

# THE SALDHANA



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In a decision handed down in the *Saldhana* case (Cosco Bulk Carrier Co. Ltd v Team-up Owning Co. Ltd [2010] EWHC 1340) on 11 June 2010, the High Court held that the off-hire provisions contained within a NYPE form charterparty did not extend to cover loss of time due to seizure by pirates. For off-hire to be accepted, an express provision would need to be incorporated.

## THE INCIDENT

On 22 February 2009, the *Saldhana* was seized by pirates whilst transiting the Gulf of Aden. The ship was held until a ransom was paid by ship interests on 25 April 2009, she resumed her voyage from an equivalent position to where she was captured on 2 May 2009.

The shipowner pursued the charterer for hire payments totalling \$3,622,500. The charterer refused payment on the basis that the incident fell within the following off-hire clause within the charter party:

‘That in the event of the loss of time from **default and/or deficiency of men... detention by average accidents to ship or cargo... or by any other cause preventing the full working of the vessel**, the payment of hire shall cease for the time thereby lost...’

Following an arbitration, the tribunal reached a unanimous decision condemning the charterer to pay hire for the entire period. The charterer appealed to the High Court, attempting to bring itself within one or more of the following charterparty exceptions:

1. Default and/or deficiency of men
2. Detention by average accidents to ship or cargo
3. Any other cause

## THE APPEAL

Mr Justice Gross heard the case, addressing each exception in turn:

### 1. Default and/or deficiency of men

In the context of this case, ‘deficiency’ required a lack of crew numbers, whilst ‘default’ required a refusal by the ship’s crew to perform their duties. The judge confirmed that no such default or deficiency of men took place within the meaning of the off-hire clause.

### 2. Detention by average accidents to ship or cargo

Mr Justice Gross could not accept that capture by pirates was an ‘average accident’, for two reasons: firstly, that for an ‘average accident’ to have taken place, damage was required. Any other construction of the term would have been contrary to the well-established view taken in the *Mareva AS*. Secondly, the judge adopted the arbitrator’s opinion that a pirate attack could not be considered an accident.

### 3. Any other cause

The court held that the words ‘any other cause’ referred only to the same kind of losses as those detailed in the clause. For the court to consider causes beyond the scope of the specific causes listed, the phrase should have been amended to read ‘any other cause whatsoever’. Hence, off-hire did not extend to the crew’s failure to carry out their duties whilst under pirate duress. Furthermore, no delay had arisen out of the condition or efficiency of the ship, its crew or cargo, and thus charterers had not brought themselves within this clause.

## THE DECISION

Mr Justice Gross noted the addition of a bespoke clause dealing with seizure of the ship, but held that there was no reason to interfere with the meaning of the off-hire clause. He concluded that if parties had intended to cover piracy, then this could have been done easily and expressly within the existing ‘seizures’ or ‘detention’ clause. As a result, the judge held that charterers could not bring themselves within the ambit of the off-hire clause.

Charterer’s appeal was dismissed and the arbitration award condemning charterers to pay \$3,622,500 in hire became final.

## PRACTICAL STEPS

Listed below are some practical steps our members can take at the time of negotiating charterparty terms to avoid a dispute on the payment of hire.

### ‘Any other cause whatsoever’

In this instance, the addition of ‘whatsoever’ after ‘any other cause’ may have altered the outcome of the case. Whilst this addition to the NYPE off-hire clause may be considered favourably during negotiations, parties should be mindful that there would be greater potential for litigation than if the issue of piracy were dealt with expressly.

### Express provision

One way for all parties to achieve a greater degree of certainty and avoid the need for litigation would be by expressly providing for the risk of delay due to piracy within the charterparty.

### Standard piracy clause

BIMCO’s Piracy Clause for Time Charter Parties 2009 provides a further option. This clause seeks to strike a balance between owners and charterers by providing a clear allocation of the costs of piracy. This clause allows for 90 days on hire; thereafter off-hire is agreed.

## CONCLUSION

At a time when the number of piracy attacks is increasing and the average duration of a hijacking can last for many months, it is in the interests of owners and charterers alike to ensure the charterparty provisions regarding piracy are carefully drafted.

The *Saldhana* provides a stark warning for the need for owners and charterers to carefully examine the provisions of standard form charterparties to ensure that piracy issues are adequately addressed within their provisions. This will minimise both the need for litigation and avoid any gaps in insurance cover in the event of a hijacking.