The Traps and Perils of Off-Hire Clauses

In a time charter, the risk of delay is essentially borne by charterers, since in the absence of any contrary terms, the contract defines the period for which they are entitled to exploit the vessel commercially and owner is entitled to receive hire throughout that period and to re-assume control of his vessel on the expiry of that period.

Therefore, time charterers will be anxious to introduce terms which define their obligations when time chartering. The most common form of express clause, which is introduced in order to minimise risk, is the ‘off-hire clause’. The purpose of this clause is to entitle charterer to stop paying hire if delay is caused to the operation of the vessel. However, the general rule is that since hire is payable fully and in advance unless there is an express clause to the contrary, the onus is on charterers to prove that they are entitled to withhold hire in the particular circumstances.

If charterer wishes to argue that hire is not payable due to delay, then he must bring himself clearly within the clause (The Mareva AS [1977] 1 Lloyd’s Rep).

If he does not do so then he has failed to pay hire in accordance with the provisions of the charter and runs the risk that shipowner will avail himself of the various remedies which are available to him in such circumstances, including a possible withdrawal of the vessel from charterer’s service.

Types of Off-Hire Clause

These clauses fall into two categories: (1) ‘net loss of time’ and (2) ‘period’.

For an example of a net loss of time, see clause 15 of NYPE 1946 which reads:

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

This clause is pro-owner as only the resulting net loss of time is counted as off-hire.

Reference to the second type of off-hire clause – the period loss of time clause – promulgates a different outcome. Clause 21 of Shelltime 3 is a prime example of a ‘period of inefficiency’ clause, stating that:

“the vessel shall be off-hire from the commencement of such loss of time until she is again ready and in an efficient state to resume her service.”

The vessel is therefore off-hire for the whole period that she’s inefficient to perform the service required. As a consequence, partial inefficiency results in a total cessation of hire, which is clearly charterer-friendy. Moreover, unlike a net off-hire clause, it is not necessary for a charterer to prove time was actually lost as a result of the inefficiency. The vessel is simply off hire for that period of time.

The question of whether the ship is off-hire is purely one of construction of the relevant clause. If the wording is sufficiently broad, the ship is off-hire and it is immaterial whether the delay has resulted from some breach of contract on the part of the owner. The off-hire clause operates entirely independently of any breach of charter by owners.

The off-hire event must:

i. Be fortuitous and not a natural result of charterers’ orders. In The ‘Rijn’ [1981] 2 Lloyd’s Rep. 267, the vessel’s hull became fouled during a protracted period of waiting to load.

   a. Must/ 31 held that “only those causes quality for consideration which are fortuitous, and are not the natural result of the charterers’ orders [...] I am bound to say that I find it hard to visualise the accumulation of marine growth during the contract service as a ‘detect’. But even if it were, the defect arose as a natural consequence of the way in which charterers chose to employ the ship.”

   b. Not be the result of a breach of contract on the part of charterer. In Lensen v Anglo-Soviet (1935) 52 Li Rep. 141, for example, where delay was caused as a result of running aground following illegitimate employment orders given by the charterer. Here, it was held that the ship was not off-hire notwithstanding the words ‘loss of time [...] due to damage to hull’ in the off-hire clause.

The mere fact that one of the events enumerated in the clause has occurred is not in itself sufficient; it must also be proved that time has been lost as a result.

In determining whether or not there has been loss of time, it is the service next required by charterers which is relevant. This is not simply a question of what service charterers ask her to undertake, but whether she is capable of performing the next operation that the charterer makes necessary.

In The Berge Sund [1993] 52 Lloyd’s Rep 455, the chartered vessels holds failed to pass a pre-load inspection and was obliged to carry out additional tank cleaning in order to be able to comply with charterers’ orders to load her next cargo. The charterers placed the vessel off-hire for such period. Lord Justice Stoughton refused to accept this and said:

“What were the Charterer orders? They were not to load the cargo, as I have said, that was the very last thing the charterers would have ordered. The orders were, in part expressly and at all relevant times by implication, to carry out further cleaning. That was the service required and the vessel was fully fit to carry it out.”

Thus it is the service actually needed next that is relevant. This principle is not to be taken to extremes though. A ship is generally prevented from working if doing something that is not ordinarily a service required by a time charterer – i.e. fighting fire. In The Clipper Sao Luis [2000] 1 Lloyd’s Law Rep 645, owners tried to argue she was not off-hire as she was performing the service then required of her after the cargo was set alight by a vessel destroyed by a shipwreck. Lord Justice McFarlane held that the ship was off-hire.
Off-Hire Causes

Once you can establish that the full working of the vessel has been prevented, it is necessary to look to see if this has been caused by one of the off-hire events set out in the clause.

“Any other cause”

General words (e.g., “any other cause”) following a list of specific causes in an off-hire clause will be construed ejusdem generis the preceding specific clauses. In other words, the ‘other cause’ will be relevant only if it is a cause of a similar type to one of the specific causes which precede it in the clause. It is not easy to identify the type, but it is generally viewed to relate to the condition of the ship or her crew. It may extend to legal or administrative acts by Port or a similar authority, provided they relate to the condition or efficiency of the ship or crew, or indeed suspected condition.

It will not extend to causes that are unrelated to the physical condition of the vessel or efficiency of the crew.

In Court Line v Danl (1939) 44 Com Cas 345, the chartered vessel was trapped in the Yangtze river during the China-Japan war by a boom placed across the river by the Chinese forces to prevent Japanese forces travelling up the river. However, the vessel herself remained fully efficient at all times. The Court held that the vessel was not off-hire as she remained fully efficient in herself to perform the required service and the cause of the delay was wholly extraneous to the vessel, namely the boom.

In Cosco Bulk Carrier Co Ltd v Team-up Owning Co Ltd (The MV Saidarina) [2010] EWHC 1343 (Comm), the charterer argued that the chartered vessel was off-hire during the period when she was captured by Somali pirates. The relevant clause provided: “That in the event of the loss of time [... from detention by average accidents to ship or cargo ... by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost.” Gross J held that the words ‘any other cause’ are usually construed ejusdem generis or at any rate in some limited way reflecting the general context of the clause. That means that the event in question should be akin to ones described prior to it. The event in question ‘seizure by pirates’ was a totally extraneous cause so the charterer cannot benefit from the sweep-up provision.

However, the ejusdem generis rule does not apply when the general words are accompanied by other words such as ‘whatever’ or ‘whosoever’. In that instance, there is no need for the ‘other cause’ to be of the same type as the preceding causes.

Full Working of the Vessel

Most standard off-hire clauses frequently conclude with the phrase ‘preventing the full working of the vessel’. Authority restricts such ‘other causes’ and also all the preceding enumerated causes to those which directly affect the running of the ship (i.e. internal, usually mechanical causes). Put differently, the courts would put the vessel off-hire only if the enumerated cause or any other cause had, in fact, had an impact on the full working of the vessel.

For example, in The Mareva AS [1977] 1 Lloyd’s Rep. 368, the discharge of the vessel was delayed by 10 days due to the fact that her cargo was damaged (‘average accident to cargo’) by leakage through defective hatch covers and was therefore more difficult to discharge. However, the ship herself remained perfectly efficient in the performance of the discharge function. It was held that the vessel was not off-hire as the ‘average accident to cargo’ had not ‘prevented the full working of the vessel’.

On the other hand, external factors, such as legal or political reasons, could trigger the off-hire clause as long as they impose restrictions which affect the nature of the vessel itself. In The Apollo [1978] 1 Lloyd’s Rep. 200, for example, the crew of the chartered vessel was suspected of having typhus and the vessel was not allowed to discharge under the health regulations of the port of discharge until she had been fully disinfected. It was held that the ship herself was prevented from working and was therefore off-hire.

In The Mastro Giorgis [1969] 2 Lloyd’s Rep 66, the chartered vessel was prevented from sailing by an arrest placed by the owners of cargo damaged during the course of the voyage. The Court held that the vessel was off-hire and Lloyd J said on p 69:

“One must have regard not only to the physical condition of the vessel but also, in the words of the arbitrators, to her qualities and characteristics, to which I would also add, her history and Ownership... The arrest was, in my view, directly attributable to the history, if not the condition, of this particular vessel.”

It should be noted that in both The Apollo and The Mastro Giorgis, the relevant off-hire clause had included the word ‘whatsoever’ so as to obviate the ejusdem generis rule.

A fine line exists between events which are considered to be attributable to the characteristics of the vessel herself and those which are considered to be extraneous. A good example in this context is The Roachbank [1987] 2 Lloyd’s Rep. 498. There, the chartered vessel picked up a number of Vietnamese refugees from another vessel in distress, but the authorities in Taiwan refused to allow the vessel to enter their ports while the refugees remained on board. The charterers placed the ship off-hire but the Court disagreed. It was held that neither the presence of the refugees on board nor their number prevented the vessel from entering the port to load her cargo. The vessel herself remained perfectly fit and efficient to perform the service required of her, which was to enter Kaohsiung and load cargo.

These cases illustrate the fact that the distinction between ‘internal’ and ‘extraneous’ causes is often artificial. Accordingly, it is perhaps unsurprising that the traditional rule was criticised by Rix J. In the more modern case of The Laconian Confidence [1957] 1 Lloyd’s Rep. 139.

The vessel was delayed for 16 days, when port authorities in Bangladesh, following the discharge of a bulk cargo, imposed a lengthy and bureaucratic procedure for the disposal of some 15 tons of residue remaining on board. Neither owners nor charterers contemplated that anything like this delay could occur; the arbitrators’ award (from which charterers were appealing) contained the following statement:

“Eventually the authorities allowed the rejected residue to be disposed of at a designated ocean position. We permit ourselves to comment that we do not see why – had the authorities acted realistically and efficiently – such permission/ruling could not have been given within a few hours of the end of discharge of all the sound cargo (so dumping might have taken place on, say, 27 May). In the event, and only after lengthy and remarkable bureaucratic procedure insisted upon by the authorities, this residual tonnage was permitted to be dumped on 13 June.”

The question was whether the authorities’ intervention was ‘any other cause preventing the full working of the vessel’. The Court first had to decide whether in fact the ‘full working of the vessel’ was prevented: if so, but only if so, the Court could then decide whether intervention by the authorities was within the scope of the phrase “any other cause” in the off-hire clause.

Charterers argued that the authorities’ refusal to permit the vessel to leave (pending disposal of the damaged residue) did indeed prevent the full working of the vessel. In support of that submission, they relied, inter alia, upon the case of the “Mastro Giorgis”. Owners claimed that the vessel was not off-hire, because she was in herself fully capable of performing the service or services contracted for under the charterparty. They distinguished the “Mastro Giorgis” case (and others cited by charterers) and relied upon decisions to the contrary including the “Roachbank” (see above).
The Judge (Mr Justice Rix) had to resolve the apparent conflict between these cases. The essential question was whether the vessel could be off-hire if fully efficient in herself to perform the next service required. The Judge held that the phrase “preventing the full working of the vessel” did not require the vessel to be inefficient in herself, and that its working could be prevented by legal as well as physical means, by outside as well as internal causes. There was nothing in the authorities which justified or mandated the judicial gloss which resulted in a narrower interpretation of the words. Accordingly, the vessel could indeed be prevented from “full working” by the wholly extraneous intervention of the port authorities.

That answered the first question, which then led to the second: was the event itself contemplated by the phrase “any other cause”? The Court concluded that, without the addition of the words “whatever”, those words had to be read ejusdem generis, to include only events similar to those specifically listed under the off-hire clause. Since the list of causes related to the physical condition or efficiency of the vessel, the phrase “any other cause” could only encompass a comparable physical event, and not an entirely external or legal one. The vessel thus remained on hire. However, if the clause had been amended to read “any other cause whatever”, then a wider interpretation would have been justified, and the interference of the port authorities (an external event) would have fallen within the scope of the clause.\(^5\)

### Time that Counts as Off-Hire

The time that fails to be deducted in consequence of an off-hire event will depend on the wording of the off-hire clause. As previously discussed, there are two principal types of clause: “net” and “period”.

In a net off-hire clause, charterers have to show both a period of time during which the vessel was prevented from working and that the adventure was in fact delayed. In The HR Macmillan [1974] Lloyd’s Rep. 311, the Court held that the breakdown of one of the ship’s cranes would not result in any off-hire if the remaining cranes were able to perform the required discharge work without any loss of time overall.

However, the obligation to pay hire is only suspended while there is an ongoing loss of time. The prevailing line of authorities is to the effect that as soon as the working of the ship is no longer prevented she will be back on hire.

This question of net off-hire clauses and how much time was “lost” has been considered recently both in arbitration and in a different matter by the Court of Appeal – see The ‘ATHENA’.

The former, an LMAA decision [London Arbitration 11/13] concerns the rider clauses to an Asbatime 1981 form which said:

- **Clause 66.** “Without prejudice to any of their other rights under this charter, it is understood that charterers shall be entitled at any time to carry out ultrasonic hose or other testing of the vessel’s hatch covers [...] the cost and time for such testing shall be borne by charterers unless any deficiency is found, in which case same shall be for owners’ account and the vessel shall be off-hire for any time lost thereby [...] and other costs incurred which are directly related expenses as a result of such deficiency shall be for owners’ account.”

- **Clause 91.** “Vessel’s holds on delivery to be completely clean [...] and in every way ready and suitable to load charterers’ intended cargoes. If the vessel is rejected at loading port by charterers’ surveyors or competent authorities, then the vessel to be off-hired from the time of failure until all holds pass re-inspection by them and any time lost and all expenses caused thereby to be borne by owners.”

Shortly after arrival at the load port, the holds and hatch covers failed an inspection by the shippers’ surveyor. The load berth was free at the time the vessel arrived. Remedial work was carried out, and following a further inspection was passed two days later. An NOR was then tendered. By then the berth was occupied, so loading did not commence for another two days.

It was agreed that the vessel was off-hire until she passed the inspection. Charterers claimed that she should also be off-hire for additional time lost as a result of the failed inspections; alternatively they should be able to recover damages in respect of that time.

The Tribunal disagreed. It found that charterers’ claim for additional off-hire failed. Clauses 66 and 91 were “net loss of time’ clauses, the material words being “any time lost thereby”. If charterers had been able to use the vessel while the holds and hatches were being worked on – between failing the first inspection and passing the second – the vessel would have been on hire.

The alternative damages claim also failed. Charterers’ assertion that the vessel could have berthed immediately after arrival if she had passed the first inspection was based on conjecture, not substantiated fact. Even if that assertion was correct, however, Clauses 66 and 91 provided a complete code in respect of damages flowing from the relevant events. Those damages were clearly restricted to the period of the named off-hire event.

A period type of clause designates the start and end of any period for which hire is suspended by linking them to the occurrence of specified events. Therefore, while any one of a selection of events (e.g. deficiency of men or stores) might activate the clause, it would normally only cease to operate when the vessel was restored to a fully efficient state, capable of providing the service immediately required of it.

In line with the first instance decision of The Dorc Pride [2005] EWCHC 945 (Comm), period unavailability clauses operate when a vessel becomes, even partially, inefficient to perform the task at hand – irrespective of whether a loss of time has actually been suffered.

In this case, a vessel was chartered to carry a cargo of soya beans from the US Gulf to South Korea. The charterers instructed the vessel to proceed to New Orleans to load. Upon arrival, it was deemed by the US Coast Guard to be a “High Interest Vessel” which was a term used to describe vessels calling for the first time in America post 11th September 2001. “High Interest Vessel” status meant the vessel was prohibited from entering the port before inspection. The USCG ordered the “Dorc Pride” to proceed to a particular location outside US waters to await inspection. The vessel arrived there on the morning of 20th February, anticipating that the inspection would take place the following day. However, a serious collision between two vessels early on 21st February led to the closure of the Southwest Pass of the Mississippi River until 28th February and the “Dorc Pride” being moved to another waiting location.

Clause 85 stated: “Should the vessel be captured or seized or detained or arrested by any authority or by any legal process during the currency of this charter-party, the payment of hire shall be suspended until the time of her release, and any extra expenses incurred by and/or during the above capture or seizure or detention or arrest shall be for Owners’ account, unless such capture or seizure or detention or arrest is occasioned by any personal act or omission or default of the charterers or their agents or by reason of cargo carried or calling port of trading under this charter.”

Citing Clause 85, charterers contended that the vessel was off-hire as the vessel had been detained by the US Coast Guard. Inter alia, owners sought to argue that the effective cause of the delay was not the USCG order for the vessel to remain at Southwest Pass NW Approach Safety Fairway, but the closure of the river following the collision on 21st February between two other vessels. The Court rejected this argument on the basis that Clause 85 was a period off-hire provision, and it was not necessary for the Court to look beyond the fact that as long as the detention lasted, the vessel would be off-hire.

In summary, as an owner, net off-hire clauses are generally more favourable and the converse for charterers. By way of example The “Dorc Pride” above would have resulted in a very different outcome if Clause 85 had not been a period off-hire clause but had required charterers to demonstrate a loss of hire by reason of the detention. The subsequent closing of the Mississippi would have severely curtailed charterers’ off-hire
It is important to remember whether as an owner or charterer that the consequences of wrongly deducting hire have the potential, dependent on the charter terms, to be draconian. Suspension of services or even withdrawal of a vessel can be the ultimate penalty and the consequences for either an owner, if the charter service is wrongly suspended or the vessel wrongly withdrawn, or a charterer if hire is not paid when due, can be substantial. As ever, the managers encourage members to seek advice when faced with off-hire disputes.

1Note that Shelltime 4 contains a net loss of time clause.

2NYPE–Clause 15 ‘That in the event of the loss of time from deficiency of men 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.’

3NYPE–Clause 15 ‘That in the event of loss of time from... any other cause whatsoever preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost and if upon the voyage the speed be reduced... the time so lost, and the cost of any extra fuel consumed in consequence thereof and all extra expenses shall be deducted from the hire.’

4cl. 36 inserted in the addendum read “In the event of loss of time due to boycott of the vessel by shore labour or arising from government restrictions by reason of the vessel's flag or the terms and conditions on which members of the crew are employed, the payment of hire shall cease for the time thereby lost.”

The attached “side letter” provided that: “Clause 36 will in no way make void the clause 15 of the Charter Party, which clause is to remain fully in force”.

5NYPE–Clause 15 (additional words underlined) “That in the event of the loss of time from default and/or deficiency of men 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 whatsoever preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost, and if upon the voyage the speed be reduced by defect in or break-down of any part of her hull, machinery or equipment, the time so lost, and the cost of any extra fuel consumed in consequence thereof, and all extra expenses shall be deducted from the hire.”

6NYPE–Clause 15 “That in the event of a loss of time from deficiency and/or default of men 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, or by any other cause whatsoever preventing the full working of the vessel, the payment of hire and overtime shall cease for the time thereby lost.”

7NYPE–Clause 15 (additional words underlined) “That in the event of the loss of time from deficiency of [and/or default] men 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...”

Although the subject of a separate subject the law in this respect is not fully settled, it would appear that charterers are not in breach if they deduct from hire on the basis of a reasonable assessment made in good faith. Time Charters 16.52.