers. Anecdotally, stakeholders have recently reported losses of up to US \$500,000 arising out of a single migrant vessel rescue causing the vessel to be delayed for one week.³⁴

Under the law of salvage, it is possible for a rescuer to recover a reward for protecting the property interests of a third party shipowner. For several reasons, however, this salvage framework is unlikely to provide any recourse for losses suffered while providing assistance to a migrant vessel. While the Salvage Convention acknowledges saving life to be one factor in determining salvage remuneration, life salvage traditionally has been treated differently than property salvage.³⁵ In jurisdictions like the United States, life salvage is only recoverable from the shipowner if it is made contemporaneously with property salvage.³⁶ Pure life salvage, in contrast, will not give rise to an independent claim of recovery against the shipowner or rescued persons.³⁷ This doctrine effectively denying compensation for saving life, but allowing it for saving property, has long been controversial.³⁸ While art 16(1) of the Salvage Convention explicitly provides that payment will not be owed from rescued persons, it also appears to allow national law to derogate from this principle.³⁹ Nevertheless, even in jurisdictions in which pure life salvage creates an independent claim, this would not be helpful to the life salvor if the rescued persons are impoverished seafarers packed onto worthless inflatable rafts 'owned' by elusive migrant smuggling cartels.

³⁴ See Liam Moloney and Costas Paris, 'Europe's cargo Ships Diverted to Sea Rescues' *Wall Street Journal* (26 March, 2015) (noting the extra costs resulting from rescues could cause 'serious financial problems' for some smaller shipping companies).

³⁵ Salvage Convention art 13(1)(e) ('the skill and efforts of the salvors in salving the vessel, other property and *life*') [emphasis added]; William Rann Kennedy and Francis Rose, *Law of Salvage* (9th edn, Sweet & Maxwell 2017) 124-145.

³⁶ See Martin Davies, 'Whatever Happened to the Salvage Convention 1989?' (2008) 39 *JML & C* 463, 498-499.

³⁷ *Ibid.*

³⁸ Friedell (n 18) 1218 (discussing the history of life salvage under Anglo-American law).

³⁹ See Salvage Convention art 16(1); Kennedy and Rose (n 35) 141 (noting it is unclear whether national laws could override the general immunity from remuneration given to saved persons under Article 16).

An alternative for the rescuer would be to seek reimbursement from a fund administered by some external entity, such as a sovereign fund designed to cover the costs of saving life. Unfortunately, no such fund currently exists at the international level.⁴⁰ Although some statutes like the Merchant Shipping Act 1995 (UK) appear to legislate such options at the domestic level, these rely on narrow qualifying circumstances subject to political discretion.⁴¹ Their efficacy in adequately compensating rescuers is also largely untested (and in the context of expensive large-scale rescues, unlikely).⁴²

The unfortunate reality is that the costs of rescues are likely to be absorbed by the parties with a pecuniary interest in the underlying commercial voyage. These actors may hedge against some of these risks through special insurance products, but standard cargo and hull insurance policies are not designed to cover such losses. Even protection and indemnity (P&I) coverage intended to guard against more open-ended liabilities would cover only a portion of rescue costs.

In fact, in the wake of the recent surge in large-scale rescues occurring in the Mediterranean Sea, members of the International Group of P&I clubs have clarified the scope of their coverage through circulars, newsletters, and press releases. These publications have explained that P&I club rules may allow recovery of some of the direct rescue-related losses, such as fuel, stores, provisions, and port charges, but the indirect losses linked to delays will not be covered.⁴³ Consequently, P&I clubs have advised members to ensure their commercial contracts reflect the parties' intentions on rescue risk allocation. In a 2015 loss prevention guidance, the Standard Club advised, 'it is important that [P&I club] members give careful thought to making express and clear provisions within their commercial contracts as to who

⁴⁰ Some industry participants have argued that accepting payment for large-scale rescues is dangerous because it implies that merchant shipping might be able to serve as a permanent solution to large-scale search and rescue. See David Osler, 'Shipping Should Reject Migrant Compensation, Grimaldi Urges' *Lloyd's List* (October 16, 2015).

⁴¹ The Merchant Shipping Act 1995 (UK) s 224 (1), sch 11, part II, para 5 grants the Secretary of State the discretion to award compensation to a pure life salvor when the rescue involves a UK registered vessel or occurs in UK waters.

⁴² See Kennedy and Rose (n 35) 145 n 400 (noting the discretionary payments for pure life salvage available under UK law have been 'exercised rarely' and involved 'modest sums' of no more than £250).

⁴³ See UK P&I Club, 'Refugees at Sea' <<https://www.ukpandi.com/knowledge-publications/industry-issues/industry-developments/refugees-at-sea/>>; Gard, 'Loss Prevention Circular No 13-09, Refugees and Migrants Rescued at Sea' <<http://www.gard.no/Content/135829/No%2013-09%20Refugees%20and%20migrants%20rescued%20at%20sea.pdfAS>> accessed August 31, 2017.

— principally owner or charterer — will be liable’ for the time lost during migrant vessel rescues.⁴⁴ Similarly, the Swedish Club, in a recent guidance published on its website, emphasized, ‘... the wording of the [charterparty] will decide where the costs for the diversion, as well as other costs, will fall’ It also urged club members to recognize the substantial losses that could be involved in migrant rescues and recommended contracts include language, ‘to minimize the exposure and avoid uncertainty through clear wording.’⁴⁵

3 Uncertainty Regarding Who Bears the Risk of Rescue-Related Costs

Determining which commercial actors are responsible for such rescue costs can involve untangling complex contractual terms reflected in charterparties, bills of lading, policies of insurance, and other documents of commercial and legal significance. Risk allocations defined under the governing charterparties are particularly important and serve as the focus of this section.

Charterparties define the rights, obligations, and liabilities between the shipowner and the charterer who, depending on its commercial needs, generally contracts either to employ the shipowner’s vessel for a fixed period of time or for a particular voyage.⁴⁶ In the dry trade, the time charterparty is the most common type of agreement, in which the shipowner and charterer agree to a fixed period for the shipowner and its crew to continue operating the vessel while the charterer gives the shipowner orders to fulfil commercial responsibilities that the charterer has arranged.⁴⁷ In exchange for the use of the shipowner’s vessel, shipmaster and crew, the charterer is obliged to compensate the shipowner through periodic payments of an agreed flat-rate fee called ‘hire’ and must cover other expenses such as fuel.⁴⁸ Through this arrangement both the shipowner and the charterer can turn a profit as the shipowner and its agents facilitate the vessel’s maintenance and navigation while the charterer dictates

⁴⁴ Standard Club, ‘Refugees/Migrants at Sea’ <<http://www.standard-club.com/media/2533684/people-claims-refugees-migrants-at-sea.pdf>> accessed August 31, 2017.

⁴⁵ Swedish Club, ‘Refugees in the Mediterranean’ <<http://www.swedishclub.com/loss-prevention/trading-area/refugees-in-the-mediterranean/>> accessed August 31, 2017.

⁴⁶ Coghlin (n 15) 1-12.

⁴⁷ Ibid.

⁴⁸ Ibid 4.

the vessel's commercial activities.⁴⁹ Shipowners and charterers are generally free to negotiate the specific terms of their agreement under freedom of contract principles, yet uniformity in the industry is maintained through the widespread use of standard contract forms, such as the NYPE 1946.⁵⁰

If the time-chartered vessel deviates from its intended course or is otherwise delayed, this lost time may raise legal questions regarding who must absorb the financial consequences. If the delay arises out of a shipmaster's decision to provide assistance to a distressed third-party vessel, at least two critical commercial issues arise: First, if the rescue involves a deviation from the vessel's intended course, does this amount to a shipowner's breach of the charterparty? Second, even if such a deviation does not breach the charterparty, must the charterer continue to pay hire and other expenses during the period that the vessel is not being used for its intended commercial purposes? Each of these questions are explored below.

3.1 Is Deviation to Rescue Third Parties a Breach of Contract?

Under a time charterparty, the charterer has the right and responsibility to order employment of the vessel.⁵¹ To fulfil the shipowner's obligations, the shipmaster must comply with the charterer's orders and 'prosecute his voyage with utmost dispatch.'⁵² If the shipmaster employs the vessel for purposes that are not authorized or otherwise justified, then the charterer may have grounds to argue this is a breach of the charterparty.⁵³ If the shipmaster delays prosecution of the voyage in order to render assistance to a distressed vessel, a relevant legal question is whether such a deviation is authorized by law or express language in the charterparty.

⁴⁹ Ibid 10.

⁵⁰ See Howard Bennett (ed), *Carver on Charterparties* (Sweet & Maxwell 2017) 1-2 (discussing uniformity in charterparties achieved through the use of standard forms and clauses).

⁵¹ See Coghlin (n 15) 9, 335.

⁵² Ibid 327; See also NYPE 1946, cl 8.

⁵³ See Coghlin (n 15) 327.

In practice, when giving employment orders a time charterer might not give specific instructions regarding the vessel's route since navigation is within the responsibilities of the shipowner (an agreement on the details of the voyage route is perhaps more likely in the context of a voyage charter or a trip time charter).⁵⁴ In the time charter context, it is generally understood that the shipmaster maintains a degree of autonomy and freedom to diverge from the intended course so long as the reasons for the deviation are justified, such as to protect the safety of the vessel, crew, and cargo, or otherwise fall with the professional expertise of the shipmasters.⁵⁵

While there are few published cases directly addressing the question of whether deviation for purposes of rendering assistance to a distressed third-party vessel is justified, the early English case *Scaramanga v Stamp* discussed this issue in striking terms.⁵⁶ In that case, the dispute arose during a chartered voyage of the *Olympias* carrying a load of wheat from Cronstadt (an island off the coast of today's St Petersburg, Russia) to the Mediterranean Sea.⁵⁷ As the *Olympias* sailed along the North Sea, she encountered a vessel called the *Arion* whose machinery had broken down.⁵⁸ The *Olympias* could have rescued the crew and left the *Arion* adrift at sea, but the shipmaster of the *Arion* instead negotiated an agreement with the shipmaster of the *Olympias* to tow the disabled *Arion* to the Netherlands in exchange for a salvage payment.⁵⁹ While en route to the Netherlands with the *Arion* in tow, the *Olympias* ran aground, and its cargo was lost.⁶⁰

Although the charterparty contained a provision exculpating the shipowner from liability for damage to the cargo caused by 'perils of the seas', the charterer submitted that the cargo was lost during the property salvage attempt, which it argued was a 'wrongful deviation'.⁶¹

⁵⁴ See Coghlin (n 15) 331 (discussing the issue of deviation in the context of a time charter, but noting that the concept of deviation has developed primarily in relation to bills of lading and voyage charters); Yvonne Baatz (ed), *Maritime Law* (2nd edn, Sweet & Maxwell 2011) 149-150 (discussing the applicability of the doctrine of deviation when a time charterer gives express instructions on the route); Martin Davies and Anthony Dickey, *Shipping Law* (4th edn, Thomson Reuters 2016) 533-536 (discussing what kinds of orders a time charterer may give to the shipmaster).

⁵⁵ Davies and Dickey (n 54) 533-535.

⁵⁶ *Scaramanga v Stamp*, 4 CPD 316 (1879), affd 5 CPD 295 (1880).

⁵⁷ 5 CPD 295.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.* 298.

Determining who bore the risk of cargo loss hinged on whether the deviation of the *Olympias* was justified.⁶² If the deviation was justified, then the charterer would bear the loss because it had agreed not to hold the shipowner liable for cargo loss caused by the traditional perils of the seas, but if the deviation was unjustified and the cargo was lost during that part of the voyage, then the shipowner would have been in breach of contract at the time of the loss and would therefore be responsible.⁶³

In making this determination, the English court cogently explained the special common law liberty of shipowners to deviate for the purpose of saving lives, irrespective of the negative impact on other commercial actors with an interest in the underlying shipment.⁶⁴ The court wrote:

The impulsive desire to save human life when in peril is one of the most beneficial instincts of humanity, and nowhere more salutary in its results than in bringing help to those who, exposed to destruction from the fury of winds and waves, would perish if left without assistance. To all who have to trust themselves to the sea, it is of the utmost importance that the promptings of humanity in this respect should not be checked or interfered with by prudential considerations as to injurious consequences, which may result to a ship or cargo from the rendering of the needed aid. It would be against the common good, and shocking to the sentiments of mankind, that the shipowner should be deterred from endeavouring to save life by the fear, lest any disaster to ship or cargo, consequent on so doing, should fall on himself. Yet it would be unjust to expect that he should be called upon to satisfy the call of humanity at his own entire risk.

Moreover, the uniform practice of the mariners of every nation — except such as are in the habit of making the unfortunate their prey — of succouring others who are in danger, is so universal and well known, that there is neither injustice nor hardship in treating both the merchant and the insurer as making their contracts with the shipowner as subject to this exception to the general rule of not deviating from the appointed course. Goods owners and insurers must be taken, at all events in the absence of any stipulation to the contrary, as acquiescing in the universal practice of the maritime world, prompted as it is

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid.

by the inherent instinct of human nature, and founded on the common interest of all who are exposed to the perils of the seas⁶⁵

Articulating this ancient principle of risk-sharing between shipping interests when fellow seafarers in distress face imminent loss of life, the court identified an implied liberty for the shipmaster as agent of the shipowner to deviate from the agreed course.⁶⁶

The court framed this common law rule in contrast to deviation to save property, noting '[d]eviation for the purpose of saving property stands obviously on a totally different footing' and therefore 'entails the usual consequences of deviation'.⁶⁷ Applying the rule to the facts before it, the court found that while the *Olympias* had justifiably deviated to render assistance to the *Arion's* crew, the additional deviation of towing the *Arion* to obtain salvage was unreasonable and therefore the shipowner (not the charterer or its insurer) bore the risk of cargo loss.⁶⁸

In addition to this common law rule shielding the shipowner from liability arising out of deviation to save life, widely used charterparty forms also include specific clauses granting the shipmaster the 'liberty to deviate' in certain circumstances. These clauses typically contain the liberty to assist other vessels. For example, Clause 16 of the NYPE 1946 form reads in relevant part, '[t]he 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'.⁶⁹

Widely recognized international conventions also address the issue of deviation as it relates to the rights and liabilities allocated between carriers and shippers under a bill of lading. For instance, the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Hague Rules) expressly exculpates the carrier for liability arising out of life-saving deviations.⁷⁰ Article IV (4) of the Hague Rules reads:

⁶⁵ Ibid 304.

⁶⁶ Ibid.

⁶⁷ Ibid 304-305.

⁶⁸ Ibid 306.

⁶⁹ NYPE 1946, cl 16.

⁷⁰ International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Hague Rules).

Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this Convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.⁷¹

Note that the more recent Hague-Visby Rules, Hamburg Rules and Rotterdam Rules also each contain similar provisions exculpating the carrier for losses caused by efforts to save lives at sea.⁷²

These international agreements were designed to apply to bills of lading governing the relationship between carriers and shippers, but they still carry relevance in charterparty disputes because charterparty forms regularly incorporate these rules (or the domestic equivalents) through a 'Clause Paramount'. For example, cl 24 of the NYPE 1946 form reads, '[t]he Carriage of Goods by Sea Act of the United States ... shall be deemed to be incorporated herein ...'.⁷³ Note that the referenced Carriage of Goods by Sea Act (COGSA) is recognized as reflecting the Hague Rules through nearly verbatim language.⁷⁴

The effect of incorporating the Hague Rules or domestic legislation like COGSA into the charterparty is that the rights and liabilities of the shipper and carrier described in the rules apply to the charterparty by reading the shipowner as the 'carrier' and the charterer as the 'shipper'.⁷⁵ Thus, even if the charterparty does not include an express provision granting the liberty to deviate for life saving purposes, by way of a Clause Paramount a shipowner may still be able to rely on the liberty to deviate for life-saving rescues.

Taken as a whole, these common law, contractual, and convention-based principles place the shipowner on solid legal footing in situations in which the shipmaster has delayed or deviated from the intended voyage to render assistance to a third-party distressed vessel. Applying these principles, it is highly unlikely that a charterer could successfully argue the shipowner

⁷¹ Ibid. Note that the Hague-Visby Rules art 4(4) contains nearly verbatim language.

⁷² See United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules) art 5(6); See United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly By Sea (Rotterdam Rules) art 17(3)(l).

⁷³ NYPE 1946, cl 24.

⁷⁴ See *Senator Linie GMBH & Co KG v Sunway Line, Inc*, 291 F 3d 145, 158 (2nd Cir 2002) (discussing the desire of COGSA legislators to maintain the language of the Hague Rules).

⁷⁵ *Carver on Charterparties* (n 50) 396.

has breached the charterparty by deviating to save life. However, since charterparties are freely negotiated, there is nothing preventing a charterer from negotiating charterparty clauses that favourably allocate the financial consequences of life-saving deviations as the responsibility of the shipowner.⁷⁶

3.2 Is a Time Chartered Vessel On or Off-hire during Rescue-Related Delays?

While the shipowner is unlikely to be found in breach of the charterparty when the shipmaster deviates to render assistance to other vessels, it is a separate question whether the charterer owes the shipowner hire during such a deviation. The default arrangement under a time charterparty is that the charterer is obliged to pay hire continuously to the shipowner throughout the charter period.⁷⁷ The charterer's obligation will be suspended only when certain contractually stipulated events place the vessel 'off-hire'.

The off-hire provision contained in Clause 15 of the NYPE 1946 form reads in relevant part 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 damage to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, dry-docking for purposes of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost ...

⁷⁸

This clause contemplates enumerated causes 'preventing the full working of the vessel' in which 'payment of hire shall cease' during the lost time. These enumerated causes are quite specific, but may broadly be classified as either problems with the vessel itself or arising out of the shipowner's responsibility as the vessel operator.

⁷⁶ See section 4.

⁷⁷ Coghlin (n 15) 441.

⁷⁸ NYPE 1946, cl 15.

The clause also contains a so-called ‘sweep up’ provision recognizing ‘any other cause’ to be an off-hire event so long as it ‘prevents the full working of the vessel.’ The sweep-up provision is typically interpreted within the context of the charter as a whole through a principle known as the *ejusdem generis* rule.⁷⁹ This rule presumes the contract drafters included ‘any other cause’ at the end of the list only to capture other similar causes to those specifically enumerated in the clause, rather than to serve as an open-ended catchall provision.⁸⁰

Complicating matters, conventional NYPE forms are often amended to add the word ‘whatsoever’ to the sweep-up provision, which places the vessel off-hire ‘by any other cause *whatsoever* preventing the full working of the vessel’.⁸¹ The amended language precludes the application of the *ejusdem generis* rule and instead suggests any event could trigger the off-hire clause if it prevents the vessel from ‘full working’.⁸²

Whether loss of time caused by providing assistance to a third-party distressed vessel falls within this category of off-hire events remains a question of fact and contract construction. In making such determinations, the critical issues would be whether the event actually prevents the full working of the vessel and, if so, whether the cause is specifically enumerated or otherwise captured under the sweep-up provision.

3.2.1 Cases Addressing the Question of Hire During Rescue-Related Delays

NYPE forms (along with other widely used charterparty forms) customarily include arbitration clauses. Consequently, controversies arising under NYPE terms are normally resolved outside of national court systems. This makes published case law analysing off-hire clauses scarce and difficult to track since many industry players prefer to use arbitration to ensure confidentiality. Nevertheless, some relevant arbitration awards have been published and others have been reviewed through domestic courts in published judgments, which sheds

⁷⁹ See Coghlin (n 15) 450.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid. Professor Davies has questioned whether this amendment makes any difference at all. See Martin Davies, ‘The Off-Hire Clause in the New York Produce Exchange Time Charterparty’ [1990] LMCLQ 107.

some much needed light on how off-hire clauses might be interpreted in disputes over rescue-related delays.

The most well-known example is *Ca Venezolana De Navegacion v Bank Line (The Roachbank)*.⁸³ In that case, the legal issue was whether a time chartered vessel was off-hire during a delay flowing from a deviation to conduct a large-scale rescue.⁸⁴ In 1979, while en route from Singapore to Taiwan via the South China Sea as part of a larger voyage towards South America, the *M/V Roachbank* encountered a vessel with 293 stranded Vietnamese migrants.⁸⁵ The shipmaster of the *Roachbank* ordered embarkation of the migrants at sea and then proceeded towards its intended destination at Kaosiung, Taiwan.⁸⁶ After the vessel arrived off of the port, the Taiwanese authorities refused to allow the *Roachbank* enter the harbour until the shipowner agreed not to let the migrants disembark and secured a bank guarantee to cover any financial losses arising from a breach of that agreement.⁸⁷

The migrant rescue and the subsequent reaction of the Taiwanese authorities caused the *Roachbank* to be delayed for nearly nine days.⁸⁸ This delay spawned a legal dispute between the shipowner and the charterer regarding whether hire was owed during that period.⁸⁹ The voyage at issue was fixed under the slightly amended NYPE 1946 form containing an off-hire clause referencing 'any other cause whatsoever preventing the full working of the vessel' as an off-hire event.⁹⁰

The dispute was referred to arbitration and the majority of the arbitrators found that the vessel remained on hire during the rescue and subsequent delays.⁹¹ The arbitrators' award itself was not published, but pursuant to English procedure, the charterers were given leave to appeal in the English Commercial Court.⁹² On review, the court cited passages from the award explaining why the *Roachbank* remained on hire during the delay even though the

⁸³ *Ca Venezolana De Navegacion v Bank Line (The 'Roachbank')* [1987] 2 Lloyd's Rep 498 (Webster J) (QB), affd [1988] 2 Lloyd's Rep 337 (Eng CA).

⁸⁴ Ibid 499.

⁸⁵ Ibid.

⁸⁶ Ibid 500.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

vessel was prevented from entering port due to the ‘attitude’ of the Taiwanese authorities, as well as the stevedores on shore who refused to perform cargo work with the migrants still on board.⁹³

The court recounted the arbitrator majority’s reasoning, noting the following findings: While there was a possibility of modest delays while migrants were ‘herded to non-working areas’ of the vessel, the ‘hindrance of the number of persons on board’ did not ‘impair ‘the full working of the vessel’ as a physical reality.’⁹⁴ Instead, the *Roachbank* was ‘always capable as a vessel of performing the service immediately required by the charterers and was not prevented by the presence of the refugees from being fully worked, had port facilities been made available for them to do so’.⁹⁵

The court further addressed the arbitrator majority’s discussion of whether the presence of migrants on board the vessel and the unwillingness of the Taiwanese authorities to allow access to the port qualified as a ‘cause’ under the amended sweep-up provision.⁹⁶ The court also cited counterarguments articulated by the single dissenting arbitrator, who presented the view that performing cargo work on the vessel was unlikely when it was full of migrants since, ‘the delays which would be incurred would be unacceptable to the charterers who were running a liner service on a tight schedule’.⁹⁷

Carefully walking through the relevant cases interpreting the NYPE off-hire clause, the court explained that the proper inquiry was ‘whether the vessel is fully efficient and capable in herself of performing the service immediately required by the charterers’.⁹⁸ Since the arbitrators concluded that the vessel remained fully capable of performing such services, the court found that it was not necessary for the arbitrators to even consider causation.⁹⁹ On these grounds, the court affirmed the decision of the tribunal.¹⁰⁰ The charterers subsequently applied for leave to appeal to the High Court, but the matter was dismissed on grounds that

⁹³ Ibid 501-502.

⁹⁴ Ibid 501.

⁹⁵ Ibid 502.

⁹⁶ Ibid 502.

⁹⁷ Ibid.

⁹⁸ Ibid 507.

⁹⁹ Ibid 508.

¹⁰⁰ Ibid.

the lower court applied the proper test in analysing the issue. Thus, the charterers were ultimately responsible to pay hire to the shipowner throughout the duration of the delay.¹⁰¹

A similar question of off-hire clause interpretation in the rescue context was addressed in a New York arbitration award published in full form through the Society of Maritime Arbitrators.¹⁰² In *Osit Shipping, Ltd v Canpotex Shipping Services, Ltd (The M/V Kitsa)* again the central issue was whether a time chartered vessel could properly be placed off-hire during the time it deviated from its primary voyage to assist a distressed vessel in which loss of life was imminent.¹⁰³

In December 1990, the *M/V Kitsa* was carrying cargo from Vancouver to Taiwan when the US Coast Guard requested the *Kitsa* change course to render assistance to the crew of the distressed *M/V Elounda Day*.¹⁰⁴ The shipmaster of the *Kitsa* complied with this request and safely embarked the crew of the *Elounda Day* before it foundered.¹⁰⁵ This life-saving deviation caused the *Kitsa* to be delayed for nearly five days.¹⁰⁶ As a result, the charterer subsequently refused to pay hire to the shipowner for the lost time and in response the shipowner brought a claim in New York arbitration alleging the charterer still owed over USD \$45,000 in hire and bunkers consumed during the deviation.¹⁰⁷

The charterparty at issue was a slightly amended version of the NYPE 1946 form which contained the original language of several relevant clauses, including the unamended cl 15 addressing off-hire.¹⁰⁸ The charterparty also obliged the shipmaster to prosecute the voyage with 'utmost dispatch' but granted the shipmaster the liberty to assist vessels in distress.¹⁰⁹

The parties also included cl 34, a 'rider clause,' which supplemented the off-hire provision through the following language:

¹⁰¹ *Ca Venezolana De Navegacion v Bank Line (The 'Roachbank')* [1988] 2 Lloyd's Rep 337 (Eng CA).

¹⁰² *Osit Shipping, Ltd v Canpotex Shipping Services, Ltd (the 'M/V Kitsa')* SMA 3119 (1994).

¹⁰³ *Ibid* *1.

¹⁰⁴ *Ibid*.

¹⁰⁵ *Ibid*.

¹⁰⁶ *Ibid*.

¹⁰⁷ *Ibid*.

¹⁰⁸ *Ibid*.

¹⁰⁹ *Ibid* *2.

Deviation: Should the vessel put back whilst on voyage by reason of an 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 or accident to the crew or any person on board the vessel ... the hire shall be suspended from the time of inefficiency until the vessel is again efficient in the same position All expenses incurred, including bunkers consumed during the period of suspended hire, shall be for owner's account and Charterers may deduct such expense from hire payments.¹¹⁰

Through its written submissions, the shipowner raised several arguments focusing on the language of these clauses.¹¹¹ First, the shipowner argued that, notwithstanding the shipmaster's duty to execute the voyage with utmost dispatch, the charterparty explicitly granted the shipmaster the liberty to deviate from the intended voyage for the purpose of saving life.¹¹² The shipowner supported this position by citing the US statute criminalizing a shipmaster who refuses to render assistance to other vessels in distress.¹¹³

The shipowner further argued that rescuing 'strangers at sea' is not one of the specifically enumerated off-hire events in cl 15.¹¹⁴ Moreover, applying the *ejusdem generis* principle, the shipowner argued, third-party rescues should not trigger the sweep-up provision 'any other cause' because such events are not analogous to the other explicitly enumerated causes.¹¹⁵ Regarding cl 34, the shipowner pointed out that it contains no explicit language placing the vessel off-hire during a deviation for the purpose of assisting third-party vessels and instead only addresses deviation to assist people who were already on board.¹¹⁶

The charterers, on the other hand, argued that rescuing the crew of the *Elounda Day* was an 'other cause' captured under the sweep-up language of cl 15.¹¹⁷ They also argued that the language under cl 34 allowing the vessel to be placed off-hire for purposes of deviation caused by sickness or accident to 'anyone on board the vessel' could be construed as including situations in which the vessel deviates to render assistance and ultimately embarks rescued

¹¹⁰ Ibid *2.

¹¹¹ Ibid *2-3.

¹¹² Ibid *2.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Ibid *3.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

persons onto the vessel.¹¹⁸ To support this argument, the charterers drew the analogy between saving the lives of injured crew members and rescuing third parties, including ‘persons on another sinking ship, or a downed aircraft, or marooned on an island’.¹¹⁹

The charterers also raised the argument that the customary and legal obligation to assist other vessels in distress is squarely placed on the shipmaster and shipowner.¹²⁰ Since the charterers are merely buyers and sellers of goods, they argued, this legal and moral obligation does not attach to them and therefore should not be supported at their expense.¹²¹

The majority of the arbitrators sided with the shipowner and found that the vessel remained on-hire throughout the delay.¹²² First, the majority reasoned that cl 15 enumerates six narrow circumstances in which the vessel may be placed off-hire and it does not include any language addressing deviations to render assistance to other vessels or to save life.¹²³ The majority noted that there are a variety of risks associated with the voyage left unaddressed by the off-hire clause which are normally absorbed by the charterers, including navigation necessary to avoid violent storms or pirate attacks.¹²⁴

Addressing the argument that a rescue could fall within the sweep-up provision assigning ‘any other cause’ as an off-hire event, the majority found that rendering assistance to a third-party vessel was distinguishable from the other listed causes, each of which ‘pertain to a cessation or infringement of the physical working of the vessel’.¹²⁵ Finding that ‘[t]here is obviously nothing physically or operationally wrong with the working of a vessel that is able to go to the rescue of life or property at sea,’ the majority declined to agree with the charterer’s ‘esoteric’ interpretation of cl 15.¹²⁶

The majority further reasoned that the liberties clause granted the shipmaster the authority to deviate for purposes of assisting distressed vessels ‘without any qualification, condition or

¹¹⁸ Ibid *3.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Ibid *7.

¹²³ Ibid *4.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid *4-5.

reservation for putting the vessel off-hire for having done so'.¹²⁷ Since the charterers failed to explicitly exempt themselves from paying hire during such deviations, the majority found that 'their silence implies that they recognized this concession as an inherent exigency of the venture for which they would accept the cost ...'.¹²⁸ Additionally, since the parties incorporated the US Carriage of Goods by Sea Act into the charterparty by reference, the majority reasoned that this exculpates the vessel for 'loss or damage arising or resulting from ... any deviation in saving or attempting to save life or property at sea'. The majority found this combination amounted to a 'clear cut absolution' for the shipowners.¹²⁹

Addressing cl 34, the majority found that this rider provision was only designed to capture deviations relating to the vessel and its crew and not for deviation to provide assistance to third-party vessels.¹³⁰ Thus, even though the rescued crew of the *Elounda Day* were ultimately embarked onto the *Kitsa*, the majority refused to accept the argument that embarkation of the rescued persons changed the nature of the deviation to fall within those off-hire events reflected in cl 34.¹³¹ Instead, the majority found that cl 34 was designed to address deviations 'resulting from a vessel's internal management or operation' and held that during deviations to rescue third parties at sea 'hire continues to run.'¹³²

The sole dissenting arbitrator disagreed and in a separate written appendix explained that the vessel should have been placed off-hire for the time lost during the deviation.¹³³ The dissenting arbitrator first reasoned that the majority misinterpreted the purpose of the liberties clause.¹³⁴ He explained that the liberties clause was designed to delineate between reasonable and unreasonable deviations, which carries implications for bill of lading and COGSA/Hague Rules defences and insurance coverage but does not directly allocate risk between the shipowner and the charterer for purposes of hire.¹³⁵

¹²⁷ Ibid *4.

¹²⁸ Ibid.

¹²⁹ Ibid *5.

¹³⁰ Ibid *6.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid *7.

¹³⁴ Ibid app A.

¹³⁵ Ibid.

Regarding the off-hire provisions contained in cl 15 and cl 34, the dissenting arbitrator expressed the view that the *ejusdem generis* rule ‘has little, if any, bearing on the correct interpretation’.¹³⁶ Instead, he took the position that ‘[i]f the charterer’s use of the vessel is interrupted, suspended or delayed by any of the stipulated causes or by ‘any other cause preventing the full working of the vessel’ then the charterer can properly place the vessel off-hire.’¹³⁷

The dissenting arbitrator further reasoned that the deviation to render assistance to the *Elounda Day* was unlike a deviation to avoid inclement weather because it was an ‘*interruption not a prolongation of the vessel’s performance in the charterer’s service*’ [emphasis in original].¹³⁸ Since the US Coast Guard ordered the shipmaster to render assistance to the *Elounda Day*, the *Kitsa* was ‘effectively and legally removed from the charterer’s service and temporarily pressed into a rescue effort ...’.¹³⁹

Addressing commercial fairness as a consideration, the dissenting arbitrator explained:

[t]he immediate obligation as well as the long term benefit to respond to ships in distress rests with the shipowning community. Although it might sound callous, the interests of a time charterer are financial and do not rise to the same moral or personal level of the shipowner. However noble the cause, the simple fact remains that the charterer’s service was interrupted and it ought not also be required to reward the shipowner for complying with its moral or legal obligations to its crew or that of a fellow shipmaster. That apple falls at the foot of the owner’s not the time charterer’s tree.¹⁴⁰

Finally, the dissenting arbitrator pointed out that it is possible in some jurisdictions for the shipowner to seek recovery for life salvage through a publically administered fund and that P&I Clubs may also reimburse the shipowner for some expenses.¹⁴¹ Since the owner of the *Kitsa* made no attempt to recover its expenses through those mechanisms, this gave the

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

appearance that the shipowner instead sought to ‘profit from its obligations to give aid to the *Elounda Day* by claiming full hire from its time charterer.’¹⁴²

A recent case out of the United States District Court for the Eastern District of Louisiana also addressed the issue of hire during a rescue, albeit indirectly.¹⁴³ The dispute arose after a helicopter experiencing mechanical problems during a flight over the Gulf of Mexico was forced to land on the deck of the Panamax bulk carrier *M/V Aeolian Heritage*.¹⁴⁴ After the landing, the *Aeolian Heritage* deviated from its ‘otherwise scheduled path’ to take the rescued passengers and helicopter to the nearby port in Corpus Christi, Texas.¹⁴⁵ The shipowner brought an action under the Salvage Convention to recover a salvage award from the helicopter owner.¹⁴⁶

The shipowner alleged that the *Aeolian Heritage* was off-hire during the deviation and sought to include loss of hire as part of the salvage award calculation.¹⁴⁷ Clause 38 of the time charterparty at issue included the following language:

Should the vessel deviate or put back during a voyage, *contrary to the orders or directions of the Charterers*, the hire is to be suspended from the time of her deviating or putting back until she is again the same or equidistant position from the destination and the voyage resumed therefrom [emphasis added].¹⁴⁸

Interpreting this language without reference to any other clause in the charterparty, the court found that the shipowner was correct that the *Aeolian Heritage* was eligible to go off-hire during its deviation to bring the rescued persons to port.¹⁴⁹ While the court explicitly held that ‘an event occurred that could have triggered Clause 38 and allowed the Vessel to go off-hire’, since the shipowner provided no evidence that the Charterer actually invoked the off-

¹⁴² Ibid.

¹⁴³ *Sunglory Maritime, Ltd, v Phi, Inc*, 212 F Supp 3d 618 (ED Louisiana 2016).

¹⁴⁴ Ibid 626-634.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid 659-660.

¹⁴⁸ Ibid. It is unclear from the court’s opinion or the parties’ briefs which time charterparty form was used, but the language cited by the court is similar to cl 17 of the NYPE 1993 form, except (perhaps crucially) it omits an internal reference to the liberties clause. NYPE cl 17 is discussed in Section 4. See New York Produce Exchange Form (1993), reprinted in Coghlin (n 15) F2, 780-791.

¹⁴⁹ Ibid 660. Remarkably, the court made this finding without any discussion on whether the vessel was ‘prevented from full working’ or whether the event was a qualifying cause.

hire clause and sought a discount for the time that it went off-hire the shipowner could not secure a 'double payment' by recovering loss of hire as a part of the salvage award.¹⁵⁰

Taken together, the outcomes in the *Roachbank* and the *Kitsa* suggest that the shipowner is in a strong position under the NYPE form when the charterer seeks to place the vessel off-hire during a rescue-related delay. However, the divided nature of those arbitration tribunals and the contrary finding in the *Aeolian Heritage* case demonstrate that it is plausible a charterer could succeed in placing the vessel off-hire in certain rescue scenarios even if the charterparty is ambiguous on the issue. To fully explore this question, it is useful to turn to other cases addressing off-hire issues in the context of third-party intervention.

3.2.2 Other Cases Addressing Third-party Intervention and Off-hire Provisions

Due at least in part to the widespread preference for confidentiality in maritime arbitration, decisions like the *Roachbank* and the *Kitsa* directly addressing the issue of whether the charterer owes hire during rescue-related delays have rarely made their way into the public domain. Nonetheless, other cases in the modern era have considered similar questions involving delays caused by third parties that were not expressly enumerated under the NYPE off-hire clause.¹⁵¹ The English courts in particular have formed a somewhat infamous 'judicial gloss' addressing some of the most challenging issues raised by the interpretation of the NYPE off-hire clause.¹⁵² This guidance has primarily addressed two fundamental issues: namely, what does it mean to prevent the 'full working' of the vessel? And what limits, if any, should be applied to the sweep-up provision on causation?

Courts have examined the question of 'full working' by considering whether the vessel is 'fully efficient' and 'fully capable of performing the service immediately required of her' by the charterer.¹⁵³ By applying this standard, courts have recognized a distinction between

¹⁵⁰ Ibid.

¹⁵¹ See generally John Weale, 'The NYPE Off-Hire Clause and Third Party Intervention: Can an Efficient Vessel be Placed Off-Hire?' (2002) 33 JML & C 133.

¹⁵² See *Ca Venezolana De Navegacion v Bank Line (The Roachbank)* [1988] 2 Lloyd's Rep 337 (Eng CA) ('... the Courts have unquestionably put a judicial gloss on the way in which that question of fact is to be put ...')

¹⁵³ *Actis Co Ltd v Sanko Steamship Co Ltd (The Aquacharm)* [1980] 2 Lloyd's Rep 237, 240; [1982] 1 Lloyd's Rep 7 (Eng CA).

preventing the 'working' of the vessel and preventing the 'use' of the vessel.¹⁵⁴ As one court put it, even if the vessel is prevented from continuing on the intended voyage, the vessel will remain efficient if it is 'in every way sound and well found'.¹⁵⁵ This determination may of course depend on the physical condition of the vessel, but may also be impacted by its qualities, characteristics, history, ownership, and other factors affecting the vessel's legal status.¹⁵⁶ In this sense, 'there is no distinction to be drawn between legal and physical incapacity'.¹⁵⁷

Framing the 'full working' question in this way regrettably causes problems of its own. There is still some division in the English courts over whether it is possible for a barrier imposed by a third party intervention, such as interference by port authorities, to actually prevent the full working of an otherwise efficient ship.¹⁵⁸ In making determinations regarding the services 'required' by the charterer, it is also unclear whether the fact finder should apply this test using a subjective or objective standard.¹⁵⁹ Employing a subjective standard, the charterer's actual preference for the vessel's immediate services would be given some weight, while an objective standard may instead focus on the commercial needs ordinarily required by a time charterer under the circumstances.

The judicial guidance addressing causation is also quite convoluted. As discussed above, the original NYPE language is interpreted narrowly under the *ejusdem generis* principle; however, even the amended sweep-up provision modified to broaden the scope of the off-hire clause has caused problems, with essentially two diverging views being presented. One approach,

¹⁵⁴ *Mareva Navigation Co Ltd v Canaria Armadora SA (The Mareva AS)* [1977] 1 Lloyd's Rep 368.

¹⁵⁵ *Court Line Ltd v Dant & Russel Inc* (1939) 64 Ll L Rep 212, 219 n 23.

¹⁵⁶ *Belcore Maritime Corporation v F Lli Moretti Cereali SpA (The Mastro Giorgis)* [1983] 2 Lloyd's Rep 66, 69; Weale (n 151).

¹⁵⁷ *Ibid.*

¹⁵⁸ *Andre & Cie SA v Orient Shipping Rotterdam BV (The Laconian Confidence)* [1997] 1 Lloyd's Rep 139 (noting 'this judicial gloss has caused problems in cases where the cause of delay is the interference of authorities operating on a vessel which is herself fully efficient').

¹⁵⁹ As one commentator has pointed out in reference to the standard 'services immediately required by the charterer':

The problem with the word 'required' is that it is ambiguous. It may convey the sense of something that is needed, or it may mean something that is demanded. And that raises the question whether the test articulated by the courts is supposed to be strictly objective, or whether there may be embedded within it a subjective element of the charterer's discretion.

as articulated in the *Roachbank*, is to view the amended sweep-up provision ‘any other cause whatsoever’ as removing any limitations on the type of cause that can place the vessel off-hire.¹⁶⁰ This would make the critical inquiry whether or not the vessel is prevented from being fully worked, irrespective of the reason why. The other approach is to view even the amended sweep-up provision as still limited to causes that are intrinsic and not ‘extraneous.’¹⁶¹ Applying this rule, even under the amended sweep-up provision, a qualifying cause must relate to the qualities, characteristics, history and ownership of the vessel itself.¹⁶²

Acknowledging this uncertainty, it is unsurprising that there have been diverging results in cases analysing off-hire issues in which the cause of delay was some third-party intervention. In some of these cases, the charterer failed to show that the sweep-up provision allowed the vessel to go off-hire. For instance, in the *Aquacharm*, the charterer was unable to place the vessel off-hire through the unamended NYPE language after the Panama Canal Authority demanded cargo be offloaded to lighten the vessel before allowing it to transit through the Panama Canal.¹⁶³ Likewise, the charterer in the *Laconian Confidence* was unable to place the vessel off-hire when the vessel was delayed for over two weeks while port authorities determined a bureaucratic procedure for discharging cargo residue from the previous shipment.¹⁶⁴

In at least two other cases, however, the charterer was able to successfully place the vessel off-hire by invoking the amended sweep-up provision to capture causes that were not otherwise enumerated. In the *Apollo*, the vessel was found to be off-hire during the time it was denied port entry because local authorities suspected that members of the crew on board had contracted typhus.¹⁶⁵ Likewise, in the *Mastro Giorgis*, the vessel was found to be off-hire when cargo owners placed an arrest on the vessel after cargo on board was damaged, which prevented the vessel from being allowed to depart the port.¹⁶⁶

¹⁶⁰ See *Ca Venezolana De Navegacion v Bank Line (The Roachbank)* [1988] 2 Lloyd’s Rep 337 (Eng CA).

¹⁶¹ *Belcore Maritime Corporation v F Lli Moretti Cereali SpA (The Mastro Giorgis)* [1983] 2 Lloyd’s Rep 66, 69.

¹⁶² *Ibid.*

¹⁶³ *Actis Co Ltd v Sanko Steamship Co Ltd (The Aquacharm)* [1980] 2 Lloyd’s Rep 237, 240; [1982] 1 Lloyd’s Rep 7 (Eng CA).

¹⁶⁴ *Andre & Cie SA v Orient Shipping Rotterdam BV (The Laconian Confidence)* [1997] 1 Lloyd’s Rep 139.

¹⁶⁵ *Siderman v Apollo Corporation (The Apollo)* [1978] 1 Lloyd’s Rep 200.

¹⁶⁶ *Belcore Maritime Corporation v F Lli Moretti Cereali SpA (The Mastro Giorgis)* [1983] 2 Lloyd’s Rep 66, 69.

More recently, in the wake of a surge in maritime piracy around the Horn of Africa, two cases made their way on appeal through the English Commercial Court involving the question of whether a vessel is off-hire during lost time caused by a pirate seizure. In *COSCO Bulk Carrier Co Ltd v Team-Up Owning Co Ltd*, a Panamax bulk carrier called the *Saldanha* was attacked by Somali pirates while travelling through the transit corridor in the Gulf of Aden.¹⁶⁷ The vessel was taken to the waters off the coast of Somalia and remained under the control of the pirates for a period of two and a half months during the spring of 2009.¹⁶⁸ The vessel had a hire rate of over US \$52,000 per day and upon release of the vessel after a ransom was paid, the charterers refused to pay any hire for the period the vessel was controlled by the pirates.¹⁶⁹

The *Saldanha* was fixed under the NYPE 1946 form, containing the original Clause 15 off-hire language.¹⁷⁰ The charterers made three arguments under the language: First, the charterers argued that the detention by the pirates amounted to ‘detention by average accidents to ship or cargo.’¹⁷¹ Second, they argued that negligent errors in navigation amounted to ‘default and/or deficiency of men.’¹⁷² And finally, they argued that the seizure by the pirates was an ‘other cause’ captured by the original sweep-up provision.¹⁷³ While the arbitrators did find the vessel was prevented from ‘full working’, the charterers were unable to show that pirate detention was a qualifying cause.¹⁷⁴

On appeal, the English Commercial Court affirmed the arbitration award and held that charterers had not met the burden of showing the pirate attack was an event that brought the vessel under the off-hire clause.¹⁷⁵ The court affirmed the finding that since no physical damage was caused to the vessel and that the pirate attack was not akin to other forms of ‘average accidents to ship or cargo’ that typically occur in the shipping industry.¹⁷⁶ The court also affirmed the holding that ‘default and/or deficiency of men’ was only intended to capture

¹⁶⁷ *COSCO Bulk Carrier Co Ltd v Team-Up Owning Co Ltd* (The *Saldanha*) [2010] 1 CLC 919.

¹⁶⁸ *Ibid* 922-923.

¹⁶⁹ *Ibid* 923.

¹⁷⁰ *Ibid* 922.

¹⁷¹ *Ibid*.

¹⁷² *Ibid*.

¹⁷³ *Ibid*.

¹⁷⁴ *Ibid*.

¹⁷⁵ *Ibid* 933. Note that the shipowners did not appeal the arbitration tribunal’s finding that the vessel had been prevented from ‘full working’. *Ibid* 922.

¹⁷⁶ *Ibid* 924-927.

situations in which the crew refused to perform duties, rather than any negligent performance of those duties.¹⁷⁷

The court also upheld the finding that a pirate seizure could not be designated as ‘any other cause’.¹⁷⁸ The charterers had submitted that the sweep-up provision would encapsulate piracy-related delays if interpreted within the context of its overriding purpose to prevent disputes based on ‘nice distinctions’.¹⁷⁹ The court, however, pointed out that the sweep-up provision at issue did not include the amendment ‘whatsoever’ and therefore could not be used to capture extraneous events different than those enumerated because the *ejusdem generis* rule applied.¹⁸⁰ Holding that a pirate attack is a ‘classic example’ of an event falling outside the scope of the sweep-up provision because it is ‘totally extraneous’, the court affirmed the arbitrators’ decision that the vessel remained on-hire throughout the pirate detention.¹⁸¹

Critically, the court in the *Saldanha* also made the practical point that if parties wish to include piracy as an off-hire event, they should do so plainly and in clear terms through unambiguous language.¹⁸² The court wrote, ‘[s]hould parties be minded to treat seizures by pirates as an off-hire event under a time charterparty, they can do so straightforwardly and most obviously by way of an express provision ...’.¹⁸³

While the *Saldanha* was recognized as an important case ‘crossing the threshold from the private realm of arbitration into a public judgment at first instance’,¹⁸⁴ another similar case made its way to the court only two years later. In *Osmium Shipping Corporation v Cargill International SA (The ‘Captain Stefanos’)*, again the dispute concerned the issue of whether a time chartered vessel was on or off-hire during a period in which it was controlled by pirates.¹⁸⁵

¹⁷⁷ Ibid 927-930.

¹⁷⁸ Ibid 930-933.

¹⁷⁹ Ibid 931.

¹⁸⁰ Ibid.

¹⁸¹ Ibid 932-933.

¹⁸² Ibid 933.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ *Osmium Shipping Corporation v Cargill International SA (The Captain Stefanos)* [2012] 2 Lloyd’s Rep 46.

The Panamax bulk carrier, the *Captain Stefanos*, was carrying coal from South Africa to Italy, when it was attacked by pirates in the Indian Ocean as it headed towards the Suez Canal.¹⁸⁶ The vessel was detained for more than 2 months, and after its release, a dispute arose between the shipowners and the charterers about whether hire was owed during the pirate seizure.¹⁸⁷

Like in the *Saldanha*, there was apparently dispute that the presence of the pirates on board prevented the full working of the vessel. However, the legal issue was slightly different because the *Captain Stefanos* charterparty included a rider clause, which added substance to the original off-hire clause.¹⁸⁸ The rider clause read in relevant part 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...*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 [emphasis added].¹⁸⁹

The arbitrators found that this rider clause was specific enough to allow the charterers to bring the events within the clause and therefore suspend hire during the time the vessel was detained by pirates.¹⁹⁰ On appeal, the English Commercial Court affirmed the award, reasoning that the arbitrators had reached this conclusion by properly considering the language of the clause and its grammar, syntax, and punctuation. Since the off-hire clause dealt 'specifically with capture, seizure and detention' the charterers met their burden in showing the circumstances amounted to an off-hire event.¹⁹¹ Thus, although the *Saldanha* and *Captain Stefanos* cases were similar on the facts, the revised off-hire language used in the latter case produced a contrasting result.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

While the cases discussed here do not directly speak to the issue of rescue-related delays, they bring to the surface interpretation problems courts and arbitrators encounter when similarly applying NYPE off-hire language to facts involving outside intervention. The ‘full working’ standard articulated by these cases is remarkably high, and a charterer may find it difficult to establish that a rescue operation or related delay does in fact prevent the vessel from being ‘fully capable of performing the service immediately required’.¹⁹² Surprisingly, however, in both the *Saldanha* and *Captain Stefanos*, there was no dispute that the vessel had been prevented from full working, which suggests that the curiously strict ‘judicial gloss’ on the issue may not be a total barrier to a charterer’s argument. But even if ‘full working’ is interpreted more liberally, these cases still demonstrate that express language is the preferred way to expand off-hire scenarios rather than relying on the inconsistently interpreted sweep up language ‘any other cause’ or ‘any other cause whatsoever’. While specific decisions about how to modify the off-hire clause would be left to negotiations subject to the bargaining positions of the parties, as is demonstrated by the diverging results in the *Saldanha* and *Captain Stefanos*, it is these minor changes which can make all the difference.

4 Allocation of Rescue Costs through Revised Charterparty Terms

The above demonstrates that it is in the best interest of parties with an economic stake in a maritime venture to ensure the costs of rescue operations are clearly allocated. Particularly when the voyage involves transit through waters subject to a period of mass maritime migration, such as is occurring at present in the Mediterranean Sea, it is prudent for commercial shipping contracts to reflect the enhanced likelihood of disputes over rescue-related costs. Unfortunately, the standard boilerplate language contained in the most widely used time charterparty forms is inadequate to resolve such issues. Consequently, it may be necessary for parties to adopt more precise and explicit language allocating rescue-related

¹⁹² *Actis Co Ltd v Sanko Steamship Co Ltd (The Aquacharm)* [1980] 2 Lloyd’s Rep 237, 240; [1982] 1 Lloyd’s Rep 7 (Eng CA).

costs. Determining what language to include and whether it is feasible for modifications of this kind to be widely adopted are separate questions that warrant further exploration below.

4.1 Drafting an Effective 'Refugee Clause'

Rather than leaving courts and arbitrators to determine who bears rescue-related costs by applying contract language that is silent or ambiguous on the issue, those with a commercial interest in the voyage should ensure charterparties contain language that specifically addresses these questions of liability. Naturally, however, shipowners and charterers would approach the negotiation of such clauses from adverse perspectives. For any direct costs arising out of rescue operations, including additional fuel, supplies, food, and wages, both the shipowner and the charterer would want to shift such costs onto the other party by express contract language. The indirect costs such as loss of hire during periods of delay would be more complicated.

One approach to drafting a shipowner-friendly provision would be to grant the shipmaster the liberty to deviate for rescue-related activities through a standard liberties clause and then expressly exclude such deviations as an off-hire event. Under its original cl 16 language, the NYPE 1946 form grants the shipmaster the liberty to deviate to assist other vessels and save lives, but the clause is silent on whether such a deviation has implications for hire.¹⁹³ While the shipowner successfully convinced the arbitrators that the vessel should remain on hire in both the *Roachbank* and *Kitsa* cases discussed above, this would not necessarily be the result in every case interpreting the NYPE 1946 form, particularly if the presence of rescued persons prevents the vessel from safe operation.

A more explicit approach to handling the hire implications of the liberty to deviate is employed by the new NYPE 2015 form jointly authored by BIMCO, the Association of Shipbrokers and Agents, and the Singapore Maritime Foundation.¹⁹⁴ The NYPE 2015 form includes a liberties clause that is unchanged from the 1946 version reading, '[t]he Vessel shall

¹⁹³ NYPE 1946 cl 16.

¹⁹⁴ BIMCO, 'NYPE 2015 Time Charter Party Explanatory Notes' 3.

have the liberty to sail with or without pilots, to tow and to be towed, to assist vessels in distress, and to deviate for purposes of saving life and property'.¹⁹⁵ Referencing the liberties clause, the separate off-hire clause reads in relevant part:

Should the Vessel deviate or put back during a voyage, contrary to the orders or directions of the Charterers, *for any reason other than accident to the cargo or where permitted in Clause 22 (Liberties) hereunder*, the hire is to be suspended from the time of her deviation or putting back until she is again in the same or equidistant position and the voyage resumed therefrom ... [emphasis added].¹⁹⁶

By tying together the liberties clause with the off-hire clause by reference, this NYPE 2015 language protects the shipowner by excluding life-saving deviations as off-hire events. While a better approach for the shipowner may be for the charterparty to expressly read that the vessel 'shall remain on hire during any deviation permitted in Clause 22 (Liberties),' the NYPE 2015 language is nevertheless more complete and explicit on this issue than the popular but nebulous NYPE 1946 form.

The NYPE 2015 language, however, would not be acceptable to a charterer who enjoys a strong bargaining position and is concerned about rescue-related costs. A more charterer-friendly clause would therefore involve a different approach. Since a shipmaster is legally bound to assist vessels in distress, a charterer could not enforce a provision unconscionably preventing the shipmaster from rendering such assistance.¹⁹⁷ However, the charterer could still negotiate contractual language protecting its financial interests in a rescue scenario.¹⁹⁸ To do so, the charterer could continue to grant the shipmaster the liberty to deviate to render

¹⁹⁵ Ibid cl 22.

¹⁹⁶ Ibid cl 17. Note that cl 22 of the NYPE 1993 form uses similar language referencing the lines of the liberties clause (lines 257 to 258) within the off-hire clause:

... Should the Vessel deviate or put back during a voyage, contrary to the orders or directions of the Charterers, *for any reason other than accident to the cargo or where permitted in lines 257 to 258 hereunder*, the hire is to be suspended from the time of her deviation or putting back until she is again in the same or equidistant position and the voyage resumed therefrom ... [emphasis added].

New York Produce Exchange Form (1993), reprinted in Coghlin (n 15) F2, 780-791.

¹⁹⁷ See Section 3.

¹⁹⁸ Martin Davies, 'Obligations and Implications for Ships Encountering Persons in Need of Assistance at Sea' (2003) 12 Pacific Rim Law & Policy Jnl 109, 137 ('[I]t is quite possible for a charterer to bargain that the presence of refugees puts the ship off-hire if that is what it wants, although it may have to pay a little more by way of hire in return.')

assistance, but simultaneously make such deviations subject to an obligation of the shipowner to absorb the associated costs. This may be accomplished by placing language in the liberty to deviate clause expressly indemnifying the charterer for the costs of additional bunkers and others liabilities arising out of assistance to other vessels.

Regarding the critical issue of hire, the charterer could include rescue-related deviations as an explicit off-hire event, similar to the charterer's approach on piracy in the *Captain Stefanos* case. In doing so, the charterer might also tie this language together with the liberties clause to clarify that the two clauses are not in conflict. For example, a charterer-friendly off-hire clause might read:

Should the vessel put back whilst on voyage in the event of loss of time either in port or at sea or deviation upon the course of the voyage caused by *rendering assistance to other vessels and delivering rescued persons to a place of safety, including any deviations permitted in Clause 22 (Liberties) hereunder*, 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.

For the charterer, this approach would be much preferred to strained arguments relying on problematic sweep-up provisions like the ones which proved ineffective for the charterers in both the *Roachbank* and the *Kitsa* cases.¹⁹⁹

Due to the competing interests between the shipowner and charterer, a compromise involving cost sharing would be the most equitable solution (although the bargaining position of the parties and market conditions are likely to be the most influential factors in determining what language is ultimately used). With this concept of compromise in mind, at least one P&I Club has put forth a model clause designed to achieve a 50/50 split between shipowners and

¹⁹⁹ Professor Davies has offered the following alternative to the problematic sweep-up provision:

In the event of the loss of time from any cause depriving the charterer of the immediate and effective disposition of the ship, the payment of hire and overtime, if any, shall cease for the time thereby lost.

Martin Davies, 'The Off-Hire Clause in the New York Produce Exchange Time Charterparty' [1990] LMCLQ 112.

charterers of certain rescue-related costs. The UK Defence Club, in its 2015 publication 'Soundings: Deviation to Save Life at Sea' proposed the following 'draft refugee clause':

In the event of the ship deviating for the purpose of saving human life (other than crew members/the owners' personnel), or for the purpose of participating in search & rescue operations (as instructed by the ship's flag administration or coastal state authorities), all costs, liabilities and expenses excluding the payment of hire and bunkers consumed shall be split 50/50 between the owners and the charterers (in the event that they are irrecoverable from the relevant authorities). The phrase 'all costs liabilities and expenses' shall, for the purpose of this clause, include:

- a) All telecommunication costs, crew bonuses and overtime and port costs including anchorage, pilot, tug and other costs incurred;
- b) All water, food, stores, fuel and equipment consumed or used to rescue, care for and disembark the refugees;
- c) All stores and equipment consumed or used and related costs (such as garbage disposal or third party cleaning costs) or any repairs to the ship to return the ship to the same condition she was in before the deviation; and
- d) All liabilities to third parties, including liabilities for injuries suffered by the ship's Master, crew or third parties, except where the liability is caused by the negligence of the Master or crew or a failure to exercise due diligence to maintain or make the ship seaworthy.²⁰⁰

The above clause could reduce some of the uncertainty regarding who bears rescue-related losses by promoting cost sharing for many of the associated liabilities. The clause equitably distributes a variety of 'costs, liabilities and expenses' between the shipowner and charterer, expressly addressing some of the more substantial risks such as fuel consumed during rescue, repairs to the vessel, and personal injury arising out of rescue operations.

Significantly, however, the clause contains explicit language 'excluding the payment of hire and bunkers consumed' from the 50/50 split. As a result, the question of hire cannot be

²⁰⁰ UK Defence Club, 'Soundings: Deviation to Save Life at Sea' July 2015.

answered by the clause itself and would therefore be governed by a separate off-hire clause. For shipowners and charterers attempting to achieve a true 50/50 split of rescue costs, the parties should omit this hire and bunkers exclusion and instead explicitly address hire. Without addressing such issues, costly disputes may still arise.

Another potentially problematic feature of the UK Defence Club clause is that it does not comprehensively address the scope of the shipmaster's obligation to coordinate in ensuring rescued persons are delivered to a place of safety. While the clause does apply the 50/50 split to deviation 'for the purpose of participating in search & rescue operations (as instructed by the ship's flag administration or coastal state authorities)' it is unclear whether logistical delays linked to determining an appropriate place of disembarkation are within the scope of costs contemplated by the clause. This is particularly important because, as demonstrated by the reaction of the coastal authorities in the *Roachbank*, substantial delays may result from resistance to migrant disembarkation.²⁰¹ Since the SAR Convention requires shipmasters to coordinate with state RCCs to deliver rescued persons to a 'place of safety' a commercial vessel could face substantial delays if a place of disembarkation cannot be determined quickly.²⁰²

It is also important to recognize that the most effective 'refugee clause' will not mention the word 'refugee' at all. 'Refugee' is a term of art with a technical legal meaning under international humanitarian law, which could ultimately impact how the clause would be interpreted. The UK Defence Club clause reads, 'all costs liabilities and expenses' shall include...[a]ll water, food, stores, fuel and equipment consumed or used to rescue, care for and disembark the refugees ...'.²⁰³ This language may lend itself to technical arguments dependent on whether the rescued persons can successfully demonstrate their status as individuals entitled to refugee protection. Designation of refugee status generally requires an investigation by state immigration officials concerned with whether the individual can establish a well-founded fear of persecution, as required under treaties such as the

²⁰¹ The infamous *M/V Tampa* incident off Australia's Christmas Island is perhaps the most high profile example of a commercial delay directly caused by the attitude of coastal authorities after a migrant rescue. For a discussion of commercial implications arising out of that incident, see Davies (n 198) 137.

²⁰² SAR Convention s 1.3.2.

²⁰³ UK Defence Club (n 200).

Convention and Protocol Relating to the Status of Refugees.²⁰⁴ Since contemporary maritime migration tends to be characterized by ‘mixed’ populations that include both refugees and economic migrants who may not be able to establish refugee status, such technicalities could limit the effect of contract clauses using this language.²⁰⁵ A better clause would use the phrase ‘rescued persons’ rather than ‘refugees’.²⁰⁶

While parties are free to draft language to distribute rescue-related costs however they see fit under freedom of contract principles, it would be of substantial commercial value for industry organizations to develop model clauses for easy adoption by shipowners and charterers. There is in fact wide precedence for this as organizations such as BIMCO, Intertanko, and others have historically endorsed a number of new charterparty clauses for different purposes, some of which relate to migration issues. For example, BIMCO has published multiple iterations of a ‘Stowaways Clause’ designed to allocate responsibility between shipowners and charterers for fines, delays, and other costs of disembarking the stowaways.²⁰⁷ This precedent highlights the question of whether it is now appropriate and feasible for a model refugee/rescue clause to be recommended by industry organizations to more explicitly address large-scale rescue costs, particularly on the contentious issues of deviation and hire discussed above.

4.1 Model Charterparty Clauses Arising out of Contemporary Maritime Challenges: Piracy as a Lesson

Wholesale modifications to widely used charterparty forms have occurred periodically to better reflect contemporary commercial practices (NYPE has been revised 6 times), yet the shipping industry has generally been resistant to the adoption of these comprehensive

²⁰⁴ Convention and Protocol Relating to the Status of Refugees UNTS vol 189, 28 July 1951.

²⁰⁵ International Organization for Migration, ‘Mediterranean Update, Migration Flows Europe: Arrivals and Fatalities Infographic’ <http://migration.iom.int/docs/MMP/070717_Mediterranean_Update.pdf> accessed August 8, 2017.

²⁰⁶ An equivalent clause capturing the nature of the current maritime migration patterns might instead employ the following language: ‘all costs liabilities and expenses’ shall include...[a]ll water, food, stores, fuel and equipment consumed or used to rescue, care for and disembark *any rescued persons*’.

²⁰⁷ BIMCO ‘Special Circular No. 1, January 2010 - Stowaways Clause for Time Charter Parties 2009.’

revisions.²⁰⁸ Despite this reluctance to change, the industry response to the modern maritime piracy problems provides insight into the feasibility of rapid contract modifications to meet pressing maritime challenges. As discussed above, pirate attacks targeting commercial vessels began occurring with alarming regularity in the Gulf of Aden between 2008 and 2012.²⁰⁹ At its peak in 2010, commercial vessels were attacked on an almost daily basis, terrorizing professional seafarers and also creating substantial economic losses across the shipping industry.²¹⁰

As hijacked vessels were often detained for months on end while ransom payments were negotiated, the resulting economic losses created commercial disputes, such as the *Saldanha* and the *Captain Stefanos* cases discussed above in Section 3.²¹¹ Prior to this piracy crisis, most time charterparties, including those using the NYPE 1946 form, were silent on many of the relevant legal issues. These included whether the vessel is off-hire during the time the vessel is attacked or seized by pirates, whether the master has the liberty to choose an alternative route to avoid areas at risk for piracy, who is responsible to pay for additional security on the vessel, and how other liabilities should be apportioned, such as personal injury to the crew, marine pollution, wreck removal, and premiums for kidnap and ransom insurance.

Recognizing this problem, in 2009 BIMCO and other industry organizations began publishing model clauses for time charterparties that specifically address piracy-related liabilities.²¹² BIMCO in particular initially drafted its piracy clause with the express objective ‘to consolidate into a single provision the contractual position of the parties in relation to the threat of piracy’.²¹³ After publication of the first iteration of the piracy clause, some industry participants claimed the language was too favourable to shipowners.²¹⁴ Fearing that a one-sided clause would not be widely adopted in practice, BIMCO put together a working group to carefully consider the various positions of industry stakeholders who were invited to contribute with comments.²¹⁵ The result was a revised piracy clause addressing a variety of

²⁰⁸ Paul Todd, ‘NYPE 2015: Wholesale Reform or an Invitation to Cherry-pick?’ (2015) LMCLQ 307.

²⁰⁹ Jonathan Bellish, ‘The Economic Costs of Somali Piracy 2012’ Oceans Beyond Piracy.

²¹⁰ *Ibid.*

²¹¹ See section 3.

²¹² BIMCO ‘Special Circular, November 2009 – BIMCO Piracy Clause for Time Charter Parties 2009.’

²¹³ *Ibid.* 1.

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

related risks by more equitably splitting some of the most significant liabilities between shipowners and charterers.²¹⁶ Again, in 2013, BIMCO revised its piracy clause ‘to ensure that the provisions remain in line with commercial requirements’.²¹⁷

The current iteration, the BIMCO Piracy Clause for Time Charter Parties 2013, includes provisions addressing a number of piracy-related liabilities.²¹⁸ These include granting the master the liberty to take appropriate precautions when navigating through an area exposed to high risk of piracy and assigning charterers with the obligation to pay any additional insurance premium imposed by the shipowner’s insurers as a result of the vessel navigating in an area of enhanced risk.²¹⁹ On the contentious issue of whether the vessel would remain on hire during a pirate attack or seizure, the clause contains the following language:

If the Vessel is attacked 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 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 ...²²⁰

This language prevents a piracy attack or seizure from being construed as an off-hire event, but effectively caps the payment of hire at 90 days from the time the vessel is initially seized. While the language still appears to favour shipowners by making the charterer initially liable for hire during piracy-related delays, BIMCO has taken the position that this 90 day cap on hire ‘represents a “sharing” of the risk’ between charterers and shipowners.²²¹ A more cynical view is that the 90 day cap simply reflects the average time period that a vessel is held by pirates, which would in effect make the charterer liable for hire during the whole of most

²¹⁶ Ibid.

²¹⁷ BIMCO ‘Special Circular, July 2013 – Revised Piracy Clauses.’

²¹⁸ Ibid.

²¹⁹ Ibid 2.

²²⁰ Ibid 4.

²²¹ Ibid 2.

pirate seizures.²²² Nevertheless, BIMCO has explained that the cap is designed only to be ‘a starting point and parties are free to negotiate a figure which meets their specific needs’.²²³

It is unclear how widespread BIMCO piracy clauses have been adopted in practice. However, the 2013 iteration was incorporated into BIMCO’s most recent comprehensive charterparty revision, the NYPE 2015 form. It is too early to measure whether NYPE 2015 will become an industrial standard rivalling NYPE 1946. Observers have submitted that the new form is more likely to become fodder for contractual ‘cherry-picking’ than wholesale adoption by industry participants.²²⁴ Although adoption of the full revised form may be preferred for the sake of contract continuity which may relieve courts and arbitrators of the headaches induced by sloppy amendments to existing forms, embedding bespoke or cherry-picked language within the charterparty that directly addresses the risks of contemporary maritime challenges is better than simply remaining silent on these issues.

Regardless of how widespread these clauses have been adopted, the industry response to the maritime piracy crisis by quickly developing new charterparty language offers insight into the feasibility of rapid contract modification reacting to new developments. This sense of urgency exhibited in response to piracy suggests there is hope for mobilizing a similar reaction to the current search and rescue crisis in the Mediterranean Sea by updating inadequate charterparty language.

In drawing any analogies between piracy and search and rescue for purposes of drafting contract language, it must first be acknowledged that there are some fundamental differences in the way commercial actors are impacted by these two separate crises. In practice, delays created by a pirate hijacking are likely to be longer in duration than delays caused by a rescue operation (although this would of course depend on the specific situation). Furthermore, in a pirate hijacking scenario, it may be easier to sympathize with the shipowner whose vessel and crew is subjected to an enhanced risk of physical danger at least in part because the charterer presumably directed the master to proceed to a destination requiring navigation through unsafe waters. Thus, to some degree, it is sensible to contractually assign

²²² See G Hunter, ‘BIMCO Piracy Clauses’ (2009) 15 JIML 291, 292.

²²³ *Ibid* 4.

²²⁴ Todd (n 208) 318-319.

the charterer the responsibility to indemnify the shipowner for piracy-related liabilities including the obligation to pay hire for at least part of the duration of a vessel seizure. This is perhaps why the BIMCO piracy clauses, despite undergoing multiple revisions, still overwhelmingly favour the shipowner's position.

In the rescue context, however, it is not so easy to sympathize with the position of the shipowner at the expense of the charterer. International law ultimately places the obligation to rescue squarely on the shipmaster, who, in the charterparty context, is the agent of the shipowner, not the charterer. Consequently, when the shipmaster deviates from the contractual route to render aid to a distressed vessel in compliance with international legal obligations, this is no fault of the charterer.²²⁵ As was convincingly pointed out by the dissenting arbitrator in the *M/V Kitsa* case, the legal obligation to render assistance to distressed vessels fundamentally rests with the shipowning community and it would therefore be a peculiar result for the charterer to 'reward' the shipowner for the shipmaster's compliance with humanitarian duties.²²⁶ While shipowners and charterers are of course free to negotiate the terms of charterparties in a way that places the financial burden of rescues on the charterer, considering the equities is a reasonable starting point for such negotiations.

Even acknowledging the differences between the piracy and rescue contexts, some charterparty revisions addressed in the BIMCO piracy clauses can still serve as a model for drafting a useful rescue clause. Provisions resolving uncertainty over liability for deviation, hire, bunkers, insurance and others are fundamental in both contexts. By recognizing the likelihood of disputes involving these particular issues at the outset of commercial voyages and by amending the charterparty language to answer relevant questions of liability, industry stakeholders can certainly learn from the piracy crisis to mobilize a similarly urgent response to contract revisions in the search and rescue context.

²²⁶ *Osit Shipping, Ltd v Canpotex Shipping Services, Ltd* (the '*M/V Kitsa*') SMA 3119 (1994).

5 Conclusion

As of this writing in mid-2017, the Mediterranean Sea is still very much in the throes of a search and rescue crisis.²²⁷ The year 2016 was the deadliest on record for migrants in the Mediterranean Sea, and the tragic trend of mass drownings has continued in 2017.²²⁸ Reportedly, however, the heavy rescue burden initially placed on commercial vessels in 2014-2015 has diminished slightly due to enhanced search and rescue initiatives conducted by state coast guards, regional security forces, and volunteer humanitarian organizations.²²⁹ Yet the sustainability of these alternatives remains questionable.

Recent news out of Italy in particular suggests coastal authorities may become less receptive to disembarkation of rescued persons at its ports.²³⁰ Such resistance could prolong delays as rescuing vessels seek to deliver rescued persons to a place of safety in accordance with obligations arising under the SAR Convention.²³¹ The role of volunteer humanitarian organizations conducting rescues in the Mediterranean is also being scrutinized, calling into question the stability of their contributions.²³² In summer of 2017, several of these organizations, including Médecins Sans Frontières, which had deployed specialized rescue vessels in the Mediterranean Sea in recent years, suspended operations due to increasingly dangerous interactions with Libyan coast guard.²³³ These are worrying developments for the

²²⁷ See International Organization for Migration, 'Mediterranean Update, Migration Flows Europe: Arrivals and Fatalities Infographic' <http://migration.iom.int/docs/MMP/070717_Mediterranean_Update.pdf> accessed 8 August, 2017.

²²⁸ Ibid.

²²⁹ International Chamber of Shipping, 'Mediterranean Migrant Crisis' <[http://www.ics-shipping.org/key-issues/all-key-issues-\(full-list\)/mediterranean-migrant-crisis](http://www.ics-shipping.org/key-issues/all-key-issues-(full-list)/mediterranean-migrant-crisis)> accessed 10 August, 2017.

²³⁰ 'Europe Migrant Crisis: Italy Threatens to Close Ports as Ministers Meet' BBC <<http://www.bbc.com/news/world-europe-40470102>> accessed 2 July, 2017; James Politi, 'Italy Threatens to Block Foreign Boats With Migrants From Ports' *The Financial Times*, (London, 28 June, 2017) ('If Italy follows through on its threat, it could affect the work of several non-governmental organizations and non-Italian merchant vessels performing rescue operations in the Mediterranean Sea').

²³¹ SAR Convention s 1.3.2, 2.1.9.

²³² 'Italy Impounds NGO Rescue Ship and Sends Navy Patrol Boat to Libya' *The Guardian* (3 August 2017) <<https://www.theguardian.com/world/2017/aug/02/italy-impounds-ngo-rescue-ship-sends-navy-patrol-boat-to-libya-migrant-refugee-route-europe>>; 'Italy Seizes NGO Rescue Boat for Allegedly Aiding Illegal Migration' *The Straits Times* (3 August 2017) <<http://www.straitstimes.com/world/europe/italy-seizes-ngo-rescue-boat-for-allegedly-aiding-illegal-migration>>; Anna Momigliana, 'Aid Groups Say Italy is Forcing Them to Stop Rescuing Migrants at Sea' *The Washington Post* (15 August 2017).

²³³ Gavin Jones, 'More NGOs Follow MSF in Suspending Mediterranean Migrant Rescues' *Reuters* (13 August 2017) <<https://www.reuters.com/article/us-europe-migrants-ngo-idUSKCN1ATOIZ>>; Jon Henley and Angela Giuffrida, 'Three NGOs Halt Mediterranean Migrant Rescues after Libyan Hostility' *The Guardian* (14 August 2017) <<https://www.theguardian.com/world/2017/aug/14/three-ngos-halt-mediterranean>>

shipping industry, signalling the burden and scope of commercial vessel demands for rescue operations could again increase in the near future. Commercial stakeholders must therefore continue to prepare for the seemingly inevitable calls for contributions in the Mediterranean Sea (and perhaps elsewhere).²³⁴

While the recent crisis has highlighted the important role of private ships in supporting global SAR functions, industry stakeholders are correct in asserting that the legal framework imposing affirmative rescue duties on commercial shipmasters was not designed to deal with a problem of the present scale.²³⁵ In fulfilling its role in the context of frequent large-scale rescues, commercial shipmasters and crews take on incredible risks and shipping interests incur substantial financial losses. Since no functioning mechanism exists to reimburse these expenses, it is the shipping interests and their insurers who absorb rescue costs pursuant to their commercial arrangements.

The NYPE 1946 charterparty form, despite its flaws, continues to serve as an industry standard with perceived reliability. Unfortunately, the problems explored above demonstrate how even trusted forms may be largely inadequate in allocating rescue costs. By recognizing the deficiency of standard clauses, shipping interests should consider contract modifications that more specifically and predictably allocate rescue costs. Such changes, however, require an awareness of the very real losses that can arise out of rescue operations and an understanding that these risks are important enough to diverge from long-trusted boilerplate contract language.

Some stakeholders have encouraged contracting parties to include rider clauses rectifying this problem, but few have offered any specific guidance. It would therefore be of significant

migrant-rescues-after-libyan-hostility>; Yannis Behrakis, 'Spanish Migrant Rescue Ship Threatened by Libyan Coastguard' *Reuters* (16 August 2017).

²³⁴ Deadly trends in mass maritime migration have also continued in Asia, particularly off the coasts of Myanmar. The same phenomenon has recently occurred in Latin America as well. See UN High Commissioner for Refugees (UNHCR), 'South-east Asia: Mixed Maritime Movements' <<http://www.refworld.org/docid/55e6c1994.html>> accessed July 28, 2017; Nicholas Casey, 'Hungry Venezuelans Flee in Boats to Escape Economic Collapse' *The New York Times* (25 November 2016).

²³⁵ See International Chamber of Shipping, 'Mediterranean Migrant Crisis' <[http://www.ics-shipping.org/key-issues/all-key-issues-\(full-list\)/mediterranean-migrant-crisis](http://www.ics-shipping.org/key-issues/all-key-issues-(full-list)/mediterranean-migrant-crisis)> accessed August 10, 2017 ('... while shipping companies will always meet their humanitarian and legal responsibilities to come to the rescue of anyone in distress at sea, the obligations contained in the IMO SOLAS and SAR Conventions were never intended to address this unprecedented situation').

assistance for industry organizations, such as BIMCO or others, to consider publishing model clauses to support commercial players in developing language to more adequately allocate rescue costs. The success of employing model clauses to allocate risks in other contexts, including rapidly emerging problems such as piracy, demonstrate the feasibility for contracts to be quickly amended in response to dynamic maritime challenges.

Drafting model clauses is of course a formidable challenge in itself and should involve careful deliberation with industry participants. As is demonstrated by the result in the *Roachbank* and *Kitsa* cases, despite the ambiguity of standard forms, the status quo is more likely (although not certainly) to favour the shipowner position. Consequently, it may be charterers who must push for favourable contract modifications. Nevertheless, both shipowners and charterers would benefit from clear and predictable language precisely allocating rescue risk. Leaving such issues to be governed by the vagaries of contractual silence will likely lead to costly disputes.

Rescue costs, exotic as they seem, are just another type of risk that maritime voyages have always had to anticipate. While uniquely springing from humanitarian roots, the delays rescues create are not so different than chancing upon inclement weather, pirates, or incidents of war. During periods of mass migration at sea, when the likelihood of expensive rescues is enhanced, contracting parties should recognize this risk as they do others, by seriously evaluating potential losses and negotiating terms containing clear allocations of liability. In developing such language, these negotiations carry implications extending beyond risk sharing or business pragmatism — they reflect noble efforts to commercially facilitate an ancient custom motivated by the impulse to preserve human life at whatever the cost.