

Update

The “ATHENA” – Court of Appeal upholds charterers’ claim for off hire

The Court of Appeal just delivered its judgement in the “ATHENA”¹, overturning the first instance judgement of Mr Justice Walker. Although a blow for owners, this outcome was largely expected following a paper written for the LMAA by the authors of Time Charters criticising the first instance judgement (see the update in our July newsletter – [click here](#)). The Court of Appeal’s decision on the “ATHENA” is an important judgement on the NYPE off hire clause. In essence, it holds that to determine whether the vessel is off hire the enquiry only goes to the service immediately required of the vessel at the time of the off hire event, and not the entire voyage or adventure or the chartered service overall.

The vessel carried wheat from Russia to Syria but the cargo was rejected there and the charterers ordered her to take the cargo to Libya. However, instead of proceeding straight to Benghazi roads, the vessel drifted for two weeks in international waters off Libya while new bills of lading were being issued. The charterers put the vessel off hire for that period. The owners asserted that she remained on hire as there had been no loss of time to trigger the off hire provisions. The matter proceeded to arbitration.

Clause 15 of the NYPE charterparty provided that “... in the event of loss of time from ... default of master ... or any other cause preventing the full working of the vessel, payment of hire shall cease for the time thereby lost...” The Tribunal held that the vessel was off hire because there had been a default

by the master in not proceeding straight to port. It also found that had the vessel proceeded straight to port she would not have discharged any earlier, as the issue of the bills of lading would still have taken two weeks to resolve. However that was irrelevant to the enquiry as to off hire.

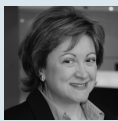
The owners appealed. Mr Justice Walker overturned the award. There were two requirements for the vessel to be off hire:

- a) the off hire clause should be engaged. In this case it was, as there was a default by the master, and
- b) there should be actual loss of time as a consequence. In this case there wasn’t, as she could not have berthed any earlier in any event. There was no loss of time to the

¹ Minerva Navigation Inc v Oceana Shipping AG : Oceana Shipping AG v Transatlantica Commodities SA (The “ATHENA”) [2013]

Further information

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adventure or the service overall, so the vessel remained on hire. In other words, a “commercial” result welcomed by owners.

In the Court of Appeal, however, the High Court decision was set aside and the arbitrators’ award was restored. Lord Justice Tomlinson, delivering the lead judgement, focused on the net loss of time provision in the off hire clause. He concluded that the enquiry should be as to whether time was lost in the **service immediately required** of the vessel, not with “the chartered service” as a whole or the entire maritime adventure. Having analysed earlier authorities he commented:

“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”.

Intricate and speculative enquiries as to the course which events would have taken had the vessel not gone off hire are to be avoided according to the authorities. The use of the

word “overall” in the first instance judgement begged the question when the service starts and when it ends. If the entire service is to be looked at then this might actually lead to the possibility that the same triggering event might give rise to different consequences in terms of off hire in back to back charterparties of differing length - a most undesirable outcome commercially. In addition, in this case, the master’s “arbitrary action”, as the judge put it, in drifting for two weeks in international waters instead of proceeding straight to port also resulted in the “*upsetting of the normal allocation of the risk of delay under the sale contract*”. The “IRA”² is no longer good law as Tomlinson LJ expressly disagreed with the analysis of Mr Justice Tuckey in that case.

The position following the Court of Appeal’s decision in the “ATHENA” is clear: it is impermissible to have regard to events occurring after the end of the off-hire event. One might argue that English law has chosen certainty and practicality over justice overall. However, the object of the off hire clause has always been the mechanistic allocation of time regardless of fault and the “ATHENA” is consistent with that approach.

2 Forestships International Ltd v Armonia Shipping & Finance Corp (THE “IRA”) [1994]