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Submarine cables and Admiralty law: a guide to cable damage claims

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Recent years have seen an increasing number of claims for cable breaks, just as there has been an increase in the number of subsea cables. Such incidents may be caused by vessels dropping anchor in heavy weather, inadvertent paying out of anchors, or by the snagging of fishing gear such as trawling nets and scallop dredging gear. As many as 70 per cent of cable breaks are thought to be caused by fishermen.[1] *The claims are often very valuable.*

According to a report published by the Kingfisher Information Service the cost of repairing a subsea telecoms cable is, on average, £750,000, and for power cables it can rise to in excess of £5 million.[2] The loss of revenue may be much more. Such claims can involve complicated issues of admiralty law and practice, as well as conflicts of law. This paper seeks to summarise some of the legal and factual considerations that arise.

Background

Whilst submarine cables were first laid in the 1850s, their number has proliferated in recent years. In a world of wireless devices, it is easy to ignore that we depend on subsea cabling for the internet, for telephony, and for the transmission of electricity, both from offshore windfarms and from conventional power plants located on the Continent. Inspection of a submarine cable map shows a spaghetti-web of cables spreading from the UK's shoreline through areas of dense seaborne traffic as well as important fishing waters. Prominent examples of recent cable breaks include the loss of power to the Isles of Scilly,[3] and the severing of Britain's main power link to France.[4]

The risks are not only to important strategic assets. Since cabling may conduct high voltages, contact with or proximity to them poses an extreme danger to fishermen. As explained in *The Mariner's Handbook*, "[e]very care should therefore be taken to avoid anchoring, trawling, fishing, dredging, drilling, or carrying out any other activity in the vicinity of submarine cables which might damage them".[5]

Fortunately, the positions of cables are readily known. A scheme called "KIS-ORCA", a joint initiative of the European Subsea Cables Association and RenewableUK, distributes up-to-date plotting information to fishermen which can be displayed on electronic charts onboard. KIS-ORCA also manages a compensation scheme whereby fishermen are reimbursed the cost of slipped

[1] *The Kingfisher Bulletin Talking Points*, January 2018, page 4.
[2] *The Kingfisher Bulletin Talking Points*, January 2018, page 4.
[3] *ITV News Online*, 5 March 2017.
[4] *The Telegraph Online*, 29 November 2016.
[5] Paragraph 3.169.

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fishing gear provided they notify the appropriate authority within 24 hours of arrival in port and provided the current KIS-ORCA data was installed on their fishing plotter. It is an irony that fishermen may face claims from cable operators for breaking a cable when, if only the requirements of the compensation scheme had been followed, they might instead be due a recovery from the cable operators for instead letting go of their gear.

Gathering of evidence

After a cable break, the first step forensically will be to gather evidence. Three types will be especially important.

First, it is likely that the cable will be inspected and/or repaired with ROV[6] assistance. It will be essential to ensure that video footage captured by the ROVs is retained, not least because it will be important to demonstrate that the cable was in its charted position (the video footage ought to include plotting data).

Secondly, data from real-time signal monitoring ashore will help to show precisely when the break occurred. This will allow the culprit to be identified.

Thirdly, vessel tracking data will assist in demonstrating which vessel was in the vicinity of the cable at the precise time when the damage occurred. The use of AIS[7] data has become commonplace in maritime dispute resolution. But it may not always be available in the pursuit of claims for cable breaks. One reason is that fishermen often turn off their AIS transponder when nearing fishing grounds in order to conceal their whereabouts from competitor vessels. Another reason is that only UK-registered fishing vessels that are over 15 m are required to carry AIS transponders.[8] However, even if fishing vessels are not transmitting AIS data, they will nevertheless be transmitting VMS[9] data, provided they are 12 m in length or over.[10] Historic VMS data are held by the MMO.[11] It has proven possible to obtain VMS data from the MMO under Freedom of Information requests, such requests being strengthened by the assertion that vessels may be committing a criminal offence by navigating without transmitting AIS data. Once the potential culprit has been identified, consideration should also be given to the securing of navigational data stored on the vessel's "fish plotter" or, in the case of a merchant vessel, on its ECDIS[12] and/or VDR.[13]

Jurisdiction

Claims for damage to subsea cables fall within the scope of claims heard by the Admiralty Court and must be commenced there, rather than, for instance, in the county court.[14] Whether the Admiralty Court will have jurisdiction to entertain a claim will depend on a number of considerations relating to matters of private international law.

If the prospective defendant[15] is domiciled in an EU member state such that the Brussels Regulation Recast applies, or else is domiciled in a state that is a counterparty to the Lugano Convention,[16] the ordinary rule is that it shall be sued in the courts of the state where it is domiciled. A special derogation nevertheless applies so as to allow defendants to be sued "in the place where the harmful event occurred".[17] The Admiralty Court has interpreted this derogation restrictively. In *Virgin Media Ltd v Joseph Whelan (trading as M & J Fish)*[18] it was held that, in the case of a claim for damage to a subsea cable, the court will have jurisdiction under the special derogation only where the damage has occurred in UK territorial waters. By contrast, it is not engaged where the damage has occurred in the UK's exclusive economic zone (EEZ). Nor is it possible to circumvent these difficulties through resort to the in rem jurisdiction of the Admiralty Court,[19] unless the ship is actually arrested.[20] In sum, if, in such instances, the owner or demise charterer of the culprit vessel is not domiciled in England but in a state to which the Brussels Regulation Recast or the Lugano Convention applies, it will only be possible to sue the defendant in England and Wales if the damage occurred within territorial waters or else if the vessel is arrested there. Otherwise, the defendant will have to be sued in the state in which it is domiciled, supposing of course it does not agree to English jurisdiction.

If, on the other hand, the prospective defendant is not domiciled in an EU member state or a state that is party to the Lugano Convention, the position would appear to be as follows. In *Virgin Media Ltd v Joseph Whelan* Admiralty Registrar Kay QC expressed the opinion that, unless its in rem jurisdiction is invoked, the Admiralty Court "will not have jurisdiction over incidents occurring outside territorial waters unless some Act of Parliament or other effective rule or regulation concerned with jurisdiction has given the Courts of England and Wales such jurisdiction."[21] In the case of a collision occurring in the UK's EEZ in the Irish Sea, none could be found. Therefore, in order for the Admiralty Court to have jurisdiction in such instances, either the damage must occur in territorial waters (in which case it would seem possible to apply for permission to serve out of the jurisdiction upon the prospective defendant in personam[22]) or else there would need to be a successful invocation of its in rem jurisdiction through service of an in rem claim form, either on the guilty vessel, or else, in some circumstances,[23] on a sister ship. For this to occur, it will of course be necessary for the guilty vessel or her sister ship to be served with process in English waters.

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[6] Remotely operated underwater vehicles.
[7] Automatic Identification System.
[8] Merchant Shipping (Vessel Traffic Monitoring and Reporting Requirements) Regulations 2004 (SI 2004 No 2110) (as amended); Annex II Part 1 point 3 of Directive 2002/59/EC of 27 June 2002 establishing a Community vessel traffic monitoring and information system; Regulation (EC) 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy (the Control Regulation), article 10. See www.gov.uk/government/publications/automatic-identification-system-ais-for-fishing-vessels
[9] Vessel Monitoring System.
[10] This is a requirement of Commission Implementing Regulation (EU) 404/2011 of 8 April 2011 laying down detailed rules for the implementation of Council Regulation (EC) No 1224/2009 establishing a Community control system for ensuring compliance with the rules of the Common Fisheries Policy. See www.gov.uk/government/publications/vessel-monitoring-system-devices
[11] Marine Management Organisation, a government agency which licenses, regulates and plans marine activities, including fishing.
[12] Electronic Chart Display and Information System.
[13] Voyage Data Recorder.

[14] Senior Courts Act 1981, section 20(2)(e); CPR 61.2(a)(ii).
[15] ie the registered owner of the vessel or, if the vessel has been bareboat-chartered, the demise charterer.
[16] ie Denmark, Iceland, Norway and Switzerland.
[17] Brussels Regulation Recast, article 7(2); Lugano Convention, article 5(3).
[18] [2017] EWHC 1380 (Admlty), Admiralty Registrar Kay QC.
[19] ie whereby jurisdiction is founded through service of the claim form on the ship.
[20] The reasons for this relate to the preservation under the Brussels Regulation Recast of the Arrest Convention 1952. For further explanation, see Derrington and Turner, *The Law and Practice of Admiralty Matters*, 2nd Edition, at para 6.32.
[21] At para 18.
[22] Under CPR PD 6B para 9(a). (CPR 61.4(7) does not apply, as that rule concerns collisions between ships.)
[23] See Senior Courts Act 1981, section 21(4).

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Wherever the prospective defendant is domiciled, it is nevertheless possible to confer jurisdiction on the English Admiralty Court by means of express agreement between the parties. This can be obtained through the threat of arrest elsewhere.[24]

Tonnage limitation

Tonnage limitation refers to the privilege afforded to owners of ships, and certain other classes of individuals interested in their operation, to limit their liability in a fixed amount based on the ship's gross tonnage.[25] This entitlement arises from the Convention on Limitation of Liability for Maritime Claims 1976, as amended by its 1996 Protocol ("LLMC 1996"), which is incorporated into English law by section 185 of the Merchant Shipping Act 1995. To take the example of a small container vessel of about 8,000 mt deadweight and 600 TEU[26] container capacity, the limitation fund would be in the amount of about £4 million.[27] If the vessel should cause damage to a single cable in any greater sum, the shipowner will only be liable in that amount, and no more. Similarly, if the vessel should cause damage to multiple cables in an aggregate sum which is greater than that amount, the cable owners will have to share the limitation sum in proportion to the amounts of their respective claims.

In England, rights of limitation may be asserted either by defence to a claim, or by the institution of limitation proceedings seeking a limitation decree. By this latter method, the Admiralty Court may declare that the shipowner is liable only in the fixed amount and, in case of a general limitation decree, this will be good "against the world".[28] Whereas the limitation decree need not be accompanied by the constitution of a limitation fund[29] (either through payment of monies into court or through establishment of a guarantee sanctioned by the court) it is only through constitution of the fund that the shipowner will be entitled to the important relief available under LLMC 1996, that there shall be a bar to the pursuit of other actions arising from the incident, and that the ship shall be free from arrest.[30]

As with liability claims, complex rules govern the question whether the Admiralty Court may entertain limitation proceedings claiming a decree. In summary, the position under the Brussels Regulation Recast and the Lugano Convention is that, where the court has jurisdiction in actions relating to liability (as to which see above), it shall also have jurisdiction over claims for limitation of liability.[31] Where, however, the Brussels Regulation Recast and the Lugano Convention do not apply, ether the limitation claim form must be served on a defendant in this jurisdiction, or else permission for service out of the jurisdiction will need to be obtained.[32] In the ordinary case of damage being done to a subsea cable belonging to an operator domiciled in this jurisdiction, there ought not to be any difficulty in a foreign shipowner commencing limitation proceedings here. More complicated is the question whether it would be to the shipowner's advantage instead to commence limitation proceedings elsewhere, for instance in the state of its domicile. This may yield benefits if, for instance, the limitation amount were lower there yet the decree were still capable of recognition in England. Whether there is any advantage for the shipowner in this type of "forum shopping" and how it may be prevented by the cable operator are matters which fall outside the scope of this paper.[33]

The amount of the shipowner's limitation of liability will depend on the application of the aggregating formula in LLMC 1996, article 9. This provides that "the limits of liability … shall apply to the aggregate of all claims which arise on any distinct occasion". As will be apparent, the question whether there has been one, or more than one, "distinct occasion" can make an enormous difference as to whether liability claims are affected by tonnage limitation at all, or else as to the size of the monetary fund in which the liability claimants must share. The question of how many occasions existed is likely to depend on whether the separate occasions of damage were the result of the "same act of want of seamanship".[34] Such a test was applied in the Australian case of *Strong Wise Ltd v Esso Australia Resources Pty Ltd (The APL Sydney)*.[35] In that case, two separate acts of damage were occasioned to a single submarine pipeline. The court held that each damage was a distinct occasion, since there were two separate faults. The first related to the fouling of the pipeline by the ship's anchor, the court finding that the master should have weighed anchor and sailed clear. The second occasion comprised the chain of events which led to the rupture of the pipeline after the ship's engines were put slow ahead. However, in the more straightforward case of a vessel whose anchor has inadvertently paid out and strikes a succession of cables whilst underway, it is likely that there will be only one "distinct occasion", unless of course the error should reasonably have been noticed by the crew before another cable was struck.

The consequences of tonnage limitation are difficult for a cable operator to avoid. LLMC 1996 sets a very high threshold for the breaking of limits by providing that "[a] person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result."[36] The persons whose knowledge is relevant is not specified by the LLMC, but this is generally understood as referring to those

[24] A pro forma jurisdiction agreement designed for use in collision proceedings may be found on the website of the Admiralty Solicitors Group, www.admiraltysolicitorsgroup.com
[25] Gross tonnage is an expression of the internal volume of the vessel, and is not to be confused with deadweight tonnage.
[26] Twenty-foot equivalent unit, ie the ordinary size of container.
[27] The figures are given as a rough example. The precise amount depends on gross tonnage and is determined according to the measures in the Merchant Shipping Act 1995 (Amendment) Order 2016 (SI 2016 No 1061).
[28] In summary, general limitation decrees require the publication of the decree in newspapers. Unless a challenge to the right of limitation is made within a set period of time, it would not be open to a liability claimant subsequently to contest it.
[29] See LLMC 1996, article 10; *Seismic Shipping Inc v Total E&P UK plc (The Western Regent)* [2005] 2 Lloyd's Rep 54; (CA) [2005] 2 Lloyd's Rep 359.
[30] See LLMC 1996, article 14.
[31] See Brussels Regulation Recast, article 9; and Lugano Convention, article 7.
[32] See CPR 61.11(5).
[33] For commentary on this complicated area, see Reynolds and Tsimplis, *Shipowners' Limitation of Liability*, chapter 11.
[34] See *The Schwan* [1892] P 419.
[35] [2010] FCA 240; [2010] 2 Lloyd's Rep 555.
[36] LLMC 1996, article 4.

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in charge of the company.[37] Where the act or omission in question is caused by a crewmember as distinct from, for example, the managing director, this therefore causes a yet further obstacle to the breaking of the limits. Where, however, the act or omission is that of a fishing boat skipper who also owns the fishing boat, the obstacle does not arise.[38] But even with this obstacle removed, substantial difficulties remain. For instance, in the Canadian case of *Peracomo Inc v Telus Communications Co (The Realice)*,[39] in which the skipper of a fishing vessel took an electric saw to a fibre optic cable that he had raised to the surface, it was held that the right to limit liability had not been lost. The court found that the skipper thought that the cable was useless and would not be repaired as it had no value. Since he did not intend to cause the loss or appreciate that it was a probable consequence, the mental state necessary for breaking the limits under the Convention was not present. Breaking the limits is not, however, inconceivable in a cable damage case. Consider, for instance, a skipper and owner of a scallop dredger who deliberately dredges within 100 m of a cable location in the expectation of a plentiful catch, knowing that the cable might not be in its precise charted position but takes the risk, hoping that the gear will anyway trundle over the buried cable rather than snagging it.

Ship arrest

Unless and until a limitation fund is constituted, whether in England or in another LLMC 1996 contracting state, a cable operator may apply to the Admiralty Court for the guilty vessel to be arrested.[40] The advantages of carrying out an arrest include that it will thereafter constitute the ship as security for the claim. Not only that, but the security cannot ordinarily be defeated by the subsequent insolvency of the owner of the arrested property. Carrying out an arrest can, however, carry disadvantages. For instance, the expenses of keeping a vessel under arrest are payable by parties who have arrested the vessel. Whereas such expenses may be recouped from the proceeds of any judicial sale, they will need to be paid in the first instance by the arresting party.[41]

However, it will usually be unnecessary to carry out an arrest, despite the threat. This is because cable damage is typically covered by a vessel's P&I insurers, who may ordinarily be expected to put up a letter of undertaking in lieu of arrest.[42] The point to note for those unfamiliar with claims that are subject to admiralty jurisdiction is that security may be obtained at the outset of the claim,[43] thereby avoiding the difficulty of enforcement of judgment against a foreign defendant.

The liability claim

In order for a cable operator to succeed in a claim against a vessel's owner for causing damage to a submarine cable, it will be necessary to demonstrate the facts essential for a cause of action in the tort of negligence, ie that the vessel owner owed a duty of care which was breached, and the breach of duty has caused losses which were reasonably foreseeable. The authors Wargo and Davenport[44] suggest that the following facts must be demonstrated: (i) the cable must have been damaged by mechanical means; (ii) the vessel must have had actual or constructive notice of the position of the cable;[45] (iii) the vessel must have been at the cable fault location at the approximate time of the fault; (iv) the vessel must have been engaged in an activity capable of causing the damage; and (vi) no other vessel must have been in the same area at the approximate time of the fault. Once those matters are sufficiently proved, the authors suggest that the burden of proof will in practice switch to the defendant to demonstrate that the damage was in fact done by some other vessel.

The evidence which is likely to be necessary to prove these matters has already been noted above. Proving them will involve a number of areas of expert evidence. These may include the interrogation and analysis of shoreside signals monitoring, the interrogation and analysis of shipboard data recorders and other broadcast tracking data such as AIS, as well as expertise in fishing and fishing patterns.

One defence which is potentially open to the defendant is that of contributory negligence. In *The Realice* (see above) it was alleged that the operators were contributorily negligent in failing to bury the cable underground. The defence failed. However, even if a cable operator were held to have been contributorily negligent for failing, for example, adequately to bury or armour a cable, it is likely that the guilty vessel would still be required to bear the greater share of responsibility. By analogy with the well-known case of *Froom v Butcher,*[46] in which a passenger was held contributorily negligent for failing to wear a seatbelt and damages were therefore reduced by 25 per cent, it was observed that the negligent driver "must bear by far the greater share of responsibility. It was his negligence which caused the accident. It was also the prime cause of the whole of the damage".[47]

Another issue which may arise relates to the fact that multiple damage repairs may be carried out during the same excursion. Repairs may not need to be carried out immediately (for instance, because it has been possible to switch services to undamaged fibres) and instead can wait until a cable requires further maintenance or repair. The costs of mobilising and demobilising the cable vessel will then be common to both repairs. The question arises whether a defendant could, in

[37] For further explanation, see Reynolds and Tsimplis, op cit, at pages 76 to 78. For a case involving the fouling of an oil pipeline by an anchor decided under LLMC 1956 see *The Marion* [1984] 2 Lloyd's Rep 1.
[38] See *Margolle v Delta Maritime Co Ltd (The Saint Jacques II and Gudermes)* [2003] 1 Lloyd's Rep 203.
[39] 2014 SCC 29; [2014] 2 Lloyd's Rep 315.
[40] The entitlement arises by reason of there being a maritime lien for damage (see *The Bold Buccleugh* (1851) 7 Moo PC 267) and/or by reason of Senior Courts Act 1981, section 21(3) thereby being fulfilled.
[41] Or, even more immediately, by its firm of solicitors – see the undertaking in form ADM4.
[42] A pro forma for use in collision cases may be found on the website of the Admiralty Solicitors Group.
[43] On an arrest, the claimant would only, however, be entitled to an amount sufficient to cover the quantum of its best reasonably arguable case, together with interest and costs, and it could not demand security in an amount which exceeds the value of the property proceeded against. Similar considerations will apply to security given in lieu of arrest.

[44] Robert Wargo and Tara Davenport, chapter 10, "Protecting Submarine Cables from Competing Uses" in D R Burnett, R C Beckham and T M Davenport, *Submarine Cables: The Handbook of Law and Policy* (Leiden, Boston: Martinus Nijhoff Publishers, 2014) at page 270.
[45] In other words, the crew either knew or ought reasonably to have known of the charted location, for instance by means of KIS-ORCA bulletins.
[46] [1975] 2 Lloyd's Rep 478. See also *Constantine (trading as Tavistock Antiques) v TotalFinaElf* [2003] EWHC 428 (Ch), in which the judge considered that a reduction in no more than 15 per cent would have been appropriate for failing to cover antiques kept in a garage that were damaged by heating oil.
[47] *Froom v Butcher* at page 483 col 1 per Lord Denning.

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such circumstances, seek to reduce its liability by contending that some part of the costs were incurred for other reasons. It is suggested that there would ordinarily be no such right of reduction. This is because a number of cases in the field of ship collisions and marine insurance make it clear that there is to be no process of averaging.[48]

Criminal liability

This review has so far only covered matters of civil liability. Damage to a submarine cable can, however, also lead to criminal prosecution. This is the result of the Submarine and Telegraph Act 1885 which gives effect to the International Convention for the Protection of Submarine Telegraph Cables 1884. The purpose of the Act is to permit criminal prosecutions of persons who deliberately or negligently damage cables. Article 8 of the Convention provides that the tribunals which "are competent to take cognizance of infractions of the Present Convention are those of the country to which the vessel on board of which the offence was committed belongs." It is understood that prosecutions are not often brought, supposing they are brought at all. Perhaps this is because of historic difficulties in proving cases, given their occurrence at sea. As this paper has shown, there are now sophisticated tools for the identification of guilty vessels. There would therefore seem no reason why the law, and the UK's treaty obligations, should not be upheld.

Conclusion

Through the deployment of sophisticated electronic tracking data – something to which the Admiralty Court is no stranger[49] – claims for damage to subsea cables can stand very good chances of success. The increasing number of cable strikes poses a problem for the industry. By pursuing claims in the Admiralty Court, operators can demonstrate that the cable industry is tough on transgressors. It is suggested that Admiralty law and practice has a role to play in the protection of these vital strategic assets.

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[48] See *The Ferdinand Retzlaff* [1972] 2 Lloyd's Rep 120; *Elpidoforos Shipping Corporation v Furness Withy (Australia) Pty Ltd (The Oinoussian Friendship)* [1987] 1 Lloyd's Rep 258; *The Ruabon* [1900] AC 6; *Sealion Shipping Ltd v Valiant Insurance Co (The Toisa Pisces)* [2013] 1 Lloyd's Rep 108.

[49] CPR PD 61 has recently been revised to allow for "fast track" procedures in cases where electronic track data is available in collision proceedings.

"Off-hire clause" in charterparty may become adverse to shipowners upon failed inspection

At many loading ports, charterers will carry out a preliminary survey of the cleanliness of the vessel while waiting for berth at anchorage. In such an event, shipowners should pay close attention to the off-hire clause in the charterparty. This is because charterers might be entitled to place the vessel off hire even without the loss of time, should the preliminary survey occasionally fail.

Recently, there have been various cases involving claims by charterers to place the vessel off hire as a result of failure to pass a preliminary survey for cleanliness during loading. These cases normally take place in American countries, for example the United States, Mexico etc, involving a voyage to load grain and/or other clean cargoes.

It is usual practice in the international shipping market that charterers' surveyors will carry out a preliminary survey in respect of the cleanliness of the vessel when the vessels are waiting for berth at anchorage due to port congestion. A formal survey will then be carried out after berthing.

Quite frequently, the preliminary survey will result in a failure and the ship's masters and seamen will therefore be required to clean the vessel immediately to guarantee no delay in loading cargoes upon berthing. Correspondingly, it is also likely that charterers would refuse to pay hire on the basis of the loss of time during the period of cleaning the vessel. Disputes would consequently arise between shipowners and charterers as to whether charterers are entitled under the charterparties and at law to place the vessel off hire – potentially a source of a substantial amount of litigation.

"Net loss of time clause" and "period off-hire clause"

At this juncture, it is necessary to briefly introduce the difference between a "net loss of time clause" and a "period off-hire clause", both of which can be categorised as "off-hire clauses". In principle, both clauses are designed to deal with how much time off-hire is at stake.

On the one hand, under a "net loss of time clause", charterers must first prove their own loss of time, after which they can use the amount of time lost for the purpose of placing the vessel off-hire.

On the other hand, under a "period off-hire clause", charterers can place the vessel off hire for the whole period regardless of their actual loss of time so long as the conditions specified in the charterparty are at hand. What determines which clause it is to be is the specific wording of the charterparty.

The model example of a "net loss of time clause" is article 17 of NYPE 93, which provides that "the payment of hire

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