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## The London Commercial Court rules that vessel chartered on NYPE terms remains on hire whilst detained by pirates

*COSCO Bulk Carrier Co., Ltd v Team-Up Owning Co. Ltd [2010] EWHC 1340 (Comm) (The Saldanha)*

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In an important ruling for the maritime industry, the London Commercial Court has upheld the unanimous decision of an eminent arbitration tribunal that a vessel chartered on the NYPE 46 form which was seized by pirates remained on hire whilst under the control of the pirates.

The Dryships-owned bulk carrier *m/v Saldanha* was seized by Somali pirates on 22 February 2009 whilst sailing in a laden condition through the UKMTO transit corridor in the Gulf of Aden. The vessel was taken by the pirates to Eyl where it was detained by the pirates until 25 April 2009. The vessel reached an equidistant position with the location at which it was seized on 2 May.

In an Award on Preliminary Issues dated 8 September 2009 an eminent arbitration tribunal held unanimously that the vessel remained on hire during the period of detention and until it reached the equivalent position.

## The Charterparty

The charter was on the NYPE form and included the familiar off-hire Clause 15 in the following terms:

*"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..."* (underlining added to identify the words relied on by the Charterers)

The words "default and/or" and "including strike of Officers and/or crew or deficiency of" were amendments to the standard wording.

In addition, the rider clauses included an additional clause dealing with seizure etc as follows :

*"Clause 40 – Seizure/Arrest/Requisition/Detention*

*Should the vessel be seized, arrested, requisitioned or detained during the currency of this Charter Party by any authority or at the suit of any person having or purporting to have a claim against or any interest in the Vessel, the Charterers' liability to pay hire shall cease immediately from the time of her seizure, arrest, requisition or detention and all times so lost shall be treated as off-hire until the time of her release....."*

The Charterparty terms also included a put back clause and the CONWARTIME 2004 clause.

## The Issues

The Owners, represented by Ince & Co, contended that the vessel remained on hire during the period of detention because seizure by pirates did not fall within the scope of the off-hire clause, the onus being on the Charterers to show that they can bring themselves within one of the off-hire exceptions.

The Charterers, represented by Holman Fenwick & Willan, argued that the vessel was off-hire on the following grounds:

- (i) detention by pirates amounts to "detention by average accidents to ship or cargo";
- (ii) the phrase "default and or deficiency of men" encompasses errors, alternatively negligent errors, by the master and crew;

- (iii) seizure by pirates falls within the sweep-up provision "any other cause".

It was common ground that the Charterers were required to pay hire for the use of the ship unless they could bring themselves within the ambit of the off-hire exceptions. If unable to do so, the risk of delay was to be borne by the Charterers. Mr Justice Gross endorsed the submissions of Owners' counsel that "There is no relevant concept of fairness other than the contractual balance struck by the off-hire clause, construed in accordance with well-known orthodoxy."

## Average Accident

Charterers' first argument was that the seizure by pirates amounted to "detention by average accidents to ship or cargo". The arbitrators had found that heavily armed pirates attacking and seizing a vessel was not an accident, let alone an 'average accident' to the ship; and that an 'average accident' necessarily means an accident that causes damage to the ship, as stated by Kerr J (as he then was) in *The Mareva A.S.* [1977] 1 Lloyd's Rep 368.

Charterers' counsel argued that the capture of the vessel, albeit planned in advance and a deliberate act on the part of the pirates, was a fortuity so far as the crew and the vessel were concerned. Mr Justice Gross was unable to accept that such an incident can properly be described as an "accident", endorsing the tribunal's reasoning as follows:

*"We disagree that 'accident to the ship' is a natural way to describe a seizure by pirates. We cannot imagine a master telephoning or e-mailing his Owners after the seizure and saying 'there has been an accident to the ship'. He would naturally say 'the ship has been seized by pirates' or 'we have been captured by pirates'. Accident requires lack of intent by all protagonists. An obviously deliberate and violent attack is not described as an accident, no matter how unexpected it may have been to the victim. A much more specific word or phrase is put to the incident, to reflect its deliberate and violent nature."*

Furthermore, whilst the wording 'average accident' points towards an insurance context, it does not follow that 'average' in this context is simply to be equated with a peril ordinarily covered by marine insurance, such as the risk of piracy. The Judge found that damage to the ship is an essential ingredient for the wording "average accident ... to ship" to apply. Emphasising the importance of certainty in commercial law, he shared the tribunal's view that the *dictum* of Kerr J in *The Mareva A.S.* as to the meaning of 'average accident' was correct and has been accepted as

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such for almost 30 years, both in text books and in arbitration.

### Default and or Deficiency of Men

This issue arose in the following context: the Charterers allege that the ship's officers and crew failed to take adequate anti-piracy precautions, before and during the attack; that those alleged failures were a significant cause of the vessel being seized; and that such failures fell within the scope of the 'default of men' exception.

The Owners vehemently dispute that there were any such failings by the officers and crew, and maintain that they were innocent victims of an attack by a gang of heavily armed pirates. Notwithstanding this, so that the matter could proceed by way of preliminary issues, the tribunal proceeded on the assumption that the alleged failure on the part of the officers and crew was a significant cause of the vessel's seizure and detention. In due course, should it prove necessary, the tribunal will consider the facts and circumstances of the seizure and whether there were in fact any failings by the officers and crew.

Charterers argued that the natural meaning of 'default of men' includes any failure by the Master and crew to perform their duties or any breach by them of their duties. If so, then, on the assumed facts, Charterers could bring themselves within the scope of the off-hire clause.

The arbitration tribunal, and the judge, accepted that the natural meaning of 'default' of men was capable of including a negligent or inadvertent performance of duties by the Master or crew. However, consistent with the history of the clause and the mischief that the additional words were designed to address, both the arbitrators and the judge decided that a narrower construction should be applied to the wording 'default of men'.

In the wartime case of *Royal Greek Government v The Ministry of Transport* (1949) 82 Lloyd's Rep 196 the crew refused to follow charterers' orders to sail from port not in convoy. A dispute arose as to whether the crew's refusal resulted in the vessel being off-hire. The Court of Appeal held that it did not, since the "*deficiency of men*" wording in the off-hire goes to "*numerical insufficiency*" and only results in a vessel being off-hire when an insufficient number of crew are available for working on a ship.

As the arbitration tribunal observed:

*"In consequence of this decision, the printed clause has for many years frequently been amended, as here, by the addition of 'default*

*and/or'. The insertion of that phrase with the additional words '...including strike of Officers and/or crew...' showed, at least, that the parties unmistakably intended that a refusal to perform duties would be an off-hire cause."*

Thus the words "*default and/or*" and "*including strike of Officers and/or crew or deficiency of*" were added to the standard wording of clause 15 to meet a particular mischief, namely the refusal of officers and crew to perform duties, whether or not amounting to a full-scale strike.

In addition to such considerations, Mr Justice Gross observed that Charterers' construction would result in a startling alteration to the bargain typically struck in time charterparties as to the risk of delay. If the Charterers' arguments were well founded, it would follow that on almost every occasion when the officers or crew negligently or inadvertently failed to perform their duties causing a loss of time, then a vessel would be off-hire under the 'default of men' wording. Tellingly the Charterers were unable to point to any authority in support of that proposition, even though this standard amendment has been in use for more than 50 years.

### Any Other Cause

Charterers raised various alternative arguments as to why the vessel's detention by the pirates fell within the scope of the sweep-up provision "*any other cause*". Those arguments included:

- (a) If an 'average accident' requires damage to the ship, a fortuitous occurrence normally covered by marine insurance which happens not to have caused damage, would fall within "the spirit" of the clause and be caught by the catch-all wording.
- (b) Even if 'default of men' did not cover negligent errors, given the sweep-up wording, such a "fine distinction" should not determine whether or not the vessel was off-hire.
- (c) There had been a refusal by the officers and crew to perform their duties, and no less so because they were under duress from the pirates.
- (d) Seizure by pirates operates to disable the officers and crew, who are just as much unable to work as if struck down by disease, thereby immobilising the ship just as much as if it were aground or if there were not enough crew to work it.

All of the above submissions were rejected by the judge, who concluded that:

*“Intuitively, as a matter of indelible impression and in agreement with the tribunal, I think that seizure by pirates is a “classic example” of a totally extraneous cause. Suffice to say with regard to “average accident” that Charterers’ submissions gain no force from the wording “any other cause”; for the reasons already canvassed there was here neither an “accident” nor an “average accident” and Charterers’ case cannot be rescued by the sweep up wording (or “spirit”) of the clause. I do not think there is only a “fine distinction” between the narrower and wider constructions of “default of men”, still less a distinction that would bring Charterers within the sweep up wording. I confess I regard as unreal the notion that the Officers’ and crew’s failure to carry out their duties under duress of pirates was equivalent to a refusal to perform those duties.”*

Finally, the judge observed that the Charterparty included a “bespoke” clause dealing with the risk of seizure, arrest, requisition and detention. It was telling that the seizure clause did not extend to cover seizure by pirates.

Consequently, the Charterers’ appeal was dismissed and the arbitration award stands. The charterers have been refused leave to appeal to the Court of Appeal.

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