

PIRACY AND OFF-HIRE CLAUSES: *COSCO BULK CARRIER CO LTD v TEAM-UP OWNING CO LTD ('THE SALDANHA')* [2010] EWHC 1340

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In *The Saldanha*, the UK High Court (Commercial Court) ruled that seizure by pirates would not entitle charterers to put the seized vessel off-hire under clause 15 of the NYPE 46 form. This decision is important in that it clarifies the interpretation of the wording of clause 15 in line with the traditional method of construing such clauses narrowly and in favour of the owner where there is doubt. While there have been many cases which have dealt with off-hire clauses, *The Saldanha* is the first English case which addresses the effect of piracy on such clauses, and in particular, clause 15.

Essentially, this was an appeal of an arbitration tribunal's decision. The appellants, the charterers, claimed that the tribunal erred in finding that clause 15 excluded seizure by pirates. In the High Court, the matter came before Gross J, who upheld the tribunal's decision. The charterers appealed the court's decision but leave for appeal was denied.

Facts

The parties had entered into a time charter on 25 June 2008 using an amended NYPE 46 form for a period of 47 to 50 months at a hire rate of US\$52 500 per day. The vessel, a Panamax bulk carrier, the *Saldanha*, was delivered into charter on 5 July 2008.

On 22 February 2009, while travelling through the transit corridor in the Gulf of Aden laden with a cargo of bulk coal and heading for Koper, Slovenia, from Indonesia, the vessel was seized by Somali pirates. It was taken to waters off the town of Eyl, Somalia, where it remained under the control of the pirates until a ransom was paid. Following the payment of the ransom, the vessel was released on 25 April 2009 and on 2 May it arrived at an equivalent position to which it was seized.

The charterers refused to pay hire from 22 February to 2 May, a period of about two and a half months during which the ship was detained. The owners, on the other hand, claimed for hire during that period, as well as the cost of bunkers, additional war risk premiums, and crew war risk bonuses.¹

The dispute went to arbitration and the tribunal found in favour of the owners. The tribunal held that the seizure had prevented the 'full working' of the ship and that time was lost as a result. However, the charterers had not been able to show that the seizure was within any of the specified off-hire events in clause 15 and therefore the vessel remained on-hire while it was detained by the pirates.²

The Appeal

The charterers appealed the decision to the High Court. The appeal concentrated solely on the issue of whether detention by pirates entitled the charterers to rely on the off-hire clause to release them from liability for hire.³

Clause 15 of the amended NYPE 46 form provided:

That in the event of the loss of time from default and/or deficiency of men including strike of Officers and/or crew or deficiency of ... stores, fire, breakdown or damages to hull, machinery or equipment, grounding,

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¹ It may be noted here that under the terms of the charterparty, the charterers had agreed to reimburse the owners for additional war risk premiums that arose as a result of making the voyage from Indonesia to Slovenia through the Suez Canal, which would entail travelling along the Gulf of Aden: *The Saldanha* [2010] EWHC 1340, [7].

² *Ibid* [6].

³ *Ibid* [5].

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 ...⁴

It is trite law that time charterers are obliged to continue to pay hire for the vessel during the period of the charterparty unless they can prove that they came within any one of the events provided for in the off-hire clause of the contract. The charterers bear the burden of proving that the event is capable of being brought under the off-hire clause.⁵

The charterers, in this case, contended that detention by pirates was an event provided for under clause 15 and consequently, that the vessel was off-hire while detained by pirates and that hire was therefore not payable during this period. They argued that detention by pirates constituted ‘detention by average accidents to ship or cargo’, or alternatively that there was ‘default and/or deficiency of men’ because the master and crew failed to take sufficient anti-piracy measures to protect the ship from a pirate attack. In the final alternative, the charterers claimed that in any case, seizure by pirates would fall within the sweep up provision ‘any other cause’.⁶

The High Court decision

Gross J dealt with the arguments systematically and in each case, he affirmed the decision of the tribunal and dismissed the appellant’s submissions.

‘average accidents to ship or cargo’

The charterers argued that ‘average accident’ was to be construed in a marine insurance context and it therefore did not require any damage to the vessel. Furthermore, they claimed that physical damage was already covered by the phrase ‘damages to hull, machinery or equipment ...’ They reasoned that ‘average accidents’ were consequently fortuities which are marine perils. Section 3 of the *Marine Insurance Act 1906* (UK) provides that piracy is a marine peril, and while the attack may be deliberate and planned, it was a fortuity as far as the *Saldanha* was concerned. Therefore, seizure by pirates is an ‘average accident’ to the ship.⁷

Gross J disagreed and carefully laid out his reasons.

Firstly, he affirmed Justice Kerr’s remarks in *The Mareva*⁸ where the latter stated that ‘average accident’ means simply an accident which causes damage. Since no physical damage was caused to the vessel, the seizure cannot come under this provision.⁹ Secondly, he rejected that an act of piracy was an ‘accident’ because it was incongruent with the ordinary use of the word.¹⁰ Thirdly, while he agreed that ‘average’ points towards an insurance context, he stated that an ‘average accident’ is an ‘an accident causing damage to ship or cargo resulting from a peril that may be ordinarily covered by marine insurance’.¹¹ In this case, no damage was caused, so the exception did not apply. Fourthly, Gross J rejected the charterers’ claim that damage was not necessary under ‘average accident’ as it was already provided for under ‘damages to hull, machinery or equipment ...’¹² Therefore, while damage may be provided for in a subsequent provision in the clause, it did not prevent it from being necessary in an earlier provision of the clause. With regards to this point, Gross J also endorsed the tribunal’s remarks relating to surplusage and agreed that the presumption against surplusage will not limit the construction of terms in a charterparty where overlapping appears. This position is in line with traditional authority where the presumption against surplusage in

⁴ Ibid [3].

⁵ Ibid [8]; Stewart C Boyd *et al*, *Scrutton on Charterparties and Bills of Lading* (Sweet & Maxwell, 20th ed, 1996), 351.

⁶ *The Saldanha* [2010] EWHC 1340, [6].

⁷ Ibid [10].

⁸ *Mareva Navigation Co Ltd v Canaria Armadora SA* (*‘The Mareva AS’*) [1977] 1 Ll Rep 368, 381.

⁹ *The Saldanha* [2010] EWHC 1340, [11].

¹⁰ Ibid [12].

¹¹ Ibid [17].

¹² Ibid [18].

charterparties is generally weak. This is because charterparties comprise of an accumulation of clauses generally agreed in the industry, and repetition is likely when they are occasionally added to or varied.¹³

'default and/or deficiency of men'

The charterer had submitted before the tribunal that on assumed facts (which were disputed), the officers and crew of the ship had failed to take recognised anti-piracy measures and that this was a significant cause of the loss of time as the pirates were hence able to seize and detain the vessel. They argued that 'default' in clause 15 included failure to perform duties, and as a result the clause operated to relieve the charterer of the obligation to pay hire during the period of seizure.¹⁴

Gross J agreed with the tribunal's decision to reject the argument. While he accepted that the word 'default' was capable of referring to negligent or inadvertent performance of duties in the natural sense, the history of the clause together with the mischief it was designed to address meant that it was to be narrowly construed. Under this restricted interpretation, the phrase 'default and/or deficiency of men' was only meant to cover refusal to perform duties and not the wider concept of negligent or inadvertent performance.¹⁵

Importantly, Gross J noted that if the wider interpretation was allowed, it would result in a 'startling alteration in the bargain typically struck in time charterparties as to the risk of delay'.¹⁶

'any other cause'

The sweep-up provision 'any other cause' was the final – and rather hopeful – ground on which the charterers attempted to pin the seizure by pirates on.

It is well-recognised that the term 'any other cause' is to be determined *eiusdem generis* with the preceding events listed in an off-hire clause, or at least in a restricted way that reflects the 'general context of the charter and clause.'¹⁷ However, the addition of the word 'whatsoever' after 'any other cause' may open the clause to cover any extraneous event that caused loss of time as a result of the impeded efficiency of the vessel.¹⁸

The charterers nonetheless contended that 'any other cause' was a sweep-up provision whose purpose was to prevent disputes on based on 'nice distinctions'. They submitted with respect to the *eiusdem generis* construction principle that no genus could be easily indentified among the listed events and consequently the sweep-up provision would include seizure by pirates, which in any case was not a totally extraneous event.¹⁹

Gross J rejected this argument. He relied on Rix J's judgment in *The Laconian Confidence* and highlighted the fact that clause 15 did not include the word 'whatsoever',²⁰ which excluded the scope of the sweep-up provision from entirely extraneous events.²¹ He regarded an act of piracy as a "classic example" of a totally extraneous case' that fell outside the reach of the phrase 'any other cause'.²²

¹³ *Royal Greek Government v Minister for Transport* (1949) 83 LI L Rep 228, 235 (Devlin J). See also Staughton LJ's remarks in *Total Transport Corp v Acadia Petroleum Ltd* [1998] 1 LI Rep 351, 357: 'It is well-established that the presumption against surplusage is of little value in the interpretation of commercial contracts.'

¹⁴ *The Saldanha* [2010] EWHC 1340, [19]-[20].

¹⁵ *Ibid* [28].

¹⁶ *Ibid* [27].

¹⁷ *Andre & CIE SA v Orient Shipping (Rotterdam) BV ('The Laconian Confidence')* [1997] 1 LI Rep 139, 150 (Rix J).

¹⁸ *The Laconian Confidence* [1997] 1 LI Rep 139, 151 (Rix J), albeit in obiter.

¹⁹ *The Saldanha* [2010] EWHC 1340, [32].

²⁰ *Ibid* [30].

²¹ *Ibid* [33].

²² *Ibid*.

Comment

Gross J noted in his judgment that ‘certainty is of great importance’ in commercial matters.²³ His decision clearly makes the effort to clarify the operation of the off-hire clause with respect to piracy. With regards to the appeal as to ‘average accidents’ and ‘default and/or deficiency of men’ he simply applies existing law to the facts of the case and finds, rightfully, that piracy is not included.

In relation to the sweep-up provision, he deals with the phrase ‘any other cause’ in line with well-established principles of construction. However, he was not called upon to decide on whether the addition of the word ‘whatsoever’ would include seizure by pirates. While he endorsed Rix J’s comments in *The Laconian Confidence* that ‘whatsoever’ would function so that any extraneous cause of delay would fall within its scope, the matter is not well-settled. There is contradicting authority that even with the word ‘whatsoever’ the delaying cause must be somehow related to the qualities, characteristics, history or ownership of the vessel.²⁴ Gross J admitted as much but decided that Rix J’s words were ‘most persuasive.’²⁵

As a final point, the charterparty included a bespoke clause, clause 40, which purported to place the vessel off-hire in the event of seizure, arrest, requisition or detention. However it was clear from the language of the clause that it did not include seizure by pirates. So in relation to clarity and certainty, Gross J stated that if parties intend to include piracy as an off-hire event, they have to do so plainly. He suggested expressly adding piracy to a clause similar to clause 40, or adding the word ‘whatsoever’ after ‘any other cause’.²⁶ Thus as a matter of law, if the parties so intend, piracy has to be included as an off-hire event unambiguously in the charterparty. As a matter of business practice, it would be in the best interests of parties to ensure that any risk they intend to address is adequately provided for in the terms of the charterparty.

Conclusion

In light of the High Court’s February decision in *Masefield AG v Amlin Corporate Member Ltd* (*‘The Bunga Melati Dua’*) [2010] EWHC 280, which considered the effect of piracy in a marine insurance dispute, the issue of piracy is topical.²⁷ One might add further that the effect of piracy in commercial shipping law is an area gaining focus. As mentioned above, *The Saldanha* is the first English case that deals with the effect of seizure by pirates on an off-hire clause in a time charterparty and it confirms the application of existing law to such an event.

In line with the usual distribution of risk in a charterparty, this decision firmly plants the piracy risk in the charterers’ court.

²³ Ibid [11].

²⁴ See M Davies and A Dickey, *Shipping Law* (Lawbook, 3rd ed, 2004) 380.

²⁵ *The Saldanha* [2010] EWHC 1340, [36].

²⁶ Ibid.

²⁷ Ibid [1].