



June 2018

Defence class cover

A review of off-hire clauses

Part one: the NYPE form

Introduction

Time charters always set out the defined period within which a charterer can exploit the commercial operations of the ship and the rate of hire payable to the owner. The risk of any delay is therefore borne by the charterer who, in the absence of any express term, must continue to pay hire as agreed. Most time charters therefore contain an off-hire clause, in one wording or another, to make clear when a charterer does not have to pay the agreed rate of hire.

The right to put a ship off-hire is strictly contractual. The onus is on the charterer to bring itself within the off-hire clause in order to make a legitimate deduction from hire. If hire is unlawfully withheld, the owner may be entitled to damages and could withdraw the ship from service.

With the shipping market in a continuous state of flux, we are seeing an increase in off-hire disputes as charterers look to save on costs, particularly in the dry-bulk trade.

This net *loss of time clause* is generally regarded as being 'owner-friendly', as a charterer must show both an off-hire event and that a net loss of time has been suffered. Conversely, a *period off-hire clause*, as found in the Shelltime 3 form, is more 'pro-charterer' as a ship goes off-hire upon commencement of the off-hire event and hire is suspended until the full working of the ship is once again resumed. There is no need, under a *period off-hire clause*, to calculate separately the net loss of time.

Loss of time, preventing the full working of the ship?

Under the NYPE form, the **first question** to be answered when considering a charterer's claim for off-hire is whether the full working of the ship has been prevented. If not, there is no need to go on to consider whether there has been an off-hire event.

Whether the full working of the ship has been prevented will always be a question of fact. However, case law suggests that the types of cause expressly listed, and the phrase 'any other cause' restrict the charterer's ability to place the ship off-hire to circumstances which directly affect the running of the ship, e.g. internal mechanical problems. Using an unamended NYPE form, a charterer cannot ordinarily place the ship off-hire for an event which is wholly extraneous. This was the case in *Court Line v Dant*¹ where the ship was delayed due to a blockage in the river. The court held that the charterer could not place the ship off-hire as it remained fully fit to perform the service required.

The NYPE 1946 form, clause 15, provides for a simple net loss of time clause as follows:

'In the event of 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.... or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost.'



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To bring itself within this clause, a charterer must also show that the ship was unable to perform its actual orders, as opposed to what it may have hoped or expected its orders to be. This point was discussed in *The Berge Sund*² where the charterer tried to put the ship off-hire for time spent cleaning the ship's tanks after carrying a defective cargo of butane. The court held that the ship was not off-hire, as the service required of the ship at the load port was not to immediately load a further cargo. The actual service required was to undertake further cleaning and so the ship remained on hire.

However, this rule cannot be taken too literally. In the *Clipper Sao Luis*³ the charterer treated the time spent fighting a fire in one of the ship's holds as off-hire. The owner tried to argue that the ship was performing the service as required, i.e. remaining at the quayside whilst the fire was dealt with. However, the court found this argument to be 'wholly unreal' and held that the ship was unable to perform the service then required, which was to sail for Itajai.

Sometimes, ordinary operations take a little longer than they should, and a charterer will not be able to claim off-hire just because the operation was difficult to perform. In *The Mareva A.S.*⁴ the discharge operation took longer than usual because the cargo was damaged. Here, the ship was not 'fully prevented from working'. The ship was able to perform the service required of her at all times; it just took longer than first anticipated. A similar principle can be applied to delays during a ship's voyage when caused by natural obstacles: '*A vessel is not off-hire just because she cannot proceed upon her voyage because of some physical impediment, like a sand bar, or insufficiency or water, blocking her path.*'⁵

However, there can be a somewhat artificial distinction sometimes between what is seen as an internal, compared with an extraneous, cause preventing the full working of the ship and the traditional approach was criticised by Rix J. in *The Laconian Confidence*⁶. Here, the ship was delayed for 18 days due to the 'lengthy and remarkably bureaucratic procedure' which was followed by the local authority upon discovery of a small quantity of cargo residue after discharge operations. The court first had to decide whether the 'full working of the vessel' had been prevented, in circumstances where the ship was fully efficient and able to perform the next service required. The judge held that the ship did not, in fact, have to be inefficient of itself. A ship's working could be prevented by '*legal as well as physical means, by outside as well as internal causes*'. A ship can therefore it seems be prevented from 'fully working' by an extraneous event, but as discussed below, can only be placed off-hire if the clause is amended to include the words '*any cause whatsoever.*'

Is it an off-hire event?

Once it has been established that the full working of the ship has been prevented, the second question to be answered is whether the circumstances surrounding the incident have been caused by a specified event within the wording of the off-hire clause. We now look at the causes specifically listed in the NYPE form, clause 15, in turn.

Deficiency of men

The meaning of the phrase 'deficiency of men' has been narrowly interpreted by the courts. In *The Illisos*⁷ the ship was delayed because the officers and crew refused to sail unless they were part of a convoy. The court held that the ship was on hire since there was no numerical deficiency, just a deficiency in the willingness to work, which did not fall within the clause. To get around this problem, a charterer will often insert the words 'or default' into the NYPE form to bring this circumstance within the scope of the off-hire clause. It should also be noted that the word 'men' is to be construed as officers and crew, not third parties such as anti-piracy security.⁸

Breakdown to hull, machinery or equipment

The most common situation is when a ship has to undergo repairs to its engines or generators. The off-hire clause receives quite a literal and pragmatic interpretation by the courts. For example, the early 20th century case of *Giertsen v Turnbull*⁹ is authority for the position that where the condition of a ship's machinery becomes progressively worse, a 'breakdown' occurs only when it becomes necessary to interrupt the voyage and seek repairs.

Detention by average accidents to ship or cargo...

For a ship to have been '*detained*' there must have been something more than a mere delay to the ship. Therefore, if the ship is merely delayed during cargo operations, this will not act to put the ship off-hire. Conversely, if the ship is involved in an accident and suffers a delay, this will put the ship off-hire. It is important to note here that the term 'average accident' is not a reference to general average, but is a reference to a fortuitous occurrence.

...Or by any other cause preventing the full working of the ship

Lastly, clause 15 of the NYPE form includes the standard catch-all provision of 'any other cause'. Upon first glance, it may seem that this provision would cover all other fortuity, but this is not the case. It is an established principle of construction under English law that this sweep-up provision must be taken to refer to the same types of cause as those previously mentioned in clause 15 (the *eiusdem generis* rule). Therefore, only other similar causes will be caught.

Examples of previously held off-hire events

Deficiency of men	<ul style="list-style-type: none"> • An insufficient crew number to run the ship • An unwillingness of the crew to run the ship (but only if the words 'or default' are added) • Crew struck down by illness
Breakdown to hull, machinery or equipment	<ul style="list-style-type: none"> • Interruption to the voyage to repair the ship's main engine or generators, including towage and waiting time for repairs • Interruption to loading/discharging operations due to a problem with the ship's cranes • Time spent repairing the ship following a collision
Detention by average accidents to ship or cargo	<ul style="list-style-type: none"> • A physical constraint placed on the ship's movements by a port authority, following damage to cargo (e.g. ordering the ship off the berth until security is provided for the storage costs of the damaged cargo) • Detention by the Classification Society following damage suffered to the ship

It was the application of this rule that stopped the ship being placed off-hire in the *Laconian Confidence*. The second question the court looked at, after establishing that the 'full working of the vessel' had been affected, was whether the event itself fell within 'any other cause'. It was held that the types of causes listed in clause 15 in fact only related to the efficiency of the ship itself and its crew (and, in one instance, cargo) so the interference of the authorities, which was entirely external and did not relate to the efficacy, meant the ship could not be placed off-hire.

The more recent piracy case of *The Saldanha*¹⁰ looked at this issue specifically. Here, the ship was sailing through the Gulf of Aden when it was seized by pirates and taken to Somalia, where it was held for two months. The charterer sought to place the ship off-hire under clause 15. The court considered the ship to be on hire, on the basis that it had not been detained by any of the causes listed in clause 15. However, the court went on to suggest that the ship would have been off-hire had clause 15 been amended to include the word 'whatsoever'.

What does the word 'whatsoever' add?

The legal position is altered when the NYPE clause is amended to include 'whatsoever' after 'any other cause'. The effect of this one word is to widen the scope of potential off-hire events significantly and the relevant causes of delay no longer have to be of the same nature as those listed in clause 15. However, the addition of the word 'whatsoever' does not have the effect of putting the ship off-hire in all circumstances where there is a loss of time to the ship. So, what situations does it cover?

In *The Mastro Giorgis*¹¹ the ship was arrested by cargo interests who alleged that the cargo had been damaged during shipment. As a result, the ship was unable to leave the port for several days. The court held that the ship was off-hire while under arrest, as the full working of the ship had been prevented for the service immediately required. Lloyd J. stated: 'One must have regard not only to the physical condition of the vessel... but also to her qualities and characteristics, to which I would also add her history and ownership.'





So it is clear that where the word 'whatsoever' is added, any cause *may* suffice to put the ship off-hire, whether physical or legal. However, there is a need for a direct linkage between the cause of the loss of time and the ship concerned, and entirely extraneous causes which are not linked to the ship will not suffice to put the ship off-hire.

Although arrests and seizures can fall within the scope of clause 15, these situations might be dealt with specifically by an additional off-hire clause in the charterparty. For example, the NYPE 1993 form deals with detention by arrest specifically in clause 17:

'In the event of loss of time from...detention by the arrest of the Vessel, (unless such arrest is caused by events for which the Charterers, their servants, agents or subcontractors are responsible)...'

This is in line with the implied indemnity principle which acknowledges that a charterer must reimburse an owner for any loss, if the cause of that loss is due to a fault of their own.

Charterers' actions and agents

In *The Global Santosh*¹² the charter was on an amended NYPE form, which included an off-hire clause stating that hire would be suspended if the ship was arrested, unless '*occasioned by any personal act or omission or default of the Charterers or their agents*'. Here the ship was delayed and arrested at discharge by the sub-charterer and sellers of the cargo in order to secure its claim for demurrage against the receivers of the cargo under an entirely separate sales contract.¹³

The Court of Appeal held in this case that the term 'agent' should be widely interpreted so as to include any party to whom the charterer had entrusted the performance of its obligations under the charterparty (here the loading and discharge of cargo). The court called such entities 'delegates', which could include sub-charterers, sub-sub-charterers and even shippers/receivers. The court therefore held that the ship remained on hire throughout the period of delay and arrest at the port of discharge.

Whilst this decision is pending an appeal to the Supreme Court, it has been widely accepted by many as correct and a practical, commercial approach to splitting responsibility between an owner and charterer under the NYPE form.

Conclusion

In its unamended form, the NYPE off-hire clause is certainly more beneficial to owners. However, even the smallest alteration can have far reaching consequences when hire disputes arise. Careful thought and consideration should therefore always be given when amending any standard form off-hire wording. Members are advised to take legal advice whenever drafting or amending off-hire clauses or if any dispute arises.

Defence cover is, by its very nature, discretionary in that the club must be satisfied as to the merits and quantum of the claim in question and the likelihood of achieving a successful outcome, if it is to lend support.

The club has a good level of experience in advising on and managing off-hire disputes and members requiring further information on this topic should direct their enquiries to their usual contact at the club.

- 1 (1939) 44 Com Cas 345
- 2 [1993] 2 Lloyd's Rep. 453 (C.A.)
- 3 [2000] 1 Lloyd's Rep 645
- 4 [1977] 1 Lloyd's Rep 237 and [1982] 1 Lloyd's Rep. 7
- 5 *The Laconian Confidence* [1997] 1 Lloyd's Rep. 139
- 6 *ibid*
- 7 [1948] 82 Ll.L. Rep. 196 (C.A.)
- 8 *Radcliffe v CGT* (1918) 24 Com Cas 40
- 9 (1908) S.C. 1101
- 10 [2010] EWHC 1340 (Comm)
- 11 [1983] 2 Lloyd's Rep 66
- 12 [2013] 1 Lloyd's Rep. 455
- 13 A full account of this case can be found in the club's Standard Bulletin: Defence Special Edition, dated January 2015, which can be found [here](#)

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