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The Off Hire Clause; a Case of Any Other Cause?

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For Julius, Josephine, Kaula, Tindi and Kasyo Kamwetu. My family. My rock.

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-Mbenya Kamwetu

Summary

How an off hire clause is drafted determines how the risks will be redistributed between the shipowner and the charterer. This thesis aims to find out what the sweep up clause, “any other clause” entails, how it is interpreted and the effects of amending it to include the word, “whatsoever” with the use of case law.

A brief background of time charterparties and the freedom of contract have been laid as a backdrop to the thesis. The off hire clause and its principles have been discussed in detail and the various components that trigger off hire have been discussed and analyzed.

The thesis uncovers that when the sweep up phrase, “any other cause” is added to an off hire clause, it opens up the clause to include external causes that are associated with the ship or the crew. When the sweep up phrase is amended to include the magical word, “whatsoever”, the clause is opened up even further to include external causes that are extraneous to the vessel and the crew.

Abbreviations

BALTIME	The Baltic and International Maritime Conference Standard form of Time Charter.
BIMCO	The Baltic and International Maritime Council.
FRS	Förde Reederei Seetouristik.
NYPE	The New York Produce Exchange.
UNCTAD	United Nations Conference on Trade and Development.

1.0 Introduction

How a shipowner relates with its ship when the shipowner or someone acting on its behalf agrees to carry goods at sea for a fee or furnishes the ship for the carrying of goods in return for some money paid to it, is usually contained in an agreement known as a contract of affreightment. When this employment is for the whole ship for a given voyage or voyages or for a specific period of time then the contract of affreightment is contained in a charterparty.[1] Where it is between a shipper and a carrier it is found in the bill of lading.[2] Though the bill of lading and the charterparty mostly operate at the same time, and at times are in conflict, the bill of lading usually acts as a document of title and the charterparty operates as the primary document that stipulates the contractual relationship as between the owner and the charterer.[3] This paper will deal only with the charterparty.

As parties to a charterparty make their own stipulations in the contract, there is no convention law regarding charterparties, they fall in the territory of freedom of contract. The parties, the shipowner and the charterer both of whom have relatively equal bargaining power and a common goal of doing business, in essence make their own law and it is this law that is used to resolve disputes. This is probably one of the many reasons why attempts to make legislation on charterparties have failed. There was such an attempt by United Nations Conference on Trade and Development (UNCTAD) to make some regulations regarding charterparty clauses.[4] However the industry was not keen on accepting this. The industry is more comfortable, it seems, with using standard forms and guidelines issued by entities in the industry like BIMCO with the Baltime form 1939 that know and understand the business.

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[1]Stewart Boyd, (2008). Scrutton on Charterparties and Bills of Lading. 2nd Edition, (pp. 311-331) London. Para A3, p. 3.

[2]*Ibid* Para A1, p. 1.; Contracts of affreightment can also be in other documents such as like mates' receipts, freight contracts and other transportation documents.

[3] W.J Park, Incorporation of Charterparty Terms into Bill of Lading contracts- a Case of Rationalization (1986) 16 *Victoria U. Wellington Law Review* 177, pp. 177 and 178.

[4] See UNCTAD Secretariat, (1990) *Charter Parties, A comparative Analysis.* http://r0.unctad.org/ttl/docs-legal/Reports%20and%20Documents/Charter%20Parties-A%20Comparative%20Analysis.pdf <Accessed on 7th March, 2013>.

The various standard forms provide guidance on typical clauses that should be included in the charterparty and this thesis will focus on those that relate to time charterparties and in particular; NYPE 1946, NYPE 1993 and the Baltime 1939 as revised in 2001. They are by no means mandatory, parties are free to use or amend the forms as need be. This is usually done through the addition of rider clauses. It is interesting to note that even with the amendments, parties rarely deviate from the standard forms; they are highly recognized and widely used in the industry. They are terms of art that have been well established and understood within the industry and this is how they are often interpreted. As they are commercial documents, the terms used must be understood in a business and practical sense.[5] The standard forms contribute to jurisprudence in this area and the industry is able to bypass bureaucracy and treaty law with the use of the standard forms. Case law will be looked at to see how courts interpret the "off hire" clause.

1.1 Purpose

This thesis investigates and analyses what the sweeping phrase "any other cause" is, how it is interpreted and what it entails. Does the addition of this phrase to the off hire clause open up more avenues or causes to be off hire causes or events? Does the situation differ and in what way when the word "whatsoever" is added to the phrase? This thesis attempts to analyse whether this opens up issues regarding the construction of the phrase and the off hire clause in general.

[5] *Royal Greek Government* v *Minister of Transport* [1949] 82 Ll. L. Rep, 196 at p. 199.

1.2 Scope and Delimitation

As the issue of off hire has the potential to cover a wide range of issues relating to time charterparties, this thesis will focus only on the off hire clause. A brief overview of freedom of contract, time charterparties and the hire clause has been given for purposes of establishing the foundation for discussion of the off hire clause. Matters relating to the off hire clause are also wide in scope, however this will focus on general principles and components that trigger off hire, all leading to the discussion of the sweeping up clauses; "any other cause" and "any other cause whatsoever". For purposes of this thesis, the standard forms that deal with time charters, that will be used are Baltime 1939 as revised in 2001, NYPE 1946 and NYPE 1993 as they are widely used and the first two have the stipulation of "any other cause" making them necessary for the discussion in this thesis.

Most legal essays have a section for comparative law as it aids in further understanding and analysis of the topic. However, this thesis will only discuss the common law of England. This is because off hire clauses and the sweeping up phrases have been dealt with extensively in this system and the case law is interesting, bringing out general principles in this field. Also in this field there is no treaty law and therefore discussion of case law gives it a wider perspective. It is prudent to note that there will be some highlighted American cases but they are only used for the purpose of explaining and clarifying some concepts. Case law will be heavily relied for discussion and analysis of the off hire clause.

1.3 Methodology

This thesis will employ the dogmatic methodology as it is sets out to interpret legal norms related to the off hire clause and in particular, the sweep up phrase, "any other cause". The sources of law used are primarily relevant clauses in standard form charterparties and English law cases interpretating those clauses. The methodology thus used depicts the case law jurisprudence in this area of commercial maritime law.

1.4 Structure

The realm of the off hire clause has already been introduced with a look at charterparties and freedom of contract. The second chapter begins with a brief background on time charterparties and an introduction to hire. This chapter will be descriptive in nature and will mainly deal with off hire generally, focusing on the general principles of the off hire clause with a view to providing a foundation for the further understanding of off hire clauses. The third chapter will include a discussion and an analysis on how off hire is triggered. The components of off hire will be discussed here. As these components relate to the sweeping up clause "any other cause" they will be dealt with in depth. Typical off hire clauses as provided by the standard forms and those used in practice will be highlighted. The fourth chapter will deal exclusively with the sweep up clause "any other cause". The thesis will look at reasons for having the sweep up clause, its construction and what it entails. The thesis will go further and discuss the effects of adding the word "whatsoever" to the sweep up clause.

2.0 Off Hire

2.1 Background

2.1.1 Time Charters

There are various forms of charterparties but the two main ones are the voyage charter and the time charter. The voyage charter involves the ship being contracted out for particular voyages. A time charterparty, on the other hand, is a contract between a shipowner and the charterer who hires the ship for a specific period of time. The shipowner at all times retains possession, management, and control of his ship.[6] The charterer therefore retains no property in the ship whatsoever while it is being chartered.[7] Only matters relating to the time charter will be dealt with.

There is a clear dissection of operational responsibility between the owner and the charterer.[8] The owner retains responsibility for navigation and maintenance of the ship while the master is under the direct orders and direction of the charterer. The shipowner handles charges relating to the officers and the crew comprising the different departments of the vessel like the cabin, deck, engine room etc., insurance of the vessel and some repairs.[9] The charterer is responsible for all fuel,[10] water for the boilers, port, pilotage and towage charges and is generally responsible for cargo stowage and stevedoring costs while loading and offloading.[11]

[6] Braden Vandeventer, 'Analysis of Basic Provisions of Voyage and Time Charter Parties'. (1974-1975). 49 *Tulane law Review* 806, p. 806.
[7] Charles Trowbridge, 'The History, Development and Characteristics of the Charter Concept' in Admiralty Law Institute: Symposium on Charter Parties. (1974-1975). 49 *Tulane Law Review* 743, p. 749.
[8] *Ibid*, p. 806.
[9] *Ibid.*
[10] This does not include galley fuel which is the fuel used in relation to the kitchen or an area with kitchen facilities.
[11] Vandeventer, s*upra* note 6, p. 807.

Time chartered vessels are chartered either for a stated time period or for one or more consecutive voyages between particular geographical areas.[12] The compensation for use of the ship in a time charterparty, the charter hire, is calculated per ton deadweight capacity and is always based upon the deadweight capacity at the vessel's summer loadline.[13]

Chartering vessels is a business and issues of time and delay are important.[14] The allocation and distribution of risk and loss is therefore crucial. The shipowner is responsible for providing a ship that fits the description of what the charterer wants and risk and/or loss related to that is to be borne by the shipowner. Risks relating to matters beyond the control of the shipowner that fall within the realm of the charterer's responsibilities are to be borne by the charterer.

2.1.2 Hire

The basic form of compensation in a time charterparty is hire.[15] The hire clause declares the payment due from the charterer for the use of the vessel. It is either calculated at a daily rate and a pro-rata adjustment is done if it is for part of the day[16] or, hire is charged at the rate of a certain amount per ton on the deadweight capacity of the vessel.[17] Parties can choose either of these methods for calculation of hire.[18]

Payment is to be made in cash,[19] monthly in advance.[20] This does not imply hard cold cash; the payments may be made by a commercially recognized method of transferring funds which

[12] Norman Lopez, (1992) Bes Chartering and Shipping Terms. 11 Ed., Barker & Howard ltd, London, p. 152.
[13] *Ibid*, p. 153.
[14] Vandeventer, *supra* note 6, p. 825.
[15] Francis O'Brien, 'Freight and Charter Hire' (1974-1975) 49 *Tulane Law Review* 956, p. 956.
[16] Qingdao Ocean Shipping Mariners College, *Practice &Law of Chartering Shipping*, (2010), (pp.184-189), p. 184.
[17] Vandeventer, *supra* note 6, p. 826.
[18] Clause 10 of the NYPE form 93 includes both methods so parties can choose.
[19] Clause 11 of NYPE 1993 form and cl. 6 of Baltime 1939 as revised in 2001.
[20] Baltime 1939 as revised in 2001, Clause 6, states "per 30 days" and the NYPE 1993, clause 11 provides for semi-monthly "15 days "

results in giving the transferee the unconditional right to the immediate use of the funds.[21] If the due date falls on a weekend or a bank holiday then the hire must be paid on the last banking day before the due date. Prompt payment of hire is taken seriously. Probably as a not so friendly nudge to ensure the charterers do this, time charterparties give the owner an express right to withdraw the ship, *i.e.* to terminate the charterparty if the hire is not paid.[22] The shipowner may also have a lien upon the cargo for overdue hire,[23] which rarely proves useful as the charterer is rarely the owner of the goods he is carrying on board. As a result, it is now a more established rule that hire is paid in advance by the charterer.[24]

Time charterers have an absolute liability to pay hire for every minute that the ship is within its disposal from her delivery until redelivery.[25] Charter parties offer protection to the charterer against this liability through the anti-technicality clauses, off hire clause and/or the charterer's limited right to make deductions from hire. This absolute liability to pay can also be suspended by a breach by the shipowner or frustration of the charter.[26] Off hire comes in to ensure that the charterer is not paying hire when the vessel is not fully working or when he is not getting the services as stipulated in the charterparty.

[21] O'Brien, *supra* note 15, p. 962.
[22] Clause 6, Baltime 1939 as revised 2001 and NYPE 1993 Clause 11.
[23] *Wehner* v. *Dene S.S. Co.,* E[1905] 2 K.B. 92. ; *Supra* note 6, p. 826; *Supra* note 12, p. 154.
[24] Lars Gorton, 'Breach and Remedies in Chartering in the Swedish Maritime Code of 1994 Chartering and the Law of Obligations – Some Aspects from a Swedish Angle' (1999) 38 *Scandinavian Studies in Law.* 472, p. 472.
[25] *Supra* note 5, p. 196.
[26] Vandeventer, *supra* note 6, p. 826.

2.2 Off hire in general

The concept of off hire is captured well in the following quote,

> [T]he object is clear. The owners provide the ship and the crew to work her. So long as these 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.[27]

When the ship is delivered, her condition has to be "in every way fitted" and operational for the employment that the charterer has in mind.[28] Hire has to be continuously paid for the use and the hire of the vessel by the charterer. If for specifically agreed reasons, the charterer is prevented from making full use of the vessel, either in whole or in part, as a result of some deficiency of the vessel, its equipment or the crew,[29] then it is not responsible to pay hire for that period when the ship is not at its full disposal and there is loss of time for the charterer. This period is known as off hire.[30] Most, if not all time charters provide for off hire.[31]

The off hire clause is only a qualification for the payment of hire where there is delay caused by an off hire event.[32] It does not affect the rest of the charterparty unless there is an express provision to the contrary.[33]Compensation in off hire is agreed beforehand and is based on the charter hire. Even if the charterer can prove its loss is higher than the charter hire, it is not

[27] Kerr, J., on page 382, *The Mareva* A.S. [1977] 1 Lloyd's Rep 368; However not all circumstances will come under off hire. How off hire is triggered will be discussed in the coming chapters.
[28] *Supra* note 12, p. 153.
[29] *The Yaye Maru,* 274 F. 195 (4thCir.), *cert. denied,* 257 U.S. 638 (1921).
[30] Lopez, *supra* note 12, p. 110.
[31] O'Brien, *supra* note 15, p. 966.
[32] Vandeventer, *supra* note 6, p. 827.
[33] Rhidian Thomas , 'Time charterparty hire: issues relating to contractual remedies for default and off hire clauses' in Rhidian Thomas (Ed), *Legal Issues Relating to Time Charterparties,* (2008) London. Chapter 7, Para 7.71 p. 135.

entitled to more than what was agreed beforehand, however, if it is less, then compensation is based on charter hire.[34]

A typical off hire clause in a time charterparty provides as follows:

> "In the event of drydocking or other necessary measures to maintain the efficiency of the Vessel, deficiency of men or Owners' stores, breakdown of machinery, damage to hull or other accident, either hindering or preventing the working of the vessel and continuing for more than 24 consecutive hours, no hire shall be paid in respect of any time lost thereby during the period in which the vessel is unable to perform the service immediately required. Any hire paid in advance shall be adjusted accordingly."[35]

While this principle is straightforward, its application is hard in practice.[36] The wording of the off hire clause is varied as parties can have the clause tailor made[37] and this leads to disputes on its applicability. The period of off hire depends on the language used. It can be specified that hire ceases from the occurrence of the stipulated event until occurrence of a second event, such as the vessel's regaining an efficient state.[38] Others require the off-hire period to be determined by the net time lost.[39]

[34] Lars Gorton, *et al*, *Shipbroking and Chartering Practice*, 7th Edition, (2009) (pp.272-283) London, p. 279.
[35] Baltime 1939 as revised in 2001, Clause 11.
[36] Michael Cohen, 'Confusion in the Drafting and Application of Off –Hire Clauses'(1977-1978) 9 *Journal of Maritime Law &Commerce*,343, p. 343.
[37] *Hyundai Merchant Marine Co Ltd* v. *Furness Withy (Australia) Pty (The Doric Pride)* [2006] 2 Lloyd's Rep 175;
[38] *Poseidon Schiffahrt GmbH v Nomadic Navigation Co Ltd (The Trade Nomad)* [1998] 1 Lloyd's Rep 57 at p. 65; [1999] 1 Lloyd's Rep 723 (CA).
[39] For example, cl. 21(c) of Shelltime 4. ; *Supra* note 6, p. 827.

2.3 Terminologies

2.3.1 Terms similar to off hire

There is other terminology used in relation to and similar to off hire.[40] "Suspension of hire"[41] is one such term that deals with qualification of payment of hire. Other terms that are used are "breakdown",[42] and "cesser of hire".[43] There are also other provisions relating to "reduction" or "adjustment" of hire found in modern time charters.[44] It is noteworthy that the damages payable for suspension of hire are also known as off hire.[45]

2.3.2 On/Off-hire clause

The off hire clause together with other clauses sprinkled in charter parties specify the circumstances which cause the ship to be off-hire and payment of hire to be reduced. These should not be confused with "On/Off hire" clause which deals with surveys to determine things like quantity of bunkers or if there is any damage to the ship on delivery and redelivery of the ship. [46] In this case the term "off hire" refers to the point in time when the vessels hire permanently ceases under the time charter.[47]

[40] Off hire is used in the NYPE 1993 clause 17.
[41] Suspension of Hire is used in the Baltime 1939(as revised in 2001) Clause 11; see also Lopez N.J., *Bes Chartering and Shipping Terms*, 11ed., Barker & Howard ltd, London, 1992, p.111.
[42] *The Yaye Maru*, 274 F. 195 (4thCir.), *cert. denied,* 257 U.S. 638 (1921).
[43] O'Brien, s*upra* note 15, p. 966.
[44] Cohen, s*upra* note 36, p. *347.*
[45] *Ibid*, p. 343.
[46] See NYPE 1993 Clause 3.
[47] Lopez, *supra* note 12, p. 111.

2.4 Justification for off hire clauses

The core transaction in a time charterparty is that the shipowner employs the ship to earn hire and the charterer pays hire to utilize the ship efficiently. The clash with the obligation of continued payment of hire comes in when the ship is not working properly or is not efficient and how the parties will apportion the risks.[48] Under a time charter, it is the charterer who bears the risk of delay. However where there is delay caused by an off hire event, the off hire clause redistributes the risk and the risk from the loss of time resulting from that is borne by the shipowner as the off hire event falls within his responsibility.[49] This is so that the charterer does not pay for periods when the ship is not performing as expected.[50] It is a way of protecting the charterer in that he gets what he pays for. Off hire clauses bring clarity to the charterer as it stipulates the exact causes that trigger off hire that the charterer can rely on to bring himself within the off hire clause and brings predictability to the shipowner as he knows what amount of hire to expect every month and the precise instances when off hire is to be deducted.

2.5 General Principles of Off Hire

> Off Hire
>
> In the event of loss of time from deficiency and/or strike of officers or crew, or deficiency of stores, fire, breakdown of, or damages to hull, machinery or equipment, grounding, detention by the arrest of the Vessel, (unless such arrest is caused by events for which the Charterers, their servants, agents or subcontractors are responsible), or detention by average accidents to the Vessel or cargo unless resulting from inherent vice, quality or defect of the cargo, drydocking for the purpose of examination or painting bottom, or by any other similar cause preventing the full working of the Vessel, the payment of hire and overtime, if any, shall cease for the time thereby lost. Should the Vessel deviate or put back

[48] Zheng Xia, 'Measures Would be Taken by the Courts in Deciding whether to Trigger the Off-hire Clause' by (2009) Vol.3 No.1 *Management Science and Engineering*, 60-69, http://50.22.92.12/index.php/mse/article/view/j.mse.1913035X20080301.008/897 <Accessed on 7 February, 2013> p. 60.
[49] *Supra* note 33, p. 141.
[50] James Gould, 'Chartering of offshore Supply Vessels in the Canadian Sphere- Some Legal Implications' (1984) 22 *Alberta Law Review* 126, p. 128.

> 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 position from the destination and the voyage resumed therefrom. All bunkers used by the Vessel while off hire shall be for the Owners' account. In the event of the Vessel being driven into port or to anchorage through stress of weather, trading to shallow harbors or to rivers or ports with bars, any detention of the Vessel and/or expenses resulting from such detention shall be for the Charterers account. 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 bunkers consumed in consequence thereof, and all extra proven expenses may be deducted from the hire.[51]

The above, is a sample of an off hire clause. Off hire clauses have two provisions that qualify the charterer's obligation to pay hire. The first deals with interruptions to the charter service and the other deals with deduction from hire.[52] For purposes of understanding the principles and the components of off hire, this thesis will deal with the first part of interruption to the charter service. Deduction of hire will only be highlighted but not dealt with in depth.

There are some principles that must be borne in mind when dealing with all issues of off hire.

[51] NYPE 93 cl. 17.
[52] Terence Coughlin, *et.al*, (2008) Time Charters, 6 Ed, (pp.441-471). p. 441, para 25.1.

a) Charterer has the burden of proof

The charterer has an obligation to continuously pay hire and bears the risk of delay[53] unless it can prove that the off hire is operational in that particular situation.[54] Therefore, the burden of proof squarely falls on the charterer. The cardinal rule is that the charterer will pay hire for the use of the ship unless he can bring himself clearly within the exceptions.[55]

b) Off hire operates independent of any breach of contract by the owners.

The off hire clause operates independently of fault or breach on the part of the owners. The objective of an off hire clause being to relieve the charterer of the obligation to pay hire when he has no use of the ship, fault attributable to the owners is not required, instead the emphasis is on the allocation of risk.[56] It was held in *The Aquacharm*[57] by Lord Denning M.R., that there was no inquiry needed as to whose fault caused the delay in application of the off hire clause.

Off hire operates on a self help basis.[58] Other remedies may be pursued by the charterer if the off hire event is due to shipowner's fault or breach of charterparty like claiming for damages or terminating the contract. However, if the off hire event is caused by a charterer, then he cannot benefit from the off hire even if it is caused by an off hire event.[59]

[53] Rix, L.J., in *supra* note 37, p. 179.
[54] *The Berge Sund*, [1993] 2 Lloyd's Rep.453, p. 463.
[55] Bucknill, L.J., in s*upra* note 5, p 199.; Coughlin, *supra* note 52, p. 441 para 25.4.
[56] *Supra* note 54, p. 463 (per Steyn J). ; John Weale, 'The NYPE Off-Hire Clause and Third Party Intervention: Can an Efficient Vessel be Placed Off-Hire?' Vol. 33, No. 2, April, 2002 *Journal of Maritime Law & Commerce*, 137,p. 138 footnote 26.
[57]*The Aquacharm*, [1982] 1 Lloyd's Rep.7 at p. 9.
[58] *The Jalagouri* [2000] 1 Lloyd's Rep515, p.520.
[59]*Ibid*; Thomas, *supra* note, 33,para 7.76 p. 137;Gorton, *supra* note 34, p. 279.

Not all off hire events are a breach of contract and the off hire clause may lead to a different effect or consequence as compared to a claim for damages for breach of contract. This was explained by Staughton, J. in the following words,

> But the charterers point out that they are not obliged to claim damages; they can instead bring a claim under..., 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 [the off-hire clause] leads to a different answer than would ensue in the case of a claim for damages for breach of contract.[60]

The nature of an off hire is allocation and redistribution of risk and not damages related to breach.[61] In the *Royal Greek Government v. Minister of Transport* case,[62] it was pointed out that the charterer "...must bring himself clearly within the exceptions." Therefore it is not necessarily a fault of the shipowner that triggers the off-hire clause. Off hire clause is triggered by events or conditions regardless of whether the causes arose from owner's negligence or other fault. It is a 'no-fault' provision.[63]

c) Exemption nature of off hire

The nature of an off hire clause is that of an exemption. The charterer exempts himself from paying hire and is usually then construed narrowly against him as it is for his benefit. The

[60] Staughton, J., in *Ocean Glory Compania Naviera S.A.* v. *A/S P.V. Christensen (The loanna*), [1985] 2 Lloyd's Rep. 164 at p. 167.
[61] Zheng Xia, *supra* note 48, p. 61.
[62] *Supra* note 5, p.196.
[63] Cohen, *supra* note 36, p. 343.

general rule is that if there is doubt as to construction of any term in a contract, it should be construed strictly against the party in whose favour it was made.[64]

> The cardinal rule, if I may call it such, in interpreting such a charter-party as this, is that the charterer will pay hire for the ship unless he can bring himself within the exceptions. I think he must bring himself clearly within the exceptions. If there is a doubt as to what the words mean, then I think those words must be read in favour of the owners because the charterer is attempting to cut down the owner's right to hire. [65]

2.6 Deductions from hire

Deduction of hire is a concept which is very beneficial to the charterer and its cash flow that allows the charterer to deduct claims from hire instead of paying the hire in full and seeking to recover the off hire from the shipowner. This is also very important for the cash flow of the charterer. This also applies to advances for the ship's disbursements made by the charterer on behalf of the shipowner.[66] Clause 11(d) of the NYPE 1993 provides for cash advances for the ordinary disbursements at the port issued by the charterer to be deducted from the hire.

However, this right of deduction of hire is not a given. Wrongful deduction of hire can entitle the shipowner to withdraw the ship. For a charterer to make deduction of hire there must be an express right to do so or an equitable right of set off. An equitable right of set off is recognized by English law where there is no express provision for deduction of off hire.[67] If there are no such provisions, then the charterer must pursue the claim personally against the shipowner. Whichever the case might be, express right or equitable set off, deduction of hire must be a reasonable assessment made in good faith.[68] Charterer may be entitled to make deductions of

[64]Weale, *supra* note 56, p. 138 footnote 25.
[65] As per Bucknill J., *supra* note 5, p. 199.
[66]See line 66 NYPE 1946.
[67] See *Federal Commerce and Navigation Ltd v Molena Alpha Inc (The Nanfri, Benfri and Lorfri)* [1978] 2 Lloyd's Rep 132.
[68] *Ibid.*

hire despite the absence of breach of contract or negligence on the part of the owner. If the owner is in breach or is negligent, then the charterer may be entitled to a choice of damages or off hire or both.[69] Deduction of hire cannot be made of a future event regardless of how certain it may seem that the ship will go off hire. However if the hire had already been paid in advance, then it can be recovered for lack of consideration.[70] The payment of hire is absolute and off hire comes in as a way of protecting the charterer from making payments even when the vessel is being prevented from working. The concept of off hire is not as clear cut as it might be. The next chapter will deal with triggering off hire and will look at various principles of off hire and the components of off hire that will shed more light on the off hire clause.

[69] Gorton, *et al*, *supra* note 34, p. 279.
[70] Boyd, *supra* note 1, p. 324.

3.0 TRIGGERING OFF HIRE

3.1 Samples of typical off hire clauses

3.1.1 Baltime 1939 (As revised in 2001) cl. 11:

> Suspension of Hire etc
> (A) In the event of drydocking or other necessary measures to maintain the efficiency of the vessel, deficiency of men or Owners' stores, breakdown of machinery, damage to hull or other accident, either hindering or preventing the working of the vessel and continuing for more than twenty four consecutive hours, no hire shall be paid in respect of any time lost thereby during the period in which the vessel is unable to perform the service immediately required. Any hire paid in advance shall be adjusted accordingly.
> (B) 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 shall be for the Charters' 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.

3.1.2 NYPE 1946 cl. 15:

> 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 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 all extra expenses shall be deducted from hire.

3.1.3 NYPE 93 cl. 17:

Off Hire
In the event of loss of time from deficiency and/or strike of officers or crew, or deficiency of stores, fire, breakdown of, or damages to hull, machinery or equipment, grounding, detention by the arrest of the Vessel, (unless such arrest is caused by events for which the Charterers, their servants, agents or subcontractors are responsible), or detention by average accidents to the Vessel or cargo unless resulting from inherent vice, quality or defect of the cargo, drydocking for the purpose of examination or painting bottom, or by any other similar cause preventing the full working of the Vessel, the payment of hire and overtime, if any, shall cease for the time thereby lost. 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 position from the destination and the voyage resumed therefrom. All bunkers used by the Vessel while off hire shall be for the Owners' account. In the event of the Vessel being driven into port or to anchorage through stress of weather, trading to shallow harbors or to rivers or ports with bars, any detention of the Vessel and/or expenses resulting from such detention shall be for the Charterers account. 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 bunkers consumed in consequence thereof, and all extra proven expenses may be deducted from the hire.

3.1.4 Charterparty between Shipowner ABC and Charterer XYZ [71]

"Clause 35 Off-Hire
35.1 The Vessel shall be off-hire for the time lost on each and every occasion that there is a loss of time arising out of or in connection with the Vessel being unable to comply with Charterers' instructions (whether by way of interruption or reduction in the Vessel's services, or in any other manner) on account of:
35.1.1 any damage, defect, breakdown, deficiency of or accident to the Vessel's hull, machinery, equipment or cargo handling facilities or maintenance thereto; or

[71] Identities of the parties have been altered for purpose of maintaining secrecy and confidentiality.

35.1.2 any default and/or deficiency of the Master, officers or crew, including the failure or refusal or inability of the Master, officers and/or crew to perform the services required; or
35.1.3 any other cause preventing the full working of the Vessel.
Bunkers consumed and port costs or other expenses incurred during off-hire period shall be owners' account.
35.2 If the Vessel deviates, unless ordered to do so by Charterers, it shall be off-hire from the commencement of such deviation until the Vessel is again ready to resume its service from a position not less favourable to Charterers than that at which the deviation commenced. For the purposes of this Clause the term deviation shall include stopping, reducing speed, putting back or putting into port or place other than that to which it is bound under the instructions of Charterers for any reason whatsoever, including for maintenance, dry-docking, taking on stores or fresh water, but shall exclude deviations made to save life or property. Should the Vessel deviate to avoid bad weather or be driven into port or anchorage by stress of weather, the Vessel shall remain on hire and all port costs thereby incurred and bunkers consumed shall be for Charterers account. Any service given or distance made good by the Vessel while off-hire shall be taken into account in assessing the amount to be deducted from hire.
35.3 Any time during which the Vessel is off-hire under this Charter may be added, at Charterer' option, to the Charter Period. Such option shall be declared in writing not less than one month before the expected date of redelivery, or promptly if such event occurs less than one month before the expiry of the Charter period. If Charterers exercise their option to extend the Charter Period pursuant to this Clause, the Charter Period shall be deemed to include such extension and hire shall be payable at the rate(s) which would have been payable but for the relevant off-hire event.
35.4 If the Vessel is off-hire for more than 10 consecutive days and/or more than 20 cumulated days under this charter the Charterers have the right to terminate the Timecharter."

There are several events that need to take place in order for off hire to be triggered. To bring themselves under off hire, the charterer must show that there was prevention of the full working of the vessel, the prevention was caused by one of the causes or risks listed, also known as off hire events and that there was a loss of time.[72] But before considering these components, the presence or absence of the threshold rule must be looked into.

[72]Coughlin, *supra* note 52, para 25.6 p. 442.

3.2 Threshold rule

The threshold rule is a provision in the off hire clause that stipulates that the hindrance must continue for a number of consecutive hours or days. It is a *de minimis* condition.[73] For example, Baltime 1939 form, Clause 11. Here it is the hindrance and not the loss of time that must continue for a number of consecutive hours. For example, if vessel travels at half speed for 30 hours, a threshold of 24 hours does not prevent off hire even though the time lost is 15 hours. This particular clause for Baltime works as a threshold and not a deduction. So if the ship stops because of an off hire event for 25 hours, it shall be off hire for 25 hours and not 25 less 24 hours.[74] As it is the hindrance that should last for a number of consecutive hours and not the loss of time, the charterer bears quite a risk. It is argued and the author agrees that this threshold rule is not justified as the charterer is then obligated to pay for periods when the vessel is not in use due to an off hire event or reason on the owners' side.[75] If the threshold rule is present and the hindrance has reached or exceeded the stipulated time or if the threshold rule is absent, then the charterer can check if the following components have been fulfilled so as to bring itself under off hire.

3.3 Preventing the full working of the vessel

The question of whether a vessel has been prevented from fully working is an important one.

> It has therefore been said that the first question to be answered in any dispute under the clause is whether the full working of the vessel has been prevented; for if it has not, there is no need to go on to ask whether the vessel has suffered from the operation of any named cause...[76]

[73] Thomas, *supra* note 33, p. 136.
[74] Gorton, *supra* note 34, p. 280.
[75] *Ibid* p. 281.
[76] Rix, J., in *The Laconian Confidence* [1997]1 Lloyd's Rep. 139 at p. 141; See also, *The Aquacharm* [1982]1 Lloyd's Rep 7, at p. 9.

As the clause mostly appears "or any other cause preventing the full working of the vessel",[77] it was assumed that preventing the full working of the vessel was only a qualification for the sweep up clause "any other cause". However, the provision preventing the full working of the vessel also qualifies the causes listed in the off hire clause.[78]

> The word 'other' in the phrase 'or any other cause preventing the full working of the vessel ' in my view shows that various events referred to in the foregoing provisions were also intended to take effect if the full working of the vessel in the sense just described was thereby prevented.[79]

This was also cited in *The Laconian Confidence* by Rix J, who stated, "It is established that the phrase 'preventing the full working of the vessel' qualifies not only the phrase 'any other cause' but also all the named causes." [80] Since the question of preventing the full working of the vessel is of paramount importance, what then is the meaning of full working vessel?

3.3.1 Meaning of "the full working vessel"

The main point with the phrase "full working of the vessel" is when a vessel is prevented from performing the next operation that the charterer requires of her, the vessel is deemed to be prevented from working.

> ....[the ship] should be efficient to do what she was required to do when she was called upon to do it; and accordingly, at each period, if what was required of her was to lie at anchor, ...[and] if she was efficient to do it at that time she would

[77] See for example NYPE 1946 and the Charterparty Between Shipowner ABC and Charterer XYZ, Off Hire Clause 35, (3.14 above)
[78] Weale, *supra* note 56, p. 140 footnote 29 ; Coughlin, *supra* note 52, para 25.7 p. 442.
[79] Kerr, J., in *The Mareva A.S* [1977] 1 Lloyd's Rep. 368, at p. 382.
[80] Supra note 76, p. 141; Weale, *supra* note 56, p. 140 footnote 29.

> then become in the language of the contract,... 'efficient' reading it with the other words, 'for the working of the vessel'.[81]

A vessel must be fit to do what is required of her next, by the charterer. There are general principles that have been formed over time that should be borne in mind when determining if the full working of the vessel has been prevented.

a) It is what the charterer requires of the ship as necessary and not what the charterer expects that determines whether a ship was prevented from working. In *The Berge Sund*,[82] the tanks needed more cleaning at the port as it had not been done properly during the ballast voyage. The question was whether the ship was off hire for not being efficient. The Court of Appeal held per Staughton L.J., as follows;

> In my opinion, the critical question is, what was the service required of the vessel on Dec. 20, 1982? What were the charterer's orders? They were not to load cargo; as I have said, that was the last thing that the charterers would have ordered, since the copper strip test had been failed. The orders were, in part expressly and at all relevant times by implication, to carry our further cleaning. That was the service required, and the vessel was fully fit to carry it out.[83]

This seems harsh for the charterer as what is required of the ship as necessary could be as a result of an off hire event like deficiency of men as was the case above. The crew did not clean the tanks properly and therefore had to do them again but the vessel will not be off hire as the full working of the ship was not prevented. The charterer in this case suffers consequences or risk that should, in the author's opinion, be of the shipowner as had the tanks been cleaned properly by the crew then the charterer would not be in the position in which it found itself.

[81] In *The Berge Sund* [1993] 2 Lloyd's Rep 453 (C.A.), Staughton, L.J., at p. 459 where he quoted Lord Halsbury, L.C in *Hogarth* v *Miller* [1891] A.C 48 (H.L) at pp. 56 and 57.
[82] *Supra* note 54, p. 453.
[83] *Ibid* p.460; See discussion in Coughlin, *supra* note 52, para 25.11 p. 443.

b) A ship is prevented from working if she has to do something that is not in the ordinary way an activity required by a time charterer *e.g.* repairs on a broken engine.[84] The justification for this is that whatever needs to be done falls under the responsibility of the shipowner and therefore the charterer should not pay hire.

c) Full working of a ship may be prevented by legal or administrative action which prevents her from operating normally. It was held in *The Laconian Confidence* that,

> ... therefore, the qualifying phrase 'preventing the full working of the vessel' does not require the vessel to be inefficient in herself. A vessel's working may be prevented by legal as well as physical means, and by outside as well as internal causes. [85]

d) When a ship is performing an operation "in the ordinary way an activity required by a time charterer"[86] then it is not prevented from working. In *The Aquacharm*[87] where the ship was delayed for unloading cargo because the master had loaded it above the limit for passing in a fresh water lake. The charterers claimed off hire but it was held that she was not. The vessel was still working fully; it was just delayed by the need to unload part of the cargo. The situation arises as a result of the charterer's decisions and he should be therefore the one that bears the risk.

e) A ship is not prevented from working in circumstances where there is no impediment to the normal physical or legal operation of the ship but circumstances may exist where it makes the voyage impossible or more time consuming. In *The Mareva A/S*,[88] delay was caused during discharge by wet damaged cargo but it was held that the ship was fully capable of performing

[84] Coughlin, *supra* note 52, para 25.13 p. 444.
[85] Per Rix, J., in *Supra* note 57, p. 150; Coughlin, *supra* note 52, Para 25.15 p. 444.
[86] Staughton, L.J., in *supra* note 54, p. 461.
[87] *Supra* note 57, p. 9; Coughlin, *supra* note 52, para 25.11 p. 444.
[88] *Supra* note 27, p. 368; Coughlin, *supra* note 52, para 25.14 p. 444.

every service required of her and in particular that of discharging cargo. It was held that the ship was not prevented from working and was therefore not off hire.

There have been various interpretations of the meaning of the full working of the vessel. There are two main approaches; the judicial gloss approach and the ordinary meaning approach.

3.3.2 Judicial Gloss Approach

In this approach the full working of the vessel is with regard to the ship herself as opposed to external causes.[89] The ship is prevented from working only if it relates to the ship being internally inefficient. Even where the source of the deficiency is physical or legal and may be connected to the vessel as a physical entity or in relation to ownership, quality, character and history, it does not count as preventing the full working of the vessel.[90] This is a very restrictive approach.[91] Full working of the vessel is only prevented where the source is internal and not when the source is external or extraneous of the ship and therefore even if the ship is efficient but cannot provide the services required of her because of an external cause, she cannot go off hire. This approach leads to the interpretation that "any other cause" does not include external causes whatsoever.[92]

3.3.3 Ordinary Meaning Approach

Rix J., in *the Laconian Confidence*[93] arguing the absence of judicial gloss approach precedent, assigned the ordinary meaning to the words "preventing the full working of the vessel" eliminating the restrictive approach and leaving any restriction to the construction of the off hire

[89] *Supra* note 27, p .382 per Kerr J; *The Mastor Giorgis* [1983] 2 Lloyd's Rep 66, 69 per Lloyd J.
[90] *The Mastor Giorgis* [1983] 2 Lloyd's Rep 66, 69 per Lloyd J.; *Supra* note76, p. 150 per Rix J.
[91] Internal and external causes will be further explained later on this chapter.
[92] Thomas, *Supra* note 33, para 7.93 pp. 143-144.
[93] *Supra* note 76.

causes and the sweep up clause where existent. The question of preventing the full working of the vessel is a factual one. Was the full working of the vessel prevented? If yes, then it must be examined if it was caused by one of the causes listed in the off hire clause.[94] He explained that,

> The qualifying phrase 'preventing the full working of the vessel' does not require the vessel to be inefficient in herself. A vessel's working may be prevented by legal as well as physical means, and by outside as well as internal causes. An otherwise totally efficient ship may be prevented from working. That is the natural meaning of those words, and I do not think there is any authority binding on me that prevents me from saying so.[95]

It is yet to be determined which of the two is authority.[96] Professor Thomas argues that in the judicial gloss approach, the judicial intent of restricting "any other cause" is achieved indirectly by the restrictive construction of "preventing the full working of the vessel" thereby going against the ordinary meaning of the phrase. The author agrees that indeed using the judicial gloss approach does not take into account the ordinary meaning of the phrase.

In the ordinary meaning approach the question if the ship has been prevented from working must at all time be answered first whatever the case. Once it is answered then the off hire causes can be looked at. The approach is clear and logical.[97]The ordinary approach appreciates that there are situations where the ship can be efficient in herself but unable to provide services required of her due to other reasons. This approach includes the consideration of external causes depending on how the off hire clause is drafted.

[94] Thomas, *Supra* note 33, para 7.94 p. 144.
[95] *Supra* note 76, p. 150 per Rix, J.
[96] Thomas, s*upra* note 33, para 7.95 p. 144.
[97] *Ibid.*

3.3.4 Preventing the "efficient working of the vessel"

There are other forms[98] that use the words, "the efficient working of the vessel" which has been held to relate to the efficient physical working of the vessel and legal or administrative constraints only count if they relate to the physical condition or suspected condition of the ship.[99]

In *The Aquacharm,* [100] due to loading to a draught not permitted by the Panama Canal, the ship was delayed for nine days as they had to lighten and reload the ship again. The charterers claimed that the ship was off hire but it was held that since the efficiency as a working ship was not reduced by the lightening and reloading of cargo then the ship was not off hire.[101] In cases where a ship has to deviate, charterparties may stipulate that she will be off hire until the time she is again an efficient vessel even if the will be in a less favourable position than from where she had to deviate from.[102] This situation can be avoided by adding the "put back" clause, a provision that stipulates the ship will go on hire once the vessel has been returned to the position it was in. This is more favourable to the charterer.[103]

3.3.5 Partial prevention of working of the ship

Clause 17 of NYPE 1993 refers to "preventing the *full* working of the vessel". The term "full" implies that if the working is partly prevented then it is enough to prevent the full working of the vessel.[104] This of course applies to both the off hire causes listed and the "any other cause"

[98] Shelltime 3 and 4.
[99] *The Manhattan Prince* [1985]1 Lloyd's Rep. 140 , p.146; Coughlin, *supra* note 52, para 25.17 p. 445.
[100] *Supra* note 57.
[101] Lopez, *supra* note 12, p. 112.
[102] Cl. 21(c) of Shelltime 4, *Supra* note 38, p .65.
[103] Nick Collins, 'The Essential Guide to Chartering and the Dry Freight Market', (2000) London. Chapter 7, p. 305.
[104] Coughlin, *supra* note 52, Para 25.18 p. 445.; Thomas, *Supra* note 33, para 7.92 p. 143.

provision. This is mitigated by the fact that most charter parties have express provisions for cases of partial prevention of working in which case the off hire clause cannot be relied upon.[105]

3.4 Off Hire Causes or Events

Once the question of preventing the full working of the vessel has been answered in the affirmative then it has to be examined whether the prevention was caused by one of the off hire causes listed in the off hire clause. The general rule is that a ship on time charter is continuously on hire unless the charterer is able to bring itself clearly within the terms of any off hire provisions.[106] The events that can cause the ship to become off hire are usually agreed before hand and expressly stipulated in the off hire clause. Off hire causes are also referred to as off hire events.[107] Off hire causes is a vast topic and this thesis will only address it in a broad and general way. The various off hire causes can be generally divided into two categories comprising of causes internal to the ship and those external to the ship.

3.4.1 Internal Causes

Causes of off hire vary from one off hire clause to another, as charterparties fall in the realm of freedom of contract. However, conventionally off hire causes relate to the chartered vessel, her efficiency and ability to perform the service contracted by the charterers and navigational performance issues. These are matters regarded as internal to the ship.[108] The following are some examples of common internal causes found in off hire clauses:[109]

a) Breakdown, damage, deficiency, defect (including fire damage) to hull, machinery and equipment;

[105] Coughlin, *supra* note 52, para 25.20 p. 446.
[106] *Supra* note 27, p. 381.
[107] Lopez, *supra* note 12, p. 110.
[108] Thomas, *supra* note 33, para 7.73 p. 136.
[109] *Ibid*, para 7.86 p. 141.

b) drydocking and other measures necessary to maintain the vessel;
c) Collision and grounding;
d) Detention, seizure and arrest of the vessel;
e) Deficiency/default/strike of men;
f) Deficiency of stores/documentation and
g) Unjustified deviation and putting back

All internal matters relate to what is stipulated in the charterparty; what the shipowner contracts to provide and what the charterer expects. They relate to the charterer not getting what he is paying for or what was described in the charterparty.[110] A trigger of the above causes may in themselves be a breach of contract on the part of the shipowner and the charterer may have other remedies but this is of no consequence whatsoever on the ship going off hire as off hire operates independently of fault. [111] These are the causes that are considered in the judicial gloss approach as set out above.

3.4.2 External Causes

Because of freedom of contract, in theory, parties can include external causes in the off hire clause.[112] External causes are those not related to the ship per se. Examples of these would include physical impediment to the navigation of the ship, bad weather, port congestion and third party interference.[113]

Inclusion of external causes would mean that the shipowner bears the risks the charterer would ordinarily bear, for example bad weather. Therefore, the justification for the off hire clause of

[110] *Ibid*, para 7.87 pp. 141-142; Lopez *Supra* note 12, p. 110.
[111] Thomas, s*upra* note 33, para 7.88 p. 142.
[112] *Supra* note 76, p. 140 per Rix, J.
[113] Thomas, *supra* note 33, para 7.74 p. 136 and para 7.89 p. 142.

redistributing the risk to the shipowner for matters he is responsible does not apply.[114] Of course off hire clauses vary depending on the market and who has the market advantage but inclusion of external causes in an off hire clause is rarely done in practice as no shipowner wants to be responsible for matters over which they have no control.[115]

Mostly these external causes are usually stipulated in the mutual exceptions clause whose essence is the description of those risks that neither the owner not the charterer will accept.[116] However, parties may also stipulate who bears the risks when it comes to certain external causes in other clauses for example, government intervention.

It is important to note that external causes can be totally external and not related to the ship or they can be associated with the condition of the ship.

3.4.2.1 Extraneous external cause

Where the external cause is completely extraneous from the ship, it cannot come under the off hire clause even when the sweep up phrase "any other cause" is used.[117] In *The Laconian Confidence*[118] the port authorities had refused the vessel permission to leave because of presence of sweepings remaining on board that led to a delay of eighteen (18) days. This period was held not to be off hire as the detention, which was deemed bureaucratic and highly extraneous, was the main cause of the delay and did not fall within the domain of "any other cause preventing the full working of the vessel". Similarly, where a vessel is prevented from passing through the Panama Canal due to excessive draft and delay is caused due to the need for unloading and

[114] *Ibid*, para 7.85 p. 141.
[115] *Ibid*, para 7.98 p. 145.
[116] Gorton, *supra* note 24, p. 477.
[117] The sweep up phrase, "any other cause" will be discussed in the next chapter.
[118] *Supra* note 76, p. 144.

reloading at the end of the canal. The vessel is not off hire as there is nothing wrong with the efficiency of the ship and the sole reason for the delay is the Canal Authority's decision.[119]

3.4.2.2 Associated external cause

However where the external cause is not extraneous and has some relationship with the internal condition or efficiency of the vessel, the situation differs. In such a situation, there are usually two causes; the external apparent one which results in the detention or interference by a third party of the vessel and the internal underlying cause that relates to the efficiency of the ship which is less apparent.[120] In such a situation, the underlying internal cause, even though less apparent, is characterized as the primary source and regarded as the paramount cause.[121] Lloyd J., in *The Mastro Giorgis* stated that,

> I can see no valid distinction between a vessel being arrested because of a claim by cargo against her owners and a vessel being prevented from leaving port because, for example, her classification certificates are not in order.[122]

The internal cause need not be established as law or fact; reasonable belief in the existence of the facts or the legal right relating to the efficiency or navigation of the ship would suffice. However if such belief is unreasonable, unlawful or unjustified, then the cause might be characterized as an external cause.[123]

Internal condition of the ship not only relates to the physical condition and efficiency of the ship, it is understood broadly to include qualities, characteristics, history and ownership of the ship.[124] Sister ship arrest, for example, would be a valid reason for off hire as it relates to the history of

[119] *Supra* note 57, p. 11.
[120] Thomas, *supra* note 33, para 7.103 p. 148.
[121] *Ibid*, para. 7.103 p. 147.
[122] *Supra* note 90, as per Lloyd J. on p. 69.
[123] *Supra* note 76, p.151 per Rix J.
[124] *Supra* note 90, p.69, per Lloyd J.

the ship.[125] In *The Apollo,*[126] the ship was held to be off hire when the ship failed to get a letter of praxis as they had left two men in another port for fear of typhoid. The decision by the authorities prevented the full working of the vessel.

Usually, off hire will not be triggered by causes in the mutual exception list but the position of associated external cause will apply especially where it relates to payment of hire. In the *The Yaye Maru* case,[127] the *Yaye Maru* was involved in a collision with the *War Lark* with the *War Lark* being at fault. She sought for damages for loss of time and the owners of *War Lark* resisted stating that *Yaye Maru* should not have been allowed the off hire as they had no employment of the vessel because of an embargo preventing her from lifting her cargo. It was held that, the charterer had no obligation to pay hire even if he had no use for the vessel, if the vessel is not in full working order because of her injury even if the owner is not at fault for the off hire occurrence.[128]

This relationship can be better explained by looking at *Clyde Commercial Steamship Co. v. West India Steamship Co*[129] where the vessel had been delayed leaving the Panama Canal due to illness of the crew which amounted to deficiency of men. On arrival in Texas, she was placed in a quarantine which was an exception clause because she had come from Panama and not because of illness of the crew. It was held that during this period, the ship was not off hire as quarantine and other mutual exceptions were not causes listed in the off hire clause. It is of importance to note that if the quarantine was as a result of the illness of the crew, thus preventing performance, then the vessel would be off hire but if it related to the charterer's employment of the vessel, then it would not be off hire.[130]

[125] Thomas, *supra* note 33, para 7.106 p. 148.
[126] *The Apollo* [1978] 1 Lloyd's Rep 200.
[127] *Supra* note *29.*
[128] O'Brien, *supra* note 15, pp. 965-966.
[129] *Clyde Commercial Steamship Co. v. West India Steamship Co* 61 169 F. 275 (2d Cir.), *cert. denied,* 214 U.S. 523 (1909).
[130] O'Brien, s*upra* note 15, p. 966.

The author is of the opinion that it is only fair for the ship to go off hire when the apparent cause is an external cause even if contained in the mutual exception clause if the underlying cause is an internal one for which the ship owner should be responsible. It has been argued that if the exceptions clause prevented the charterer from putting the vessel off hire then the off hire clause would be meaningless; it would be more like a shield against liability rather than a limitation on stoppage of hire.[131] The author agrees with this argument but only to the extent where there are two causes, the external one that is part of the mutual exception clause and an underlying cause which goes to the efficiency of the vessel and her ability to perform the services for which she was contracted.

3.4.3 Implied limits on causes

An off hire clause depends highly on how it is drafted, but based on standard forms, there are some implied limits that are deemed to apply in all cases even when the term "whatsoever" is used.[132] First, it is probably only a fortuitous cause or event that can give rise to off hire. Secondly, if an off hire event is caused by the charterer or arises from something for which the charterer is responsible; the vessel will most likely not go off hire.[133]

3.4.3.1 Fortuitous causes

An event that occurs as a result of natural compliance with the charterers orders will not give rise in off hire. In *The Rijn,* the hull of the cargo became fouled by marine growth during an extended period of and waiting for cargo. Charterers claimed off hire because fouling fell under "any other cause preventing the full working of the vessel". Mustill, J., rejected the claim and stated,

> The draftsman cannot possibly have intended that hire should cease in every circumstance where the full working of the vessel is prevented. This reading

[131] *Ibid.*
[132] The effect of the word, "whatsoever" when added to the sweep up clause will be discussed in the next chapter.
[133] Coughlin, s*upra* note 52, para 25.42 p. 450.

> would be commercial nonsense, and would make the second half of the clause redundant. In my judgment, only those causes qualify for consideration which are fortuitous, and are not the natural result of the ship complying with the charterers' orders". [134]

3.4.3.2 Incident caused by a matter for which the charterers are responsible

Sometimes, the events that prevent the full working of the vessel caused by the charterers or by something for which they are responsible for are expressly excluded in the off hire clause.[135] However there are instances where such is not expressly provided for. It would seem that even in such cases, the vessel will still not go off hire. In *The Laconian Confidence*[136], Rix, J., discussed a hypothetical case where contraband was found on board the vessel and the charterers were responsible for putting it there. He said,

> If...the charterers were responsible, it would seem absurd to hold the vessel off hire: [but] how would that square under an amended clause [including the word 'whatsoever'] with my construction, seeing that the detention by the authorities under my construction would be 'any other cause whatsoever preventing the full working of the vessel'? It seems to be that there would be an implicit exclusion of causes for which the charterers were responsible.

What then does it mean for the charterer to be responsible? In *The Berge Sund*,[137] Staughton, J., at the Court of Appeal, said in *obiter* that the argument of the owners which he agreed with was,

> ...that 'fault' here only refers to a causal connection between the time lost and something done or omitted by the charterers, as in the phrase, 'it was your (his) (my) fault'. I find that a plausible argument; and as ambiguity us to be resolved in favour of the owners

[134] *The Rijn*, [1981] 2 Lloyd's Rep. 267.
[135] For example *The Berge Sund*, *supra* note 54, p. 462.
[136] *Supra* note 76, p. 15.
[137] *Supra* note 54, p. 462.

Coughlin, T. *et.al.* suggest an alternative analysis if the ship is off hire when prevented from working due to circumstances for which the charterers are responsible .They suggest that the law may treat the ship as off hire but then allow the owners to claim back from the charterers as damages.[138]

3.5 Loss of time

Just because the full working of the vessel has been prevented by one of the listed causes does not automatically lead to the interruption of hire, it must be shown that time was lost to the charterers as a consequence.[139] The service required of the vessel next must be regarded and only when that is affected does the possibility of off hire arise. One off hire event can cause the ship to be off hire at sea but on hire once the event is no longer relevant to the particular service required next *e.g.* breakdown of the propeller.[140] The breakdown must prevent the full use of the vessel at the time of the breakdown.[141] With partial deficiency, as with the NYPE form, hire is deductible only to the extent of time lost as a consequence of the partial deficiency.[142] The charterer is not entitled to put the ship off hire due to an event leading to the loss of time that is due to his breach of contract.[143]

3.5.1 Forms of loss of time

Loss of time can be interpreted in two different ways;[144]

[138] Coughlin, s*upra* note 52, Para 25.50 p. 451.
[139] Thomas, *supra* note 33, para 7.75 p. 136; Qingdao Ocean Shipping Mariners College, *Practice & Law of Chartering Shipping,* (2010) Chapter 4, Sections 3 &4, p. 189.
[140] *Supra* note 16, p. 189.
[141] Lopez, *supra* note 12, p. 11.
[142] *Supra* note 139.
[143] *Nourse* v. *Elder Dempster* (1922) 13 Ll.L.R 197 p. 323.
[144] Coughlin, *supra* note 52, Para 25.53 p. 452.

a) To refer to the period of time during which the ship is prevented from working *i.e.* 'loss of a period in service'

b) To refer to the period of time which the progress of the charter service has been delayed or "delay to the progress of the adventure."

3.5.1.1 Net Loss of Time

'Net loss of time' clauses are clauses where loss of time is interpreted to mean both loss of a period of service and delay to the progress of adventure.[145] The burden of proof is on the charterer to show not only that the off hire event occurred but also that time has been lost as a result. Only then can there be deduction of hire. Once the ship is again in full working order, the ship is no longer off hire even if time is lost thereafter.[146] First, delay to the adventure must be shown. It was held in *The Pythia*[147] that the effect of an off hire clause and the words "payment of hire shall cease for the time thereby lost", was that the ship was off hire only to the extent that the progress of the charter service had been delayed.[148]

Hire is suspended only where there is an ongoing loss of time *i.e.* when the full working of the vessel is being prevented not for the whole time the adventure is being delayed because of an off hire event. As soon as full working resumes the hire is resumed. Robert Goff, J., in *The Pythia*[149] explains that with "net loss of time" clauses a comparison is not made of the period the vessel would have been occupied in performing the relevant service had the off hire event not occurred and the period in which the vessel occupies as is performing the service. This comparison of the two periods and the difference being the off hire period is a logical conclusion but it may also lead to speculative enquiries as to the events that would have taken place if the vessel had not

[145] *Ibid*, para 25.54 p. 453; see NYPE and Baltime forms.
[146] *The Marika M* [1981] 2 Lloyd's Rep 622.
[147] *The Pythia* [1982] 2 Lloyd's Rep. 160, p. 168.
[148] Coughlin, *supra* note 52, para 25.55 p. 453.; see NYPE cl. 15.
[149] *The Pythia* [1982] 2 Lloyd's Rep. 160 at p. 168.

gone off hire. This is perhaps why the Baltime and the NYPE form only calculate the period in which the full working of the vessel was prevented and only to the extent of time thereby lost. No deduction is made once the ship is able to perform services required of her.[150]

Calculation as to extent of delay is not easy. An example was given by Lord Denning, M.R., in *The HR Macmillan,*

> Taking that clause [Clause 15 of the New York Produce form] 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 so, 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 threecranes, instead of two, had been available throughout? [151]

The Baltime form Clause 11(A) is a 'net loss of time' clause because of the use of the words "no hire shall be paid in respect of any time lost thereby" but its position is further clarified by use of the additional words, "during the period in which the Vessel is unable to perform the service immediately required" making it clear that full hire becomes payable as soon as full efficiency is resumed.[152]

With the NYPE 93, hire is resumed when the vessel is put back in the position it was in. Clause 17 states 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

[150] Coughlin, *supra* note 52, para 25.56 p. 453.
[151] *The HR Macmillan,* [1974] 1 Lloyd's Rep 311(C.A), p. 314
[152] Coughlin, *Supra* note 52, para 25.58 p. 454.

> 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 position from the destination and the voyage resumed therefrom.[153]

Net loss of time can also be taken to regard all time lost for charterer including consequential loss of time, and can be treated as off hire even where the ship has been restored to an efficient on hire state.[154]

3.5.1.2 Period Loss of Time

Loss of period clauses stipulate that hire ceases from the occurrence of a stipulated event and ends at the occurrence of another event.[155] Here "loss of time" refers to the loss of period of service and not the delay in the progress of service. In *Hogarth* v. *Miller*[156] it was explained that in a period clause, the charterer is not to pay for that period in which he shall lose the use of the ship as a result of one of the listed off hire events. In such cases, the ship goes off hire once the full working of the vessel is prevented and comes back on hire once full working of the ship starts again.[157] In *Smailes* v. *Evans,*[158] the ship ran aground and had to discharge the cargo. The question was whether the ship was off hire until the time the repairs were completed or when the cargo was reloaded. It was held that when the repairs were completed, putting back the ship to an efficient state, then hire would resume. The charterer can treat the whole period during which the off hire event is taking place, the actual time lost, as off hire whether or not loss of time has actually been suffered.[159] This brings certainty as the question of the existence of an off hire event is easily defined and is one of fact.

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[153] *Ibid*, para 25.59 p. 454.
[154] Lopez, *supra* note 12, p. 111.
[155].Boyd, *supra* note 1, p. 324; Lopez *supra* note 12, p. 111.
[156] *Hogarth* v. *Miller* [1891]A.C 48 (H.L.)
[157] Coughlin, *supra* note 52, para 25.61 p. 454.
[158]*Smailes* v. *Evan* [1917] 2 K.B 54.
[159] Lopez, *supra* note 12, p. 112.

Courts prefer interpreting time lost clauses as period clauses in order to avoid the calculation that comes with net loss of time clauses.[160] Plus period clauses are relatively easier to interpret and calculate as the question of existence of an off hire event is a factual one. However, the net loss of time clauses, which are more favourable to the shipowner and argued to be a rational way of assessing loss of time are widely used in the industry.[161] The main difference between the "net loss of time" and the "period" clauses is that with period clauses the charterer can claim for the actual time lost while in 'net loss of time', there has got to be a loss of time resulting from one of the off hire events and the charterer can claim for total time lost even after the vessel is made efficient again.[162]

Calculation of net loss of time can be very detailed and complex. It is crucial for both charterers and shipowners to be aware of the form of calculating loss of time as the amount calculated as off hire can vary quite a lot. Under English law, most cases have been held that the vessel is off hire when the full working of the ship is being prevented and hire resumes once the vessel is efficient. This was the case in *The Aquacharm*,[163] where there was a delay due to the need of loading and reloading cargo. However, it was held that the vessel was not off hire as the efficiency of the ship was not affected by the loading and the reloading of the cargo. This is not the case in American law, if the use of the ship is lost due to a consequent delay the ship remains off hire until the delay is removed.[164] After the loss of time is established, it is converted to money by looking at the cost of hire per day, converting it into hours and calculating the number of hours that the vessel was off hire.[165] It is prudent for the shipowner to have off hire insurance as long periods of off hire can be devastating.[166]

[160] *The Bridgestone Maru No. 3* [1985]2 Lloyd's Rep 62.
[161] Thomas *supra* note 33, para 7.71 p. 135.
[162] Lopez *supra* note 12, p. 112.
[163] *Supra* note 57, p. 11.
[164] Lopez , *supra* note 12, p. 112.
[165] Gorton, *supra* note 34, p. 281.
[166] *Ibid*, p. 282.

4.0 The Sweep up Phrase

4.1 "Any other cause"

Many charterparties provide in the off hire clause for a list of events or causes that trigger off hire and in the end have the sweep up phrase, "any other cause". This chapter aims to discuss and analyze what this phrase entails and how it is interpreted. It will also analyze the scenario where the sweep up phrase is amended to read, "any other cause whatsoever".

The relevant phrase for this discussion in the off hire clause usually reads, "... or any other cause preventing the full working of the vessel". As already discussed the first thing to inquire about is whether the "full working of the vessel" has been prevented and only then can the cause be considered.[167] It follows then from the reading and interpretation of the phrase, that "preventing the full working of the vessel" qualifies not only all the listed causes but also qualifies the phrase, "any other cause".[168]

The applicable test to the words, "any other cause preventing the full working of the vessel" is whether the vessel was fully efficient in herself. Lord Denning agreed with the holding of the Commercial judge, Lloyd, J in *The Aquacharm*[169] and explained that the efficiency of the vessel related to 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 pass through the canal.[170] Even where, the vessel is efficient but the off hire event is related to the master's fault, as was the case here, the vessel is still deemed not to be off hire. The shipowner has a duty to

[167] *Supra* note 57, p.9.
[168] *Supra* note 27, p. 382.
[169] *Supra* note 57.
[170] *Ibid,* p. 7.

offer a functioning ship and crew, should not the shipowner bear some responsibility when the off hire cause is the crew's fault? Lord Denning M.R. explained that it all depends on whether the vessel was seaworthy or not at the beginning of the voyage. If it was unseaworthy then the shipowner would be liable under the Hague Visby Rules III (I) (a) and IV. But if the vessel was seaworthy as it was in this case, then the shipowners could not be liable as they would have the defense of "management of ship" due to the neglect of the master.[171]

The burden of proof to show that the case falls within the phrase, "any other cause" squarely falls on the charterer. The cardinal rule for interpreting charterparties is

> [T]hat the charterer will pay hire for the use of the ship unless he can bring himself within the exceptions. I think he must bring himself clearly within the exceptions. If there is a doubt as to what the words mean, then I think those words must be read in favour of the owners because the charterer is attempting to cut down the owner's right to hire.[172]

The explicitly listed off hire causes usually relate to internal causes. However, the phrase "any other cause" envelopes both internal causes and associated external causes. It extends to cover not only physical or tangible causes but also legal actions and administrative acts by lawful authority so long as they relate to the physical condition or efficiency of the ship or her crew or suspected condition of the crew or the ship.[173] It was stated in *obiter* by Rix, J., in *The Laconian Confidence*[174] that authorities suggest that, "where the authorities act properly or reasonably pursuant to the (suspected) inefficiency or incapacity of the vessel, any time lost may well be off hire even in the absence of the word "whatsoever"". Causes not related to the physical condition or efficiency of the ship or crew do not come under the phrase, "any other cause". In the words of Rix, J., " ...it is natural to conclude that the unamended words, "any other cause" do not cover

[171] *Ibid,* p. 9.
[172] *Supra* note 5, p. 199.
[173] Coughlin, *supra* note 52, para 25.36 p. 448.
[174] *Supra* note 76, p. 151.

an entirely extraneous cause, like the boom in *Court Line*, or the interference authorities unjustified by the condition (or reasonably suspected condition) of the ship or cargo".[175]

In *The Court Line* case[176] referred to above, the vessel was trapped when war broke out between Japan and China and the Chinese sank ships in the river to prevent the Japanese from coming up the river. It was held that the charter was frustrated and it was also held in *obiter* that in the alternative argument of the ship being off hire, it would depend if the delay caused by the boom came within the words 'any other cause preventing the full working of the vessel' and in his opinion, it did not.

It seems that though the phrase includes associated external causes thereby including legal and administrative causes, the decisions by legal and administrative authorities have got to be natural and reasonable. The court held in *The Laconian Confidence*,[177] where the vessel was delayed due to residual sweepings, that the ship remained on hire and that the actions of the authorities did not come under the phrase, "any other cause" which was restricted to the physical condition or efficiency of the ship, crew or cargo. Rix, J., held that,

> Prima facie it does not seem to me that it can be intended by a standard off-hire clause that an owner takes the risk of delay due to the interference of authorities, at any rate where that interference is something beyond the natural or reasonably foreseeable consequence of some named cause.

Though the phrase, "any other cause" seems to widen the scope of the causes that can trigger off hire, the causes are restricted to the physical condition or efficiency of the ship, crew or cargo. It includes internal causes and only associated external causes which also relate to the internal causes of the ship and such external causes ought to be natural and reasonable.

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[175] *Ibid.*
[176] *Court Line* v. *Dant & Russel*(1939) 44 Comm. Cas. 345.
[177] *Supra* note 76, p. 151.

4.2 *Ejusdem generis* rule

General words that follow a list of specific things, such as "any other cause" in the off hire clause, are usually construed as things of the same general kind or class of the specifically mentioned things and not to the widest extent.[178] It was held in *The Roachbank* that,"Where the off-hire clause ["any other cause"] is unamended and does not contain the word 'whatsoever', then the *ejusdem generis* rule could, and probably should, be applied."[179]

Though the phrase "any other cause" seems to increase the ambit of off hire causes, it is narrowly and restrictively construed. It is construed to relate to causes that have been previously listed in the off hire clause.[180] This is an application of the *ejusdem generis* rule which is a rule of construction to the effect that a sweep up provision at the end of a list must be taken to refer to the same kind of things as those previously specifically mentioned.[181]

In the application of the *ejusdem generis* rule, identification of the general type of cause of the named causes is crucial. [182] This is not an easy task. The counsel for the charterers in *The Laconian Confidence*[183] case argued that the heterogenous nature of the named causes made any application of the *ejusdem generis* rule inappropriate and instead the question should be whether the ""other cause" had a sufficiently close relationship to any named cause. In disagreeing with the counsel, Rix, J., held that "In my judgment it is well established 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 clause."[184] The general context

[178] http://thelawdictionary.org/ejusdem-generis/#ixzz2RvPgSUtW <Accessed on 30 April, 2013>.
[179] As per Webster J in *The Roachbank* [1987] 2 Lloyd's Rep. at 507.
[180] Thomas, *supra* note 33, para 7.89 p. 142.
[181] Coughlin, *supra* note 52,Para 25.34 p. 448.
[182] *Ibid,* para 25.35 p 448.
[183] *Supra* note 76, p. 143
[184] As per Rix, J., in s*upra* note 76, at p. 150.

of the charter can be interpreted as the owners providing an efficient ship and crew. Lord Rix, J., held in *The Laconian Confidence*[185] that,

> A consideration of the named causes indicates that they all relate to the physical condition or efficiency of either vessel (including its crew) or, in one instance, cargo. There is, moreover, the general context, ...that it is for the owners to provide an efficient ship and crew.

In the interesting case of *The Saldanha*,[186] the vessel was seized by Somali pirates and compelled to sail off the waters of a Somali town Eyl where she remained and was brought back to a position equivalent to the location of seizure after approximately 38 days. The charterers submitted that they brought themselves in one or more of the following three causes: "detention by average accidents to ship or cargo", "default and/or deficiency of men"; and "any other cause". The Counsel for the charterers in this case also did not find it easy to identify any "genus" of the off hire causes. They argued that the most that could be said was all the causes related to the physical condition or efficiency of the vessel (including its crew) or, perhaps cargo and that they did not include truly extraneous causes.[187]

In the author's opinion, in an attempt to bring piracy under the above genus, and in distinguishing the case from *The Laconian Confidence*, the Counsel submitted that,

> Seizure by pirates is far from being a totally extraneous cause. It operates by disabling the officers and crew, who are just as much unable to work as if struck down with typhus, and by immobilizing the ship, just as much as if it were not enough crew to work it. Owners are entitled to hire if they provide a functioning ship and a crew able to work the ship to provide the service required--neither ship nor crew can function if seized by pirates...and the basis for the payment of hire is in such circumstances wholly undermined.[188]

[185] *Supra* note 76, pp. 150-151.
[186] *Cosco Bulk Carrier Co. Ltd* v *Team Up owning Co. Ltd ("The Saldanha")* [2011]1 Lloyd's Rep 187.
[187] *Ibid,* p. 193 para 32.
[188] *Ibid,* p. 193 para 32.

Gross, J. disagreed with the submissions and failed to accept them, he held, "Intuitively, as a matter of indelible impression and in agreement with the tribunal, I think that seizure by pirate is a "classic example" of a totally extraneous cause."[189] Piracy therefore falls outside the scope of the sweep-up wording. Gross, J., agreed with the tribunal who stated,

> This act of piracy was not *ejusdem generis*. It did not arise out of the condition or efficiency of the vessel, or the crew, or the cargo, or the trading history, or any reasonable perception of such matters by outside bodies. Unlike a trading history which gave rise to typhus or a well grounded suspicion of typhus, it was a truly extraneous cause. The effect of the bargain contained in clause 15, construed in its general context, was that Owners did not take the risk of the full working of the vessel being prevented by an extraneous cause such as piracy. The Charterers...did assume that risk.[190]

The author agrees with the observations of Counsel regarding the difficulty of putting all the named causes in the off hire clause in a genus. However, without the *ejusdem generis* rule, the off hire clause would make no commercial sense. This conflict was well captured by the Mustill, J. in *The Rijn*,[191]

> I do not consider that the charterers' argument can be disposed of simply by applying the *ejusdem generis* rule to the words 'or any other cause'; for in the absence of any decisive authority on the point, I would not be disposed to find that the rule provides a helpful guide to the construction of the clause, where the general words follow such a heterogeneous collection of terms ....On the other hand, the words cannot be applied in their full width without qualification by reference to the general purpose of the clause, the draftsman cannot possibly have intended that hire should cease in every circumstance where the full working of the vessel is prevented. This reading would be commercial nonsense, and would make the second half of the clause redundant.

Though the use of the *ejusdem generis* rule is set out rather weakly by Webster, J. in *The Roachbank, The Laconian Confidence , The Saldanha* and other cases that have used this principle have solidified the rule that the clause "any other cause" is construed by using the

[189] *Ibid,* p. 193-4 para 33.
[190] *Ibid,* p. 194 para 34.
[191] *Supra* note 134, pp. 271 and 272.

ejusdem generis rule. The use of the *ejusdem generis* principle or the restrictive construction in relation to the charter at the very least means that the phrase does not include totally extraneous causes but includes physical, legal or administrative causes where there is an underlying cause that relates to the efficiency or physical condition of the ship or her crew.

4.3 "Any other similar cause"

When the clause is drafted to read "any other similar cause" as the case in NYPE 1993 clause 17 then it is clear that *ejusdem generis* applies.[192] In this case, it is narrowed down from general to specific from the wording of the clause and the court does not have to construe the clause constrictively.[193]Here, the use of the word, "similar" makes it abundantly clear whatever the "other cause" is, it has to be similar to the causes specifically listed in the off hire clause.

4.4 "Any other accident"

The Baltime form 1939 as revised in 2001 provides for "or any other accident, either hindering or preventing the working of the Vessel" In this instance it is suggested by Coughlin *et.al.* that for the phrase to apply there must be an accident, which is defined as something out of the ordinary course of happenings and that the words have their full natural meaning and embrace therefore the *ejusdem generis rule* does not apply.[194]

[192]Coughlin, *supra* note 52, Para 25.39 p. 449.
[193] Thomas, *supra* note 33, para 7.90 p. 142-143.
[194] Coughlin, *supra* note 52, Para 25.39 p. 449, para 37.43 p. 618 and para 37.44 p. 618.

4.5 "Any other cause whatsoever"

As has already been eluded, the word "whatsoever" when added to the phrase "any other cause" has a different effect. Following the decision in *The Apollo*[195], which will be discussed here, there was a common commercial belief that simply adding "whatsoever" would solve all the charterers' problems.[196] This next part will discuss the effects of including the word "whatsoever", how it is interpreted and if indeed it is true that it solves all charterers' problems.

When the word "whatsoever" is added after "any other cause" in the off hire clause, the *ejusdem generis* rule is not applied. Mocatta J., held, "In my view .... 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."[197] This means that the relevant causes are not limited to what has been listed in the clause before and can include extraneous external causes. Rix, J., in *Laconian Confidence* clarified that, "Where, however, the clause is amended to include the word, "whatsoever", I do not see why the interference of authorities which prevents the vessel performing its intended service should not be regarded as falling within the clause, and I would be inclined to say that that remains so whether or not the interference can be related to some underlying cause internal to the ship, or is merely capricious".[198]

The question of prevention of full working of the vessel also comes into play despite the lack of limit of the causes. In *The Mastor Giorgis,*[199] where the vessel was arrested because the cargo she delivered was alleged to have been damaged during the voyage. Lloyd, J. held that the ship was off hire during the arrest and stated, "Where, as her, the word 'whatsoever' is added, any cause may suffice to put the vessel off hire, whether physical or legal; the question in each [case]

[195] *Supra* note 126.
[196] Weale, *supra* note 56, p. 141 footnote 31.
[197] *Supra* note 126, p. 205.
[198] *Supra* note 76, p. 151.
[199] *Supra* note 90.

is whether it prevents the full working of the vessel for the service immediately required ...no person could use the vessel in the present case, so long as she was under arrest."[200]

Andre & Cie S.A v. *Orient Shipping (Rotterdam) B. V ("The Laconian Confidence")*[201] covers the issue of the amended sweep up clause, "any other cause whatsoever". Here, the ship was prevented from performing the next task by an interference of authorities despite the ship being fully efficient. The issue was then whether the ship was prevented from working by some "other cause" other than those named in the off hire clause. Though the particular off hire clause did not include the phrase "any other cause *whatsoever*" the court touched on it.

The vessel was held not to be off hire as in absence of the word "whatsoever", the unexpected and unforeseeable interference by the authorities at the conclusion of what was found to be a normal discharge was a totally extraneous cause. However, Rix, J., said in *obiter* that had the clause contained the word "whatsoever" then the position would have been otherwise. The vessel would have been prevented from working, albeit in unexpected circumstances and it would not have mattered that the actions of the authorities may have been capricious.[202] This seems to be controversial as completely extraneous external causes are not associated whatsoever to the internal causes or efficiency of the ship. They have nothing to do with what the shipowner contracts to provide to the charterer. Rix. J., on the other hand is of the opinion that a shipowner should be cautious in dealing with a clause that has the words "whatsoever" added.[203]

Gross, J., in *The Saldanha* case went even further and recommended that should parties wish to treat seizures as an off hire event under time charterparty, they should do so by having an express provision for it in the seizures or detention clause or simply by adding whatsoever to any other

[200] *Ibid,* pp. 68 - 69.
[201] *Supra* note 76.
[202] *Supra* note 76, p.151.
[203] *Ibid.*

cause but noted that it did not have the same certainty as the issue of whatsoever hinges on *obiter dicta*, albeit of a most persuasive kind.[204]

Although this whatsoever issue exists as *obiter dicta*, it is very convincing and the author agrees fully with the *obiter* that it really does or should broaden the construction of any other cause. Otherwise it would mean the same thing and that is not the intention of the party. [205] Shipowners and charterers know the industry very well and no reasonable shipowner would sign a charterparty with the term whatsoever without failing to inquire about the consequences.

Though the inclusion of "whatsoever" to the phrase "any other cause" increases the ambit of the off hire clause to include both internal and external causes, the phrase by no means covers all kinds of causes. It would seem if a cause was the fault of the charterer it would still fall under "any other cause whatsoever" preventing the full working of the vessel. However, in considering an example argued before him, Rix J., held that "It seems to me that there would be an implicit exclusion of causes for which the charterers were responsible".[206] The author agrees with the honourable Judge, because if the charterers were not responsible for their own actions, they would not be diligent in their role as a charterer. Besides, this extra risk would be too heavy a burden for the shipowner to bear.

As can be seen, difficult decisions have to be made in borderline cases or cases with unusual combination of circumstances. The ultimate decision is usually influenced by the arbitrator's findings of fact or fact mixed with law, perhaps as they are deemed to be experts. This was admitted by Rix, J., in the making of his decision in *The Laconian Confidence*.[207]

[204] *Supra* note 186.
[205] Thomas, s*upra* note 33, para 7.100 p. 146 and Para 7.108 p. 150.
[206] *Supra* note 76, pp. 151-152.
[207] *Ibid*, p. 152.

The applicable principles as discussed in this thesis can be summarized as follows,

> As is hornbook law ... under a time charterparty, hire is payable continuously unless charterers can bring themselves within any exceptions, the onus being on charterers to do so. Doubt as to the meaning of exceptions is to be resolved in favour of owners. Unless within the ambit of the exceptions, the risk of delay is borne by charterers. The justice of the matter is to be found in the bargain struck by the parties.[208]

With freedom of contract, it is all about the way an off hire clause is drafted. This is from where justice is derived; the intentions of the parties. Gross, J., in his judgement rightly quoted the counsel for the owners with the words, "There is no relevant concept of fairness other than the contractual balance struck by the off-hire clause, construed in accordance with well-known orthodoxy." [209]

[208] Per Gross, in *supra* note 186, p. 189,para 8.
[209] Baker, QC as quoted in the judgment by Gross, J. in *ibid* p.189, para 8,

5.0 Summary and Conclusion.

This thesis has looked at the sweeping clause, "any other cause", how it is interpreted and the effects of amending it with the addition of the word "whatsoever". A background to the off hire clause was given illustrating the issue of freedom of contract, the presence of standard forms which the parties are free to amend and the main obligations of the shipowner and the charterer in relation to payment of hire. A shipowner provides a vessel and crew as per the requirements of the charterparty and the charterer has an absolute obligation to pay hire. Risks and losses that fall within the realm of the shipowner's responsibilities are borne by him. The charterer pays hire for the use of the vessel and the crew and when he does not get use of this, he should not pay hire. This is where the off hire clause comes into play.

A variety of case law has been presented to illustrate the main principles of the off hire clause. As the charterer has an absolute duty to pay hire, the burden of proof squarely falls on the charterer to bring himself within the exceptions of not paying the hire which is always not fault based.

As seen in the discussion, bringing oneself within the exceptions of off hire is not as easy as it would seem. Various considerations are to be borne in mind. There must be prevention of full working of the vessel caused by an off hire event or cause and there has to be loss of time.

There exists two ways of interpreting the prevention of the full working of the vessel and though there is confusion as to which one is the binding authority, the author sides with the ordinary meaning approach as opposed to the judicial gloss approach. Once this question has been answered in the affirmative, the charterer needs to show that whatever caused the prevention of the full working of the vessel falls within the listed causes in the off hire clause. The causes that can prevent the full working of the vessel are various. Most of the specifically listed causes are

termed as internal in relation to the vessel or the crew. Those external to the ship are further divided into two groups, those associated with the vessel and those that are extraneous to the vessel.

As case law has shown, the sweep up phrase, "any other cause" opens up the off hire causes to include external causes that are associated with the ship meaning out of the two causes, the underlying cause is one that is internal to the ship. The off hire clause is generally restrictively construed as against the charterer because of its exemption nature. Further to the restrictive construction, once the sweep up phrase, "any other cause" is added, its construction is done through the use of the *ejusdem generis* rule. As has been seen, it is not the easiest of tasks to categorize all the listed causes in the off hire clause into one genus. However the courts have held that the general context is that the owners provide an efficient ship and crew.

The *ejusdem generis* rule does not apply when the sweep up phrase is amended to include the word "whatsoever". This has the effect of further opening up the off hire causes to include even external causes that are completely extraneous to the ship. This is somewhat controversial as it goes above and beyond the scope of the responsibility of the shipowner. Does this then mean that if the off hire clause has the phrase, "any other cause whatsoever" that it encompasses all the causes under the sun? As illustrated with case law though stated in *obiter*, the addition of the word "whatsoever" opens up the clause to include even bureaucratic and authoritarian decisions that have no basis. However, it is quickly noted that it is implied that causes that come into existence as a result of the charterer's orders are not included. This is of course because without this, the charterer would have no motivation to perform his responsibilities well. However, shipowners should be careful when accepting a charterparty with such terms.

It is concluded that when it comes to the off hire clause, it is all a matter of balance. The parties themselves agree on the terms of the charterparty and in essence what governs them. The use of the *ejusdem generis* rule and the constrictive construction of the off hire clause balances out the

risks so that its exemption nature does not wholly favour the charterer. The charterer cannot also benefit from the off hire clause when one of the causes is as a result of his orders. Though charterparties fall in the realm of freedom of contract, the field is mostly regulated by general principles that have been used in the industry over time and solidified by court judgments.

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