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## Defence class cover

# A review of off-hire clauses

## Part two: the Shelltime 4 form

### Introduction

This publication concentrates on the off-hire clause within the Shelltime 4 form. For information on the NYPE form, we have created a similar comprehensive hand-out.

Since off-hire clauses are principally exception clauses, they are interpreted against the party relying on the same to limit its liability. Therefore, as a general principle of English law, off-hire clauses are read in favour of the owner, especially in areas of possible ambiguity.

### The Shelltime 4 form, clause 21(a), provides for a net loss of time clause as follows:

*"On each and every occasion that there is loss of time (whether by way of interruption in the vessel's service or, from reduction in the vessel's performance, or in any other manner);*

- (i) due to deficiency of personnel or stores; repairs; gas-freeing for repairs; time in and waiting to enter dry dock for repairs; breakdown (whether partial or total) of machinery, boilers or other parts of the vessel or her equipment (including without limitation tank coatings); overhaul, maintenance or survey; collision, stranding, accident or damage to the vessel; or any other similar cause preventing the efficient working of the vessel; and such loss continues for more than three consecutive hours (if resulting from interruption in the vessel's service) or cumulates to more than three hours (if resulting from partial loss of service); or*

- (ii) due to industrial action, refusal to sail, breach of orders or neglect of duty on the part of the master, officers or crew; or*
- (iii) for the purpose of obtaining medical advice or treatment for or landing any sick or injured person (other than a Charterer's representative carried .....) or for the purpose of landing the body of any person (other than a Charterer's representative), and such loss continues for more than three consecutive hours; or*
- (iv) due to any delay in quarantine arising from the master, officers or crew having had communication with the shore at any infected area without the written consent or instructions of Charterers or their agents, or to any detention by customs or other authorities caused by smuggling or other infraction of local law on the part of the master, officers, or crew; or*
- (v) due to detention of the vessel by authorities at home or abroad attributable to legal action against or breach of regulations by the vessel, the vessel's owners, or Owners (unless brought about by the act or neglect of Charterers); then*

*without prejudice to Charterers' rights ..... 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 from a position not less favourable to Charterers than that at which such loss of time commenced; provided, however, that any service given or distance made good by the vessel whilst off-hire shall be taken into account in assessing the amount to be deducted from hire."*



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### Net loss of time clause

Clause 21 is classified as a *net loss of time* clause, rather than a *period off-hire* clause. In this sense it is similar to the NYPE form. However, as will become clearer in our discussion below, the Shelltime 4 form defines the off-hire period more generously for the charterer than under the NYPE form.

### Loss of time

Off-hire clauses are not triggered simply because there is an inefficiency or breakdown. For the clause to be triggered, there needs to be an actual delay, i.e. a real 'loss of time', and this is the **first question** to be answered when considering a charterer's claim for off-hire.

When deciding whether there is a delay, the question that one should ask is whether the ship has been prevented from performing the next operation that the charterer's orders necessitate. A ship is not prevented from performing merely because it cannot perform the next operation that the charterer would wish, or was expecting, it to undertake. Put another way, the question is not what a charterer hoped or expected its order(s) would be, but what service it actually required.

In *The Berge Sund*<sup>1</sup>, the ship had just discharged a cargo of coal in bulk and the charterer next wanted the ship to load a cargo of sugar.

*"The critical question is, what was the service required of the vessel?"*

*What were the charterer's orders? They were not to load cargo; as I have said that was the very last thing that the charterer would have ordered, since the copper strip test had been failed. 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."*<sup>2</sup>

The application of the above overriding principle, within the Shelltime form, was made clear in *The Fina Samco*<sup>3</sup>. In this case, the ship was having problems discharging her cargo of crude oil at a berth in Japan due to boiler trouble. Whilst attempts were made to diagnose the cause of the trouble, the ship was ordered to leave the berth due to bad weather conditions. The cause was identified and rectified 10 days later, but owing to the continuing adverse weather conditions, the ship did not berth again for a further six days.

The charterer claimed that the ship was off-hire for the entire period, due to the loss of time ultimately being caused by a breakdown of the boiler under Clause 21(a)(i), which lasted more than three hours. The judge rejected the charterer's argument, emphasising that what had to be considered in a claim for off-hire was the service immediately required. Whilst originally the service immediately required was the discharge of cargo, which the ship could not perform because of its boiler trouble, shortly thereafter the service actually required was waiting at anchor for the weather conditions to improve. *This* the ship was capable of performing, irrespective of the fact that its boilers remained unrepaired for some further 10 days.

### Off-hire event

The **second question** to be answered, whenever considering a charterer's off-hire claim, is whether the circumstances surrounding the incident have been caused by a specified event within the wording of the off-hire clause.

The Shelltime 4 form has a much broader range of off-hire events than the NYPE form. It also expressly refers to '*any other **similar cause preventing the efficient working of the vessel***' (our emphasis in bold).

Clause 21(a)(i) of the Shelltime 4 form does not, however, include the word '*whatsoever*', without further express amendment. Thus, the words '*or any other similar cause*' should be understood to extend only to other loss of time situations which are similar to the specific items listed earlier in that clause.

Example: if a playing field is available for hire for 'tennis, soccer and any other similar games' then cricket will fall within the meaning of other games. Putting up a marquee to hold a chess tournament, however, will most likely not fall within this category. By contrast, if the same field is advertised as being available for hire for 'tennis, soccer and any other games whatsoever' then it is arguable that setting up a marquee for a chess tournament would be allowed.



### From a position not less favourable to charterers

The result of these words is that if a ship has to deviate whilst en route to a port due to an off-hire event, it will continue to be considered off-hire until the ship has made up the same distance towards her original destination. Similarly, if a ship is on a berth when it breaks down and is put off the berth as a result, then it will be off-hire until the ship is back on the berth once again.

However, if the ship is at anchorage one 'place' away from the front of the queue waiting to berth, and at that moment it breaks down and is put out of the queue until efficient once again, then even if the ship is held to be off-hire, it would be considered back on-hire as soon as it was once more in an efficient state and in the same anchorage waiting place. The ship would not be considered as continuously off-hire, under the Shelltime 4 form, until it was once again at the front of the queue.

In *The Trade Nomad*<sup>4</sup>, which was on the Shelltime 4 form, the ship was damaged in a collision whilst transiting the Mississippi. As a result, it had to put back to undertake repairs, but by 5 March was as far down the Mississippi as it had been at the time of the collision, and was again ready and in an efficient state to resume service. However, in the meantime, the USCG had restricted shipping movements in the river due to a sunken barge and the ship was unable to sail until 6 March. The charterer in this case argued that it was not until the ship was able to sail, on 6 March, that it could be said to be in a position no less favourable than at the time of the collision. It was held by the arbitrator that the ship came back on-hire again on 5 March, because the fact that it could not resume its service had nothing to do with the condition of the ship and was attributable to an entirely extraneous cause.

### Conclusion

There are numerous circumstances when a ship may be put off-hire even where the owner has not committed any breach of charter. In particular, it may be that the ship was in good order when it was delivered under the charter and the owner has exercised due diligence to maintain the ship ever since. Even so, an off-hire event may still occur – and this depends on the wording of the off-hire clause in the subject charter and, in particular, how widely drafted it is. As we hope to have shown in this publication, the Shelltime form is markedly more generous to charterers than the NYPE off-hire provisions.

However, as a matter of English law, off-hire clauses are also exception clauses in favour of the charterer and, as such, any ambiguity will be construed in favour of the owner. Also, as a general principle under English law, any exception clause in favour of one party to a contract will not be interpreted to apply where the circumstances arise from that same party's (i.e. in this case, a charterer's) own negligence or own breach of contract.

**Defence cover is, by its 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 [1993] 2 Lloyd's Rep 453 (C. A.)
- 2 *The Berge Sund* [1993] 2 Lloyd's Rep 453 (C. A.), at page 460
- 3 [1994] 1 Lloyd's Rep 153
- 4 [1998] 1 Lloyd's Rep. 57

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