

SOUNDINGS

February 2014

THE ATHENA

When calculating whether there has been loss of time under an off-hire clause, do you look at the service immediately required of the ship, or is delay to the adventure as a whole to be considered?

Introduction

The interpretation of off-hire clauses, and their application to any given set of facts, is often the subject of disputes between owners and charterers. The Court of Appeal decision in the ATHENA establishes that, in order to determine whether a ship is off-hire the enquiry only goes to the service immediately required of the ship at the time of the off-hire event, not the entire voyage or adventure or chartered service overall. Overturning Walker J's Commercial Court judgment and reaffirming the view of the LMAA arbitrators, the decision underscores the Court's desire to maintain a more practical commercial stance with regard to disputes arising as to whether a ship should be regarded as being off-hire.

Background

Minerva Navigation Inc (the "owner"), time chartered the ATHENA to Oceana Shipping AG, on an amended NYPE 1948 form dated 13th January, 2009, for a period initially of three to six months (subsequently extended). By a charterparty on materially identical terms dated 9th October, 2009, Oceana sub-chartered the ship to Transatlantica Commodities SA (the "charterer") for one time-charter trip with redelivery at Syria or in the Egyptian Mediterranean at the charterer's option.

The ship loaded a cargo of wheat at Novorossiysk for carriage to Syria and appropriate bills of lading were issued. The cargo was rejected at Syria on the ground that it was contaminated. The charterer instructed the ship to sail for Libya and anchor "at road port Benghazi". The owner, however, instructed the master to proceed to international waters just outside Libya and await further instructions. The master stopped the ship in international waters about 50 miles from Libya. The ship drifted for about 11 days until problems with the return of the original bills of lading were resolved, and only then did the ship proceed to Benghazi.

There was a further delay before the ship berthed at Benghazi on 3rd February, 2010 and cargo discharge was completed on 18th February, 2010.

The charterer claimed that the ship was off-hire for the full drifting period. The material parts of the off-hire provision read at clause 15:

"...in the event of loss of time from... default of Master... or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost..."

Arbitration Award

It was accepted during the subsequent arbitration that, during the drifting period, the master's refusal to comply with the charterer's order to proceed to Benghazi amounted to a "default of master" which prevented the full working of the ship within the terms of clause 15. The majority of the arbitrators, mainly relying on the standard text book, Wilford Time Charters, 6th ed., held that, in order to deduct from hire under clause 15, the charterer only had to demonstrate that:

- i) there was a default by the master; and
- ii) as a consequence of that default there was an immediate loss of time.

The ship was therefore held to be off-hire. The owner appealed.

Commercial Court decision

On appeal, the owner challenged the arbitrators' interpretation of the point, based on Wilford that:

"The ship must render the service immediately required of her, in which event, hire is payable continuously, but if she cannot, or does not, hire is not payable for the time so lost."

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continued

The owner submitted that any calculation of loss of time is not restricted to the period of inefficiency and that the charterer had to go on to demonstrate that there was delay to the progress of the adventure – a loss of time in performing the chartered service overall, not merely for the immediate period of inefficiency. As the tribunal had found as a matter of fact that, had the ship proceeded directly to Benghazi, it would not have berthed any earlier than it did – the owner argued that there was, in fact, no overall loss of time to the adventure.

Walker J. overturned the arbitration award, setting out two requirements for the ship to be off-hire:

- i) the off-hire clause should be engaged; and
- ii) there should be an actual loss of time as a consequence.

On the facts Walker J. agreed that the clause was engaged due to the default by the master. However the second part of the test precluded the ship from being off-hire as she could not have berthed any earlier due to complications with the bills of lading in Benghazi. Therefore there was no loss of time to the service overall and the ship remained on-hire.

The Court of Appeal decision

The charterer appealed to the Court of Appeal which set aside the Commercial Court decision and unanimously restored the arbitrators' award. Tomlinson LJ., focusing on the net loss of time provision in clause 15, concluded in his lead judgment that the enquiry should be as to whether time was lost in the service immediately required of the ship, stating that:

"Whether the same amount of time would have been lost for other reasons at another stage in the chartered service is not a relevant consideration... Quite apart from this being the natural construction of the language under consideration, there are sound practical reasons for this approach. It avoids intricate calculations, enabling the parties to know where they stand without having to wait on events subsequent to the period of inefficiency, a consideration of primary importance bearing in mind the remedies available to the owners in the event that payment of hire is not made punctually."

All three Appeal judges were of the view that the service immediately required of the ATHENA during the drifting period was to proceed to the anchorage in the Benghazi roads and to await further instructions there.

She did not comply with the charterer's orders. Whether the same amount of time would have been lost for other reasons (i.e. the bill of lading issue) was not a relevant factor according to the judges.

Conclusion

The judgment means that, when considering whether a ship is off-hire, intricate and speculative enquires as to the course which events would have taken had the ship not gone off-hire should be avoided. If an owner can call for hire to be paid and it is subsequently not paid, most time charters afford him a variety of remedies: withdrawal, termination, liens and suspension of performance. If the Commercial Court decision were upheld, the ship owner would have to wait to see what would happen further down the line before calling for hire to be paid, thereby risking losing effective use of those remedies.

Though the outcome ruled definitively in the charterer's favour in this case, it is by no means an exclusively pro-charterer conclusion. The application of the same reasoning to different facts could equally lead to the owner being successful in a claim that a ship is in fact on-hire. For example, in the older case of *Tynedale Steam Shipping v Anglo-Soviet Shipping* (1936) 54 Ll. Rep. 341 it was held that a ship was not off-hire when her cranes were not working but the service immediately required of the ship was to sail from A to B. What the ATHENA has successfully created is a practical test which fits the words of the off-hire clause which has been used for decades in standard time charters. Though there is clearly commercial reasoning behind the Commercial Court's decision (time would have been lost in any event), there are clear commercial upsides to the Court of Appeal's decision. The off-hire clause is written as an independent code which is to apply regardless of questions of fault or breach. The Court of Appeal confirmed that off-hire should be dealt with at a fairly rudimentary level; it should be a mechanical allocation of time regardless of fault.

If Members have any questions concerning the implications of the ATHENA judgment please contact your usual contact at your local Managers' office.

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