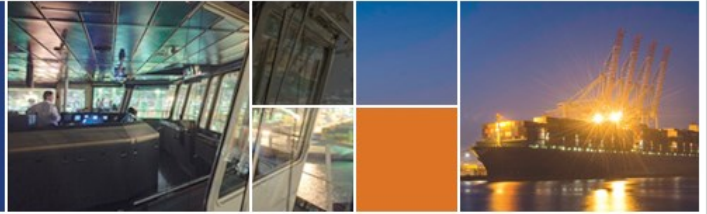




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Piracy - an Off Hire Event?

September 2010

In *Cosco Bulk Carrier Co. Ltd. v Team-Up Owning Co. Ltd. (the "Saldanha")* [2010] EWHC 1340, the English High Court upheld a London arbitration decision that charterers were not entitled to place a vessel off-hire when detained by pirates. The court considered the facts in detail, though primarily in the context of clause 15 of the NYPE charterparty.

The Circumstances

On 22 February 2009, whilst on a laden voyage from Indonesia to Slovenia, the Panamax bulk carrier "Saldanha" was seized by pirates whilst transiting the Gulf of Aden. Upon capture, the vessel was forced to sail to a location off the Somali port of Eyl, where she was detained until a ransom was paid by the vessel interests. The vessel was released on 25 April 2009. After reaching a position equidistant to that at which she was captured, she resumed her voyage on 2 May 2009.

The vessel's daily hire rate was US\$ 52,500 and the accrued charter hire for the duration of the detention was in the region of US\$ 3,622,500. The vessel was chartered on NYPE terms. In addition to the standard off-hire clause, the charterparty incorporated a number of individually tailored clauses including a "seizure and detention clause" - clause 40. This "bespoke" clause did not extend to cover seizure by pirates

The charterers refused to settle hire for the period of capture between 22 February 2009 and 2 May 2009. The owners claimed for hire plus the cost of bunkers and other sundry items. The onus was on charterers to demonstrate that they could bring themselves within one of the off-hire exceptions.

The dispute was referred to London arbitration. The tribunal found that the "full working" of the vessel had been prevented by the detention by the pirates, but that the charterers failed to establish that the full working of the vessel had been prevented in the context of clause 15 of the NYPE '46 form. Charterers were granted leave to appeal to the English High Court.

Off-Hire Clause - NYPE Charterparty

Clause 15 of the NYPE form, the off-hire clause, is widely used. The decision of the court holds a particular resonance with the industry, as a general consensus had developed that such hijackings would not necessarily activate the off-hire provisions of the clause. Charterers had for some time challenged this view, though until now this issue had never been tested in the courts. The High Court focussed on the following highlighted provisions contained Clause 15:

*"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 or stores, fire, breakdown or damages to hull, machinery or equipment, grounding, **detention by average accidents to ship or cargo**, dry-docking for the purpose of examination or painting bottom, or **by any other cause** preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost..."*

(Emphasis supplied.)

It is worthy of note that the words "default and/or" and "including strike of Officers and/or crew or deficiency of" were amendments to the standard wording of clause 15.

(i) "detention by average accidents to ship or cargo"

Charterers argued that "accident" did not necessarily require damage to the vessel or that there is an accident in the general sense. Notwithstanding the deliberate planning of the hijacking by the pirates, charterers sought to convince the court that the capture was a fortuitous event and that piracy was a marine peril and, as such, would be sufficiently covered in the clause.

The court did not accept that such an event could be properly described as an "accident to the ship". The court took the view that an accident requires a lack of intent and that a deliberate and violent attack cannot be described as an accident, regardless of the element of surprise that such an attack would have on the ship.

Furthermore, the court did not accept that "average accident" in the context of the off-hire clause could be equated to an "average accident" in the context of marine insurance. The court supported the long-standing position in commercial law that damage would have to be an essential ingredient for "average" to apply in the context of a peril ordinarily covered in marine insurance.

(ii) "default and/or deficiency of men"

Charterers also argued that the officers and crew failed to adopt sufficient anti-piracy measures before and during the attack and that this failure was significantly causative of the vessel being detained. Charterers argued that the natural meaning of "default of men" included a failure by the Master, officers and crew to perform their duties or a breach by the Master, officers and crew of their duties.

Owners contested any such failure or breach of duty, maintaining that the Master, officers and crew were innocent victims of a dominant force of armed pirates.

The court and tribunal accepted that "default" was capable of including negligent or inadvertent performance of the duties of the Master, officers



The court and tribunal accepted that *Verdan* was capable of including negligence or inadvertent performance on the part of the master, officers and crew. However, considering the historical development of the clause, both the tribunal and the court considered a more restricted interpretation of the wording "default and/or deficiency of men" would be more appropriate; thus, in the absence of a numerical deficiency of crew, there was no default and/or deficiency of men.

(iii) "by any other cause"

Charterers introduced additional arguments in an effort to demonstrate that the detention by the pirates fell within the sweep-up provision "by any other cause". Namely: (1) extending the scope of "average accident" to include an act of piracy; (2) extending the scope of deficiency of men to include negligence on the part of Master, officers and crew in failing to prevent an act of piracy; (3) extending the scope of "default and/or deficiency of men" to include negligence on the part of Master, officers and crew in failing to prevent an act of piracy; (4) extending a refusal by the officers and crew to work the vessel by reason of duress by pirates.

The court recognised the distinction between the wording "any other cause" and "any other cause whatsoever" when considering this argument. In the absence of the word "whatsoever", the clause should be construed in the general context and did not include a distinctly extraneous cause. The judge considered the seizure of the vessel by pirates as a "classic example of a totally extraneous cause".

Commentary

Whilst the decision of the English High Court may not come as a total surprise to the wider shipping community, it does illuminate the requirement for parties to address, at the time of negotiating charterparty terms, the issue of delays caused by piracy.

The judge noted that the charterparty included a "bespoke" seizure and detention clause (clause 40) which omitted any reference to piracy. In his conclusion, the judge reinforced the point:

"Should parties be minded to treat seizures by pirates as an off-hire event under time charterparty, they can do so straightforwardly and most obviously by way of an express provision in a "seizures" or "detention" clause. Alternatively and at the very least, they can add the word "whatsoever" to the wording "any other cause", although this route will not give quite the same certainty as it presently hinges on obiter dicta, albeit of a most persuasive kind."

By incorporating express terms in to the charterparty, the parties can seek to avoid any such disputes. In this case, the off-hire clause did not include reference to "any other cause whatsoever". The inclusion of such may have been capable of activating an off-hire event caused by an extraneous factor. However, the provision of a tailored "seizures and detention clause" may prove to be more effective.

For parties who may wish to agree to a compromise, **BIMCO's Piracy Clause for Time Charter Parties 2009** provides an additional option. The BIMCO clause seeks to find a balance between the parties and defines in paragraph (f) the period in which hire will remain payable.

"...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".

This case serves to underline the importance of incorporating clear and express wordings in to the charterparty when considering the threat of piracy.

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Different charterparty provisions led to a different outcome in *Osmium Shipping Corporation v Cargill International SA (the "Captain Stefanos")*. A report of this case can be found in a recent website article: [Piracy and Off Hire – Another Perspective](#)