

Off-hire. Introduction

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When the owners let their vessel to the time charterers in consideration of the payment of hire the latter entitled to the use of the vessel during contracted period of time. Express provision for punctual advanced¹⁸ payment of hire¹⁹ usually followed by relevant withdrawal wording in time charterparty. Thus being under strict obligation to pay for services rendered by the owners, the charterers are obviously concerned over uninterrupted employment of the vessel. On the other hand, unpredictable factors such as weather, navigation or management errors, political unrest and instability, etc., peculiar to shipping business make delays inevitable. To deal with consequences of such delays parties insert certain provisions into the time charter contract, which are primarily collected in an 'off-hire' clause. Such a clause suspends the running of hire on occurrence of some specific events mentioned in the clause.

The charterers bear the burden of proof to show that the owners' failure is within provisions of 'off-hire' clause. The first and probably the main point for the charterers is to demonstrate that the shipowner has been unable to perform the services required of it by the charterer. Then, such inability shall be caused by the event mentioned in the 'off-hire' clause. And finally, the charterers must show how much time is lost as a result of said inefficiency.

The charterer must first show that it has actually lost time, in that the ship has been prevented from performing a service which is one of the usual incidents of a time charter. This is the effect of words such as 'preventing the full working of the vessel', which appear in cl 15 of the NYPE form, or the reference to 'the service immediately required', in cl 11 of the Baltime form.

¹⁸ See Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade) [1983] 2 All ER 763 by Lord Diplock at p.767

¹⁹ usually in the beginning of each month

Off-hire due to the seizure by pirates.

Provoked by political chaos in Somalia, an unprecedented surge of hi-jacking cases, first over the Gulf of Aden and later over both western and central parts of Indian Ocean, brought to shipping community incredibly difficult problem of protection of ocean trade routes. Since August 2008, naval ships from Combined Task Force 150²⁰, Russia, China and India are trying to take control over the situation on the high seas around Somalia and in Indian Ocean. Unfortunately, up to now, all efforts undertaken by international counter-piracy forces are far from any definite success. It is, therefore, commonly understood that presently, payment of a ransom is the only realistic and effective manner of obtaining the release of a vessel and crew as Steel J inferred in *Masefield AG v Amlin Corporate Member Ltd* [2010] EWHC 280 (Comm) (18 February 2010).

Apart of human problem of releasing crews from lengthy captivity there are many complex financial issues related to ship and cargo being out of owners' hold for significant time. In *Masefield AG v Amlin Corporate Member Ltd* [2010] EWHC 280 (Comm) the High Court considered a question whether by the capture of the vessel by the pirates and its removal into Somali waters the cargo became an actual total loss in terms of s57(1) of the Marine Insurance Act 1906(read more about this decision here).

In another recent case *Cosco Bulk Carrier Co Ltd & Anor v M/V "Saldanha"* C/P dated 25/06/08 [2010] EWHC 1340 (Comm) the charterers' claim raised a question whether, under NYPE form of charter, the hire is due for that time when the vessel was in pirates hands and out of charterers' service.

Cl. 15 of charterparty on amended NYPE form has the following wording:

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....

The charterers' case was that seizure and detention of the vessel by pirates falls within one or more of the following three causes contained in cl. 15 of the charterparty:

- i) "Detention by average accidents to ship or cargo";
- ii) "Default and/or deficiency of men";
- iii) "Any other cause".

²⁰ a multinational coalition task force

It's also notable that it looks that any pirate attack whether successful or not, causing damage to the vessel or not, cannot be properly called as 'accident' being deliberately planned by pirates, although unexpected by ship's crew.

Recent BIMCO 'piracy' clause adopts similar approach that would put the risk of time lost due to pirate attacks on charterers. But market analysis shows that the BIMCO clause has not been widely used, mainly because stronger bargaining power enjoyed by the charterers' now gives them upper hand in demanding express exemptions for time lost due to pirate seizures.

Off-hire due to marine growth.

Accumulation of marine growth on ship's plating in warm tropical seas is often a cause of significant reduction in ship's speed and impairment of vessel's performance. Such accumulation produces particularly negative effect on speed characteristic when vessel remains waiting at anchor in tropical water for a period of more than 3-4 weeks. Obviously, this natural factor also affects positions of the shipowner and the charterer under time charter contract in a way that it can lead to loss of time resulted from underperformance and expenses plus time losses associated with hull cleaning.

This issue is usually closely related from one side to the speed warranty and from another side to off-hire provisions which allocate the risks for delays related to vessel's underperformance and hull cleaning.

A purpose of the description of the vessel containing a speed warranty is that when the vessel enters on her service, she will be capable of the speed in question, subject only to any protection which her owners may obtain under an exceptions clause, protecting them from liability in relation to a failure to comply with the warranty. Furthermore, any cause such as deficiency of men or stores, fire, breakdown or damages to hull and machinery which deteriorates vessel's performance against that declared in time charterparty triggers off-hire clause and shifts liability to the owner's side.

In *Cosmos Bulk Transport Inc v China National Foreign Trade Transportation Corporation* - [1978] 1 All ER 322, Clause 11(A) provided, so far as relevant, as follows:

In the event of dry-docking or other necessary measures to maintain the efficiency of the Vessel, deficiency of men or Owner's stores, breakdown of machinery, damage to hull or other accident, grounding except in berth, strike of officers and/or crew either hindering or preventing the efficient working of the Vessel, no hire to be paid in respect of any time lost thereby during the period in which the Vessel is unable to perform the service immediately required. Any hire paid in advance to be adjusted accordingly.