



Neutral Citation Number: [2010] EWHC 1340 (Comm)

Case No: 2009 FOLIO 1301

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**COMMERCIAL COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 11/06/2010

**Before :**

**MR JUSTICE GROSS**

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**Between :**

**Cosco Bulk Carrier Co. Ltd.**

**Applicant**

**- and -**

**Team-Up Owning Co. Ltd.**

**Respondent**

**M/V "Saldanha"**  
**C/P dated 25/06/08**

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**Luke Parsons QC and David Lewis** (instructed by **Holman Fenwick Willan**) for the  
**Applicant**

**Andrew Baker QC and Sean O'Sullivan** (instructed by **Ince & Co**) for the **Respondent**

Hearing dates: 05/02/10  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE GROSS

**Mr Justice Gross :**

INTRODUCTION:

1. The subject-matter of this case is unfortunately topical: namely, Somali pirates. In *Masefield v Amlin; The Bunga Melati Dua* [2010] EWHC 280 (Comm); [2010] 1 Lloyd’s Rep. 509, the context was marine insurance; here the issue concerns off-hire under a time charterparty.
2. The question is whether detention by pirates, piracy or perhaps the effects of piracy entitled charterers to put the vessel off-hire in reliance upon that version of cl.15 of the NYPE form of charterparty agreed by the parties in the charterparty of 25<sup>th</sup> June, 2008 (“the charterparty”).
3. Cl. 15 of the charterparty provided 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 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....”

(Italics added).
4. By its Award on Preliminary Issues dated 8<sup>th</sup> September, 2009 (“the award”), an eminent arbitration tribunal (“the tribunal”) held unanimously that the answer to the question was “no”. From that decision the Applicants (“Charterers”) appeal.
5. For completeness, the tribunal also considered preliminary issues arising under other clauses of the charterparty. In summary, the tribunal held that the vessel was not off-hire under cl. 39 of the charterparty and that the war risk and insurance provisions of the charterparty did not preclude the Respondents (“Owners”) from claiming hire in respect of periods during which the vessel was under the control of pirates. There is no appeal from these determinations of the tribunal and no more need be said of them. This appeal is accordingly solely focussed on the question of off-hire under cl. 15 of the charterparty.
6. Reverting to the award, loss of time resulting from the seizure by pirates was not in dispute. The tribunal held that the “full working” of the vessel had been prevented by the actions of the pirates. Owners do not appeal from that decision of the tribunal. The only issue on this appeal is therefore still further narrowed: namely, whether, contrary to the decision of the tribunal, Charterers succeed in bringing themselves within one or more of the following three (italicised) causes contained in cl. 15 of the charterparty on which they seek to rely:
  - i) “Detention by average accidents to ship or cargo” (“Issue (I)”);
  - ii) “Default and/or deficiency of men” (“Issue (II)”);

- iii) “Any other cause” (“Issue (III)”).
7. The facts, so far as relevant to this appeal, are within a short compass and may conveniently be taken from the award:
- “ 5. The vessel is a Panamax size bulk carrier....
6. The charter was contained in a recap which provided for a charter period of 47 to 50 months at US\$52,500 per day and ‘otherwise as per’ an earlier charter of a similar vessel ‘logically amended’ with certain exceptions. The earlier charter was on the NYPE form with additional clauses....The clauses we have to construe come from this earlier charter.
7. The vessel was delivered into the charter on about 5 July 2008. On 30 January 2009 Charterers gave orders to load a cargo of bulk coal in Indonesia for carriage to Koper in Slovenia. Owners responded by saying they supposed this voyage was to be via the Cape of Good Hope. When Charterers said it was to be via the Suez Canal Owners reserved their right to refuse to comply with the orders unless Charterers confirmed that they would reimburse Owners for the additional war risk premium which they would have to pay. Charterers confirmed that they would do so ‘as per Charter’.
8. On 22 February 2009 the vessel was seized by Somali pirates whilst sailing through the transit corridor in the Gulf of Aden. The pirates compelled the Master to sail the vessel to the waters off the Somali town of Eyl where the vessel remained until 25 April when she was released by the pirates. She reached an equivalent position to the location at which she was seized on 2 May.
9. Charterers have refused to pay hire for the period between 22 February and 2 May. Owners claim the hire plus the cost of bunkers, additional war risk premium and crew war risk bonuses. The claim is made under the terms of the charter alternatively as a claim for an indemnity against the consequences of following orders to take the Suez route. Charterers counterclaim for damages alleging unseaworthiness because the vessel and its crew had not been properly prepared to deal with an attack by pirates. The preliminary issues are not concerned with the claim for indemnity or the counterclaim.”
8. Pausing here, it is worth underlining that the applicable principles are beyond argument. As is hornbook law and was clearly expressed in the award, under a time charterparty, hire is payable continuously unless charterers can bring themselves within any exceptions, the onus being on charterers to do so. Doubt as to the meaning of exceptions is to be resolved in favour of owners. Unless within the ambit of the exceptions, the risk of delay is borne by charterers. The justice of the matter is

to be found in the bargain struck by the parties. Mr. Baker QC, for Owners, put it well in his skeleton argument:

“ 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.”

9. I turn without more ado to the three Issues, already identified.

ISSUE (I): “Detention by average accidents to ship or cargo”

10. For Charterers, the essence of the argument carefully developed by Mr. Parsons QC was as follows:

“ ...in the context of clause 15, the reference to an ‘average accident’ is not intended to require that there be damage to the Vessel, i.e., physical loss (that is covered elsewhere in clause 15), nor to require that there be an ‘accident’ as that term would be understood in an everyday sense, but to enumerate that the Vessel will be off-hire in the event of ‘detention’ (itself a limiting requirement...) due to fortuities which are marine perils. Piracy is a marine peril: see section 3 of the 1906 Act.... ”

The tribunal rejected Mr. Parsons’ submissions under this heading. With respect and notwithstanding Mr. Parsons’ advocacy, I have no hesitation in agreeing with the tribunal. My reasons follow.

11. *First*, in commercial law, certainty is of great importance. In *The Mareva A.S.* [1977] 1 Lloyd’s Rep. 368, at p. 381, Kerr J (as he then was) said of this very wording that “average accident”:

“...merely means an accident which causes damage”

On any view, this incident did not result in damage to the vessel. It follows that if this *dictum* is correct, then the wording in question affords no assistance to Charterers. It is right that Kerr J’s observation was *obiter*. But, as the tribunal remarked and over and above the respect due to observations of Kerr J:

“ Our own experience is that in the period of almost 30 years since it was given, it has been accepted as correct, and as settling the issue of the meaning of ‘average accident’ in the NYPE form, both in textbooks and in arbitration. We imagine that innumerable charterparties have been made on this basis.”

I respectfully share the tribunal’s understanding. In the circumstances, I agree entirely with the tribunal that it would only be right to differ from the view expressed by Kerr J if persuaded that it was clearly wrong. To the contrary, that view seems right to me as it did to the tribunal.

12. *Secondly*, I am unable to accept that, however approached, the incident can properly be described as an “accident”. Mr. Parsons submitted that although the capture of

the vessel was planned in advance and deliberate, it was a fortuity so far as the crew and the vessel were concerned. In telling wording, the tribunal rejected this submission:

“ 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.”

The tribunal recorded that other examples had been canvassed at the hearing, including hijacking and the assassination of President Kennedy. As to the latter:

“...nobody would naturally say that President Kennedy had an accident in Dallas in 1963.”

To my mind, this reasoning of the tribunal is unanswerable.

13. Mr. Parsons valiantly contended that, as the wording “average accident” was esoteric and not in everyday use, the tribunal’s point was neutral; a master would never contact owners to say that the vessel had had an “average accident”. This submission misses its mark. I shall come to the question of “average” accident very shortly; but, on no view and for the reasons given by the tribunal, could this incident properly be termed an “accident”.
14. For completeness:
  - i) I did not think that anything in *Wilson Sons & Co. v Owners of Cargo per the ‘Xantho’* (1887) 12 App. Cas 503, relied upon by Mr. Parsons, assisted the argument either way; apart from all other considerations, a collision at sea is far removed from a seizure by pirates.
  - ii) Nor for that matter is there anything in the war risk clauses of the charterparty which can properly be prayed in aid in support of Mr. Parsons’ construction of “accident”.
  - iii) All the objections canvassed so far to describing the incident as an “accident” apply, if anything, *a fortiori*, when it is remembered that the wording is “accident to” the ship. As the tribunal observed, the preposition suggests “an accident physically affecting (and probably causing damage to) the structure or machinery of the ship...”. Collision, grounding or an explosion on board, furnish ready examples of when this wording in the clause may be invoked; seizure and detention by pirates is a very different matter.

15. *Thirdly*, I have already foreshadowed the thrust of Mr. Parsons’ submission as to the meaning of “average accident”. I agree with Charterers thus far, that much depends on context and that the wording “average accident” points towards an insurance context. But it does not at all follow (even putting Kerr J’s authoritative *dictum* to one side) that “average”, in this context is simply to be equated with a peril ordinarily covered by marine insurance. At the least, as it seems to me, in this context, damage to the ship is an essential ingredient for the wording “average accidents...to ship” to apply. The tribunal said this:

“...in the insurance context, ‘average’ tends to be used to mean damage which is less than a constructive total loss: for example ‘free of average’ or ‘particular average’. The word does not mean a maritime peril....Accordingly, if the issue were free from authority, our view would be that the word, in context, was intended to refer to damage rather than to a peril, so that in clause 15 an average accident to ship or cargo was an accident which caused damage to ship or cargo, but not total loss.”

Suffice to say, I respectfully agree.

16. The tribunal ventured the further consideration that this approach to the wording in question in cl. 15 of the charterparty might have formed part of a consistent scheme, when regard is had to cl. 16 of the charterparty. Cl. 16 provided as follows:

“That should the Vessel be lost, money paid in advance and not earned...shall be returned to the Charterers at once....”

As the tribunal put it:

“It seems plausible that the draftsman intended clause 15 to deal, inter alia, with the effect upon hire of damage short of total loss, and clause 16 to deal, inter alia, with the effect upon hire of a total loss.”

Though I respectfully see force in this linkage between cll. 15 and 16, I would not wish to – and do not – rest my decision upon it. My concern is that this may be putting more weight on the overall coherence of the drafting of the charterparty than it will safely bear – a consideration emphasised when regard is had to the question of “surplusage” (dealt with below).

17. In all this, I have not lost sight of Mr. Parsons’ references to other authority, viz., *Kidston v Empire Insurance Co.* (1866) LR 1 CP 535, at p.546; *Kelman v Livanos* [1955] 1 Lloyd’s Rep. 120, esp. at p.134; and *The Alfred Trigon* [1981] 2 Lloyd’s Rep. 333, at pp. 336-8. Over-elaboration is unnecessary. First, no help is to be obtained from the very different case of *Kidston*, determined on facts far removed from those with which the present dispute is concerned. Secondly, these authorities undoubtedly underline the importance of context but that, by itself, does not advance the argument. In *The Alfred Trigon*, for instance, the wording in question – in the context of the second-hand ship sale and purchase market – was “average damage”. As the tribunal observed, “average” there could not have meant “damage” *simpliciter* and was understandably construed to mean a particular kind of damage – namely,

damage occasioned by a peril ordinarily covered by insurance as opposed to defects through wear and tear or general old age. Thirdly, in both *Kelman v Livanos* and *The Alfred Trigon* there had been damage. The most, as it seems to me, Charterers could extract from these authorities is that an “average accident” in cl.15 meant an accident causing damage to ship or cargo resulting from a peril ordinarily covered by marine insurance. But even if that be right, it does not go nearly far enough to assist Charterers’ case; on any view, these two authorities cannot be read as removing the requirement of damage.

18. *Fourthly*, Mr. Parsons understandably pointed to the wording “damages to hull, machinery or equipment” as a separate cause in cl. 15. On the tribunal’s construction of “average accident” – and that adopted by Kerr J – there was a significant overlap between these two causes. The tribunal accepted that its construction would lead to surplusage, pointing out that Kerr J had himself acknowledged the problem: *The Mareva A.S. (supra)*, at pp. 381-2. The tribunal said this:

“ In truth, the clause is riddled with potential overlap in many of its causes. Indeed it may have been put together long ago as a patchwork of exceptions to hire then in vogue, rather than the draftsman starting from a blank piece of paper. In any event, bearing in mind that the presumption against surplusage is weak in charterparties, we were not impressed by the point.”

Again, I agree. The presumption against surplusage does not at all dissuade me from the construction I otherwise favour.

ISSUE (II): “Default and/or deficiency of men”

19. The issue under this heading was dealt with by the tribunal on assumed facts. The tribunal was asked to determine whether, on the factual assumption (very much disputed) that the Officers and crew had failed to take recognised anti-piracy precautions, before and during the attack, these failures would fall within the exception “default of men”. The tribunal was further asked to assume that this failure on the part of the Officers and crew was a significant cause of the loss of time resulting from the pirates taking over the vessel and consequent loss of full working of the vessel.
20. Mr. Parsons submitted that the natural meaning of “*default* of men” included a failure to perform or a breach by the Master and crew of their duties. If so, then, on the assumed facts, Charterers would bring themselves within cl. 15 of the charterparty.
21. In essence, the tribunal held that the context presented an insuperable obstacle to adopting Charterers’ construction of “default of men”. Instead, in context, “default of men” in cl.15 had the limited meaning:

“ ...of a refusal by Officers or crew to perform all or part of their duties as owed to the shipowner and not the negligent or inadvertent performance of those duties....”

It followed that, even on the assumed facts, Charterers’ case failed. I agree with the tribunal.

22. *First*, it must be accepted, as the tribunal rightly did accept, that the natural meaning of “default” is capable of including the negligent or inadvertent performance of the duties of Master and crew. Thus far, Charterers’ argument is soundly based. Thereafter, however, the submission encounters ever-increasing difficulties.
23. *Secondly* and immediately, the history of the clause must be considered. In the wartime case of *Royal Greek Government v Minister of Transport* (1949) 82 Ll. L. Rep. 196, charterers ordered the vessel to sail but her crew refused to do so, except in convoy. A dispute arose as to whether, charterers’ order to sail having been disobeyed, the vessel was off-hire. Upholding the decision of Sellers J, as he then was, the Court of Appeal held that charterers could not bring themselves within the off-hire clause, which contained (so far as relevant) only the printed words “deficiency of men”. That wording meant “numerical insufficiency” and resulted in the vessel being off-hire when an adequate complement of officers and crew for working the ship was not available. However, the vessel had a full complement of crew, so that, on the facts, the wording did not assist charterers. “Deficiency of men” did not extend to cover a wilful refusal to work.
24. As the 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.”
25. Mr. Parsons sought to meet this point by submitting that although the decision in *Royal Greek Government v Minister of Transport* may have “provoked” the amendment to the clause, it did not follow that the wording was confined to meeting the facts and the result of that case. That is a submission not without force, especially when allied to the natural meaning of the wording in question. On the other hand, it is to be acknowledged that the mischief which the amended clause was designed to address must be a powerful factor in its construction – and offers no assistance to charterers. In any event, matters do not end there.
26. *Thirdly*, cl. 15 in the present case contains the additional wording “...including strike of Officers and/or crew”. This additional wording may be seen as suggesting that the clause is focussed on a refusal to perform duties, whether or not amounting to a full-scale strike. Mr. Parsons countered by submitting that this was no more than a single example. That is right as far as it goes but it is also fair to observe, as Mr. Baker retorted, that it was the only example given. For my part, I think this additional wording is of limited weight – and certainly not decisive in itself – but is a pointer towards a narrow construction of “default of men”, consistent with the history of the clause and the mischief at which it is aimed.
27. *Fourthly* and to my mind decisively, I have regard to the allocation of the risk of delay under a typical time charterparty – emphasised above. If, however, Charterers’ case is well-founded, it must follow that on almost every occasion when Officers or crew negligently or inadvertently fail to perform their duties causing some loss of time, then a vessel would be off-hire under this wording. That would be so whether

or not owners were liable in damages for breach of contract. For example, even if (as here) owners enjoyed the benefit of familiar exemptions in respect of errors of navigation (cl. 16) or negligent navigation (cl. 76), charterers could claim off-hire. Consider, for instance, delay attributable to bad weather or port congestion which would have been avoided but for an error in navigation. Ordinarily under a time charterparty, such risks are to be borne by charterers; but, on the face of it, Charterers' submission results in the shifting of these risks to owners. Moreover, off-hire could be asserted regardless of whether an equitable set-off could be made good on the facts. Granted that it is commonplace for charterers to enjoy the benefit of an off-hire clause without the need to make good a breach of contract on the part of owners; even so, this submission of Charterers would, if soundly based, result in a startling alteration in the bargain typically struck in time charterparties as to the risk of delay. In my judgment, the wording "default of men" is not so clear as to compel the surprising conclusion (and consequences) to which I have referred.

28. Although I share the tribunal's reluctance to depart from the natural meaning of the word "default" without good reason, in agreement with the tribunal I too conclude that Charterers fail to satisfy the burden of bringing themselves clearly within the wording of cl.15 in question. In the event, the tribunal, with respect, correctly summarised the sense of the relevant wording as follows:

“ If the Owners do not provide a workforce in the numbers necessary to perform the chartered services as owed by the Owners to the timecharterers, when required, there is a 'deficiency of men'; if the Owners do provide the numbers necessary, but the workforce refuses to perform the services, there is a 'default'. This is distinct and separate from an individual transient act of negligence by a crew member or officer in the carrying out of the Owners' chartered services.”

In this manner, proper effect can be given to the wording "default of men" by way of the narrower construction preferred by the tribunal – a construction consistent with the history of the clause and the mischief at which it was aimed.

29. I am fortified in reaching this conclusion by the further consideration that if Mr. Parsons' submission was right, then it is remarkable that he can point to no authority in support. As the tribunal observed:

“ ...there does not seem to have been a single case where a default by the crew or a crew member (in the sense of simple negligence) has triggered off-hire under clause 15 as amended.”

ISSUE (III): "Any other cause"

30. The starting point here is to underline that cl.15 in the charterparty contains the wording "*any other cause*" rather than the wording "any other cause *whatsoever*". This difference in wording is significant, a matter best encapsulated, with respect, in a passage from the judgment of Rix J (as he then was) in *The Laconian Confidence* [1997] 1 Lloyd's Rep. 139, at pp. 150 – 151:

“ In my judgment it is well established that those words [i.e., ‘any other cause’], in the absence of ‘whatsoever’, should be construed either *ejusdem generis* or at any rate in some limited way reflecting the general context of the charter and clause....A consideration of the named causes indicates that they all relate to the physical condition or efficiency of either vessel (including its crew) or, in one instance, cargo. There is, moreover, the general context....that it is for the owners to provide an efficient ship and crew. In such circumstances it is to my mind natural to conclude that the unamended words ‘any other cause’ do not cover an entirely extraneous cause, like the boom in *Court Line*, or the interference of authorities unjustified by the condition (or reasonably suspected condition) of ship or cargo. *Prima facie* it does not seem to me that it can be intended by a standard off-hire clause that an owner takes the risk of delay due to the interference of authorities, at any rate where that interference is something beyond the natural or reasonably foreseeable consequence of some named cause. Where, however, the clause is amended to include the word ‘whatsoever’, I do not see why the interference of authorities which prevents the vessel performing its intended service should not be regarded as falling within the clause, and I would be inclined to say that that remains so whether or not that interference can be related to some underlying cause internal to the ship, or is merely capricious. That last thought may be controversial, but it seems to me that if an owner wishes to limit the scope of causes of off-hire under a clause which is deliberately amended to include the word ‘whatsoever’, then he should be cautious to do so.”

31. The decision of Rix J was that charterers’ appeal failed. The arbitrators in that case had been right to decide that the vessel was not off-hire. In the absence of the word “whatsoever”, the unexpected and unforeseeable interference by the Chittagong authorities at the conclusion of a normal discharge was, Rix J said (at p.151):

“...a totally extraneous cause...unconnected with, because too remote from, the merely background circumstance of the cargo residues of 15.75 tonnes. There was no accident to cargo, and there was nothing about the vessel herself, her condition or efficiency, nor even anything about the cargo, which led naturally or in the normal cause of events to any delay. If the authorities had not prevented the vessel from working, she would have been perfectly capable of discharging the residues or of sailing and dumping them without any abnormal delay.”

32. Against this somewhat unpromising background, Mr. Parsons’ carefully constructed argument proceeded as follows. First, even without the additional word “whatsoever”, the wording “any other cause” was a sweeping up provision. That wording was there to prevent “disputes founded on nice distinctions”: see, *Chandris v Isbrandtsen Moller* [1951] 1 KB 240, at pp. 246-7. Secondly and accepting that the

sweeping up provision was to be construed in some limited way reflecting the general context of cl. 15, it was nonetheless not easy to identify any “genus” which included all of the named causes in cl. 15. The most that could be said was that they all related to the physical condition or efficiency of the vessel (including its crew) or, in one instance, cargo and did not include truly extraneous causes. Thirdly, if contrary to Charterers’ primary case (see above), “average accident” did “technically” (Mr. Parsons’ word) require there to be damage, nevertheless a fortuitous occurrence normally covered by marine insurance but which happened not to have caused damage, would be within “the spirit” of the clause and caught by the wording “any other cause”. Fourthly, even if “default of men” did not cover negligent errors, given the sweeping up wording, such a “fine distinction” should not determine whether or not the vessel was off-hire. Fifthly, there had here been a “refusal to perform” their duties on the part of Officers and crew and no less so because the Officers and crew were under duress from pirates. Sixthly, it was necessary to consider the *effect* of piracy as much as piracy itself. The acts of piracy could result in an off-hire event such as grounding; so too, here, they resulted in off-hire by preventing the crew acting as a crew. Thus:

“ Seizure by pirates is far from being a totally extraneous cause. It operates by disabling the officers and crew, who are just as much unable to work as if struck down with typhus, and by immobilising the ship, just as much as if it were aground or if there were not enough crew to work it. Owners are entitled to hire if they provide a functioning ship and a crew able to work the ship to provide the service required – neither ship nor crew can function if seized by pirates....and the basis for the payment of hire is in such circumstances wholly undermined.”

*The Laconian Confidence* was accordingly distinguishable.

33. With respect, I am unable to accept these submissions. 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. For completeness, I have not overlooked a further submission advanced by Mr. Parsons that the tribunal erred in requiring Charterers to demonstrate that for a cause to fall within the sweeping up provision it had to “arise out of” the condition or efficiency of the vessel or crew, rather than merely “relate to” the relevant condition or efficiency – the words used by Rix J, in the passage already cited from *The Laconian Confidence*. No more need be said than that, in this context at least, the difference is purely semantic; there is nothing in this point. All in all and whether regard is had to piracy, the effects of piracy or both, to my mind, the incident remains a totally extraneous cause, falling outside the scope of the sweep up wording.

34. Here too, with respect, the tribunal put the matter well:

“ We cannot accept any of these permutations [i.e., those contained in Charterers’ argument.] They all seemed to us to be attempts to avoid the well known consequences of the wording in the form agreed by the parties. This act of piracy was not *eiusdem generis*. It did not arise out of the condition or efficiency of the vessel, or the crew, or the cargo, or the trading history, or any reasonable perception of such matters by outside bodies. Unlike a trading history which gave rise to typhus or a well-grounded suspicion of typhus, it was a truly extraneous cause. The effect of the bargain contained within clause 15, construed in its general context, was that Owners did not take the risk of the full working of the vessel being prevented by an extraneous cause such as piracy. The Charterers...did assume that risk.”

I agree.

#### OVERALL CONCLUSION

35. As Mr. Baker submitted, the seizure of a ship by external actors is a recognised peril; but no such peril was covered by cl. 15 of the charterparty. Moreover and, to my mind significantly, there was in the charterparty a “bespoke” clause dealing *inter alia* with seizures; cl. 40 of the charterparty provided 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 time so lost shall be treated as off-hire until the time of her release....”

Plainly, however, cl. 40 did not extend to cover seizure by pirates. Perhaps that is Charterers’ misfortune but, be that as it may, it does not furnish justification for distorting the meaning of cl. 15 of this charterparty.

36. Should 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 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.

37. At all events in this case, the various submissions advanced by Charterers fail, individually and cumulatively, to satisfy the burden of proof resting on them to come clearly within the wording of the off-hire provisions contained in cl. 15 of the charterparty. The appeal must therefore be dismissed.

38. I add only this. The issue of piracy is topical and, I suspect, of interest to the industry, so making this a suitable case for crossing the threshold from the private realm of arbitration into a public judgment at first instance. Accordingly, I have set the matter out at a little length, even though, effectively, I have dismissed the appeal for the reasons given by the tribunal.
39. I shall be grateful for the assistance of counsel in drawing up an appropriate order and in respect of all matters relating to costs.