Off-hire clauses and how to end time charters

SHIPS BREAK DOWN. Machinery goes wrong. Other factors can affect operations. If a ship is under time charter such problems may indicate a breach of charter by owners and if charterers have suffered a loss they may have a claim for damages. But proving a breach may be difficult. Obligations as to seaworthiness and maintenance vary. The law is complex and predicting an outcome may be uncertain. Even proving what loss has been suffered may not be easy. And what if a breach cannot be proven? Must a charterer still pay for a ship if he cannot use her or, because of some deficiency, she is not what he thought he was paying for? Off-hire clauses go some way to addressing these questions.

There is often a tailor-made clause
In one form or another, an off-hire clause will appear in most time charters. There is generally a printed clause and there is often an additional tailor-made clause applying to special circumstances – for example covering time the ship might spend in drydock. The purpose of an off-hire clause is to relieve the charterer of having to pay hire in circumstances where use of the ship is compromised and without any need to prove breach of charter by the owner. As there is no need for a breach, the off-hire clause is therefore not a liquidated damages clause (unlike as a demurrage clause in a voyage charter). However, not all off-hire clauses are equal and sometimes it is the circumstances of the charterer rather than the ship that decide if such apply.

Clause 15 – a classic off-hire clause
A classic off-hire clause is that in clause 15 of the (1946) New York Produce Exchange time charter. This provides that ‘...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, drydocking 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; and if upon the voyage the speed be reduced by defect in or breakdown of any part of her hull, machinery or equipment, the time so lost, and the cost of any fuel consumed in consequence thereof, and all extra expenses shall be deducted from hire.’

In applying such a clause to particular circumstances, the court or arbitrators begin with the principle that under a time charter ‘the risk of delay is fundamentally on a time charterer’ so it follows that the charterer ‘remains liable to pay hire in all circumstances unless the charterer can bring himself within the plain words of an off hire provision’ [The Doric Pride – 2006]. The charterer must prove that the clause applies and any benefit of the doubt is given to owners.

Full working of the vessel
The next point to note is that, for hire to cease, there must have been something preventing full working of the vessel. Unless this is so, there is no need to consider if this had a relevant cause. The question was there some failure in the full working of the vessel requires a practical rather than theoretical enquiry. It is necessary to look at the next operation required of the vessel [The Berge Sund 1993]. If the vessel has a broken crane but this has no effect on the time she takes actually to discharge her cargo or her engines are under repair but this does not affect her actual loading time, or a breakdown means she cannot for a time load any cargo but no cargo is ready for loading, then full working of the vessel – in terms of the service actually required of her – is not affected.

Also, if the vessel is performing a normal operation she will not be regarded as being prevented from working. Where a master overloads his ship and is required to lighten her (say because the Panama Canal is fresh water) and then re-load her, the process of lightening and re-loading may delay the ship but full working of the vessel has not been affected [The Aquacharm 1980] so there is no off-hire. In such circumstances, charterers may have to resort to considering if they can bring a claim for negligence.

A fully efficient ship might be prevented from full working
On the other hand, just as a defective ship might not be prevented from full working (as required at the particular time) so a fully efficient ship might yet be. If a vessel is required to sail but the local authorities prevent such, full working of the vessel may have been prevented and the vessel may be off-hire [The Roachbank 1987] which may then send owners to checking the law on unsafe ports. ([Other charters such as the Shelltime 3 and 4 refer to the efficient working of the vessel. In such cases, any bureaucratic or legal impediments would not be relevant unless related to the actual (or perhaps suspected) physical condition of the ship itself.)

Finally, preventing the full working of the vessel does not mean that the vessel must be wholly prevented from operating for there to be off hire but rather the
opposite – that even a slight inefficiency may make the vessel wholly off-hire. This appears to make no sense inasmuch as the owner has no interest in working the vessel partially if hire is not being earned at all and even has a vested interest in not working at all until the vessel is fully efficient full hire can once more be earned. The apparent toughness of this clause is qualified however by the fact that the clause only permits hire to be deducted only to the extent that a loss of time has really been suffered.

Looking at loss of time

Assuming that the full working of the vessel has been prevented and by a cause falling within the clause, the last question is whether and if so how much loss of time there has been.

There are two ways of looking at loss of time: from the owners’ perspective – for how much time has the vessel been prevented from working; or from the charterers’: by how much time has its adventure been delayed. The Baltime, Shelltime 3 and 4 and New York Produce Exchange charters’ off-hire clauses are all interpreted as net loss of time clauses. This means that it is not enough (as it would be under a period off-hire clause) simply to identify the length of time the vessel was not fully working by reason of one of the required causes. Instead, in addition to this, charterers must establish the loss of time they have truly suffered – the real delay to their adventure [The Pythia 1982].

So for example, if during discharging, a vessel’s crane breaks down, the vessel is no longer fully working but unless that breakdown adds real time to the discharging, there is no net loss of time so no off-hire. If discharging does take longer as a result of the breakdown then it is necessary to calculate by how much as being the permitted off-hire. But the obligation to pay hire is also only suspended for as long as the off-hire event applies. So if the vessel’s deficiency is cured, hire can no longer be deducted even if, as a result of the original inefficiency, the delay to the charterers’ adventure is still continuing. Again, if charterers seek additional compensation they must find a breach of charter and claim damages.

Benefit to owners

The final irony of the net loss of time clause is that it most benefits owners when charterers are already worst off. If charterers have no employment for the vessel and so their non-existent adventure is not in any sense delayed, then no matter how inefficient the vessel, she will not be off-hire. So charterers will have to pay hire when had they been earning freight they would have been relieved from doing so. Charterers may of course seek to improve their position by agreement. They may amend or supplement the basic off-hire clause – perhaps with a period clause to cover routine or emergency drydocking or repairs not necessarily in drydock. Or charterers may add a clause to make continuing delays off-hire where the off-hire event causing those delays has ended.

What is essential is that the off-hire provisions not be dismissed as irrelevant boiler plate but that they be understood before committing to the fixture in the first place and that such should be negotiated to meet both parties’ reasonable expectations.

How to get out of the charter

Of course the desperate time charterer may wish to get out of the charter altogether. He may have a defaulting sub charterer or difficult finances or there may simply be an unsustainable disparity between the hire he has agreed to pay and what he can hope to earn. In such circumstances a charterer may take the legal route – relying on a real or invented breach by owners to justify his treating the charter as terminated.

By walking out on a charter, the charterer essentially presents owners with a fait accompli – shooting first even if he is willing to negotiate afterwards (and whilst the owner is mitigating his loss). The prospect of being dragged through arbitration or the courts and with whatever uncertainty there is as to recovery from charterers may make owners more realistic in their expectations.

Negotiate from the beginning

A charterer who has a care for its reputation or real assets (so that any award or judgment against them is likely to be re-