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Legal analysis of off-hire clauses

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Legal Analysis of Off-hire Clauses

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DECLARATION

I certify that all the material in this research paper that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this research paper reflect my own personal views, and are not necessarily endorsed by the University.

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ABSTRACT

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The time charter, in my opinion, is the most complicated and difficult part in the shipping practice. Under a time charter, the shipowner provides the vessel and the charterer uses the vessel during the period of charter for trading. Therefore, one important obligation carried by the charterer is to pay the hire, on the other side the shipowner has a right to receive the payment of the hire. As the exception of the payment of the hire, off-hire clause is one of the most important aspects in the time charter. This dissertation will focus on the off-hire clause in the time charter.

Firstly, it is necessary to analyze the nature of the time charter and the payment of hire. The obligation of paying the hire in time, on full, continuous is on the shoulder of the charterer. The consequence of failing to pay the hire is strict; the shipowner has the right to withdraw the vessel from the use of the charterer. There is a dispute that whether the off-hire clause is the allocation of the risk or a clause of indemnity of loss or damage, however, the former is supported by most researchers. The legal characteristics of the off-hire clause will also be discussed in my dissertation. The most important part of the dissertation is the part about the general rules relating to the off-hire clause, which is mainly about the necessary aspects of applying the off-hire clause. This part will be analyzed in details because these aspects will affect whether the charterer should pay the hire or not. An overall conclusion will be made at the end of the dissertation. I hope that this dissertation will be helpful in shipping practice.

KEY WORDS：off-hire clause, general principal, payment, time loss, legal

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Chapter 1 Introduction

1.1 Background

The time charter, in my opinion, is the most complicated and difficult part in the shipping practice. The off-hire clause is the agreement of two parties; accordingly the clause should depend on the freedom of two parties and the utmost good faith. The shipowner and charterer can conclude the contract as they want if the content does not violate other principles. Along with the development of the shipping practice and the occurrence of the new cases, the off-hire clauses may verify ceaseless. Hereby, the dispute about the off-hire clauses always happens. Therefore the author makes a study about the off-hire clause, investigating considerable amount of cases, which are most from English law. I would approach the question by elaborating more of all the issues I have raised and support my arguments with case law and statutes. I hope that points in this dissertation could be significant reference for charterers and shipowners in concluding a time charter contract.

1.2 Literature Review

After studied and compared the NYPE'46, NYPE'93 AND BALTIM time charter contract, and find the different wording about the "off-hire" clauses. In order to analyze the specific meaning of the "off-hire" clause, this dissertation explains and

discusses some cases in details to analyze the “off-hire” clause.

In order to study the “off-hire” clause, I read the “Time Charter” (Third Edition) for the concept and meaning of “off-hire”. I also check some cases to analyze the view in the English law about the off-hire clause, i.e. “The Nanfri” (1979).

Due to the off-hire is related with the hire payments, the judge in the cases “The Brimnes” (1972), “The Laconia” (1977), “The Chikuma” (1981), “The Lutetian” (1982), “Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd.” (1983), states the importance of the payments. Some other cases also states the remedy of shipowners, if charterers does not arrange the hire payments according to the contract. For example, cases “The Georgios C” (1971), “The Laconia” (1977), “The Mihalios Xilas” (1978), judges the remedy “withdraw of the ship”

Apart from the above basement of the off-hire clause, the purpose of off-hire is another important issue which has to analyze. The purpose of the off-hire clause is to protect the charterer from the delay. The “Berge Sund” (1993) and “Mareva A.S.”(1997) have the judgment of above purpose of off-hire clause

It is noticed that the off-hire is not based on the breach of the shipowners, this is one legal characteristic of the off-hire clause. The cases the “Hogarth v Miller” (1891) , the “Aquacharm” (1982) and the “Ioanna” (1985) supported this kind of opinion, and “The Berge Sunk” (1993) further stated on this point. Also some other cases stated other legal characteristic of the off-hire clause, for example, “the charterer cannot benefit from his own breach of the contract”. In the case “Board of Trade v. Temperley”, Scrutton”, L.J, states that: “I am quite unable to find any case or any principle which will bring an action of that sort within the principle, which is

sometimes expressed, that a man cannot take advantage of his own wrong."

From the general rules parts of the off-hire clause, follow cases were studied and analyzed, for instance, (1) the case "the Jalagouri" (Nippon Yusen Kaisha Ltd V Scindia Steam Novigation Co. (1999), to state and explain the specific meaning of the "delay" in the aspect of loss of time. The case "The Westfalia" (1891), "The Mareva A.S." (1977), "The Hermosa" (1980) and "The Ira" (1995), also held the opinion about the aspect of loss of time. (2) In the case "The Berge Sund" (1993) stated and held the opinion on "the meaning of immediately", the aspect of construction of the "off-hire". (3) For the aspect, "the onus of proof", I check and study the cases "The Hermosa" (1980) and "The Berge Sund" (1993) elaborate which side will carry the liability to prove the existence of the off-hire event and loss of time caused by this event. (4) There are several cases states the meaning of "efficient vessel" in the off-hire construction, and also several cases show the trend to explain the specific meaning of the "efficient vessel". The case, "The Aquacharm" (1982), holds the narrow opinion to explain and define the meaning of the "efficient vessel", the standard is "physical efficient". However, there is new trend that more and more off-hire cases were caused by the interference of the third parties such as the authorities of the ports. The case "The Apollo" (1978) held this above kind of view to explain the "efficient vessel", which is broad sense view compared with "physical efficient". Cases "The Aquacharm" (1982), "The Mastro Giorgis" (1983) , "The Roachbank" (1988), , "The Laconian Confidence" (1997) held similar broad sense opinion to explain and define the "efficient vessel", which is the new trend.

My dissertation will be based on, but not limited to the above listed cases. These cases will be analyzed one by one in detail to support my points.

1.3 Research Objective

The objectives of this dissertation is to

1. Explain what the off-hire is
2. Define the nature and characteristics of off-hire clause
3. Analyze how the off-hire clause works
4. Avoid risks arising following the off-hire clause in practice

1.4 Structure of the Dissertation

The first part is the introduction of the whole dissertation.

In the second chapter of the dissertation, the author explains the off-hire clause and relevant issues to give an overall understanding of the basic information about this topic. Several points will be discussed, including the nature of the time charter, the importance of the payment of the hire and the serious results of failing to pay the hire, it compares the allocation of the risk with the compensation of the loss or damage, and it is to certain that the point the off-hire clause is a term about the allocation of the risk is supported by most researchers; the purpose of the off-hire clause.

The most important parts are the following three chapters. In chapter 3, the legal characteristics of off-hire clauses will be considered, the off-hire clause is no fault

provision, further, the relationship between applying the off-hire clause and the claim about the damage on the breach of the contract by the shipowner. Chapter 4 is the part about the general rules relating to the off-hire clauses. Three aspects are introduced which are the necessary conditions that the off-hire clauses should be satisfied, which is the core of the main body. Chapter 5 focuses on the types of hire-clauses, and in chapter 6, specific off-hire clauses is compared in this part. At the end of the dissertation, a conclusion makes a simple sum-up.

Chapter2 Introduction of off-hire clauses and relevant issues

2.1 The nature of a time charter

This dissertation will concentrate on the off-hire clause under the time charter, therefore, it is important to analyze the nature of the time charter first. The focus is whether the time charter is a carriage contract or a hire rent contract.

The charter can be freely negotiated by the shipowner and the charterer in the market, thus, the charterer can choose the kind of the contracts that he needs. There are two important charters in the market, voyage charter and time charter. The time charter entitles the charterer wider range to use the vessel. Further, the charter is subject only to the laws of supply and demand. The nature of the time charter will be different under different countries law systems.

2.1.1View held by different law systems

In the Chinese Maritime Code the voyage charter is regulated by the fourth part i.e. 'the contract of carriage of goods by sea', however, the time charter and demise charter are regulated by another part i.e. 'the charter party'. There is no regnant viewpoint in China on this question. Some people have held that only voyage charter is deemed to be a special cargo voyage contract, and that time charter and demise charter are property tenancy contract not cargo voyage contract. Others have held that the time charter has the same characteristics as the property tenancy contract,

professedly, such as the obligation of “delivery the vessel”. But this duty of “delivery of the vessel” differs from the normal duty under the property tenancy contract because the delivery of the vessel does not actually deliver the vessel itself to the charterer. The charterer does not actually possess the vessel himself. The words “delivery of the vessel” means that the vessel is under the control of the charterer. The shipowner is also responsible for the safety of the navigation of the vessel and the conduct of the crew when they navigate or manage the vessel. Therefore, some people think the time charter has characteristics of the carriage charter.

The legal system in France is influenced by the civil and business law, hence, French researchers deem that the contract of carriage comes into effect when the cargo is received. The time charter is deemed to be a common property tenancy contract. They deem that the purpose of the time charter for the charterer is that he can use the vessel as he wants. Therefore, in their opinions, the hire under the time charter has the nature of rent under a common form of tenancy contract.

In addition, the general view under the common law is that charters, and particularly time charters, are indeed contracts of hire rather than contracts for the carriage of goods since hire is payable irrespective of whether goods are carried. The charterer under the time charter which is regulated by the English law should pay the hire on time, in full. Whether the shipowner receives cargoes or not does not influence his right to receive the hire. It is also clear that the freight under the contract of carriage will be affected by the delivery of the cargoes. Accordingly, the contract of carriage is based on the delivery of the goods. That is to say that the time charter is similar to a property tenancy contract. The hire has the nature of the rent under property tenancy contract.

Under the British common law system, the possession of the vessel is the only test whether the charter is a tenancy of the vessel or a contract of carriage. But in my opinion, the use of the vessel should be considered. If the vessel is just used by the charterer to carry cargo on one special voyage and the shipowner possesses the vessel, then this contract is the contract of carriage. However, if the charterer can use the vessel as he wants even though he does not possess the vessel, it is deemed that he has possessed the vessel in form.

In the case *"Nanfri"*, Lord Wilberforce said at page 206 that: *"It is important in this connection to have in mind that the present charters are time charters, the nature and purpose of which is to enable the charterers to use the vessel during the period of the charters for trading in whatever manner they deem fit."*

2.1.2 Author's opinion

It can be concluded that although the shipowner is responsible for the navigation and management of the vessel, the charterer can use the vessel as he wants therefore he actually controls the vessel. Hereby, in my opinion, the time charter is a special property tenancy contract. Under the ordinary conditions, the shipowner under the time charter provides the crews and is responsible for the navigation and management of the vessel, the charterer arranges the commercial use of the vessel. In addition, the charterer pays the hire to the shipowner, and he is responsible for the time loss under the time charter. In this dissertation, I will focus on the off-hire clause which is designed to decrease the responsibility of the charterer regarding the risk of time loss. The off-hire clause transfers the risk of the time loss.

2.2 Importance of payment of hire

Payment of hire is the primary obligation of the charterer. A time charter often has a provision which regulates the method of calculation, time of payment, location and so on. Provision is usually made in time charters for hire at a certain rate per calendar month and at the same rate for any part of a month to continue until redelivery, with payments to be made in cash monthly in advance.

2.2.1 The requirements of payment of hire

Most standard time charters regulate that the hire must be paid in full, on time, in advance.

BALTIME 1939: *"Payment of hire to be made in cash ... without discount every 30 days in advance"*.

NYPE 1946:

C1.4: *"That the Charterers shall pay for the use and hire of the said vessel at the rate of …….commencing on and from the day of her delivery ……; hire to continue until the hour and day of her redelivery in like good order and condition…..,,"*

C1.5: *"Payment of said hire to be made in New York in cash in United States Currency, semi-monthly in advance, and for the last half of month or part of same, the approximate amount of hire, and should same not cover the actual time, hire is to*

be paid for the balance day by day, as it becomes due, if so required by Owners….."

SHELLTIME 4: *"Payment of hire shall be made in immediately available funds ... in default of such proper and timely payment ..."*

The word "in cash" should not be narrowly understood as "cash, coins", as it includes other forms of payment commonly used by bankers.

In the case *"Brimnes"*, the judge Justice Brandon stated that: *'(1) The words "payment . . . to be made . . . in cash" in clause 5 of the charter-party did not mean that payment had to be made in dollar bills. The expression "payment in cash", as used in a modern charter-party, included any commercially recognized method of transferring funds, the result of which was to give the transferee an unconditional right to the immediate use of such funds. Both the direct and indirect methods of transfer used by the charterers at different times in this case constituted payments in cash within the meaning of clause 5. (3) While the expression "payment in cash" covered the methods of transferring funds used in this case, a payment by such methods could not be regarded as having been made until the payee had an unconditional right to the immediate use of the funds transferred.'*

At last, the judge Brandon, J. concluded that: *"In my view these words must be interpreted against the background of modern commercial practice. So interpreted it seems to me that they cannot mean only payment in dollar bills or other legal tender of the U.S. They must, as the shipowners contend, have a wider meaning, comprehending any commercially-recognized method of transferring funds, the result of which is to give the transferee the unconditional right to the immediate use of the funds transferred."*

Other forms of payment are the equivalent of payment by “cash” only if and when owners’ account is irrevocably credited and the money is freely disposable by the owner. Some methods of payment do not amount to payment by “cash”, which are payment by uncleared cheque, payment under reserve or payment which cannot yet earn interest.

Another point which should be noticed is that how to determine the date of the payment of the hire if the hire is paid by the banker’s draft and payment orders. In the case *“The Brimnes”*, it was held that where the charterers’ bank delivers to the owners’ bank a banker’s draft or equivalent document, payment under the charter is complete at the time of such delivery. However, this way is not same as the payment of hire by the cash. Because the payment of hire by cash gives the shipowner a right to immediately obtain the interest. Relatively, the payment of hire by banker’s draft may lead to another problem. The payment of hire by the banker’s draft may need a period to process this conduct to the bank of shipowner. Therefore, Lord Salmon pointed out in *“The Laconia”* that a certain amount of processing would be needed before a credit was raised in an owner’s account even where the charterers paid in cash. In conclusion, the payment of hire by banker’s draft should be deemed to perform the charterer’s duty when the bank of shipowner accepts the payment.

Under the time charter, the payment of hire has several characteristics such as in full, on time, in advance. This duty of charterer is a continuous, punctual and absolute one. The charterer cannot delay, decline and deduct the hire on due date. The basic duty of charterer is to pay the hire continuously under the charter period unless there are express clauses to delay, decline or deduct the sum; or the shipowner breaches the contract and fails to provide the services stated in the contract; or the charter is

frustrated. This duty is strict even if the charterer cannot use the vessel unless there are express clauses in the contract. However, the purpose of payment of hire by the charterer is to obtain the sufficient and efficient services from the vessel. If the vessel fails to provide the services, the charterer also suffers due to the time lost. Therefore, the charterer inserts the off-hire clause into the time charter to provide his benefit. In *"The Lutetian"*, both counsel and the court accepted that it was permissible for hire paid in respect of a past period of off-hire to be deducted from the next monthly hire payment. Furthermore, it is also decided by the Court of Appeal in *"The Nanri"*, that off-hire under the Baltime Clause 11 (A) ("no hire to be paid in respect of any time lost thereby… Any hire paid in advance to be adjusted accordingly") could be deducted from a subsequent hire payment.

2.2.2 One important remedy to the shipowner – withdrawal of the ship

It is common that the shipowners have continuous running expenses to pay such as crew salaries, insurance premiums etc. Therefore, if the charterer fails to pay the hire then the shipowner will loss cash-flow to maintain the running of the vessel. So it is important that the shipowner receives the hire punctually and in full. Many standard time charters state one remedy for the failure of the payment of hire which is the right of withdrawal of the ship.

NYPE 1946:

5 *"Payment of said hire to be made in New York in cash in United States currency, semi-monthly in advance ... otherwise failing the punctual and regular payment of the hire ... the Owners shall be at liberty to withdraw the vessel from the service of*

the Charterers without prejudice to any claim they (the Owners) may otherwise have on the charterers."

NYPE 1993

11 *"At any time after the expiry of the grace period ... and while the hire is outstanding, the Owners shall, without prejudice to the liberty to withdraw, be entitled to withhold the performance of any and all of their obligations hereunder and shall have no responsibility whatsoever for any consequence thereof, in respect of which the Charterers hereby indemnify the Owners,..."*

The failure of payment of hire by the charterers is conduct which breaches their obligation under the charter, normally, the consequence of the conduct should be as same as that caused by other common conduct of breach. It means that the failure of payment of the hire does not directly lead to terminate the charter. However, it is normal that the time charter has a clause to entitle the shipowner to withdraw the vessel from the service of the charterer. The consequence of this remedy is significant; when the shipowner adopts this remedy the charter is terminated. The right of withdrawal of the vessel is entitled by the charter and it can be adopted by the shipowner. It is up to the shipowner to choose whether he wants to use the right of withdrawal of the vessel when the payment does not accord with the regulation of the charter. In addition, the right of withdrawal of the vessel is not interfered with by the charterer or the court.

For instance, in the "Baltime Charter", Clause 6 states that *"... In default of payment the Owners to have the right of withdrawing the vessel from the service of the Charterers, without noting any protest and without interference by any court or any other formality whatsoever and without prejudice to any claim the Owners may*

otherwise have on the Charterers under the Charter."

The shipowner should be careful to perform the right of withdrawal of the vessel, because the performance of this right is final. The shipowner cannot withdraw the vessel temporarily unless there are special terms in the charter. Therefore, "withdraw" means finally withdraw.

In the case *"the Mihalios Xilas"* on the Baltime form, Donaldson, J. said: *"Temporary withdrawal of a vessel for non-payment of hire is a right which could only exist if specially conferred upon the owners by the terms of the time charter. No such right is conferred by this charter-party."*

If the shipowner withholds the services of their ship, he cannot resume the vessel under the use of the charterer. In my opinion, the right of withdrawal of the vessel is finial in another aspect that if the shipowner accepts the later payment by the charterer even if the charterer fails to do so on due date then the shipowner cannot perform the right of the withdrawal of the vessel again.

In the case *"The Georgios C"*, the Court of Appeal held that these words in the Baltime charter meant *"in default of payment and so long as default continues", 'so that a late payment or tender of hire by the charterers would extinguish the right of withdrawal if this right had not been exercised by the owners prior to that payment or tender'.* The House of Lords in a case concerning the New York Produce Form, *"The Laconia"*, overruled this point.

The performance of the right of withdrawal of the vessel should be based on the breach of the charterer on the payment of the hire. The breach of this obligation can

be divided into two aspects: the first one is that the charterer does not perform the obligation at all; the second one is that the charterer fails to fulfill the duty properly e.g. he does not pay the full sum of hire regulated by the charter. In the case *"Western Bulk Carriers K/S v. Li Hai Maritime Inc"*, Jonathan Hirst QC supported this view that even 500 dollars can lead to the shipowner applies the right of withdrawal of the ship.

Hence, the charterer should be careful in performing his obligation, because even very slight delay or non-sufficient payment of the hire may entitle the shipowner to withdraw the vessel from the use of the charterer. Further, this situation may be common when the rate of hire prevailing in the charter market rises.

One of the necessary conditions of the performance of the withdrawal of the vessel is that the shipowner gives notice of the withdrawal. Because the consequence of the withdrawal of the vessel is serious, it is prevalent that the charter inserts into an "Anti-technicality" clause which is to prevent the shipowner to abuse the right of withdrawal of the use of the charterer. Thus, on account of the existence of the anti-technicality clause the shipowner should give notice to the charterer before he carries out the withdrawal of the vessel as the breach of the payment of the hire by the charterer. The notice of withdrawal of the vessel should state that the shipowner can withhold the service of the vessel if he does not receive the payment on the regulated date.

2.3 Risk allocation between owners and time charterers re payment of hire

Traditionally, there are two opinions around this point, one is the compensation of the loss and damage, the other is apportionment of the risk.

The duty of compensation is the most important and usual way under the civil responsibilities. The purpose of that is the party who breaches the contract pays some certain sum of money to the innocent party to remedy the loss of the victim who suffers loss because of the breach conduct of other parties. At the same time, the compensation is paid by the party in breach to other party who complies with the contract, so the compensation of loss or damage is the crack-down of the property which embodies the characteristic of the punishment. The purpose of the compensation of the loss or damage is to put the plaintiff in the same condition as if that the contract has been carried out. Or the compensation of the loss or damage makes the plaintiff on the condition that the contract was not formed at all. Some researchers normally say that the compensation of the loss or damage is to protect the contemplated benefit of the plaintiff. But it should come into mind that the compensation of loss or damage is based on the conducts of breach. In addition, the plaintiff has an obligation that he should reduce his loss or damage when he applies the compensation of the loss or damage, if he fails to do so he cannot gain the compensation of this increased part.

However, the off-hire clause does not depend on the breach of the contract or the fault of the shipowner. That is to say that if the events listed on the contract has happened then the charterer can claim the rights entitled by the off-hire clause in the time charter whether or not the shipowner is at fault. The charterer has a right to postpone the payment of hire or deduct the sum because the events written in the off-hire clause in the time charter has occurred. The purpose of the existence of the off-hire clause in the time charter is to reduce the obligation carried by the charterer.

Without doubt, the shipowner is responsible for providing sufficient crews, equipment and services of the vessel. Consequently, the shipowner has a right to receive the hire throughout that period and to re-assume control of his vessel on the expiry of that period. To the contrary, the charterer is entitled to exploit the vessel commercially within the period defined by the contract. Further, the charterer carries the duty to pay the hire punctually, in full and in advance.

In the case *"The Gregos"*, the House of Lords has stated that: *"Where the charter-party is for a period of time rather than a voyage, and the remuneration is calculated according to the time used rather than the service performed, the risk of delay is primarily on the charterer"*.

It is clear that the risk of delay is borne by the charterer if there is absence of any contrary terms. The charterer may lose benefit because he should pay additional hire for the delay if there are no provisions similar to the off-hire clause. It is clear that the charterer carries more risks than the normal allocation.

In the case *"The Berge Sund"*, the judge Steyn stated that: *"As is fashionable nowadays, the clause is said to deal with allocation of risk."*

It should come into mind that the charterer carries a heavy obligation that he should pay the hire. However, the charterer wants to alleviate this heavy duty, he wants the shipowner to take some risk. Therefore, the charterer wishes to insert the off-hire clause into the time charter to change the allocation of the risk.

It can be concluded that the off-hire clause is the agreement that two parties accede to share the risk. Under this situation, the charterer takes the risk when he exploits

the vessel commercially; the shipowner carries the risk specified by the off-hire clause. The off-hire clause states the events which can make the charterer deduct the amount of the hire or stop to pay the hire.

2.4The purpose of off-hire clauses

The general loss-of-time risk under a time charter is allocated to the charterer as discussed above. In other words, the charterer will lose his benefits if the vessel is delayed or is unproductive and the shipowner is to blame. Therefore, the shipowner and charterer reach the agreement that the time charter releases the charterer from his continuous obligation to pay hire. The purpose of the off-hire clause is to protect the charterer from the delay.

In order to expound the purpose of off-hire clauses, one of the examples should be listed in front. The clause 15 in the New York Produce Exchange Form 1946 (NYPE'46) states that *"That in the event of the 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 sped 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 extra fuel consumed in consequence thereof, and all extra expenses shall be deducted from the hire."*

It is clear that the clause in the latter paragraph entitles the charterer to deduct the amount of the hire because of the existence of the off-hire events. In the case *"The*

Mareva A.S.", Kerr, J. commented on the Clause 15 of the New York Produce Form that "*It is settled law that prima facie hire is payable continuously and that it is for the charterers to bring themselves clearly within an off-hire clause if they contend that hire ceases. This clause undoubtedly presents difficulties of construction and may well contain some tautology, e.g. in the reference to damage to hull, machinery or equipment followed by 'average accidents to ship'. But I think that the object is clear. The owners provide the ship and the crew to work her. So long as there are fully efficient and able to render to the charterers the service then required, hire is payable continuously. But if the ship is for any reason not in full working order to render the service then required from her, and the charterers suffer loss of time in consequence, then hire is not payable for the time so lost."*

Therefore, the charterer favors the off-hire clause very much because he can escape the heavy duty of payment of hire sometimes.

But it should come into mind that the off-hire clauses in different standard contracts do not have identical contents. Furthermore, the off-hire clauses are in any event frequently amended by the parties.

For these reasons it has been said that *"the only general rule that can be laid down is that one must consider the wording of the off-hire clause in every case"*.

The scope of the off-hire clause depends on the wording of that clause, and the performance of the right to deduct the amount of the hire is also affected by the wording of the clause. However, it should be noticed that even if the wording of the clause is different, the object of the off-hire clause is obvious that the off-hire clause operates as exceptions which cut down the owner's right to hire. Another way to put

the same point is to say that the off-hire clause gives the protection to the charterer in the event of delay.

Chapter 3 The legal characteristic of off-hire clauses

3.1 The off-hire clause is no-fault provision

In the case *"Hogarth v Miller"*, the judge, Morris, held that the off-hire clause is the compensation clause of loss or damage. Although his viewpoint was not same as others', his opinion was accepted as the finial decision. Under his opinion, the shipowner has an obligation to make the vessel in an efficient state and to perform the service regulated by the time charter. *"But as the owner would only be liable under the clause on p. 33 in an action for damages, the parties very wisely chose to measure their damages, and accordingly the measure is that the hire is to cease on the contingency of there being 'a loss of time from a deficiency of men or stores, breakdown of machinery, want of repairs, or damage, whereby the working of the vessel is stopped for more than forty-eight consecutive working hours, until she be again in a fit state to resume her service'."*

Therefore, the conduct of breach is the necessary aspect of the compensation of loss or damage.

However, most judges in this case preferred the view held by Halsbury. Lord Halsbury, held that the off-hire clause was deemed to be a switch to protect the charterer from the loss of time caused by the situations special listed in the time charter.

In the case *"The Ioanna"*, in the words of Staughton, J. stated that: *"Off-hire events are not necessarily a breach of contract at all. So one should not be too surprised if*

one finds that leads to a different answer than would ensure in the case of a claim for damages for breach of contract." Hereby, the off-hire clause is not the clause of compensation of loss or damage in the time charter. The breach of the conduct is not the necessary aspect of the applying of the off-hire clause.

Whether the conduct of breach is the necessary aspect of applying the off-hire clause or not can be discussed by the following cases.

In the case *"The Aquacharm"*, the judge, Denning, held that *"In seeing whether cl. 15 applies, we are not to inquire by whose fault it was that the vessel was delayed"*. It can be concluded that the application of the off-hire clause is entirely independent from the breach of the contract. The off-hire clause is not affected by whether the shipowner breaches the contract or not.

In another case *"The Berge Sund"*, Lord Justice Staughton took the opinion that: *"A charter-party might provide that the vessel would remain on hire except during delay caused by a breach of contract on the part of the owner; or it might provide that the vessel should be off hire in the event of delay, unless caused by breach of contract on the part of the charterers….They provide for a vessel to be off hire in some events which are not a breach of contract by either party for example, interference by authorities in the present case. As is fashionable nowadays, the clause is said to deal with allocation of risk."*

The first part of the cited statement reveals two ways that delay caused by a breach of contract on the part of the owner or the vessel should be off-hire which entitle the charterer ceases to pay the hire. The existence of the wordings "a breach of contract on the part of the owner" and "the vessel should be off hire in the event of delay"

means that the breach of contract separates from the off-hire clause. The second part of the cited statement expresses clearly that the off-hire events does not need the breach of the contract.

It can be concluded that the off-hire clause is a no fault provision. It means that the charterer can apply the rights entitled by the off-hire clause to stop or deduct the relevant amount of the hire only if the events specified in the contract arise no matter whether the shipowner breaches the contract. In addition, the shipowner cannot argue that his lack of fault declines the right of the charterer to use the off-hire clause. The same point can be said in another way, that the charterer can stop to pay the hire even though it is not based on the breach of the shipowner. Although the off-hire clause is one part of the time charter, the off-hire clause operates separately and independently of any breach of contract by the shipowner.

3.2 The charterer cannot benefit from his own breach of the contract

Although the off-hire clause is a no fault provision, the situation that the breach of contract is conducted by the charterer is different. If an event falling within the wording of the off-hire clause has been caused by some breach of the express or implied terms of the charter by the charterers, the courts may deal with it in one of two ways. One solution is that the ship is deemed to be off-hire but allow the shipowner to claim hire back from the charterer because of the breach of the contract. The other solution is that the court may hold that the ship remains on hire. Although the off-hire clause does not mention the fault of both party and it should be operated

automatically suppose that the events fall in the wording of the off-hire clause, some authority supports that the charterer cannot rely on the clause if the events of off-hire clause is resulted from the breach of the contract by the charterer.

In the case *"Board of Trade v. Temperley", Scrutton"*, L.J, stated that: *"I am quite unable to find any case or any principle which will bring an action of that sort within the principle, which is sometimes expressed, that a man cannot take advantage of his own wrong."*

It was held that if the charterers' breach of an express or implied term of the contract had caused the loss of time they could not have relied on the clause. Thus, the off-hire clause cannot be used by the charterer if he breaches the express or implied terms of the contract. There is a similar conclusion in the case *"Fraser v. Bee"* that it is clear support that the charterers may not rely on the clause when the loss of time relates to something which under the charter it is their duty to supply, although the decision could have been reached on construction alone.

In the case *"James Nourse, Ltd., v. Elder Dempster & Co., Ltd."*, the delay was caused by the charterer who provided the bunker coal which is heated dangerously. Two parties achieved a cesser clause of hire in the time charter, that: *"That in the event of loss of time from deficiency of men or owners' stores, breakdown of machinery or damage to hull preventing the working of the steamer for more than 24 consecutive hours, the hire shall cease until she be again in an efficient state to resume her service; or if breakdown or damage occurs at sea, not resulting from the cargo, necessitating putting back, hire shall cease until steamer is again in the same position as when the accident occurred, assuming that the same voyage is continued, or if that voyage is abandoned until she is in a similar position on the following*

voyage, &c."

It was held that the delay was caused by the dangerous bunker coal provided by the charterer, therefore, the charterer breached the contract. Greer, J. stated that: *"It is to be observed that under this charter-party it is for the charterers to find bunkers; and this cesser clause is in my judgment drawn so as to make hire cease when there is a failure of that which has to be supplied by the shipowner, but it does not extend the cesser of hire when anything for which the charterer is responsible has caused the loss of time"*. Hereby, it is clear that the charterer cannot apply the off-hire clause when the delay is caused by the fault of the charterer which is regulated expressly or impliedly by the time charter.

In the case *"Lensen Shipping Ltd v Anglo-Soviet Shipping Co. Ltd."*, the Court of Appeal held that the charterer was responsible for paying the hire under the Baltime form because the inefficient state was caused by the shipowner's compliance with the employment order given by the charterer. The judge, Greer, made a leading judgment which is based upon the charterer being unable to rely on the off-hire clause while employing the ship outside the limits agreed in the charter and partly on the indemnity clause, but also refers to the right of the owners to recover hire as damages.

Further, Greer, L.J., stated that *"The same result follows from the words in the second part of Clause 12 of the charter-party, as I think if technically the vessel was off hire the owners would be entitled to recover the same amount from the charterers under this clause as damage caused to the owners by goods being loaded contrary to the terms of the charter-party."*

Accordingly, another situation that the charterer cannot apply the off-hire clause is that the incidents of the off-hire clause are the direct result of their employment instruction.

In the case *"Rijn"*, MUSTILL, J. held similar view that *"in the case of a vessel being tendered at a port which was not within the redelivery range, the owner had a contractual right to have the vessel kept in employment at the charter rate of hire until the service was completed and this did not happen until the vessel reached the redelivery range and the voyage to that range formed part of the chartered service so that here not only was the tender in the wrong place, but it was also at the wrong time, and full compensation for the breach required the charterers to restore to the owners the hire which would have been earned if the voyage had been performed and the arbitrators were right in basing their award on the cost of a notional final voyage to Japan"*.

It should be noticed that the onus of proving that the incident is caused by the breach of the charterer is on the shipowner if he wants to reject the claim of off-hire clause applied by the charterer. The shipowner cannot obtain the hire if he fails to prove the events are caused by the breach of conduct of the charterer or the employment orders given by the charterer.

It can be easily concluded that the principle is established that the charterer cannot rely on the off-hire clause when the time of loss is contributed by the charterer, though the off-hire clause is a no fault provision. In this situation, the charterer is not entitled to cease to pay the hire. It can be stated by other words in same meaning that the charterer cannot obtain the benefit from his own breach of the contract.

3.3 Off-hire clauses vs. Claims for damages

If the off-hire event is caused by the conduct of the breach of charter of the shipowner, the charterer has a right to choose to apply the off-hire or claim the damage of breach. However, most charterers are favor to the benefit of the off-hire clause, for example, they can escape ordinary contract rules such as escaping the effect of exception clauses etc. For instance, a ship has a slower speed than stated in the performance clause, and the vessel uses less fuel.

The NYPE' 46 is used in this case, which has clause 15 that *"... 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 extra fuel consumed in consequence thereof, and al extra expenses shall be deducted from hire."*

If the charterer claims for the slow speed as damages (e.g. for breach of the ship description) then the amount of bunkers saved because of the slow steaming must be credited against the claim for slow speed in order to determine exactly what the charterers loss is overall. However, if the charter (e.g. the second part of clause 15 of NYPE 1946) allows the charterer to deduct time lost as a result of slow steaming from hire then charterers can do so without giving credit for any bunkers saved as a result of the slow steaming since the claim is one for off-hire rather than for damages.

When the off-hire event has occurred, the charterer is entitled to cease to pay the hire for the loss of time, and he does not need to prove the loss he suffers. Even if the loss he suffers is more than the hire, he is not entitled to obtain more than the hire. On the

other hand, if the actual loss is very small and is less than the hire which should be paid, the sum of the hire which he is entitled to deduct is not affected. The nature of ceasing to pay the hire is similar to the nature of the indemnity. But the indemnity depends on the breach of the shipowner, the off-hire clause is based on the agreement of the charterer and the shipowner. Therefore, the nature of the off-hire clause is the allocation of the risk. It means that the risk is on the shipowner when the charterer ceases to pay the hire.

The off-hire clause does not destroy or cut down any right the charterers may have to claim damages from the owners even in respect of matters specifically mentioned in the clause. The focus of this problem is whether the charterer can prove he suffered damages in excess of or in addition to the loss of use of the vessel as a result of a breach of charter by the shipowner or not, if the charterer can do so then he can recover these damages.

In the case *"The Democritos",* Kerr, J. said at the page 401: *"since this point appears rarely to have arisen in practice, it is right to repeat that it was common ground that if a period of off-hire results from a breach of the charter on the part of the owners, then the charterers would in law be entitled to damages quite apart from not being liable for hire, or being able to recoup any hire paid in respect of this period, if they can establish that they have thereby suffered additional loss"*.

For example, the delay is caused by the breakdown of the engine which is due to the unseaworthiness of the vessel on delivery. Further, the shipowner has an obligation to provide the seaworthy vessel, so he breaches the time charter. The conduct of the shipowner causes the delay of the vessel and deprives the charterer of a profitable

voyage. Therefore, the charterer is not restricted to claim the off-hire, he is entitled to claim the profit exceeded the hire lost.

3.4 The conflict between the off-hire clause and the exceptions clauses and the regulations under the common law

The parties under the time charter often want to avoid their obligation by inserting exceptions clauses into the time charter to release their responsibilities. The two parties may agree to insert mutual exceptions clauses into the charter. It means that they achieve an agreement to escape the responsibilities caused by the reasons listed in the clause. The purpose of exceptions clause is to exempt the party who relies on the exceptions clause from the liability for the act, neglect or default of himself. But it should be come into the mind that the off-hire clause is entirely independent from the exceptions clause. The off-hire clause is not bound by the exceptions clause. This viewpoint was interpreted by the case *"The Aquacharm"* In this case, the charterer was not only to claim off-hire, but also claim the loss because of the fault, negligence of the master. However, the shipowner successfully exempted his liability because of the exception clause in the Hague Rules which is about exceptions for the act, neglect or default of the master in the navigation or in the management of the ship. In addition, the claim about the off-hire clause was not relevant with the applying of the exception clause in the Hague Rules.

It is important that there are many same incidents or causes listed in the off-hire clause and exceptions clauses, for instance, fire, breakdown of the engine or equipment. There will be a conflict between the exception clause and the off-hire

clause when the same events have arisen. According to the common law, the off-hire clause is entirely independent from exception clause. That means that in despite the fact that the exception clause states that fire is one incident of the exception events, however, if the fire rises which is not caused by the conduct or instructions of the charterer, the charterer can cease to pay the hire. Furthermore, he is entitled to claim back the hire paid in advance.

In the case *"The Ioanna"*, Staughton, J., said that *"But the charterers point out that they are not obliged to claim damages; they can instead bring a claim under cl. 51, which I shall call, more or less accurately, the off-hire clause, if they can bring themselves within it. In that event the common law rules as to damages do not apply and one must go by what the clause says.It may say something different from the common law rules. After all, if it did not, there would not be much point in it being there. Off-hire events are not necessarily a breach of contract at all. So one should not be too surprised if one finds that cl. 51 leads to a different answer than would ensue in the case of a claim for damages for breach of contract"*.

It can be easily concluded that the off-hire clause is not based on the breach of the contract, hence, the result of apply the off-hire clause may be different from the one gained from the breach of the contract.

3.5 Conclusion of chapter 3

In conclusion, main characteristic of the off-hire clause is that this clause is no fault provision. The applying of the off-hire clause is not dependent on the breach of the

parties. But the charterer cannot cease to pay the hire under the off-hire clause if the incident is caused by his breach of contract or the employment orders given by himself. It is forbidden that the charterer gains the benefit from his own fault. After then, if the events in the off-hire clause and in the exception clause are same, the applying of the off-hire clause is independent from the exception clause. That is to say, whilst the shipowner can exempt himself from the liabilities because of the exception clause, at the same time, the charterer is entitled to cease to pay the hire as a result of the off-hire clause. Further, the common law may not affect the applying of the off-hire clause. The result of that may be different, and the use of the common law depends on the breach of the contract, whilst the applying of off-hire clause is not.

Chapter 4 General Rules relating to off-hire clauses

If the charterer wants to apply the off-hire clause, he must show that three conditions have been satisfied as follow:

(1) the charterer has suffered the loss of time;

(2) such loss of time is caused by the events listed in the off-hire clause;

(3) such event prevents the full working of the vessel.

Therefore, it is important to analyze the above conditions which may affect the use of the off-hire clause.

4.1 The loss of time

The wording of the off-hire clause varies, but it frequently provides as followes: *"That in the event of loss of time from deficiency of men or store etc"*.

The happening of the enumerated events in the clause may not directly lead to the automatic interruption of the hire, the loss of time is the necessary aspect of the applying of the off-hire clause. The charterer must show that he has suffered the loss of time even if the incidents listed in the clause have happened.

The loss of time under the time charter may be in several forms such as: it may belong to the loss of time of the off-hire clause, but it is not caused by the conduct of

shipowner; it may be included in the time of off-hire clause, however, which may be caused to by the breach of the shipowner; it may be caused by the breach of the shipowner but it may not belong to the off-hire clause; or it may not belong to the off-hire and it is also not caused by the breach of contract, but it may be indemnified; it may remain with the off-hire clause, but the charterer may contribute to that (e.g. he provides unqualified fuel); it may belong to the off-hire clause on the surface, nevertheless, it may actually be the results that the charterer uses the vessel legally (e.g. the vessel navigates in the tropical water area so that the speed is lower which is caused by the growing of the life-form under the bottom of the vessel). Therefore, it should be noticed again that the off-hire clause is the allocation of the risk, the wording of the off-hire clause is the only standard of determining the allocation of the risk. The wording of off-hire clause must be clear, then, the charterer can show the loss of time and obtain the protection from the off-hire clause.

The direct reason of the applying of off-hire is the loss of time, further, the causation of the loss of time is either “delay” or “detention”. Herewith, these concepts should be explained first.

The Oxford English Dictionary has made definitions about these concepts, in addition, Rix J., cited the definitions in the case *“Nippon Yusen Kaisha Ltd. V Scindia Steam Navigation Co. (The Jalagouri)*. Rix J. held the word “delay “that: “*in its ordinary meaning delay was a word of broad import meaning "postpone, defer, make late, hinder"; it was an extremely common word in shipping contracts, where it was generally given its ordinary broad meaning; it was a basic tenet of time charter interpretation that delay had to be measured by reference to the service immediately required”*.

The meaning of the word, "detention" is narrower than the word "delay". The leading explanation was held in the case *"Mareva Navigation Co. v Canaria Aemadora S.A. (The Mareva A.S.)* Kerr J. stated that *"It is not used in relation to any of the other events referred to, and must, I think, be given some specific and additional meaning. I think that it is intended to refer to some physical or geographical constraint upon the vessel's movements in relation to her service under the charter"*.

But in the case *"The Jalagouri"*, the definition of "detention" was expanded *"detention involved more than mere delay; there was a physical or geographical constraint upon the vessel's movements in relation to her service under the charter or a constraint on her movements in the charterers' service; an order by authorities which could presumably be backed up by force or the imposition of sanctions might be a physical constraint in itself; but in any event a legal restraint was clearly within the logic of the concept of detention"*.

If the charterer wants to obtain the protection entitled by the off-hire clause, he must show the service is delayed or detention, that means he must show he has suffered the loss of time. Regard must be had to the particular work that is required of the ship at the relevant time and only if that is affected does the possibility of deduction under the off-hire clause arise. For example, the main engine of the vessel has suffer a serious breakdown, if the ship is at the berth and the service of loading or discharging cargo is required immediately, it means that the charterer does not suffer the loss of time because the service required immediately is loading or discharging the cargo. Therefore, there is no off-hire in this situation. However, if the breakdown happens in the period of navigating in the open sea, the equipment required immediately is the main engine so the charterer suffers the loss of time because of

the breakdown. Therefore, if the off-hire clause has included the breakdown of the engine as an event which allows off-hire and the charterer can show the loss of time, the charterer can obtain the protection. In the case *"Hogarth v. Miller"*, the House of Lords held that the ship was off-hire during the tow from Las Palmas to Hamburg, for although the cargo was moved to destination in the ship, she was not fully efficient during the tow because she could not proceed without the aid of the tug. Once discharge began, however, the ship came on hire again as she was efficient for what was then required of her.

Lord Halsbury said: *"It appears to me, therefore, that at that period there was a right in the shipowner to demand payment of the hire, because at that time his vessel was efficiently working; the working of the vessel was proceeding as efficiently as it could with reference to the particular employment demanded of her at the time."*

Therefore, the time is lost only when the service immediately required of the vessel has been delayed or interrupted.

Furthermore, just off-hire event and loss of time are not enough, it must be shown that this off-hire event causes the loss of time.

In the case *"The Hermosa"*, Mustill, J. held this point that *"the claims by Nitrates for recovery of hire between Mar. 27 and the moment of collision would be rejected in that Nitrates were unable to show that a cause of the relevant type specified in cl. 8 had brought about any loss of time"*.

This point was also stated in the case *"Forestships International Ltd v Armonia Shipping and Finance Corp, (The Ira)"*, Tuckey J. held that *"...A net time clause,*

such as this clause is, requires the charterer to prove the happening and the duration of the off-hire event, and that time has been lost to him thereby. So it is a two-stage operation and it does not follow merely by proof of the off-hire event and its duration that he is able to establish a loss of time to him. That must depend on the circumstances of the particular case".

In conclusion, the loss of time is one necessary aspect of the occurrence of the off-hire clause. The loss of time must be shown when the charterer wants to cease to pay the hire on account of the occurrence of the off-hire events. At the same time, the loss of time must be caused by the off-hire events, if not, the charterer cannot get the protection from the off-hire clause.

4.2 The service required immediately

The determination of the loss of time always relates to the service required. If the service is demanded later not immediately, the charterer does not suffer any loss because he does not need the vessel to do anything even though the vessel is in an entirely efficient state. Therefore, the service required immediately is the necessary aspect of determining of the loss of time.

In the case *"The Berge Sund"*, the delay was caused by the cleaning checking before loading the cargo. Staughton, J. held that *"despite the wide words of cl. 8(a)(i) of the charter the vessel would not be off hire during the time occupied in "ordinary" or "normal " cleaning; and to attribute to the parties the intention that the vessel should be off hire during all the cleaning time was untenable; on Dec. 20, 1982 the*

charterers' 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; cleaning was in the ordinary way an activity required by a time charterer and it was his choice what cargoes were loaded and consequently what cleaning was required; the vessel was not off hire and the charterers' claim failed".

Therefore, the service required immediately is the cleaning which is ordered by the charterer. But it should be noticed that not all the orders given by the charterer is the service required immediately, for instance, the charterer orders the shipowner to repair it when the engine has a breakdown. The order given by the charterer is to repair the engine, however, the time of repairing the engine does not belong to the loss of time. Because the difference between them is that one is the subjective willing, the other one is objective requirement. Therefore, the objective requirement of the charterer can lead to the loss of time.

4.3 The onus of proof

In my opinion, this part can be divided into two parts: one is that the onus is on the charterer who has to prove the existence of the off-hire event and the loss of time caused by this event; the other one is that the liability is on the shipowner who should prove the events are partly or entirely contributed by the breach conduct of the charterer if he wants to disprove the right of the charterer.

In the first condition, the charterer is no doubt to carry the onus of proof, because the off-hire clause is to entitle the right of the charterer. If the charterer can obtain the

benefit from the off-hire clause, then for equitable reason, he should carry the onus of proof. The cases mentioned hereinabove all stated that the necessary condition is that the charterer shows the existence of the off-hire events and the loss of time caused by this off-hire event. In detail, in the case *"The Hermosa"*, the judge held that the charterer was responsible for demonstrating that one of the events referred to in the off-hire clause operated and that it caused loss of time. In another case *"The Berge Sund"*, Steyn J. also held that if the charterer fails to demonstrate the loss of time is caused by the events enumerated in the off-hire clause, the charterer cannot obtain the protection from the off-hire clause and he has to pay the hire.

In the second condition, the shipowner has the onus of proving that the off-hire event is contributed to by the breach of the charterer. The shipowner can gain the benefit from the successful proof of the contribution in the events of off-hire clause caused by the breach of the contract conducted by the charterer. This focus is specifically stated in the part V hereinabove, therefore, there will not be stated again.

4.4 Construction of the off-hire clause (the importance of the meaning of efficient vessel)

When considering the off-hire clause, the first important aspect which should be noted is that in which situations the charterer can apply the off-hire, that is to say the off-hire events. Therefore, it is important to correctly analyze the meaning of the off-hire clause, that means there is a important question whether or not the vessel can entirely perform the service which is immediately required. Sometimes, the vessel itself has some problems which prevent it to provide the service to the charterer.

However, sometimes the vessel itself is in a completely efficient state, but it cannot perform the service required immediately or entirely. Hence, it is very important to give a clear range of the definition of the construction of the off-hire clause, the same meaning in other words, the determining of the efficient state of the vessel is significant.

Considering the wording of the standard time charter such NYPE' 46 or NYPE' 93, it is common that there are the wordings that *"that in the event of the loss of time from deficiency of men or stores, ..., or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost."*

The important aspects in the above cited statement are that "the loss of time" and "preventing the full working of the vessel". The words "the loss of time" have been analyzed above. Then, the meaning of the word "preventing full working of the vessel" will be subsequently analyzed. The wording of "preventing full working of the vessel" concentrates on the "efficient vessel", that is to say that when the vessel can be determined as not efficient vessel.

The traditional meaning of "preventing the full working of the vessel" was interpreted by Lloyd. J. in the case *"The Aquacharm"*, he stated that *"for the words "or by any other cause preventing the full working of the vessel" in cl. 15 to apply the test was whether the vessel was fully efficient in herself, i.e., whether she was fully capable of performing the service immediately required of her, and if she was, then she was not off hire even though she was prevented from performing that service by some external cause such as the refusal by the canal company to permit the vessel to pass through the canal; and the umpire, having found that the vessel was fit in herself to perform the service immediately required had applied the right*

test and come to the right conclusion that the vessel was not off hire". In summary, Lloyd. J held that the words "prevent the full working of the vessel" must be caused by the vessel itself, the external causes cannot prevent the full working of the vessel.

In the case *"The Errington Court"*, the vessel, *"Errington Court"*, was surrounded at Wuhu because the Chinese Army set a carrier across the Yangtse River to prevent the Japanese warship. The main question in this case is whether the time charter was frustrated by the delay, the result is frustrated.

But Branson, J. held that *"If there was no frustration the contract stands and hire is payable unless there is anything in the contract to prevent it becoming payable. The charterers rely on Clause 15 for this. The argument depends upon the delay caused by the boom coming within the words 'any other cause preventing the full working of the vessel.'"* Finally, Branson, J. held that the vessel was in a efficient state, and that the full working of the vessel was not prevented even the vessel was surrounded in the Yangtse River, therefore, there is no off-hire at all.

However, there is a new trend that more and more off-hire cases were caused by the interference of the third parties such as the authorities of the ports. Because the authorities often regulate the carriage of the goods by sea and the complex clauses in the bulk time charter, for example: in the case *"The Apollo"*, the authorities of the port had sufficient reasons to believe that there was infectious disease on the vessel and they delayed to grant to give the certificate of immunity; in the case *"The Aquacharm"*, the authority of Panama held that the vessel must reduce the weight; in the case *"The Roachbank",* the authority of Kaohsiung rejected the vessel to go to the berth because this vessel rescued many Vietnamese refugees; in the case *"The Mastro Giorgis"*, the Italian court arrested the vessel because there was a claim of

loss and damage of the cargo; in the case *"The Laconian Confidence",* the authority did not allow the vessel to leave the Chittagong port because of the cargo residua on the vessel.

The result of these cases is different: the case *"The Apollo"* and *"The Maestro Giorgis"* held that the charterer can cease to pay the hire because the off-hire existed. In these two contracts another word, "whatsoever" had been insert. However, in the case *"The Roachbank"*, the word, "whatsoever", was also inserted into the contract, the result was that there was no off-hire. Further, in the cases *"The Aquacharm"* and *"The Laconian Confidence"*, they did not insert "whatsoever", the charterer cannot obtain the right entitled by the off-hire clause.

The phrase "preventing the full working of the vessel" should be interpreted as qualifying, which affects not only the words "any other cause" but also the events or reasons before these words "preventing the full working of the vessel". Without other words restrict "any other cause", these words must be read ejusdem generis with the preceding words of the clause. The interpretation of "any other cause" should be similar to the context of the off-hire clause. The range of the interpreting of "any other cause" should be similar in the type to the specific and express causes itemized in the clause will qualify as "any other causes". It is easy to conclude that the specific events or causes in the off-hire clause are all about the physical condition, therefore, the words "any other cause" should be also interpreted as the physical reasons.

Rix, J., in the case *"The Laconian Confidence"*, held that *"it was well established that the words 'any other cause', in the absence of 'whatsoever', should be construed either ejusdem generis or at any rate in some limited way reflecting the general*

context of the charter and the clause; a consideration of the named causes indicated that they all related to the physical condition or efficiency of either vessel or cargo; it was for the owners to provide an efficient ship and crew and it was therefore natural to conclude that the unamended words 'any other cause' did not cover an entirely extraneous cause like the interference of authorities unjustified by the condition or reasonably suspected condition of ship or cargo".

That is to say that the phrase "any other causes" should be interpreted as the internal conditions or events without the word "whatsoever". The eiusdem generis rule is also to regulate this situation without the word "whatsoever".

Whereas, if the word, "whatsoever", is inserted into the clause, then the result will be different. The effect of inserting the word "whatsoever" after "or by any other cause" is that the ejusdem generis rule does not apply again. When the off-hire clause includes the word "whatsoever", any reasons can lead to the vessel into the off-hire, whether the reason is internal or external, whether the reason is about the physical or legal aspect, the focus of that is whether this reason prevents the full working of the vessel.

In the case *"The Apollo"*, the off-hire clause is inserted into "any other cause whatsoever", the crew had typhus and the vessel was delayed, the court held that the off-hire clause applied. Mocatta, J. held that *"In my view although there is considerable tautology about the printed clause, which has been increased by the typed amendments, the use of the word "whatsoever" coming after the words "or by any other cause" excludes the application of the ejusdem generis rule so as to limit the "other causes" to those of the same genus as previously enumerated, if such a genus can be found. This does not, however, necessarily mean that there is no*

limitation on the application of the amended clause since one has the general context of the charter and the words 'preventing the full working of the vessel'". "But in the present case the obtaining of free pratique was no mere formality and there was good cause for the careful testing and disinfection that was carried out before free pratique was given involving a delay of 29 1/2 hours. In my judgment the action taken by the port health authorities did prevent the full working of the vessel and did bring the off-hire clause into play". This case establishes the effect of the word "whatsoever", the external cause can bring on the off-hire if the word "whatsoever" is inserted after "any other cause".

In the case *"The Roachbank"*, the wording of "any other cause whatsoever" is inserted into the off-hire clause, Dillon, J. cited the judgment of the Lloyd. J in the case *"The Mastro Giorgis"* that:

1) *The addition of the word "whatsoever" in cl. 15 excludes the ejusdem generis rule, as was held by Mr. Justice Mocatta in The Apollo (sup.) and as was conceded in the present case by Mr. Tomlinson.*
2) *Where, as here, the word "whatsoever" is added, any cause may suffice to put the vessel off-hire, whether physical or legal; the question in each is whether it prevents the full working of the vessel for the service immediately required.*
3) *In deciding whether a cause prevents the full working of a vessel, distinction is drawn between causes which are totally extraneous, such as the boom in Court Line Ltd v. Dant & Russell Inc., and causes which are attributable to the condition of the ship itself, such as engine breakdown.*
4) *Sometimes, however, there is a combination of causes. The immediate cause may be extraneous, such as a refusal to grant free pratique or a refusal to allow the vessel to leave the port. But it may be necessary to go behind the immediate cause to find the underlying cause. If the port authorities refuse to allow a vessel*

to leave because her classification certificates are not in order, or because she has an insufficient number of certificated officers, then she would plainly be off-hire, even though the immediate cause of the detention was the "extraneous" action of the authorities. The action of the authorities in such a case would appear extraneous, but in reality it is not.

In the above cited judgment, it is clear that the word "whatsoever" excludes the ejusdem generis rule, both physical and legal reasons can lead to the off-hire of the vessel. The charterer can obtain more benefit if the word "whatsoever" is inserted into the off-hire clause.

In the case *"The Laconian Confidence"*, the authority of the port found that there remained on board 15.75 tonnes of rejected residue sweepings. As a result the vessel was delayed for nearly 18 days until she was finally allowed to dump those residues and thereafter to sail when many certificates were provided. Rix, J. held that *"it was well established that the words 'any other cause', in the absence of 'whatsoever', should be construed either ejusdem generis or at any rate in some limited way reflecting the general context of the charter and the clause; a consideration of the named causes indicated that they all related to the physical condition or efficiency of either vessel or cargo; it was for the owners to provide an efficient ship and crew and it was therefore natural to conclude that the unamended words 'any other cause' did not cover an entirely extraneous cause like the interference of authorities unjustified by the condition or reasonably suspected condition of ship or cargo".*

In addition, in the case *"The Aquacharm"*, the court does not hold that the transshipment of the cargo does not prevent the full working of the vessel. Because it is common that the cargo is discharged into another vessel such as the vessel is

grounded, the vessel is still in an efficient state though the vessel was delayed for several days.

Chapter 5 The Types of off-hire clauses

The off-hire clause is the shipowner and charterer achieves the agreement about the allocation of the risk under the time charter. Therefore, there are many different kinds of off-hire clause in practice, and the issues are often about the interpretation of the off-hire clauses.

Before I introduce the types of off-hire clauses, I think it is important to notice another kind clause.

In the case *"The Fina Samco"*, there is one clause in the time charterer that *"If at any time whilst the vessel is on hire under this charter the vessel fails to comply with the requirements of clause 1.2(1) or 10 then hire shall be reduced to the extent necessary to indemnify charterers for such failure…."*

The boiler often has problems under the performance of the shipowner, the loading or discharging of the cargo is often interrupted. The court in this case, did not hold this vessel should be off-hire, they held that the hire should be reduced, even though that is also "preventing the full working of vessel". This kind of clause is not off-hire clause, but is one clause which relates to reduce the hire.

5.1 The Types of the off-hire clause

In practice, the off-hire clauses are often divided into two kind's clause: period loss of time clause and net loss of time clause. The period clause is often shown as *"the payment of hire shall cease until the vessel is again in an efficient state to resume her service."* However, the net loss of time clause is often stated in the time charter as *"that in the event of the loss of time from…"*

5.1.1 Period off-hire clause

A period off-hire clause is one which puts the vessel off-hire for the duration of the off-hire event without reference to its effect. This kind clause is clear that once the vessel resumes the efficient state, the charterer should pay the hire at once. The advantage of period loss of time clause is that either party does not count how long the time lost, but the defect of this clause is that if the vessel is in a partial efficient state, it is difficult to determine the actual loss of time.

5.1.2 Net off-hire clause

A net time clause requires the charterers to prove the happening and the duration of the off-hire event, and that time has been lost to him thereby. Therefore, under this kind of off-hire clause, the charterer is responsible for proving two parts. First, the charterer should prove the occurring of the off-hire events and the period of which lasts; second, he has to prove how long he suffered actually loss of time. In this type of the off-hire clauses, it is difficult that when the charterer should resume to pay the hire. It is different that the points held by the English courts and American courts.

1) English court holds that once the vessel resumes entirely efficient working state, the charterer should pay the hire. Hence, it can be concluded that the effect of the period loss of time off-hire clause and net loss of time off-hire clause is same when the vessel entirely loses the efficient working state in Great Britain. However, the net loss of time off-hire clause can give more benefits to the charterer in the partial inefficiency.
2) the view held by American courts is different, the court holds that the hire should be paid when the vessel resume efficient state and the disadvantaged effect given by the events listed in the off-hire clause is extinct at all. This point is supported by the clause 17 NYPE 1993 (New York Product Exchange Form 1993), that *"Should the vessel deviate or put back during a voyage, contrary to the orders or directions of the charterers, for any reason other than accident to the cargo or where permitted in lines 257 to 258 hereunder, the hire is to be suspended from the time of her deviating or putting back until she is again in the same or equidistant position from the destination and the voyage resumed therefrom"*.

In the case *"The Ira"*, the charter has words "in the event of loss of time from drydocking preventing the full working of the vessel the payment of hire shall cease for the time thereby lost".

Thereby, the drydocking can lead to the off-hire. In this case, after the vessel "Ira" discharged the cargo at Ravenna, the vessel was navigated to the Piraeus after the shipowner obtained the permission of the charterer. Before the repair work finished, the charterer arranged the vessel to load cargo at Novorosiysk. "Piraeus" is the middle port of ports "Ravenna" and "Novorossiysk", so there is slight deviation.
"It is obvious that in certain circumstances it is not possible to determine what loss

of time has occurred until the end of the off-hire event. If one asks the question at that stage in this case (and Mr. Lord submits that in fact here one could do it before the end of the off-hire event) that is to say as at Jan. 25, what loss of time as a result of the drydocking of this vessel have charterers suffered, there can only really, in my judgment, be one answer. They have not lost the time that it has taken for the vessel to sail from Ravenna to Piraeus, apart from the small amount of time involved in the deviation into that port for the purpose of drydocking".

5.2 From when full hire again becomes payable

Under a "period" off-hire clause it is clear that hire becomes payable again as soon as the ship becomes once more fully efficient. In the case *"Smailes v. Evans"*, a time charter of the Carisbrook provided that *"In the event of loss of time from ... damage preventing the working of the vessel for more than twenty-four running hours, the payment of hire shall cease until she be again in an efficient state to resume her service".*

The question of this case arose whether hire was payable from the completion of repairs on 18 October or only from the completion of reloading on 30 October. It was held that after completing repairs the ship was again in an efficient state and hire became payable.

Bailhache, J., said: *"It is quite true that there was time lost by the accident until 8:30 a.m., on October 30, and if the clause had said that hire should not be payable*

during 'all time lost in consequence of an accident' contention would, I think, have been right. But that is not the language used."

Under the "net loss of time" clause the charterers should logically be entitled, as was indicated by Bailhache, J., in the above case, to deduct any time lost in consequence of the event which put the ship off-hire, even after the ship again becomes fully efficient. For instance, the charterer is entitled to deduct any time lost by the ship in regaining the position she was in when the event occurred. But this point is not supported by the judgment of *"Vogemann v. Zanzibar"*.

In the case *"Vogemann v. Zanzibar"*, the off-hire clause in this contract stated that *"That in the event of loss of time from ... detention by average accidents to ship or cargo, ..."* The Zanzibar suffered an accident which obliged her to put back to Queenstown. The charterer argued that she remained off-hire until she once again reached the spot where the accident had happened, "time" having been "lost" up to that point. Phillimore J., said that the question whether hire was payable by the charterer during the time occupied by the ship in regaining the spot where the accident occurred turned on the meaning of "detention by average accidents to ship or cargo". He wants on saying: *"I think that the safest way of construing that clause is to regard it as one of exception or defeasance. By the clause certain days are deducted from those for which hire is to be paid, and it was, I think, the duty of the charterer to insert in the clause everything which he wished to have deducted. There is no provision in terms covering the time in question in this case, but the words I have read are relied on by the plaintiff in support of his contention. In my opinion the word 'detention' does not apply here. 'Detention' is not quite such a strong word as, for example, 'delay'. A vessel is detained when she is sent back to a port for repairs, and so long as she is kept there for the purpose of being repaired. But I do*

not think that a vessel can be said to be detained when, the repairs having been finished, she has made a fresh stat and is once more proceeding on her voyage."

In another case *"The Marika M"*, Parker, J. also considered that the decision of the Court of Appeal in *Vogemann v. Zanzibar* was authority for the wider principle and was binding on him. The facts in the case *"The Marika M"* were that the berth was occupied after the ship was repaired. The charterers contended that the period of off-hire continued beyond 27 July (when she was again in fully efficient state) until 6 August since this period was also time lost as a result of the ground. The owners denied that the ship was off-hire after she refloated and was again in full working order. In upholding the arbitrator's award in favour of the owners, Parker, J., emphasized the difficulty of assessing any consequential loss of time and the fact that the interpretation contended for by the owners appeared to have been accepted for many years.

In conclusion, it is obvious that the point held by English court is different from the position under American law that full hire becomes payable as soon as the vessel again becomes efficient. The hire should resume to be paid until the vessel is under full efficient. In addition, the full efficiency should depend on the service demanded by the charterer. However, it should come into mind that the standard under the period loss of time off-hire clause and net loss of time off-hire clause is different. That is to say the partial efficiency of the vessel can lead to different results of those two types off-hire clauses.

5.3 Partial inefficiency

The effects of partial inefficiency are different under the period loss of time clause and net loss of time class

5.3.1 Under period loss of time clause

Under the case *"Tynedale v. Angle-Soviet"*, it was held by the Court of Appeal that the full working of the ship was prevented by the partial inefficiency of the ship's discharging gear and that the ship was off-hire for the whole period of discharge.

Lord Roche said: *"The mast being damaged did not prevent or hinder her steaming, but it did hinder or prevent her discharging in the sense in which prevention was construed in the House of Lords in Hogarth v. miller – as preventing discharge or the working of the ship happening in accordance with the contract."*

So the effect of partial inefficiency is same as total inefficiency under the period loss of time clause, which states that the payment of hire shall cease until the vessel is again in an efficient state to resume her service. Because the clause does not allow the partial working of the vessel, partial efficiency of the vessel is also to lead to the complete off-hire.

5.3.2 Under net loss of time clause

The situation under net loss of time clause is analyzed by Lord Denning, M.R. in the case *"The H.R. Macmillan"*. He held that *"Taking that clause by itself, it would mean that, if one crane broke down, there would have to be an inquiry as to the time lost thereby. That would be a most difficult inquiry to undertake. For instance, if one broke down and the other two cranes were able to do, and did do, all the work that was required, there would be no 'time lost thereby'; and there would be no cessation of hire. But if there was work for three cranes, and there was some loss of time owing to the one crane breaking down, there would have to be an assessment of the amount of time lost. In that event, as the Judge pointed out, the question would have to be asked: 'How much earlier would the vessel have been away from her port of loading or discharge if three Munck cranes, instead of two, had been available throughout?' The Judge called that a 'net loss of time' clause"*.

That is to say, under the off-hire clause in the New York Produce form, which is a "net loss of time" clause, hire should be deductible in the case of partial inefficiency only if and to the extent that time is actually lost by reason of the partial inefficiency.

As a conclusion, the two different type off-hire clauses have each characteristic. The parties should be careful to choose the kind of off-hire clause to protect their rights. In addition, they should consider the details of the clause because it is also important to make sure when the charterer should resume paying the hire.

Chapter 6 Specific off-hire clauses

The purpose of most standard time charter is to make the range of the rights and obligations clear; however, the result may not be satisfied. Therefore, the parties attempt to rectify the clauses of the standard contract or deal with new contract. Sometimes that may lead to dispute. The contents of off-hire clauses differ under the common standard time charter such as NYPE' 46, NYPE' 93, BALTIME. In the following paragraphs, the essential contents and difference in the different off-hire clauses will be discussed.

6.1 New York Product Exchange Form 1946 (NYPE' 46)

The clause 15 under this standard time charter lists some off-hire events:

1. "deficiency of men or stores"

Under English law, the deficiency of men just relates to quantity, which does not include the unwillingness of the crew or inability to do the work. That means if the crew does not want to work or cannot work. It was held in the case of *"The Ilissos"*, that:

"Looking at the words as they stand, and endeavouring to give them a meaning which practical business men would give them, I think that "deficiency of men" means "deficiency of men "; it does not mean "deficiency of willingness in men to work. ...It was not even as if they were sick."

The deficiency of stores means the shipowner fails to provide enough fuel, water, and other material resource which is important to maintain the normal running of the ship. But this clause does not include the neglect and fault of the crew which leads to the charterer suffering the loss of time.

2. “fire”

The fire usually includes the event of catching fire, and attempts to extinguish the fire. In addition, the fire must have a close causal link with the loss of time.

3. “breakdown or damage to hull, machinery or equipment”

This cause includes all the damage or other problems of the hull and equipments, but the charterer must show this damage or problem directly prevents the normal and full working of the vessel and leads to the loss of time.

4. “grounding”

This aspect also demands it prevents the normal and efficient working of the vessel, and there is loss of time which is caused by grounding

5. “detention by average accidents to ship or cargo”

The average accidents do not include all the accidents, which must be caused by the average. “Average accidents” mean fortuitous events. That average accidents often include the collision and grounding and so on, further, these events make the

charterer suffers the loss of time when he uses the vessel. Then, the charterer is entitled to cease to pay the hire. However, it should be noticed that the shipowner can claim the exception clause as the negligence or faulty of navigating or managing the vessel, so the charterer must be based on this clause to reduce the loss.

6. “drydocking for the purpose of examination or painting bottom”

The purpose of drydocking is to maintain the vessel, therefore, there is no dispute on this point.

7. “by any other cause preventing the full working of the vessel”

The meaning of “full working” means that if the vessel is under the partial efficient state, the charterer can be entitled to off-hire.

The precondition of this clause is that the events must prevent the full working of the vessel, and this clause is bound by the ejusdem generis rule. Hence, the other cause must have same characteristics with the events listed in the clause. The characteristics can be easily concluded from analyzing the events listed in the clause that:

(1) all these events are internal events, which relate to the vessel itself;
(2) these events just relate to the physical condition.
(3) these events must happen accidentally, if these events are caused by complying with the order given by the charterer the inevitable results cannot be deemed to be “any other cause”.

6.2 New York Product Exchange Form 1993 (NYPE' 93)

Compared with NYPE' 46, NYPE' 93 makes some modification that some new events are inserted into the clause:

1. "default and/or strike of officers or crew"

This event includes default of the officers and crew working on board. Because the charterer is afraid the shipowner can escape the obligation from the exception clause, he can obtain the protection from this event of off-hire clause.

2. "detention by the arrest of the vessel"

But if the charterer, his employee, agents or independent contractor causes the arrest, it is not included.

3. "the detention caused by the inherent vice or reason of quality is not included"
4. "insert the word 'similar'"

This word enlarges the range of the ejusdem generis rule, but in practice, the word "whatsoever" is often inserted into the clause after the words "any other cause".

5. listing the off-hire event about the deviation

This aspect makes it clear that determining the period of the off-hire applies the equi-distance (again in the same or equidistance position).

6.3 BALTIME

1. dry docking or other necessary measures to maintain the efficiency of the vessel;
2. deficiency of men or owner's store;
3. breakdown of machinery;
4. damage to hull or other accident;
5. either hindering or preventing the working of the vessel and continuing for more than twenty-four consecutive hours.

6.4 Comparison between NYPE' 46, NYPE' 93 and BALTIME

Compared with the NYPE' 46, the off-hire clause under the BALTIME regulates less off-hire events, for instance, there are no fire, grounding, the detention by average accidents to ship or cargo. In addition, the ejusdem generis rule cannot be applied in the BALTIME contract, the charterer can obtain the off-hire only caused by the events listed in the clause. Therefore, the shipowner favors the BALTIME than NYPE.

1). the period of off-hire time. BALTIME allows a 24 hours allowance period and the ship is off-hire only if the off-hire events last more than twenty-four consecutive hours. But NYPE' 46 and 93 do not regulate this.

2). Clause 12 under the BALTIME regulates that the cleaning of boiler should be done in the period of carriage, the charterer should give the necessary time to the

shipowner. If the vessel stays more 48 hours, the hire is ceased to pay until the vessel is again in the ready state.

3). Clause B under the BALTIME states that

"In the event of the vessel being driven into port or to anchorage through stress of weather, trading to shallow harbours or to rivers or ports with bars or suffering an accident to her cargo, any detention of the vessel and/or expenses resulting from such detention to be for the charterers' account even if such detention and/or expenses, or the cause by reason of which either is incurred, be due to, or be contributed to by, the negligence of the owners' servants".

This clause is similar with the regulation of NYPE' 93 that inherent vice, quality or defect because the vessel does not work efficiently, the charterer cannot obtain off-hire. But there is no relation about this point.

4). NYPE' 46 applies the net loss of time off-hire clause, however, the BALTIME accepts the period loss of time off-hire clause.

Conclusion

After analyzing the off-hire clause, it seems to be clear that the off-hire clause is an allocation of the risk; this clause is a no fault provision, the charterer is entitled to cease to pay the hire which does not rely on the breach of the contract of the shipowner; the off-hire clause is an exception to the rule that the charterer should pay the hire continuously. In addition, the dissertation made an attempt to analyze the details of the general rules of the off-hire clause. At the bottom of the main body, the off-hire clause is divided into two types: net loss of time off-hire clause and period loss of time off-hire clause.

But it should be noticed that it is not easy to make a clear decision about the off-hire clause in practice. The interpretations of the off-hire clause are difficult to determine which one is finial. For example, the phrase “preventing the full working of the vessel” is difficult to interpret. Because the words “any other cause” lead to some difficulties such as the reasons should be divided into extraneous and intrinsic ones held by some judges. However, the new trend, inserting the word “whatsoever”, can bring on the new interpretation. For example, although the interpretation of “any other cause” has been argued for several years, Rix, J. stated the point that even though the vessel itself is in a full efficient state, the vessel can be off-hire in some situations when the word “whatsoever” is inserted into the clause. Therefore, the parties under the time charter should notice the wording of the off-hire clause. Because if the charterer makes a mistake to use the off-hire clause to cease to pay the hire, the result will be serious such as the shipowner may withdraw the ship from the use of the charterer.

Accordingly, it can be concluded that there are three necessary conditions should be satisfied if the charterer wants to apply the off-hire clause:

(1) the charterer suffer the loss of time;
(2) this loss of time is caused by the event listed in the off-hire clause;
(3) this cause prevents the full working of the vessel.

Another point which should be noticed is that the charter period is not extended by off-hire events and the charterers cannot add off-hire periods at the end of the charter period unless the charter says so expressly.

As it is held by Staughton, J in the case *"The Berge Sund"*, my point is that it is impossible to make a final decision about the principle about the wording and application of the off-hire clause. The charterer may suffer the serious result that he may lose the use of the vessel. Therefore, the parties should be careful to prepare the wording of the off-hire clause and to claim the loss of time.

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