

## Defence Guides

## Off-hire in a nutshell

## General Principles

Time charterparties invariably contain an off-hire clause providing for exceptions from the obligation for charterers to pay hire from the time of delivery until redelivery. The specific terms of the off-hire clause will determine whether or not any particular event entitles the charterers to place the ship off-hire, and for how long. Using a common charterparty such as the NYPE '46 by way of example, a charterer should bear in mind the following general principles when bringing an off-hire claim:

- There must be a loss of time to the charterers (save where the off-hire clause is a period loss of hire clause – see paragraph 4 A) below)
- The loss must be caused by an event listed in the charter
- The event must “prevent the full working of the ship”
- The burden is upon the charterers to prove that the event is within the scope of the off-hire clause
- The off-hire clause is an exception to the owners’ right to be paid hire from the time of delivery until redelivery and therefore will be construed narrowly against charterers
- Off-hire operates independently of any breach or owners fault
- General exception provisions in the charter do not usually operate on the off-hire clause, unless expressly provided otherwise
- Off-hire events must be fortuitous i.e. not resulting naturally from compliance with the charterers’ orders
- Off-hire events caused by charterers may in some circumstances prevent charterers from invoking the off-hire clause

When dealing with an off-hire matter, it is important to consider the following steps:

### Step 1: check the charter to look at the list of events enabling the charterer to put the ship off-hire

A ship will only be off-hire if an event occurs which is specifically mentioned in the list of events in the off-hire clause. The events discussed below are some of the main off-hire events listed in clause 15 of the standard NYPE '46 form.

- Deficiency of men: this refers to any numerical deficiency of the officers and crew (but not contractors) and not any other type of deficiency or their refusal to carry out orders. Adding the word “default” would probably cover circumstances in which the crew refused to carry out charterers’ legitimate and lawful orders (note: NYPE '93 provides for “deficiency and/or default and/or strike of officers or crew”)
- Breakdown to hull, machinery or equipment: this is self explanatory. The word “breakdown” is to be construed in a popular and reasonable sense, such as to cover defects which, when discovered, would render it necessary in the opinion of a prudent operator that she should proceed to a harbour for repairs
- Damages to hull, machinery or equipment: it would probably not be an off-hire event if the damage resulted from the charterers’ use of the ship (see for example our article on hull fouling)
- Detention by average accidents to ship or cargo: this is generally taken to mean events normally covered by insurance. An average incident does not necessarily mean general average but general average incidents might be covered in some circumstances. The word “detention” means that there must be “some physical or geographical constraint upon the vessel’s movements in relation to her service under the charter”. As such, damage to cargo which causes discharging operations to be delayed (as opposed to the arrest of the ship) will not constitute detention. Since such event must not result from the natural compliance with the charterers’ orders, there is case law that detention by pirates would not be an off-hire event under this clause



- Detention by the arrest of the vessel, (unless such arrest is caused by events for which the charterers, their servants, agents or sub-contractors are responsible) - only in NYPE '93: sub-charterers, shippers, consignees are deemed to be charterers' agents and any arrest by these parties will not render the ship off-hire.
- Or by any other cause preventing the full working of the vessel: any event claimed as an off-hire event under "any other cause" must be of the same type of event as specifically mentioned in the earlier part of the clause. This could include for example, legal action or administrative acts by a port or other lawful authority (acting properly and reasonably) relating to the condition, efficiency of the ship or crew (this is more restrictive than "Any other cause whatsoever"- below).
- "Any other cause whatsoever" (sometimes this wording is added into clause 15): this means that an event claimed as an off-hire event under "any other cause" does not have to be the same type of event as specifically mentioned in the earlier part of the clause. Therefore, if this addition was made, off-hire events could include any event causing loss of time and preventing the full working of the ship – for example: arrest of the ship by cargo interests, capricious acts of local authorities, or detention by pirates.

## Step 2: check that the event prevents the full working of the ship.

Once charterers have demonstrated that one of the listed events in the off-hire clause has occurred, they must then prove that the event prevented the ship from performing the next operation that the charter service required of her at that time.

## What is the next operation that the charter service requires?

This is a matter of fact and can sometimes be difficult to ascertain, leading to disputes. The question is not what service the charterers hoped or expected the ship would be able to perform, but what service they actually required at the time of the off-hire event. Generally a ship is not prevented from working if, with a view to performing the charterers' orders, she is carrying out an operation which is in the ordinary way an activity required by the time charterers. The ship will not be prevented from working if in order to perform charterers' orders owners must first carry out an operation which is, in the ordinary way, an activity required by the charterers.

A ship will therefore be performing the chartered service when bunkering, ballasting, lightering and hold cleaning, if these services were next required at the time, even if charterers would have preferred the ship to carry out another service, such as loading cargo. Some examples follow.

### Examples: Next service required

1. Delays at the loadport are incurred because of the crew inadequately cleaning the holds. The holds need to be cleaned further in order to load the cargo. The next service required is not the loading of the cargo, but further cleaning of the holds. Under NYPE '46, the ship would not be off-hire.
2. A master is asked to load as much cargo as possible in order to have a sufficient draft to enter into the Panama Canal but negligently loads too much cargo, requiring the ship to lighten cargo. Under NYPE '46, the ship would not be off-hire, as the ship will not have been prevented from fully working: in this case, the next service required would be the lightering of the ship.

## Step 3: how long can the ship be put off-hire?

There are two types of clauses; period loss of hire clauses and net loss of hire clauses.

### A) Period clauses

Under these types of clauses, the calculation of the off-hire period is relatively straightforward. The ship will be off-hire from the start of the off-hire event up until the off-hire event ceases, whether or not any time has been lost.

### B) Net loss of time

This type of clause is the most commonly used and can be found in the NYPE '46, Balttime and Shelltime 4 charterparties. The charterers will only be able to put the ship off-hire for the time actually lost during the period that the full working of the ship is prevented.

Difficulties can arise calculating how much time was lost, if any. For example, if a ship has 4 cranes and one of those cranes breaks down, charterers may assume that the ship is off-hire for 1/4 of the time taken to complete cargo operations. This may however not be the case if no delay actually occurred because the other functioning cranes were used to complete the cargo operations without any loss of time.



The second part of clause 15 of the NYPE '46 charter specifically states that if the speed of the ship is reduced by defect or breakdown of the ship's hull, machinery or equipment, charterers are entitled to reduce hire for the time lost and any extra fuel consumed and any extra expenses incurred. (For further advice on making deductions for speed and consumption claims please see our separate article).

### **C) Net loss of time: do charterers take into account additional time lost?**

Example:- A ship is off-hire for a small amount of time because of an engine breakdown. As a result, she misses a tide or loses her berthing slot. Under clause 15 of NYPE '46, the ship will only be off-hire for the period when the full working of the ship was prevented (i.e. until the engine was repaired and the ship was able to continue the next service required). Any consequential delay arising from the off-hire event – such as missing a tide - would usually not be part of the off-hire period.

### **D) Net loss of time: do charterers take into account time made up?**

Generally, it is not possible for owners to claim credit for any time which is made up after the off-hire event. For example: a ship is on voyage from the Philippines to Shanghai; she suffers a breakdown at the Philippines which is an off-hire event, and is required to sail to Hong Kong for repairs. It

would be arguable for the purposes of calculating off-hire under clause 15 of NYPE '46 that the ship is still off-hire for the time spent on the Philippines-Hong Kong leg as a result of the off-hire event, even if time was made up at a later stage. There is authority that a ship will not be performing the service next required of her, merely because she is operating in a manner that is consistent with performing that service – therefore in this example, it would probably be irrelevant for the purposes of determining whether or not the ship was off-hire that part of the route taken by the ship proceeding to Hong Kong for repairs overlapped with the route to Shanghai. Sailing towards charterers' intended destination may not be considered by an English Court or Tribunal as the same as sailing to that destination. However, in this example, had Hong Kong been the intended next destination, the result might be different.

### **E) Net loss of time: can owners argue that there has been no loss of time if during the period of time lost, the ship would not have been able to berth in any event?**

If, a ship drifted in international waters outside a port for 11 days because of an off-hire event, it would be irrelevant for the purposes of off-hire under clause 15 of NYPE '46 that if the ship had sailed to the port 11 days earlier, the ship would not have been able to

berth before the end of the 11 days period because of congestion. In this case, the service next required would be to sail directly to the port, and not to drift in international waters awaiting repairs - the ship would accordingly be off-hire for 11 days.

### **Equitable set off: Other events not listed in off-hire clauses permitting charterers to deduct from hire**

If charterers have a claim against owners for breach of the charterparty and suffer a loss or incur expense as a result, but the breach is not an event listed in the off-hire clause, charterers may still be able to withhold hire payments in full or in part for the amount of their claim. Charterers will have such a right of set off where:-

- Owners' breach of the charterparty has deprived or prejudiced charterers in the use (partial or total) of the ship
- Charterers exercise their right in good faith and on reasonable grounds (for example by deducting an amount which is a reasonable assessment of the claim)
- Charterers prove that there has been a breach of the charter by owners





### A) Charterers may have a right to set off a claim for damages from hire payments for the following claims:-

- Breach of a speed warranty
- Failure by the owners to load a full cargo causing loss of time, or
- Time lost because of the owners' failure properly to perform their hold-cleaning obligations causing a loss of time

### B) Examples of claims that do not usually give rise to a right of set-off from hire payments (this list is not exhaustive):-

- Claims for damage to cargo
- Loss of an anticipated cargo to be loaded by charterers
- Crew party to a fraud with bunker suppliers
- Bunker claims

### Other remedies available to the charterers

It is important to remember that under clause 15 of NYPE '46, the ship will only be off-hire for the period where time is lost and the full working of the ship has been prevented. If however the event giving rise to off-hire is also a breach of the charterparty by the owners, a charterer may be able to claim damages for:

- Additional time lost or other losses incurred resulting from the breach of charterparty

- In the event that the ship was not off-hire, damages for the time lost equivalent to the hire for that period. Charterers must establish a breach of the charterparty by the owner.

Charterers will have to establish that they have, as a result of owners' breach, been prevented from using the ship or have been prejudiced in their use of the ship, for the relevant period. This is different to putting the ship off-hire (charterers do not need to show a breach to put the ship off-hire).

An off-hire event may for example cause the ship to lose time by missing a tide, a berthing slot or incurring a loss as a result of missing a fixture. If these losses arise as a result of a breach of charterparty, charterers may be able to claim for damages

### Such a claim would however be subject to the following:-

- Charterers must prove a breach of the charterparty by owners (note that some of owners' obligations are not strict, such as owners' duty to maintain the ship. Some obligations may be qualified by the obligation to exercise "due diligence" e.g. seaworthiness obligations in respect of cargo claims where US COGSA or the Hague/Hague-Visby Rules are incorporated into the charter), and
- Owners may have defences - for example, if the US COGSA or the Hague/Hague-Visby Rules are incorporated into the charter, under Article 4 rule 2(a), owners may have

a defence if the loss was caused by the act, neglect or default of the master, mariner, pilot, or servants of owners, in the navigation or in the management of the ship

- In the case of lost sub-fixtures, charterers would have to prove that the breach by owners caused charterers to incur damages in respect of the lost sub-fixture, and that the damages in respect of the same are not too remote (for example, if the cancelling date under the sub-fixture was missed and the fixture was thereafter cancelled because further time was lost by a separate intervening event, occurring after the owners' breach, e.g. the ship missing a tide, it would be arguable that a claim for the lost fixture was not a direct result of owners' breach and was too remote to recover as damages)

- Note that whether a claim in damages is recoverable or not is a specialised topic in English law, particularly with regard to causation and remoteness, where detailed advice may well be needed

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This article was written by Julien Rabeux in the Club's Hong Kong office with additional input from Holman Fenwick Willan (Singapore).

This note is for general guidance only and should not be relied upon as legal advice. Should you require specific advice on a particular situation please contact the Club.