New decision on NYPE off-hire clause

A recent decision of the High Court in London has reassessed the criteria which must be met for a vessel to be considered off hire under the New York Produce Exchange Charterparty Form 1946. The decision of Mr Justice Rix in the "LACONIAN CONFIDENCE" (Lloyd's Law Rep. 2 [1997] Vol. 1 139) has paved the way for a vessel to be found off hire when hitherto she would have been considered on hire.

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The dispute in the "LACONIAN CONFIDENCE" arose out of a charter on NYPE form for one trip from Yangon to Bangladesh with bagged rice. The vessel sailed with her cargo to Chittagong and there discharged between 5th and 26th May 1995. The arbitrators found that "normal" discharge ended on 26th May. A joint survey established the presence on board of a small quantity of rejected sweepings. These were officially deemed damaged and unfit for the purpose for which they had been imported and, importantly, the authorities would not allow them to be landed ashore. Neither, however, would the authorities allow the residue to be dumped until various certificates had been issued. In the event the vessel was delayed until 13th June (some 16 days) when the various certificates were finally issued following a "remarkably bureaucratic procedure" insisted upon by the Bangladeshi authorities. The arbitrators, whose decision was appealed to Mr Justice Rix, found that the dominant cause of the delay was the attitude and actions of the Bangladeshi authorities. Readers will recall that the NYPE Off-hire Clause (Clause 15) provides as follows: "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 accident 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." Importantly in the "LACONIAN CONFIDENCE" the off-hire clause had not been amended by the addition of the word "whatsoever" after the words "or by any other cause", which words precede "preventing the full working of the vessel". The arbitrators rejected the Charterers' submission that the vessel was off hire. Having found that the cause of the delay was the reaction of the Bangladeshi authorities, the arbitrators held that the Charterers could not rely on "any other cause", since in the absence of the word "whatsoever", they held that "any other cause" had to relate to one of the named causes in Clause 15, namely either the manning or provisioning of the vessel, serious incidents of breakdown or damage, or necessary drydocking. In other words, they applied the ejusdem generis rule. Additionally, the arbitrators also rejected the Charterers reliance on "any other cause" because they felt that the "full working of the vessel" had not been prevented. The arbitrators relied inter alia on the decision in the "ROACHBANK" (1987) 2 Lloyd's Law Rep. 489, where it was held that "the question which has to be asked, according to the authorities, is whether the vessel is efficient and capable in herself of performing the service immediately required by the Charterers" (emphasis added). The arbitrators found that the "LACONIAN CONFIDENCE" herself was fully capable of performing the services required of her, even though extraneous events were preventing the Charterers from using the vessel. The Charterers appealed to the High Court maintaining that the vessel was off hire by reason of "any other cause", namely the port authorities refusal to allow the vessel to work or leave. After reviewing many of the authorities on the off-hire clause in the NYPE form, including the "MAREVA AS" (1977) 1 Lloyd's Law Rep. 368, the "AQUACHARM" (1982) 1 Lloyd's Law Rep. 7 and the "MAESTRO GIORGIS" (1983) 2 Lloyd's Law Rep. 66), Mr Justice Rix found that there was no binding authority to say that a judicial gloss had to be imposed on the words "the full working of the vessel" such that the vessel herself had to be found to be inefficient to be off hire. Mr Justice Rix preferred to find that the qualifying phrase "preventing the full working of the vessel" does not necessarily require the vessel to be inefficient in herself. Mr Justice Rix held that 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 by such matters and the natural meaning should be given to the words "preventing the full working of the vessel". Having established that the full working of the vessel had in this case been prevented, it was still necessary for the Judge to consider whether the vessel had been prevented from working by a cause within the off-hire clause. He found that in the absence of the word "whatsoever" the unexpected and unforeseeable interference by the authorities at Chittagong was not a matter which could be brought within the wording of the clause. The actions of the Bangladeshi authorities were not ejusdem generis within the general context of the charter and clause. The unamended words "any other cause" did not cover an entirely extraneous cause. Thus the Charterers' appeal in fact failed.

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The important points to gain from this decision are the fact that if Clause 15 is amended so that the word "whatsoever" is added to qualify "any other cause", causes extraneous to the vessel herself may now be considered sufficient to place a vessel off hire, even if the vessel herself remains fully efficient and capable of performing the service required of her. The case also serves to draw a distinction between the off-hire clause in the NYPE form and that in the Shelltime 3 form, when previously they have been treated in a similar manner. The Shelltime 3 form in fact refers to "efficient working of the vessel" and the decision in the "LACONIAN CONFIDENCE" will not affect the decisions on that charterparty form, which require off hire events to relate solely to the "physical" condition of the vessel herself.