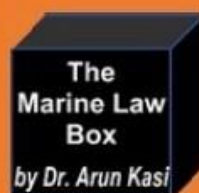


DR. ARUN KASI

# **SPEED-CONSUMPTION CLAIMS**

**A Guidebook**

The Marine Law Box



Dr. Arun Kasi

# SPEED-CONSUMPTION CLAIMS

## A Guidebook

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# Preface

This guidebook is a collection of papers on selected issues that I had written on Speed-Consumption Claims. It is part of the series of guidebooks that I am writing on charter disputes. The guidebook is written as a practical manual and handy reference for shipowners, charterers, FD&D managers, arbitration counsel and arbitrators. The guidebook offers numerous worked examples for effective understanding of the principles discussed, which is a unique feature of this guidebook.

In writing this guidebook, I particularly had in my mind LMAA and SCMA arbitration. The guidebook presents numerous LMAA awards and court cases on the subject as well as some statutes. It also includes a fair amount of analysis and, where appropriate, critical thoughts on the subject.

I trust that the industry (particularly charterparty claims managers) and legal fraternity involved in this subject will find this guidebook very useful and a quick reference material.

This guidebook is based on English law. It is up to date with materials available as around end of 2021.

Dr. Arun Kasi  
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# Abbreviations

abt	About
ADA	All details about
AIS	automated identification system
BF	Beauford scale wind force
DMI	Danish Meteorological Institute
DSS	Douglas scale sea state
HFO	heavy fuel oil
IFO	intermediate fuel oil
MDO	marine diesel oil
mt	metric ton
WOG	Without guarantee
WRC	Weather Routing Company

## **Chapter 1**

### **1. Introduction**

This Chapter introduces the speed-consumption warranty given by shipowners to charterers in time charterparties. The significance of the warranty to the charterer is discussed. Then, the remaining nine chapters are outlined.

#### **Speed-Consumption Warranty**

In time charterparties, the shipowner usually warrants the capability of the vessel. This will include the speed-consumption capability. The warranty will normally be that the vessel is capable of steaming at a certain speed on a certain consumption. The warranty will ordinarily be about the vessel's capability in good weather conditions. The qualifying conditions for good weather are normally specifically spelt out in the warranty. For example, the warranty may read like this: the vessel is capable of performing about 12.5 knots speed on about 36 mt IFO 380 per day in good weather conditions of wind force not exceeding code 4 in the Beauford scale and sea state not exceeding code 3 in the Douglas sea scale.

Needless to say, the speed-consumption warranty is an important one for the charterer. An under-speed will mean a longer time for the charterer to perform a voyage, thus more hire. Overconsumption will cost the charterer more fuel. This is an area of frequent dispute. Often, it is resolved by amicable solution between the shipowners and charters. If not, the dispute may be taken to arbitration. Again, most of the times, the dispute is resolved between the parties before an award.

#### **Chapters outlined**

In this guidebook, some selected frequent issues on this subject are discussed. First, the methodology of establishing a breach of the warranty by reference to the performance of the vessel at times of good weather and extrapolating any shortfall found in such test to the entire sea passage or passages in question (Chapter 2).

Second, the question of when, and when not, an under-speed claim will put the vessel off-hire (Chapter 3). This is an area that merchants have sometimes been confused about.

Third, the question of whether the charterer may deduct its underperformance claim from the hire (Chapter 4). Often, the charterparty can be silent on this sensitive question. A wrongful deduction may allow the shipowner to withdraw the ship and enable the shipowner to bargain for a ‘without prejudice’ agreement at a higher rate. This is a serious question at present when the hire and freight rates have risen to an unprecedented level.

Fourth, the margin to be allowed for the usual ‘about’ qualification attached to the speed and/or consumption warranty (Chapter 5). When the ‘about’ qualification is attached to both the speed part and consumption part of the warranty, it is called ‘double about’.

The fifth, bottom fouling. This is a popular subject of argument between charterers and shipowners (Chapter 6). The bottom is frequently fouled because of the charterer’s orders for a long stay at ports. More so at the present Covid-19 era where port clearances are significantly delayed. This will trigger bottom fouling, which will reduce the speed capability of the vessel and increase fuel consumption. The owner will argue that it should not be liable for the consequent underperformance because it was caused by the long port stay ordered by the charterer. The charterer will argue that the shipowner is liable to maintain the vessel in a fit state throughout the charterer, hence the shipowner is liable for the consequent underperformance.

Sixth, the relationship between the length of the sample performance taken for establishing the breach and the length of the sea passage in question (Chapter 7). A critical review of this point made in *The Ocean Virgo* is discussed.

Seventh, the ‘Without Guarantee’ (WOG) qualification (Chapter 8). This qualification is frequently attached to vessel description clauses. The current judicial trend on this, and the negotiation techniques by which charterers may mitigate against the predicament caused by this qualification, and the possible future are discussed.

Eighth, the conflict that is sometimes seen between the WRC report, weather data and deck log (Chapter 9). The weight of each of them and the interplay between them are considered. Sometimes, there will be a preference clause in the charterparty that will say how a conflict should be resolved. The preference clause and the limitations to it are also discussed.

Ninth and last, the always current issue of favourable ‘current’ (Chapter 10). When the vessel has kept up to the warranted speed-consumption only by a favourable current, is there a breach? This question is considered along with the limitations to relying on a reported ‘favourable current’ given the inherent risk of inaccuracy attached to calculating the ‘current’ factor, which is said to be an imperfect science. The margin of errors that must be allowed, if a ‘favourable current’ factor is to be taken into account, is also touched on.

## Chapter 2

### 2. Speed-Consumption Claims: Establishing and Extrapolating<sup>1</sup>

In this chapter, first, the performance warranty in the most popular standard form for dry cargo chartering, namely NYPE form (referring to the 1946 version) will be introduced and the methodology of establishing the breach on a sample basis and extrapolating the results to the entire sea passages will be considered. This will be followed by a quick comparison of the warranty in SHELLTIME 4, the most popular form in the tanker chartering business.

#### Speed-consumption warranty in NYPE 1946

In NYPE form (referring to the 1946 version), the performance warranty is in lines 9-10 (in the preamble), which must be read from line 3, of the NYPE form. The said lines are reproduced below:

- 3 Owners of the good \_\_\_\_\_ Steamship/Motorship ...
- 9 which are of the capacity of about \_\_\_\_\_ tons of fuel, and capable of steaming, fully laden, under good weather
- 10 conditions about \_\_\_\_\_ knots on a consumption of about \_\_\_\_\_ tons of best Welsh coal-best grade fuel oil-best grade Diesel oil, ...

The warranty is about the ‘capability’ of the vessel in ‘good weather’ conditions. The warranty here refers to the capability at the time of fixture or delivery and it is not a continuous warranty. Authorities better support the proposition that the warranty is tested at the time of delivery rather than the time of the fixture, which proposition will make more commercial sense than the other (see *The Al Bida*;<sup>2</sup> *The Pearl C*;<sup>3</sup> *The Pamphilos*<sup>4</sup>).

The warranty here refers only to the speed-consumption capability of the vessel in *fully laden* sea passage but in practice, parties will add warranty of capability also in *ballast* sea passage. The last clause in the standard form is cl 28. It is quite common for parties to add a rider clause, usually, cl 29 entitled ‘Vessel’s Description’ and set out, among other descriptions

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<sup>1</sup> This contents of this chapter, substantially, first appeared in [Lloyd’s Shipping & Trade Law, Vol. 21, No. 8, October 2021, p. 1.](#)

<sup>2</sup> *Luxor Trading Corporation v Geogas Enterprise SA (The Al Bida)* [1987] 1 Lloyd’s Rep 124 (CA).

<sup>3</sup> *Bulk Ship Union SA v Clipper Bulk Shipping Ltd (The Pearl C)* [2012] EWHC 2595 (Comm) (HC).

<sup>4</sup> *Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd (The Pamphilos)* [2002] All ER (D) 94 (Nov) (HC).

of the vessel, the performance warranty in more detail. The rider clause will usually provide for the capability of the vessel in ballast sea passage in addition to the 'laden' sea passage (rather than 'fully' laden performance capability). It is commonly drawn from, whether by incorporation or otherwise, a questionnaire, frequently in the Baltic Questionnaire format, furnished by the owner to the charterer, containing the vessel's description. Normally, a reference will be made in lines 9-10 to the rider clause.

The rider clause will usually set out the weather conditions in more detail with references to the Beaufort scale and the Douglas sea state scale and likely say 'no swell or adverse current' or the like. The wind force commonly admitted by the rider clause for good weather is code 4 of the Beaufort scale and the sea state allowed is code 3 of the Douglas sea state scale. Even when the wind force is not specified in the charterparty but the warranty is made subject to 'good weather', arbitral tribunals have interpreted the 'good weather' to admit wind force up to code 4 of Beaufort scale (London Arbitration 15/06). However, that will depend on the type of vessel, etc. For example, a very large vessel may not be affected by wind force in the same way a smaller vessel would be.

### **Two-Stage Test: Proving Underperformance and Assessing Damages**

Although the question is about the vessel's capability at the time of delivery, in practice this will be proved by the vessel's performance after delivery. The charterer will identify the period or periods of good weather during sea passages that the vessel performed under the charterparty. Then the vessel's performance during the said period or periods will be established. For this, the said period or periods must be sufficiently long so that the period or periods can be taken to represent the 'capability' of the vessel. If the performance, representing capability, thus established is short of the warranted performance capability, then there is a breach of the warranty. If there is a breach, the next question is what quantum of damages the charterer is entitled to for the breach. It is impractical to assess the damages with any perfection in underperformance claims. But some hypothetical methodology has been accepted by the arbitral tribunals and courts. Before delving into the methodology, it must be observed that the effect of the breach, i.e. the incapability of the vessel, is on all sea passages that the vessel performed under the charterparty and not merely on the sea passages when good weather was experienced. The methodology is that the underperformance established during the good

weather period or periods will be extrapolated to all the sea passages under the charterparty. See *The Ocean Virgo*<sup>5</sup> *The Didymi*;<sup>6</sup> *The Gas Enterprise*.<sup>7</sup>

A basic example will help understand the process and methodology. Suppose that the vessel was warranted capable of a speed of 15 knots on 30 metric tons of IFO (380 CST) per day in good weather. The vessel performed a total of 50 days of sea passages under the charterparty. Bad weather was experienced on all sea passage days except one day. Now, this one day will be taken to measure the vessel's performance capability. It is found that on this one day, she achieved only a speed of 14 knots on 31 metric tons of IFO (380 CST) per day. This means the warranty has been breached, both by under-speed and overconsumption, as the performance on this one day shows that the vessel was indeed capable only of this performance when she was delivered. The vessel steamed a total distance of 15,000 nautical miles on all sea passages during the charter period. If the vessel was capable of the warranted performance, then it would only have taken 1,000 hours (i.e. 41.66 days) (calculation: 15,000 nautical miles ÷ 15 knots) to steam the distance, assuming it was all good weather. The consumption would have been 1,250 metric tons of IFO (380 CST) (calculation: 41.66 days x 30 metric tons), again assuming good weather at all times. But, hypothetically, with the actual capability of the vessel, i.e. under-capability, she would take 1,071.43 hours (i.e. 44.64 days) (calculation: 15,000 ÷ 14 knots) and consume 1,383.93 metric tons of IFO (380 CST) (calculation: 44.64 days x 31 metric tons) in good weather. Hence, the loss to the charterer is 71.43 hours and 133.93 metric tons of IFO (380 CST). This is what the charterer will be compensated for. Other formulas of calculation have been advocated (see London Arbitration 12/14), but it is suggested that the above basic formula, in principle, will best fit the contractual principles of awarding compensation. The suggested formula would find support in *The Al Bida* The basic formula can be stated as:

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<sup>5</sup> *Polaris Shipping Co Ltd v Sinoriches Enterprises Co Ltd (The Ocean Virgo)* [2015] EWHC 3405 (Comm) (HC).

<sup>6</sup> *Didymi Corp v Atlantic Lines and Navigation Co Inc (The Didymi)* [1988] 2 Lloyd's Rep 108 (CA).

<sup>7</sup> *Exmar NV v BP Shipping Ltd (The Gas Enterprise)* [1993] 2 Lloyd's Rep 352 (CA).

$$\begin{aligned} \text{Speed claim} &= \frac{\text{Total Sea Passage Distance}}{\text{Minimum Warranted Speed}} - \frac{\text{Total Sea Passage Distance}}{\text{Actual Good Weather Speed Achieved}} \\ \text{Consumption claim} &= \frac{\text{Total Sea Passage Distance}}{\text{Maximum Warranted Cons.}} - \frac{\text{Total Sea Passage Distance}}{\text{Actual Good Weather Consumption}} \\ \text{Net underperformance claim} &= \text{Speed claim} + \text{Consumption claim} \end{aligned}$$

Notably, it does not matter that the assumption of good weather both on the warranted performance calculation and the actual performance calculation were not true. Indeed, none of the two scenarios happened, but that does not matter. The vessel would have taken, in fact, more time and consumed more fuel even than the actual performance scenario used in the above calculation. Again, that does not matter. Doing a perfect calculation of loss of time and fuel to the charter is an impractical task. The methodology used above will arrive at the probable loss and it has been accepted by the arbitral tribunals and courts, although the methodology is indeed a hypothetical one.

In London Arbitration 24/19, the methodology was well summarised and said in simple terms, namely, if a vessel underperforms by certain speed, say one knot, in good weather, then she will probably continue to underperform by the same margin in bad weather and this difference is what the charterer is compensated for throughout all the sea passages.

Suppose that the vessel achieved a lower speed at lower consumption, then there is a loss to the charterer by the lower speed and a gain to the charterer by the lower consumption. In such cases, the gain must be offset against the loss that the charterer may claim for (see *The Ioanna*,<sup>8</sup> London Arbitration 1/07; London Arbitration 9/07; London Arbitration 20/07). In total, if the gain is more than the loss, then there is no claim by the charterer. This is because damages are awarded on a compensatory basis for breach of a term of the contract, which includes the performance warranty. The contractual basis of compensating an aggrieved party is to put him in the position that he would have been had the contract been performed (see *Robinson v Harman*;<sup>9</sup> *The Golden Victory*)<sup>10</sup> subject to a limitation that the loss claimed for is not too remote (see *Hadley v Baxendale*).<sup>11</sup> It will be different if the claim is premised on off-hire provisions in the charterparty rather than breach of the performance warranty. In the case

<sup>8</sup> See *Ocean Glory Compania Naviera SA v A/S PV Christensen (The Ioanna)* [1985] 2 Lloyd's Rep 164 (HC).

<sup>9</sup> *Robinson v Harman* (1848) 1 Exch 850 (Ct of Exch).

<sup>10</sup> *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 AC 353 (HL).

<sup>11</sup> *Hadley v Baxendale* (1854) 9 Exch 341 (Ct of Exch).

of an off-hire claim, any gain by lower fuel consumption goes to benefit of the charterer (See *The Pearl C; The Ioanna*). This is because the charterparty provides that upon a certain event, the vessel goes off-hire, i.e. the vessel is free of hire for the period in question. The charterer does not make an under-speed claim for the owner to offset the gain made by the charterer in consumption. Of course, when there is a gain to the charterer in the net, the owner cannot claim the gain from the charterer, as the warranty is about the minimum performance of the vessel (see *The Al Bida*), and any better performance in the net goes to the benefit of the charterer.

It must be noted that the process of establishing an underperformance claim is a two-stage process. First, the incapability of the vessel must be established. Second, the extrapolation of the established incapability to all sea passages under the charterparty. There are some limitations in both stages.

In the first stage, the nearer the sample period is to the time of delivery, it will better reflect the capability of the vessel at the time of delivery (*The Al Bida*). A sample taken far in time from delivery, particularly in long charters, may not represent the vessel's capability at the time of delivery. The issue of the distance in time between delivery and the sample may not be a severe one in short trip charters (London Arbitration 1/14). A sample taken after the bottom was fouled following a long stay at port, outside port or at anchorage waiting for berth or loading will be no good to represent the capability at the time of delivery. If more than one sample is available and they differ in results from one another, some difficult questions will arise. One possibility is that both performances must be averaged to find out the vessel's capability at the time of delivery. Another possibility is that the one nearest to delivery must be taken. Yet a further possibility is that one most favourable to the owner must be preferred to the one most favourable to the charterer. The last option, it is suggested, is the better one. It will be supported somewhat, at least by analogy, by the authorities that have held that the owner is liable for the breach only to the extent that the performance has fallen below the minimum threshold of the warranty (see *The Al Bida*). In other words, at the action of the charterer, if there is any doubt, the benefit must be given to the owner. However, again such preference is subject to limitations. For example, in one of the periods the vessel might have achieved a better performance only because of a favourable wind or current, hence that period may be a less accurate representation of the vessel's capability than the other period. Determining which period or periods represents the vessel's capability, at the closest and on a balance of probabilities, is a matter of fact for the arbitral tribunal (or court) to decide in each case.

In the second stage, there may be periods of sea passages where the weather is extreme, hence the vessel's speed must be reduced irrespective of whether the vessel can perform at a

higher speed. Such periods must be excluded from the extrapolation. Similarly, the periods when the vessel steams at a lower speed by the order of the charterer must be excluded, irrespective of whether the vessel was capable of performing at a higher speed than that. The reason is that in such circumstances, even if the vessel was capable of better performance, she could only have performed at the speed that she did, hence no loss of time for the charterer. But there can be a loss of fuel for the charterer, which can be impractical to calculate with any probability, hence likely will be excluded from extrapolation and claim. Bingham LJ in *The Didymi* recognised such exclusions from the extrapolation. In long charters, an allowance might have to be given in the extrapolating exercise for reduced performance over time due to the aging factor. If the vessel was not originally capable of performance at the time of delivery but subsequently, by repair, cleaning bottom, etc, was made more capable but not so capable as to meet the warranted performance, then the extrapolation before the repair/cleaning and extrapolation after that will have to be done with different bases.

On both stages, difficulties may arise if performance can only be assessed in laden sea passage but not ballast sea passage, and *vice versa*. When such difficulty arises, it is for the arbitral tribunal (or court) to resolve it on the factual matrix of the case before it.

If bad weather is encountered throughout the charter period, the warranty is literally applicable. But, in such a case, it can be impractical for the charterer to hypothetically establish what the vessel was actually capable of performing had the weather been good. A charterer may attempt to establish underperformance by reference to the vessel's performance under a charterparty before delivery to the subject charterer (London Arbitration 24/05; London Arbitration 14/18). This will in practice be an uphill task as there can be challenges in the subject charterer discovering the records of the previous charter (see cl 11 of 1946 form; cl 15 of 1993 form; London Arbitration 4/11; London Arbitration 4/18). Similarly, a charterer may attempt to establish by expert evidence what performance the vessel would have achieved had the weather been good based on the evidence of what performance the vessel actually achieved in the given bad weather. Such a hypothetical calculation can be an uphill task and whether the results will have sufficient credibility to be accepted by a tribunal is a question to be asked in each such case.

However, an expert's hypothetical calculation can be of assistance in a case of gross underperformance. For instance, if the warranted speed was 15 knots in a condition of wind force not exceeding code 4 in Beauford scale and the vessel performed only 10 knots in circumstances of wind force of Beauford scale code 5, then likely the vessel was incapable of warranted performance. As to the quantum on underperformance, in such a case, an expert's

hypothetical calculation may assist. Suppose, the expert assesses that that the vessel would have performed between 12 and 14 knots had the wind force been of Beauford scale code 5 and the same is accepted as credible evidence by the tribunal, then it will be appropriate for the tribunal to take 14 knots speed as the capable performance of the vessel. It is opined that the tribunal must take 14 knots rather than 12 knots because the benefit of doubt must be given to the owners as the burden of proving the quantum is on the charterers.

The two-stage process was judicially recognised by Teare J in *The Ocean Virgo*. In endorsing the two-stage process, reference was made to *The Didymi* and *The Gas Enterprise*.

#### **SHELLTIME 4: A quick comparison**

In SHELLTIME 4, the speed-consumption warranty is spelt out in cl 24. The scheme is different from that in the NYPE form. The warranty is provided in a range of speed-consumption performance in laden and ballast conditions separately. For example:

Average speed in knots	Maximum average bunker consumption per day	
	main propulsion fuel oil/ diesel oil tonnes	auxiliaries propulsion fuel oil/ diesel oil tonnes
Laden		
10	14.5 mt LSFO / 2.5 mt HFO	/
11	15 mt LSFO / 2.5 mt HFO	/
12	16 mt LSFO / 2.5 mt HFO	/
Ballast		
10	13.5 mt LSFO / 2.5 mt HFO	/
11	14 mt LSFO / 2.5 mt HFO	/
12	15.5 mt LSFO / 2.5 mt HFO	/

Consumption here excludes fuel burnt on cargo heating and tank cleaning. A service speed (eg. 11 knots on laden and 12 knots on ballast) is separately stated, at which the vessel must proceed in the absence of an order by the charterer to the contrary to proceed at any other speed within the range. If the order is to proceed at a speed between the highest speed and the lowest speed in the range but not a specified speed within the range set, then warranted consumption for the ordered speed will be determined by pro-rating. The warranty is a continuing one on an average basis which the vessel must achieve during the good weather periods. The averaging is from the delivery anniversary-to-anniversary, and for the last year, short of a year's period, from the last anniversary to redelivery. The periods covered by the warranty are those between pilot station to pilot station on any sea passage. A good weather period is one that is not an Adverse Weather Period, which means any period when the speed needs to be reduced for safety in

congested waters or where the wind force exceeds code 8 in the Beauford scale (BF 8) for more than 12 hours in any noon-to-noon report. The weather provision does not refer to the Douglas sea state scale. However, parties frequently modify and add to the weather provision, such as reducing the default BF 8 to BF 5 and adding 'no adverse swell' and 'no adverse current'. Sometimes, they even qualify the warranted speed and/or consumption with the word 'about' with a view to allowing a margin in the shipowner's favour for any shortfall. Extrapolation of the vessel's good weather performance to Adverse Weather Periods is expressly allowed. Any gain to the charterer in speed or consumption must be offset against any claim that the charterer brings for overconsumption or under-speed. It is expressed that no increase in the hire is allowed in case of overperformance by the vessel. In the final year of the charter, the charterer is allowed to deduct its underperformance claim from the hire on an estimated basis two months before the end of the charter period. This is a provisional deduction that will be adjusted and finalised after the termination of the charter.

## Chapter 3

### 3. Speed or Off-Hire Claim?

In a speed claim, the charterer claims a compensation for breach of the warranty by the shipowner. In an off-hire claim, the charterer simply says that contractually the vessel did not earn hire for a certain period. When a vessel underperforms, it may be a case for speed claim, underperformance claim or both. It is not uncommon for merchants to confuse between a speed claim and an off-hire claim. This chapter considers how a speed claim differs from an off-hire claim and when a speed claim will be an off-hire claim. In this course, the NYPE 1946 and SHELLTIME 4 forms are considered.

#### Introduction

Almost every time charterparty will have a speed-consumption warranty, called performance warranty. In the tanker trade, the performance warranty will also include a pumping warranty, but we are concerned here with only the speed-consumption aspect. The two very popular forms are NYPE (referring to 1946 version) for dry cargo and SHELLTIME 4 (revised 2003) for a tanker. Usually, the forms are extensively modified, and rider clauses added. The warranty, in the case of NYPE form, is about the vessel's performance capability at the time of delivery. In the case of SHELLTIME 4 form, it is continuing warranty throughout the service.

Where the warranty attaches, as with NYPE, at the time of delivery, proof of the vessel's underperformance during the charter service will often be evidence of the vessel's incapability at the time of delivery (*The Didymi*;<sup>12</sup> *The Gas Enterprise*;<sup>13</sup> and *The Ocean Virgo*).<sup>14</sup> Additionally, the owner has a duty to maintain the vessel in a thoroughly efficient state throughout the service and the master has a duty to prosecute the voyages with the utmost despatch. Hence, in practice, whether the warranty attaches at the time of delivery or throughout service, the vessel must achieve the warranted performance. If not, the owner will be liable for breach of the performance warranty.

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<sup>12</sup> *Didymi Corp v Atlantic Lines and Navigation Co Inc (The Didymi)* [1988] 2 Lloyd's Rep 108 (CA).

<sup>13</sup> *Exmar NV v BP Shipping Ltd (The Gas Enterprise)* [1993] 2 Lloyd's Rep 352 (CA).

<sup>14</sup> *Polaris Shipping Co Ltd v Sinoriches Enterprises Co Ltd (The Ocean Virgo)* [2015] EWHC 3405 (Comm) (HC).

## **Difference between Speed and Off-Hire Claim, and Overlap between them**

In certain circumstances specified in the charterparty, the vessel will go off-hire (cl 15 NYPE form and cl 21 SHELLTIME 4 form). One such circumstance is where the vessel's speed, during service, is reduced by defect or breakdown. The scope of the circumstance in SHELLTIME 4 form is a little wider than in NYPE form. The two – breach of performance warranty and off-hire – are different. But it is not uncommon for merchants to confuse between the two. The vessel is off-hire only if the under-speed was the result of a defect or breakdown upon the service. If the bottom is fouled at the time of delivery, that is considered to be a defect in the hull of the vessel, which will trigger the off-hire event (*The Ioanna*).<sup>15</sup> However, where the bottom fouling develops during the service, there is somewhat contradictory views (*The Ioanna* and *The Rijn*).<sup>16</sup> The vessel goes off-hire only for the period of time lost by the off-hire event (which is called 'net clause') and not for the entire period during which the off-hire event subsists (which is called 'period clause') [*The Pearl C*].<sup>17</sup> For example, by reason of the defect, the vessel completes a voyage in three days, which she would have completed in two days but for the defect. Now the 'net' loss of time is only one day for which the vessel would be off-hire.

One of the key differences in the consequences between a mere breach of performance warranty and off-hire is this. Where the claim is for breach of performance warranty, any fuel saved during the under-speed period will be offset against the underperformance claim sum. If it is an off-hire claim, there is no such set-off, so the fuel-saving goes to the benefit of the charterer – a windfall to the charterer (*The Ioanna*). For an off-hire claim, no breach by owner need be proved. But underperformance claim is a claim for breach by the owner.

## **Consequences of Making the Right Claim on a Wrong Basis**

In the case of underperformance, the charterer may deduct the underperformance claim sum as equitable set-off without a need for any contractual provision allowing such set-off, subject only to any contractual limitation (London Arbitration 17/19). In the case of off-hire, the vessel does not earn the hire as a matter of contract and no hire need to be paid for that period. Usually, the contract will also expressly allow the deduction. But if the amount deducted goes wrong,

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<sup>15</sup> See *Ocean Glory Compania Naviera SA v A/S PV Christensen (The Ioanna)* [1985] 2 Lloyd's Rep 164 (HC).

<sup>16</sup> *Santa Martha Baay Scheepvaart and Handelsmaatschappij NV v Scanbulk A/S (The Rijn)* [1981] 2 Lloyd's Rep 267 (HC).

<sup>17</sup> See *Bulk Ship Union SA v Clipper Bulk Shipping Ltd (The Pearl C)* [2012] EWHC 2595 (Comm) (HC).

the charterer can be in breach that will entitle the owner to withdraw the vessel. There are conflicting views as to whether the owner may withdraw even if the charterer deducted an excessive amount but on a reasonable estimate (*The Nanfri*).<sup>18</sup> The question of the right of withdrawal upon such deduction will be the subject of the next chapter.

The consequences of making the claim on a wrong basis can be serious. In one arbitration, the charterer deducted from hire the underperformance claim sum as an off-hire claim. Subsequently, in arbitration, it switched the basis to performance claim and the deduction justified as 'equitable set-off'. The charterer was allowed to do so (London Arbitration 4/11). In another arbitration, the charterer sought to switch the basis after the six years' time limit had set in, which the tribunal disallowed (London Arbitration 9/18).

In most cases, it will rightly be an underperformance claim rather than an off-hire clause. Charterers, if they desire to deduct on an off-hire basis, must exercise caution before doing so.

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<sup>18</sup> *Federal Commerce and Navigation Ltd v Molena Alpha Inc and others (The Nanfri, The Benfri, The Lorfri)* [1979] AC 757, [1979] 1 All ER 307, [1978] QB 949, [1979] 1 Lloyd's Rep 201, [1978] 3 WLR 991 (HL).

## Chapter 4

### 4. Hire Deductions and Reductions

When a vessel underperforms, it is common that the charterer will want to deduct the alleged underperformance claim from the hire payments on the principle of equitable set-off where the charterparty does not spell out such a right to deduct. When the charterer claims that the vessel has gone off-hire, equally, the charterer will want to pay the reduced hire or no hire for a period on account of the off-hire period. A hire deduction or reduction, before the claim is established, comes with the risk that the shipowner may want to withdraw the vessel on an allegation of breach by the charterer of the charterparty. The risk of withdrawal is higher in a market favourable to the shipowners, as is the case now, with unprecedented leap in the hire and freight rates. While neither a right for the charterer to deduct/reduce is established, nor the right for the shipowner to withdraw, the parties may enter into a without prejudice agreement to continue the charter service at an increased hire rate pending determination of the respective rights of the parties. These are the subject of this Chapter. In this course, *The Nanfri*, is critically commented on.

#### Three Types of Crossclaims/Off-Hire claims

In every time charter, the charterer periodically pays the hire to the owner for the period the charterer uses the vessel. While the charter is ongoing, the charterer may have crossclaims against the owner for breach of performance warranty,<sup>19</sup> loading less cargo,<sup>20</sup> etc. Apart from that, a charterer may claim to be entitled to pay less hire on account of off-hire. This article discusses the right of the charterer to deduct the crossclaim amount from the hire as well as off-hire and related issues.

For the purposes here, crossclaims/off-hire claims can be classified into three categories. First, the vessel is off-hire, meaning no hire is due for the relevant period. Second, the vessel is not off-hire, but the deduction for certain expenses is contractually allowed. Third, the vessel is not off-hire and the charterparty does not provide for deduction of any expenses, but the

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<sup>19</sup> See *Santiren Shipping Ltd v Unimarine SA (The Chrysovalandou Dyo)* [1981] 1 Lloyd's Rep 159 (HC); *Federal Commerce and Navigation Ltd v Molena Alpha Inc and others (The Nanfri, The Benfri, The Lorfri)* [1979] 1 Lloyd's Rep 201 (HL).

<sup>20</sup> See *Compania Sud Americana De Vapores v Shipmair BV (The Teno)* [1977] 2 Lloyd's Rep 289 (HC).

charterer is entitled to make deductions as a matter of law by the principle of equitable set-off. These scenarios are considered below.

### **Reductions for Off-Hire claim**

Off-hire is a contractual matter. A vessel will go off-hire only upon the happening of an event that the charterparty specifically classifies as an off-hire event. Ordinarily, an off-hire clause in the charterparty will list the off-hire events (eg. cl 15 in NYPE 1946 form and cl 21 in SHELLTIME 4 form). An example of such an event is a breakdown of the vessel as a result of which some service time is lost. For the time lost, no hire is payable. Literally, this is not a case of 'deduction from the hire' but rather a case of 'no hire' for the relevant period. There doesn't need to be any breach on the part of the owner as the vessel goes off-hire upon happening of the event as a matter of contract.

When the vessel goes off-hire, usually, the charterparty will provide that all additional bunkers consumed and expenses incurred in connection with the off-hire instance are on the owner (eg. cll 15 and 20 NYPE 1946 form and cl 7(a) SHELLTIME 4 form). The charterparty may expressly allow the charterer to deduct the costs of these bunkers consumption and expenses from the hire payable (eg. certain (but not all) off-hire instances in cl 15 NYPE 1946 form). If the charterparty does not expressly allow such deduction, then the charterer may avail itself of the principle of equitable set-off to make the deduction. It is not necessary for the charterparty to allow equitable set-off. Indeed, one resorts to the right to equitably set-off because the contract does not make a provision for the deduction.

Take this example, based on a modified SHELLTIME 4 form. The charterparty provides that the vessel will go off-hire when judicially detained for fault attributable to the owner (cl 21(a)(v)). The charterparty also provides that when the vessel is off-hire, the additional bunkers consumed and expenses incurred are on the owner (cl 7(a)). However, the charterparty does not provide that the charterer may 'deduct' the costs of such bunkers consumed and expenses incurred from the hire. The vessel has completed the charter service in 10 days. In between, the vessel was arrested and kept detained for a day because the master negligently damaged a pier there. During the one day, the bunkers consumed and expenses incurred costed the charterer USD20,000. Now, as a matter of the contract, the hire is payable only for nine days, i.e. USD270,000. This is the effect of the off-hire clause. From the due hire of USD270,000 the charterer will deduct USD20,000, hence pay a net sum of USD250,000 only. The deduction

is made as a matter of law by the principle of equitable set-off as there is no contractual provision for the deduction.

### **Deduction for Underperformance claim (Equitable Set-Off)**

To make an equitable set-off (i.e. deduction), there must be a close proximity between the primary claim and the crossclaim. Here, the primary claim is that of the owner for hire. The crossclaim is that of the charterer, which can be for additional bunkers consumed and expenses incurred, underperformance, etc. It has been held that a cargo claim, bunker misappropriation claim,<sup>21</sup> bunker reimbursement claim<sup>22</sup> and bunker cancellation fee claim<sup>23</sup> do not have close proximity with a hire claim, hence no equitable set-off for them. Performance claims are recognised to be in close proximity with the hire claim. Hence, a charterer may avail itself of the principle of equitable set-off to deduct the compensation due to it for the underperformance by the vessel (*The Nanfri* (HL),<sup>24</sup> *The Chrysovalandou Dyo*).<sup>25</sup>

### **Wrongful Reduction or Deduction: Risks of Withdrawal and Without Prejudice Agreement**

In practice, a charterer paying less hire because it claims some off-hire or a charterer making a deduction from the hire by the principle of equitable set-off may run a risk, particularly if the market is in the owner's favour. Suppose the charterer assesses the underperformance claim sum to be USD20,000. The owner assesses it to be USD15,000 or denies in totality any underperformance. The owner withdraws the vessel and enters into a 'without prejudice' agreement with the charterer for continued service but at a higher rate of hire. If a tribunal later decides the compensation due to the charterer for the underperformance was at least USD20,000 (i.e. no over-deduction), then all the additional hire paid by the charterer under the 'without prejudice' agreement will be refunded and the charterparty will be put back on the original terms.

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<sup>21</sup> See *Leon Corporation v Atlantic Lines and Navigation Co Inc (The Leon)* [1985] 2 Lloyd's Rep 470 (HC).

<sup>22</sup> See *Century Textiles and Industry Ltd v Tomoe Shipping Co (Singapore) Pte Ltd (The Aditya Vaibhav)* [1991] 1 Lloyd's Rep 573 (HC).

<sup>23</sup> See *Western Bulk Carriers K/S v Li hai Maritime Inc (The Li Hai)* [2005] 2 Lloyd's Rep 389 (HC). See also *Schelde Delta Shipping BV v Astarte Shipping Ltd (The Pamela)* [1995] 2 Lloyd's Rep 249 (HC).

<sup>24</sup> *Federal Commerce and Navigation Ltd v Molena Alpha Inc and others (The Nanfri, The Benfri, The Lorfri)* [1979] 1 Lloyds Rep 201 (HL).

<sup>25</sup> *Santiren Shipping Ltd v Unimarine SA (The Chrysovalandou Dyo)* [1981] 1 Lloyd's Rep 159 (HC).

However, if the tribunal decided that there was an over-deduction, the matter can be complex. There seem to be two schools of thought. One is that if there is an over-deduction, then the charterer has breached the agreement, irrespective of whether the deduction was made based on a reasonable estimate. Thus, the owner was entitled to withdraw as it rightly did, and the ‘without prejudice’ agreement will stand good. Of course, this will be different if the charterparty allows deductions to be made on a reasonable estimate basis (eg. cl 9 SHELLTIME 4 form). Another school is that if the over-deduction is quantified by a reasonable assessment made in good faith, then the owner should not be entitled to withdraw. Lord Goff LJ in the Court of Appeal in *The Nanfri*<sup>26</sup> seems to lend support to the first school, while Lord Denning MR there seems to lend support to the second school. The view of Lord Denning MR seems to have gained popularity.<sup>27</sup>

Despite that, conceptually, it can be hard to justify the second school, because depriving the owner of the contractual right to withdraw when the due payment is not made after all the required notices and disentitling it to the right amount of hire merely because the charterer acted reasonably in making a wrong overassessment will be equivalent to re-writing the contract, which a tribunal should not ordinarily do.

The same analysis will apply in respect of the rights of the owner to suspend services by the BIMCO Non-Payment of Hire Clause 2006, which is normally added by the parties into their time charters under modified NYPE 1946 form.

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<sup>26</sup> Reported in [1978] 2 Lloyd's Rep (CA).

<sup>27</sup> See *SL Sethia Liners Ltd v Naviagro Maritime Corpn (The Kostas Melas)* [1981] 1 Lloyd's Rep 18 (HC); *Santiren Shipping Ltd v Unimarine SA (The Chrysovalandou Dyo)* [1981] 1 Lloyd's Rep 159 (HC); *Owneast Shipping Ltd v Qatar navigation QSC* [2011] 1 Lloyd's Rep 350 (HC).

## Chapter 5

### 5. Margin for 'About' in Vessel Description

Speed-consumption warranties and vessel description clauses in time charterparties are usually qualified with the word 'about'. This allows some margin in favour of the owner. In the case of speed-consumption warranty, the 'about' qualification can be attached to the speed part or the consumption part or both parts. When attached to both parts, it is called 'double about'. Sometimes, the entire vessel description clause can be qualified generally by the words 'all details about' (ADA). These are discussed in this Chapter. Also discussed in this Chapter are de minimum rule that will disallow a claim for a trivial difference in performance. The requirement to offset any saving made in fuel consumption against a speed claim is covered. When a speed claim is made, any saving in fuel must be offset against the speed claim. This is covered. The NYPE 1946 and SHELLTIME 4 forms are compared.

#### Qualifications to Speed-Consumption Warranty and 'about' qualification

The speed-consumption warranty in time charterparties is usually qualified in a few ways. One of that is qualifying it with the word 'about'. The other common qualifications include subjecting the warranty to good weather, Beauford scale wind force not exceeding code 4 (or code 5 in case of tankers), Douglas sea state scale not exceeding code 3, etc. This paper is only on the 'about' qualification.

The 'about' qualification may attach to the speed part of the warranty, or it may attach to the consumption part, or to both parts. Sometimes, a general 'about' qualification may be attached like 'all details about' (abbreviated as 'ADA') to all the descriptions of the vessel including the speed-consumption warranty. Typically, the 'about' qualification attached to the speed part has been interpreted to give a margin in the shipowner's favour of 0.5 knot, and when attached to the consumption part it has been interpreted to allow a 5% margin in the shipowner's favour. So, 'about 14 knots' will mean the warranted minimum speed is 13.5 knots. 'About 30 mt IFO 380' will mean the warranted maximum consumption is 31.5 mt of the fuel. The allowance is always in the shipowner favour when an underperformance claim is made by the charterer (*The Al Bida*;<sup>28</sup> London Arbitration 1/07).

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<sup>28</sup> *Luxor Trading Corporation v Geogas Enterprise SA (The Al Bida)* [1987] 1 Lloyd's Rep 124 (CA).

However, the margin to be allowed is a matter for the tribunal to decide in each case. A tribunal may allow a different margin taking into account the warranted speed, the vessel's configuration, size, draft, trim, etc. (*The Al Bida*). A heavily laden tanker may attract less margin as it will not be affected by the weather in the same way as a container vessel and thus a tribunal can be justified in allowing less margin in such a case.

### **'Double about'**

When the 'about' qualification attaches to both the speed part and the consumption part, this is called 'double about'. The standard NYPE form (referring to the popular 1946 version) has 'double about' qualification (lines 9-10). It is common to similarly find 'double about' qualification in the usual rider clause 29 added to NYPE forms that will describe the vessel including the speed-consumption capability. It is common to find 'ADA' qualification in the rider clause, which will apply the 'about' qualification to both the speed part and the consumption part, thus 'double about' (London Arbitration 2/87). The scheme in the SHELLTIME 4 form (the oft-used form in time charters of tankers) is different, as the speed-consumption is warranted on a yearly average basis and there is no 'about' qualification.

An issue had been taken on allowing the full standard margin of 0.5 knot on speed and 5% on consumption in the case of 'double about' qualification. In one 1980s case, the arbitral tribunal balanced the 'double about' qualification by allowing 0.5 knot margin on speed and only 4% margin on consumption (London Arbitration 12/85). In another 1980s case, the tribunal did not favour giving double benefit to the shipowner and allowed, in the factual matrix of the case, only 0.25 knot margin on speed and seemingly no margin on consumption (London Arbitration 6/88). However, the trend for more than a decade now has been to allow the full standard margin on both when there is a 'double about' qualification (London Arbitration 15/07).

### **No 'about' and de minimis rule**

If the 'about' qualification is not attached, then the obligation of the shipowner will be to strictly comply with the warranty without any margin in its favour (London Arbitration 4/94), subject only to de minimis rule (London Arbitration 4/12). De minimis rule means if the difference complained is trivial then a claim will not be entertained. Suppose the warranted speed is 14 knots and the vessel performed 13.99 knots, likely this will be a de minimis case

for 0.01 knot that a tribunal will not entertain. It must also be borne in mind that performance calculations are not by any means a perfect science and a safe margin for inaccuracy in the calculation must be allowed (London Arbitration 21/04; London Arbitration 15/05), which will in any event rule out de minimis claims.

### **Fuel-Savings set off against Speed Claim**

Where a vessel achieves a speed less than that warranted but consumes less fuel than what she would have consumed had the warranty been kept up to, then there is a loss to the charterer by the lower speed and a gain to the charterer by the lower consumption. In such cases, the gain in the consumption must be offset against the charterer's claim for under-speed (London Arbitration 2/87). For the purpose of measuring the gain, the warranted consumption will be calculated allowing any margin for the 'about' qualification in favour of the charterer (*The Gaz Energy (No. 2)*).<sup>29</sup> An example will best explain this. Suppose the vessel is warranted to achieve 'about 12.5 knots' speed at about 30 mt IFO 380 per day' on a short trip charter that involves 288 nautical miles of sea passage. If the ship performs as warranted, she will complete the sea passage in 24 hours (288 nm ÷ 12 knots) with a consumption of about 30 mt of the fuel. The ship achieves a speed of 10 knots only, hence the sea passage takes 28.8 hours (288 nm ÷ 10 knots). However, the total fuel consumed for the entire sea passage of 288 nm is only 28 mt of the fuel. Now the charterer is in a loss of 4.8 hours on hire. The charterer will make an under-speed claim for the 4.8 hours hire loss. Against this, the fuel-saving must be offset. The fuel-saving will be measured from the benchmark of 28.5 mt after allowing the 5% margin in favour of the charterer for the 'about qualification'. Hence, the fuel-saving to be offset is 0.5 mt only.

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<sup>29</sup> *Hyundai Merchant Marine Co Ltd v Daelim Corporation (The Gaz Energy) (No. 2)* [2012] EWHC 1686 (Comm) (HC).

## Chapter 6

### 6. Bottom Fouling: Who Pays for it?<sup>30</sup>

Bottom fouling is a frequent dispute between the charterers and the shipowners. When the bottom is fouled, the vessel's capability to perform is reduced and the cost of cleaning is incurred. Question arises as to whether the charterer has an obligation to redeliver in the like condition as delivered free from fouling. Question also arises as to whether the fouled bottom is a defect in the hull that will trigger the off-hire clause. Bottom gets fouled when the vessel stays at port for long time, among others. Shipowners will want to hold the charterer liable for this where the charterer orders the long port stay, as often happens. More so, during the Covid-19 times when the waiting time before berthing has increased. These are considered in this Chapter. Also considered are the science behind bottom fouling; fouled bottom at the time of delivery, service and redelivery; who bears the cost of cleaning and whether the vessel goes off-hire for the time of cleaning; the BIMCO Bottom Fouling Clauses 2013 and 2019; New Zealand Bio-Fouling Regulations wef 2018. Perspectives of the NYPE 1946 and SHELLTIME 4 forms are covered.

#### Science behind Bottom Fouling

Bottom fouling by marine growth is a subject of frequent dispute in time charters. Bottom fouling increases the friction and thereby affects the performance of the vessel in terms both of speed and consumption. It also necessitates cleaning. The bottom may be in a fouled condition at the time the vessel is delivered or, as it happens more frequently, the bottom may get fouled during the charter service. When the bottom is fouled during the service, often that is due to the orders given by the charterer for a long idle stay on waters, such as at or outside port or at anchorage while awaiting berth or loading. Technically, bottom fouling may also result from slow steaming that a charterer might order.

Various factors influence bottom fouling. They include the idle or near-idle period, the speed that the vessel steams at if not idle, the vessel's distance from the shore, the depth of the water, the temperature of the water, the freshness of the water, sea current, duration and

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<sup>30</sup> The contents of this chapter, substantially, first appeared in [Lloyd's Shipping & Trade Law, Vol. 21, No. 7, September 2021, p. 1](#), followed by [The Report: The Magazine of the International Institute of Marine Surveying, No. 98, December 2021, p. 85](#).

intensity of sunlight, etc. The chance of attracting marine growth is more in tropical waters or near the shore. The chance is less in freshwaters (eg. Mississippi River) and places of high current (eg. Chittagong).

It is not uncommon for vessels to perform ‘paint runs’ to break the idle period. ‘Paint run’ means steaming the vessel for a short period, usually a few hours. However, often, a paint run may not yield the desired result. The basic measure that shipowners take to mitigate the risk of bottom fouling and its intensity if that happens is suitably painting the bottom with an anti-fouling coat. Usually, the paint is unlikely to be effective if the vessel is idle or near idle for more than two weeks.

### **Fouled at Delivery or during Service: Significance of the Difference**

If the bottom is already fouled at the time of delivery, it is not doubted that the shipowner has to bear the loss caused by the consequent underperformance (*The Ioanna*).<sup>31</sup> In such a case the cost of cleaning is also the shipowner and the loss of time in cleaning are also on the shipowner by off-hire (*The Ioanna*). If it is necessary to ascertain when the bottom was fouled arises, a laboratory test of the marine growth sample to establish the age and the type of the growth might assist (*The Pamphilos*).<sup>32</sup> The type of the growth can suggest the time frame during which the growth must have been attached where it is a type that is present only in certain ports that the vessel visited.

### **Bottom Fouled during Service**

The question is more difficult if the bottom is fouled during the charter service as a result of the charterer’s orders. The shipowner’s standpoint will be that the charterer must bear the consequences because the bottom was fouled as a result of how the charterer employed the vessel. The charterer’s standpoint will be that the shipowner must bear it, as the charterer’s employment was within the scope of the charterparty and the underperformance was the result of the owner’s failure to maintain by cleaning the bottom.

First, we will consider bottom fouling from the perspective of the standard NYPE form (referring to the oft-used 1946 version), the most popular form for dry cargo time charters.

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<sup>31</sup> *Ocean Glory Compania Naviera SA v A/S PV Christensen (The Ioanna)* [1985] 2 Lloyd’s Rep 164 (HC).

<sup>32</sup> *Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd (The Pamphilos)* [2002] All ER (D) 94 (Nov) (HC).

Second, we will look at the common modifications made to this form that affect the bottom fouling issue. Third, we will consider the subject from the perspective of SHELLTIME 4 form – the oft-used form for time charters of tankers.

### **NYPE form perspective**

The NYPE form, unlike the NYPE 2015 form, does not have a specific provision dealing with bottom fouling. But a few other clauses have an impact on this issue. Lines 9-10 warrant the speed-consumption capability of the vessel at the time of delivery. Clause 1 requires the shipowner to maintain the hull, machinery and equipment in a thoroughly efficient state throughout the charter service. Clause 8, in its second part, requires the shipowner to comply with the employment orders given by the charterer. It is well accepted that this comes with an implied indemnity by the charterer to compensate the shipowner for losses that the shipowner suffers as a result of the employment orders. Clause 4 requires the charterer to redeliver the vessel in the like good order and condition as delivered, ordinary wear and tear excepted. There may seem to be some conflict between one another of these clauses.

It has been held by the courts that the obligation to maintain includes the obligation to keep the bottom free from fouling throughout the charter service. Accordingly, if the bottom gets fouled during service resulting in underperformance, the shipowner will be liable for the underperformance by breach of the maintenance obligation (*The Al Bida*)<sup>33</sup> as well as for the cost of cleaning (*The Kitsa*).<sup>34</sup> The impact of this interpretation on cl 4 is that the obligation of the charterer to redeliver in the like condition as delivered does not require the charterer to clean the fouled hull before delivery (*The Kitsa*).

Some controversy has been seen on the question of whether the vessel will go off-hire for the time of cleaning during the service. Clause 15 reads “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 ...” In one case, the court rejected an off-hire claim under cl 15 (‘any other cause preventing the full working of the

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<sup>33</sup> *Arab Maritime Petroleum Transport Co v Luxor Trading Corp (The Al Bida)* [1986] 1 Lloyd's Rep 142, [1985] 10 WLUK 130 (HC).

<sup>34</sup> *Action Navigation Inc v Bottiglieri di Navigation SpA (The Kitsa)* [2005] EWHC 177 (Comm), [2005] 1 Lloyd's Rep 432 (HC).

vessel') for the time used in cleaning the bottom that was fouled during service (*The Rijn*).<sup>35</sup> In another, the court admitted off-hire claim for the cleaning-time, however, by reliance on a rider clause rather than cl 15 (*The Kitsa*). Sometimes, parties add the word “whatsoever” to “any other cause preventing the full working of the vessel”. This could give some scope to argue that a wider construction of the off-hire provision to include the time of cleaning the bottom is warranted.

A question that arises in this connection is about the indemnity by the charterer attached to cl 8. The courts have again held this not to favour the shipowner because long waiting in ports and consequent bottom fouling is something foreseeable at the time of the fixture, hence the shipowner is deemed to have taken the risk unless a clause otherwise provides (*The Kitsa*).

In mitigation of the predicament, shipowners frequently add a rider clause to shift the losses caused by bottom fouling to the charterer. That may be in the form of the BIMCO Bottom Fouling Clause for Time Charter Parties 2013 (or less often the 2019 version) with desired modification or a custom-crafted clause. The scheme of the NYPE 2015 form is that the warranty is a continuing one, unlike the one in the NYPE form. It places on the charterer the responsibility for underperformance as well as the cost of and time involved in cleaning consequent upon bottom fouling where it happened as a result of charterer's order for idling exceeding 15 days or such other periods as parties may specify. There is an option for specifying different periods for idling in tropical/seasonal tropical waters and non-tropical waters.

#### **SHELLTIME 4 form perspective**

There is no clause to deal with bottom fouling in SHELLTIME 4 form. The performance warranty is a continuing one by cl 24. The shipowner's responsibility to maintain the vessel is stated in cll 1 and 3(a). The effect of these clauses is, among others, to park on the shipowner the liability for underperformance resulting from bottom fouling developed during service. Clause 8 provides the redelivery obligation but without any reference to the condition at the time of delivery. Following the maintenance obligation in cll 1 and 3(a), there will be no obligation on the charterer to clean the fouled bottom before redelivering.

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<sup>35</sup> *Santa Martha Baay Scheepvaart and Handelsmaatschappij NV v Scanbulk A/S (The Rijn)* [1981] 2 Lloyd's Rep 267 (HC).

Clause 13 obliges the shipowner to comply with the employment orders of the charterer and expressly provides for indemnity by the charterer to the owner for the consequences and liabilities suffered by the owner as a result of complying with the orders. For reasons stated in *The Kitsa*, the indemnity will not be of avail to the shipowner in connection with bottom fouling. It was so held in one case where the performance warranty on the NYPE form was modified to a continuing one (*The Coral Seas*).<sup>36</sup>

Clause 21 is the principal off-hire clause. This clause is unlikely to render a vessel off-hire for reduced speed resulting from bottom fouling. However, cl 3(b) may render the vessel off-hire where speed is reduced by breach of the maintenance obligation in cl 1. Thus, where speed is lost due to bottom fouling developed during service and not cleaned, cl 3(b) may render the vessel off-hire. The off-hire here is a ‘net clause’, meaning the hire is off only for the time actually lost by the reduced speed.

### **New Zealand Bio-Fouling Regulations**

New Zealand has introduced, with effect from 15 May 2018, regulations<sup>37</sup> prohibiting entry into its waters of vessels with a bio-fouled bottom. This will raise an additional question as to the time lost in shifting the vessel to a place where the cleaning can be performed – will the additional time be off-hire? The question will yield arguable answers, which it appears has not been addressed and resolved in any award or judgment.

### **Conclusion**

Bottom fouling triggers the issues of underperformance by lesser speed and higher fuel consumption and of the cost of cleaning. In the absence of a charterparty provision to the contrary, ordinarily, the shipowner will be liable for them. This is primarily because of the maintenance obligation of the shipowner. However, under the standard off-hire clauses, likely, the vessel will not go off-hire for the time of cleaning.

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<sup>36</sup> *Imperator I Maritime Company v Bunge SA; Bunge SA v C Transport Panamax Ltd (The Coral Seas)* [2016] All ER (D) 28 (Jul) (HC).

<sup>37</sup> Craft Risk Management Standard (CRMS) implemented by the Ministry of Primary Industries (MPI) under the New Zealand Bio Security Act 1993.

## Chapter 7

### 7. Length of Sea Passage and Size of Good Weather Period<sup>38</sup>

Typically, the performance capability of a vessel during a time charter service is determined by picking up good weather period(s) within the sea passage(s) in question and analysing the vessel's performance during the good weather period(s). If this shows an underperformance, the result will serve as a sample that will be extrapolated to the entire sea passage(s) in question to quantify the loss suffered by the charterer as a result of the incapability of the vessel. In *The Ocean Virgo*, the arbitral tribunal rejected some of the good weather periods because they were not of 24 consecutive hours between the noon-to-noon reports. Other good weather periods were rejected because they were relatively too small compared with the size of the sea passage in question. On appeal, the High Court set aside the first said rejection but not the second said rejection. This Chapter considers the relationship between the size of the sample and the size of the sea passage in question. In that course, *The Ocean Virgo* is critically commented on the failure to set aside the second rejection. London Arbitration awards on this subject are discussed.

#### Introduction

In time charterparties, the owner will give a speed-consumption warranty on sea passages subject to good weather, i.e. that the vessel is capable of achieving a certain minimum speed and that at this speed she will consume so much fuel. For example, the warranty may read like this: the vessel is capable of performing about 12.5 knots speed on about 36 mt IFO 380 per day in good weather conditions of wind force not exceeding code 4 in Beauford scale and sea state not exceeding code 3 in Douglas sea scale.

Ordinarily, a vessel will not enjoy the stipulated good weather throughout a sea passage, but she may enjoy such weather during certain periods of the sea passage. Hence, to find out whether the vessel was capable of the warranted performance, her performance during the good weather periods will be taken as the sample. If it is found that the vessel underperformed during the good weather periods, then the result will be extrapolated to the entire sea passage or

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<sup>38</sup> The contents of this chapter, substantially, first appeared in [Lloyd's Shipping & Trade Law, Vol. 21, No. 7, September 2021, p. 5.](#)

passages in question, including bad weather periods, to quantify the underperformance for which the charterer is entitled to be compensated.

For a period to be taken as the sample period, it must be of sufficient length. The question for this paper is whether it must be sufficient to represent the capability of the vessel at the relevant time (which in the case of the standard NYPE 1946 form, the time of delivery) or the entire sea passage or passages in question.

### ***The Ocean Virgo: A Revisit***

In *The Ocean Virgo*,<sup>39</sup> decided in 2015, the parties entered into a time charterparty for a trip. The vessel was warranted capable of certain performance in “good weather/smooth sea, up to max [Beaufort scale] 4/Douglas sea state 3, no adverse currents, no negative influence of swell”. The vessel performed one ballast voyage and one laden voyage.

On the ballast sea passage, the charterer’s weather routing company (WRC) identified four periods of good weather, of which only two, namely period nos 1 and 3, were accepted as good weather periods by the arbitral tribunal. The said periods were respectively for 14 hours and 16 hours. The arbitral tribunal rejected them because neither of them was for a minimum of 24 consecutive hours from noon to noon, hence no good weather ‘day’.

The background to the preference of the noon-to-noon period to test the performance of the vessel is that the master reports the position of the vessel every noon and the fuel consumed since the last noon report to the current noon, along with some other details. This enables a charterer’s WRC to calculate the speed achieved and the fuel consumed during the noon-to-noon period. However, when the relevant period is less than or other than the noon-to-noon period, it is possible for the WRC to calculate the speed based on the automated identification system (AIS) information and the fuel consumption on a pro-rata basis from the noon-to-noon fuel consumption report.

On the laden sea passage, the WRC identified a period of 27 hours as a good weather period. Seemingly, the tribunal accepted only 21 hours of the period as the good weather period. The tribunal rejected this period for two reasons. One was that it was for less than 24 hours. Another was that it constituted only 5.34% of the total voyage, hence relatively too small to represent the entire voyage. On the second reason, the tribunal seemingly directed itself “the

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<sup>39</sup> *Polaris Shipping Co Ltd v Sinoriches Enterprises Co Ltd (The Ocean Virgo)* [2015] EWHC 3405 (Comm) (HC).

sample size must be sufficiently large as to be *representative of the voyage* in its entirety.” [emphasis added]

On both sea passages, in any event, the tribunal seemingly was not ready to extrapolate any finding of underperformance to all the sea passages under the charter. This was because the tribunal was of the view that the application of the warranty was limited to periods of good weather only.

Hence, the charterer lost before the arbitral tribunal. The charterer appealed to the High Court, which came up before Teare J. His lordship found that the arbitral tribunal had misdirected itself by looking for 24 consecutive hours of good weather, i.e. good weather ‘day’, when there was no such requirement in the charterparty. Accordingly, his lordship remitted the award back to the arbitral tribunal to consider if the two periods of 14 hours and 16 hours on the ballast sea passage, whether individually or cumulatively, were sufficient periods to serve as a sample to test the good weather performance of the vessel. This was because the tribunal did not find the 16-hour and 14-hour periods to be too small a sample but rejected them only because they were not for a minimum period of 24 consecutive hours.

However, on the laden sea passage, his lordship found this. Even if the arbitral tribunal had not misdirected itself by looking for a 24 consecutive hours period, it would have arrived at the same decision because it decided that the 21-hour period which constituted only 5.34% of the total voyage was relatively too small a sample to represent the entire voyage. Hence, his lordship did not remit back the award on this point.

The question arising from this is whether the sample period must be sufficiently long to represent the capability of the vessel at the relevant time or the entire sea passage in question?

The warranty is about the capability of the vessel at the relevant time, which in this case was the time of delivery of the vessel under the amended NYPE 1946 form. It is opined, with due respect, that the right question would be whether the 21-hour period was sufficiently long for the tribunal to safely *assess the vessel’s capability* at the time of delivery and not whether the sample period was *sufficiently large relative to the size of the entire sea passage or the voyage*. While the arbitral tribunal was entitled to decide as a matter of fact that the 21-hour period was too small a sample to represent the capability of the vessel at the time of delivery, it was not entitled to hold that the sample size was relatively small to the size of the entire sea passage or the voyage as it did. Hence, the tribunal misdirected itself also in deciding the question of underperformance on the laden voyage and the award should have been remitted back on this point too.

On the approach taken by the tribunal as to extrapolation, his lordship found that the tribunal had misdirected itself. This was because once a breach was established, the result of underperformance found during the sample period must be extrapolated to all the passages under the charter including bad weather periods. In coming to this conclusion, his lordship well found support from *The Didymi*<sup>40</sup> and *The Gas Enterprise*.<sup>41</sup>

### **London Arbitration Awards**

In London Arbitration 27/19, a similar question arose as to the sufficiency of the good weather sample period. The tribunal held that a good weather period of 12 hours was not sufficient because it was relatively too small against the charter period of about 26 days covering 7,284 nautical miles. It is again opined that this was not the right approach. The right question would be whether the performance during the sample period can represent the vessel's performance capability at the relevant time, which in this case was the time of delivery under an amended NYPE 1946 form.

In London Arbitration 22/18, a good weather period was seemingly treated to necessarily mean a good weather day between the noon-to-noon report. This position will no longer hold good after *The Ocean Virgo*.

### **Recent Trend of Circumventing *The Ocean Virgo*'s 'no 24 hours requirement'**

In recent times, growing practice is seen whereby shipowners, to overcome the effect of *The Ocean Virgo* holding a sufficient period less than 24 hours to be admissible as the sample period, add a condition to the speed-condition warranty that the admissible sample period must be for a consecutive 24-hour. This can be hard to get and thus practically render the performance warranty effectless. Whether the charter can resist such a condition depends on its bargaining power.

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<sup>40</sup> *Didymi Corp v Atlantic Lines and Navigation Co Inc (The Didymi)* [1988] 2 Lloyd's Rep 108 (CA).

<sup>41</sup> *Exmar NV v BP Shipping Ltd (The Gas Enterprise)* [1993] 2 Lloyd's Rep 352 (CA).

## Chapter 8

### 8. Warranty ‘Without Guarantee’

In time charterparties, the shipowner will warrant the capabilities of the vessel. This includes the speed-consumption capability. This is important to the charterer as the speed affects the time a voyage will take and in turn the hire the charterer pays, and the consumption affects the cost the charterer has to spend on fuelling the vessel. It is quite common for the charterparties to have a ‘vessel description’ clause that will set out the speed-consumption warranty. The vessel description may be pulled in from the Baltic Questionnaire frequently furnished by shipowners. In the case of charterparties in NYPE form (referring to the 1946 version), the most widely used form for dry cargo time charters, one may quite often find a rider clause 29 (or some other number) containing the vessel description. Sometimes, the ‘vessel description’ clause will be qualified with the words ‘without guarantee’ (abbreviated as ‘WOG’). The effect of the WOG qualification has been deliberated in a few cases, both in the context of vessel description or performance warranty and other undertakings in charterparties. Some of them are discussed below, followed by the negotiation techniques employed by the charterers and the owners and the future of the WOG qualification.

#### The Trend

In *Japy Frères and Co v RWJ Sutherland and Co*,<sup>42</sup> decided in 1921, the vessel was described as capable of carrying 600 tons ‘without guarantee’. Scrutton LJ held that the WOG qualification deprived the clause of any effect as a warranty. Hence, a damages claim for breach of the clause cannot be founded. However, his lordship acknowledged, though not decisively, that the untruthfulness of the description can be a reason for the charterer to rescind the charterparty.

A similar decision was reached in *The Lendoudis Evangelos II*,<sup>43</sup> decided in 1997. In this case, it was a time charter for a trip. The charterparty stated the duration of the trip as ‘duration about 70/80 days without guarantee’. The charterer redelivered the vessel in about 113 days. Longmore J held that the shipowners had no claim for late redelivery as the WOG qualification

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<sup>42</sup> (1921) 26 Comm Cas 227 (CA).

<sup>43</sup> *Continental Pacific Shipping Ltd v Deemand Shipping Co Ltd (The Lendoudis Evangelos II)* [1997] 1 Lloyd's Rep 404 (HC).

deprived the clause of any contractual effect. His lordship found that it would make no difference even if the charterer unreasonably estimated the duration when stating ‘about 70/80 days’ in the charterparty. However, his lordship pointed out that there will be an action if, and only if, the statement was made in bad faith. In practice, it will be an uphill task for a charterer to prove the bad faith on the part of the shipowner.

These decisions were followed by Andrew Smith J in *The Lipa*,<sup>44</sup> decided in 2001, in the context of an underperformance claim based on a vessel description clause. In this case, parties entered into a time charterparty in an amended BIMCO BALTIME 1939 form. A vessel description rider clause was added which included a statement of the vessel’s speed-consumption capability. The speed and consumption descriptions were each qualified by the word ‘about’. At the end of the clause, it was added that “All details ‘about’ – all details given in good faith but without guarantee”. The charterer claimed that the vessel overconsumed. Andrew Smith J held that the WOG qualification rendered the speed-consumption statement not a warranty. However, a claim can be made in such circumstances only if the statement was not made in good faith, which was not the case here. Accordingly, his lordship turned down the claim.

### **The Hardened Trend: Double-Stand WOG Clause**

In London Arbitration 4/18, while the performance warranty was qualified with WOG, the clause seemed to envisage the possibility of an underperformance claim. It read, in relevant part, like this: “All details about and given in good faith WOG. In case a speed and performance claim of charterers, any saved bunkers at any time are also to be taken into account as well.” However, the tribunal was overwhelmed with the WOG qualification and held that the qualification ruled out the underperformance claim.

### **The Negotiation Techniques**

In practice, what the charterers do to mitigate the dilemma of WOG qualification is to avoid having it in the charterparty. Whether a charterer can successfully negotiate this depends on its bargaining power. The common ground put forward by charterers in this attempt is that the

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<sup>44</sup> *Losinjska Plovidba Brodarstovo DD v Valfracht Maritime Company Ltd and another (The Lipa)* [2001] All ER (D) 22 (Feb) (HC).

speed-consumption qualified by ‘about’ or ‘double about’ (i.e. both the speed the consumption are qualified by ‘about’), as is often the case, sufficiently protects the shipowner by giving the shipowner a safe margin on the speed-consumption description (usually of 0.5 knots on the speed and 5% on the consumption [London Arbitration 15/07]), hence, a WOG qualification is not necessary to protect the shipowner’s interest.

The speed-consumption warranty is typically about the vessel’s capability in good weather conditions. The recent years have seen a practice whereby the shipowners may not insist on a WOG qualification, but instead implant onerous conditions such as that the good weather capability of the vessel must be established by the vessel’s performance over a consecutive 24-hour good weather period, which can be hard to get and thus practically render the performance warranty effectless. Such an express provision will overcome the effect of *The Ocean Virgo*,<sup>45</sup> decided in 2015, where Teare J held that a vessel’s good weather performance capability can be established by her performance in good weather conditions over a sufficient period which can be less than 24 hours between the noon-to-noon report of the master.

## **The Future**

*Japy Frères* was decided at a time when the UK Misrepresentation Act 1967 was not in place. Although *The Lendoudis Evangelos II* and *The Lipa* were decided when the Act was in force, the Act was not considered in these two cases. The same is true of London Arbitration 4/18. Sec 2(1) of the Act renders a party liable for *negligent* misrepresentation. It puts the burden on the party who misrepresented a fact if he is to avoid liability, to prove “that he had *reasonable* ground to believe and did believe up to the time the contract was made the facts represented were true”.

If the WOG qualification does not dilute the value of the description as a representation of fact, then s 2(1) will likely render the shipowner liable for the untruthfulness of the description unless the shipowner can prove that it stated the description on reasonable ground. Scrutton LJ in *Japy Frères* seemed to have thought, though not decisively, that a description qualified with WOG was a representation of fact when his lordship acknowledged that the charterer could probably rescind the charterparty if the WOG description was untrue based on the law of misrepresentation as it was then. However, the value of a vessel description clause

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<sup>45</sup> *Polaris Shipping Co Ltd v Sinoriches Enterprises Co Ltd (The Ocean Virgo)* [2015] EWHC 3405 (Comm) (HC).

qualified with WOG as a representation of fact for the purpose of s 2(1) is yet to be tested, and it is yet to be seen what the impact of the section will be, when considered, on such qualified vessel description clauses.

For completeness, it must be added that s 3(1) of the Act subjects any clause purporting to exclude or limit liability for misrepresentation to a test of reasonableness under section 11(1) Unfair Contract Terms Act 1977. It has again not been tested whether the WOG qualification can be considered as a clause excluding liability for any misrepresentation of the vessel description.

That leads us to a conclusion that there can be some uncertainty associated with the future of WOG qualifications!

## Chapter 9

### 9. WRC, Weather Data and Deck Log

It is not uncommon to see conflicting evidence through WRC reports, weather data, and deck logbook. Sometimes, the charterparty may provide for mechanism to resolve the dispute. It may be that a report of an independent WRC will prevail or that a dispute will be resolved by reference to the weather data or some other mechanism. An overview of deck log entries and an overview of WRC reports are made in this Chapter. That is followed by a consideration of the conflict and how tribunals resolve it, i.e. the question of which one prevails. The impact of preference clauses and the limitations to them are discussed.

#### Introduction

One of the important warranties that shipowners give in time charterparties is as to the speed-consumption capability of the vessel. Should the vessel's performance fall below the warranty, the vessel will take a longer time to complete the voyage and/or more fuel. This will in turn cost more hire and fuel for the charterer, for which the charterer will make its underperformance claim. The warranty will typically be subject to good weather. For example, the warranty can be that the vessel is capable of steaming on sea passages in laden condition at the speed of about 15 knots on a consumption of about 30 mt IFO 380 per day under good weather conditions of wind force not exceeding code 4 in Beauford scale and sea state not exceeding code 3 in Douglas sea scale.

When a dispute arises as to whether the vessel kept up to the warranty, the vessel's performance during a period or periods of good weather within the relevant sea passage or passages will be tested. If the performance during the test period is short of the warranty, then the vessel is not capable of the warranted performance and there is a breach of the warranty. The shortfall will be extrapolated to the entire sea passage or passages in question including periods of bad weather to assess the compensation payable to the charterer for the breach of warranty. The methodology of establishing the breach and extrapolating the results to the relevant entire sea passage has been dealt with earlier.<sup>46</sup>

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<sup>46</sup> Chapter 1

A frequent challenge that will be taken at the stage of establishing the breach is whether the period proposed as the test period satisfies the ‘good weather’ criteria stipulated in the charterparty. On this challenge, it is not uncommon for the master’s deck log entries to conflict with the charterer’s weather routing company’s (WRC) report. The arbitral tribunal is tasked to assign the weight to each of them and/or to prefer either one. Sometimes, the charterparty may make the preference by saying that a particular WRC’s report or the deck logbooks are to be preferred. It may provide for the resolution of differences between a WRC’s report and deck logbooks by reference to a weather bureau’s data. Before considering the competition between the WRC’s report and the deck logbooks, it will be helpful to have a brief overview of how the deck log entries are made and comparatively how a WRC’s report is prepared.

### **Deck Log Entries**

The deck log entries contain data of the weather conditions including wind force and the state of the sea and swell. They are recorded by the watchkeeper on duty. The watchkeeper, if he is not the master, records them on behalf of the master. The watchkeeper records them as observed by him usually with naked eyes from the bridge. They are normally recorded in a frequency of four hours, based on the watchkeeper's continuous observation for the four hours.

A watchkeeper is usually guided by what he sees of the sea surface, waves, smoke from the funnel, etc as well as weather data available at that time in filling in the Beaufort scale wind force in the deck logbook. He usually fills in the sea state by a description like smooth, light, moderate, rough, etc rather than by the Douglas sea state codes. It must be admitted that they are the result of human observation and are subject to human errors that one may make in observation. For example, an entry made during a dark night can be more prone to human errors in observation than the one made during a sunlight day. Another type of human error is in converting the wind force that he observed to Beaufort scale numbers. For example, he might record Beaufort scale code 4 and at the same time a wind force outside 11 – 16 knots (the Beaufort scale code 4), hence the error.

Another difficulty with the deck log entries is on the sea state (sea waves) recording. It is not always easy to distinguish sea waves (caused by local winds) from swell waves (caused by distant winds). In London Arbitration 4/12, the deck log entry showed Douglas sea state code 4 (rough) for a particular period in question. However, the charterer’s weather bureau report noted swell waves of 2 metres high for the same period. The tribunal took the view that the watchkeeper must have been misled by the swell waves and mixed them up with the sea

waves in his estimation to record code 4 for what indeed could be code 3 (moderate) insofar as the sea waves were concerned. The tribunal further said that watchkeepers usually do not pay attention to separating sea and swell waves. However, an advantage of the deck log entries is that the observations are made from the bridge of the immediate surroundings, which adds to its accuracy.

## **WRC Report**

WRC reports rely on the weather information obtained from satellite imaginaries, weather buoys, etc. These data, unlike the deck log entries, are not collected by a manual process, hence immune from human observation errors. However, there are disadvantages with the satellite and weather buoy data. The satellite imaginaries are normally collected in a frequency of one or two per day. Hence, they are less representative of the weather condition for the time in question than the deck log entries recorded usually in intervals of four hours. Weather buoys measure the conditions for a far distance covering hundreds of square metres from its position. Hence, they less represent the weather condition for the given place than the deck log entry recorded from the immediate surrounding.

## **Which one to Prefer – WRC or Deck Log?**

In the absence of a clause in the charterparty for the preference, generally deck log entries of weather conditions have been preferred to conflicting WRC findings.<sup>47</sup> However, a charterer may be able to reverse it by successfully challenging the authenticity or otherwise accuracy of the deck log entries.<sup>48</sup> It is not uncommon to see a charterer mounting an authenticity challenge alleging overstatement or manipulation of weather conditions in the deck log entries to favour the shipowner. A charterer may challenge the accuracy of the deck log entries with allegations such as that details are missing or inconsistent in the entry, sufficient care was not taken in making the entries, the watchkeeper was not competent, etc. Challenge may also be mounted on the entries on the ground that they do not follow the standard set by the charterparty. Whichever channel the challenge is taken, in practice, the burden is on the charterer to convince

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<sup>47</sup> See *Nicoban Shipping Co v Alam Maritime Ltd (The Evdokia)* [1980] 2 Lloyd's Rep 107 (HC); London Arbitration 6/19.

<sup>48</sup> See London Arbitration 4/12; London Arbitration 15/07 – both awards discussed later in this chapter.

the tribunal that the WRC finding must be preferred to the deck log entries at any point of time in the case (*The Dimitris Perrotis* (2000) LMLN 533).

In London Arbitration 4/12, the tribunal seemed to accord less weight generally to deck log entries saying “log entries are at times made with half an eye on the charter warranties”. This general statement is quite contrary to the trend of preferring the deck log entries in the absence of a successful authenticity or accuracy challenge. However, the statement must be read in the circumstances of the case. The competition was between the findings of the Danish Meteorological Institute (DMI), the meteorological office of Denmark, relied on by the charterer and the deck log entries relied on by the shipowner. The charterparty expressly provided that an independent weather bureau report was to prevail over the deck log entries in case of consistent discrepancy, which apparently was the case here. The tribunal found that, looking at the finding of DMI that the swell waves were at 2 m height during the period in question, the deck log entry recording code 4 of the Douglas sea state scale (rough) for the same period must be the result of the watchkeeper erroneously mixing up sea waves with swell waves. These circumstances must have influenced the tribunal to hold as it did. Another case in which the tribunal expressed doubt over the deck log entries, on the factual matrix of the case, was London Arbitration 4/11.

In conclusion, the preference, in the absence of a provision to the contrary, is for the tribunal to determine in each case. In practice, the tribunal gives a good weight to the deck log entries, which is open to the charterer to rebut.

## **Preference Clause**

It is not uncommon for the parties to include a rider clause in their time charterparties to prefer one technical evidence to another. It may provide that in the event of a conflict, the parties will appoint an independent WRC whose ‘expert determination’ shall be final, as in cl 12(e) of NYPE 2015 form. It may alternatively provide that, where there is a conflict, deck log entries will prevail over the charterer’s WRC report (though seldom) or *vice versa*. The parties will be bound by the evidence procured by the agreed mode. Hence, ordinarily, the tribunal will have to accept it.

However, such a clause can only regulate the evidential part and not the decision part which is for the tribunal to make. Suppose that the agreement is that the independent WRC expert determination is final and binding. In such a case, while the arbitral tribunal will accept the technical findings of WRC, the tribunal is likely not bound to accept that the findings are

relevant to the case or that the methodology adopted by the WRC is correct or the conclusion reached by the WRC is accurate. Hence, the arbitral tribunal still retains some control as the decision-making tribunal (London Arbitration 15/05; London Arbitration 21/04). Suppose that, as per the charterparty, the benefit of a favourable ‘current’ is to go to the benefit of the owner, but the WRC factored favourable ‘current’ in favour of the charterer, then the tribunal will be able to reject the current factor included in the WRC’s calculation.

The difference between the process by which an expert determination is made and an arbitral decision is made must be observed. In the former process, the parties are not heard, while in the latter process, the parties are heard, which is important for a ‘decision’ making process to adhere to natural justice.<sup>49</sup> An expert is liable for negligence,<sup>50</sup> while an arbitrator is immune from actions save where he acted in bad faith (s 29 UK Arbitration Act 1996). An arbitral award is statutory binding (s 58 UK Arbitration Act 1996), while an expert determination is binding only as a matter of agreement between the parties.

Sometimes, the clause may merely provide that an independent bureau report will be taken into account if there was a consistent discrepancy between them and the deck log entries (London Arbitration 4/12; 9/18). This is not a preference clause and indeed does not add anything to the charterparty as the tribunal can consider such an independent report even in the absence of such a clause (rule 15(a) LMAA Terms 2021).

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<sup>49</sup> *Wilky Property Holdings plc v London & Surrey Investments Ltd* [2011] EWHC 2226 (Ch) (HC).

<sup>50</sup> *Sutcliffe v Thackrah and others* [1974] 1 All ER 859 (HL).

## **Chapter 10**

### **10. Issue of ‘Current’**

The impact of ‘current’ affecting a vessel’s performance, whether favourably or adversely, in underperformance claims has been a subject of argument between the shipowners and charterers. Charterers will want to argue that any favourable current must be factored into the performance analysis, while the owners will want to argue otherwise. A vessel may keep up to the warranted performance only because of a favourable current. In such a case, the question that arises is whether there is a breach of the warranty as to the vessel’s performance capability. If the favourable current is factored into the analysis, then there would be a breach. Where the vessel underperformed, a favourable current might have reduced the extent of underperformance. Again, if the favourable current is factored into the analysis, then the extent of the breach will be larger. To say it simply, the question is whether the favourable current goes to the benefit of the charterer or the shipowner. Apart from the question of whether a favourable current factor may be taken into account, calculating current is an imperfect science. If it is to be factored in, then the question of the safe margin to be allowed for inaccuracy arises. These are the subject of discussion in this Chapter. At the end, a mention is made of the wind and swell factors in performance analysis.

#### **Introduction**

Current may influence a vessel’s performance either favourably or adversely. It is usual to find the performance warranty being subject to ‘no adverse current’. If the only best ‘good weather’ period of sufficient length that is available was subject to an adverse current, then likely an ‘adverse’ current factor will be added to the performance actually achieved to find out what performance the vessel would have achieved had the current not been adverse. Take this example. The vessel performed a speed of 13 knots during a period of sufficient length that would meet the contractual benchmark of good weather save for adverse current. The ‘adverse current’ factor, after allowing the necessary margin for inaccuracy, is calculated to be, say, one knot. Now the vessel’s good weather performance, per contract, will be taken as 14 knots, for the purpose of determining the question of whether the performance warranty was breached and, if so, by what extent. Hence, if the warranted speed, after allowing any required margin for ‘about’ qualification, is 14.5 knots, then the vessel underperformed by 0.5 knot speed.

## **Favourable Current and Inaccuracy in Calculation**

It is a more difficult question if a favourable current was experienced during the good weather period taken to test the performance capability of the vessel. There is no doubt that the period is acceptable as the weather was good. The charterer will want to argue that the 'favourable' current factor should be deducted from the performance that the vessel achieved to find out the vessel's true capability in neutral current condition, i.e. the benefit of 'favourable' current must be for the charterer. The shipowner will want to argue that no such factor should be deducted because the charterparty does not provide for such a deduction, i.e. the 'favourable' current should simply be for the benefit of the shipowner. This has been a highly controversial subject. Arbitral awards have been divided on this question, while more of them support the proposition that no deduction should be made, i.e. the 'favourable' current goes for the benefit of the shipowner. There is no judicial pronouncement on this issue, while an application under s 45 Arbitration Act 1996 for determination of a preliminary point of law remains a possibility in the future.

If a current factor is to be taken into account, the difficulty that sets in is calculating the factor. Calculating the 'current' factor is described as an imperfect science. This requires a determination of the safe margin to be allowed for inaccuracy.

In London Arbitration 15/05, the performance warranty given on a continuing basis subject to good weather conditions as defined therein. No mention was made of 'current'. It also provided a technical dispute resolution mechanism, whereby in the event of a dispute the parties would be bound by the performance date of an independent WRC. The charterer claimed the vessel underperformed and produced an independent weather routing company's report that took into account a favourable current, Kuroshio current across the Eastern Pacific Ocean, and factored 0.5 knot for this. The shipowner argued that the favourable current should not be taken into account as the charterparty did not provide for that. The shipowner also argued that, if the current factor was to be taken into account, a margin for inaccuracy should be allowed. The shipowner contended that the reliability of Kuroshio current was between 50% and 75% only. The tribunal did not consider itself bound by the report in its entirety or the conclusion reached by WRC, although it was bound by the data provided by the WRC. The tribunal held that the current factor must be taken into account. The tribunal also held that a margin should be allowed for possible inaccuracy. In this case, the shipowner submitted that the current factor may go inaccurate between 25% and 50%. Thus, the tribunal allowed a 50%

margin, i.e. the maximum claimed by the owner, allowed 0.25 knot current factor to be included in the calculation of the vessel's speed capability.

### **London Arbitration Awards discussed**

In London Arbitration 20/07, an issue arose whether there was any favourable current that should be taken into account. The charterer claimed that the favourable current accounted for 5.34 miles, while the total distance steamed was 1,162.8 miles, i.e. the favourable factor accounted for 0.46% of the distance. The tribunal rejected this claim on *de minimis* rule. In any event, the tribunal noted that matters such as the effect of currents on a vessel's performance cannot be calculated with precision and an allowance has to be made for inevitable error.

In London Arbitration 4/94, the charterer made an underperformance claim. The charterer adduced expert analysis showing performance of lower than 14.5 knots speed. The shipowner challenged the charterer's contention by adducing evidence of the vessel's performance was above 14.5 knots even during some bad weather days. The tribunal found that the overperformance did not show the true capability of the vessel as it was probably the result of favourable current and wind. The tribunal's focus was on the 'capability' of the vessel. Having thus discounted the contention of the shipowner, the tribunal found, after allowing a margin for possible errors in the weather and performance analysis, that the vessel performed slightly below 14.5 knots. As there was no 'about' qualification in this case, the tribunal held that the shipowner was liable for the slight underperformance.

In London Arbitration 15/07, the warranted speed was 14 knots on ballast sea passage after allowing 0.5 knot for the 'about' qualification. The charterparty provided that any adverse current factor was to be adjusted in the performance calculation but was silent about favourable current. The vessel performed 14.1 knots on the ballast sea passage. The charterer contended that there was a favourable current factor of 0.4 knot and a negative weather factor of 0.1 knot. This meant the net positive factor was 0.3 knot. In the absence of this positive factor, the ship would only have performed 13.8 knots (i.e. 14.1 knots – 0.3 knot). Accordingly, the charterer alleged underperformance. The tribunal rejected the underperformance claim, holding the benefit of any favourable current to the benefit of the shipowner.<sup>51</sup> This decision can raise some conceptually difficult questions that follow. If a positive factor and a negative factor has affected the speed, are they to be set off against one another so that only the net factor will be

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<sup>51</sup> See London Arbitration 21/04 for a similar decision on this point.

taken into account? If not, will the positive factor be disregarded so that the shipowner will enjoy the benefit of the negative factor in its entirety? Will it be different if the warranty is a continuing one as opposed to the capability of the vessel at the time of delivery? The award, insofar as the question of favourable current is concerned, was doubted subsequently in London Arbitration 4/12.

In London Arbitration 4/12, the performance warranty was of the vessel's capability and a continuing one. The charterer claimed, among others, that the vessel under-speeded. In support of its claim, the charterer produced a voyage analysis performed by the Danish Meteorological Institute (DMI), which took into account a weather factor. The shipowner challenged the weather factor. The tribunal rejected this challenge because the shipowner did not offer its version of the factor that must be taken into account. The owner also challenged the report on the ground that DMI had taken into account favourable current in reporting the vessel's good weather performance, i.e. the benefit of favourable current was given to the charterer. The tribunal rejected the shipowner's argument.<sup>52</sup> The tribunal doubted the London Arbitration 15/07 on this point. The correctness of this award (4/12) is dubious.

In London Arbitration 22/18, the vessel was time chartered for a trip where the performance warranty was subject to 'no adverse current' and the benefit of the favourable current was expressly given to the shipowner. The charterer alleged underperformance on the approach voyage to the loading port and also on the carrying voyage to the discharge port. On the approach voyage, the report concluded there was an underperformance only because it factored the favourable current in determining the good weather performance, giving the benefit of the favourable current to the charterer. The tribunal held that this was contrary to the express agreement of the parties that gave the benefit of any favourable current to the shipowner. Accordingly, the tribunal well held that there was no underperformance in the approach voyage.

In London Arbitration 21/04, the warranted speed was "about 13 knots in ballast/laden." The WRC report produced by the charterer took the favourable current factor of 0.6 knots into account and thus calculated the vessel's speed capability to be less by this factor than that actually achieved during good weather. Thus, the report concluded underperformance. The tribunal held that it should not be taken into account as no mention of current was made in the charterparty, hence no underperformance.

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<sup>52</sup> See London Arbitration 15/05 for a similar decision on this point.

In London Arbitration 12/14, the charterer and the shipowner produced competing expert reports. The charterer's report calculated the good weather speed to be 12.48 knots after deducting 0.2 knots for the favourable current factor. The shipowner's report calculated the speed as 12.68 knots because no favourable current factor was taken into account. The tribunal agreed with the shipowner and disagreed with the charterer's taking into account of the favourable current factor.

In London Arbitration 6/19, the time charterparty was for a trip, where the performance warranty was subject to "no adverse current" and was silent about favourable current. The WRC report produced by the charterer took into account 0.4 knot favourable current factor. The tribunal, following London Arbitration 12/14, rejected this.

In London Arbitration 26/19, the performance warranty was subject to "no adverse currents" and was silent about favourable current. The tribunal held that no favourable current may be taken into account as the same was not provided for in the clause, thus an award in favour of the shipowner.

In London Arbitration 27/19, the performance warranty was subject to good weather, among others, 'without adverse current'. It was silent about favourable current. The tribunal rules against taking into account a favourable current in determining the vessel's performance capability.

In London Arbitration 21/18, the performance warranty was subject to "no negative influence of currents" and silent about favourable current. The charterer produced two WRC reports, which took into account the favourable current in calculating the vessel's capable performance. The tribunal noted the significant difference between the two reports in qualifying the favourable current factor, thus the inevitable difficulty and the potential inaccuracy associated with factoring current in determining a vessel's performance. The tribunal preferred London Arbitration 15/07 to London Arbitration 4/12 on the question of factoring a favourable current and held that a favourable current should not be factored into performance analysis. Thus the benefit of a favourable current goes to the owner. The significance of this award is that it offers a substantial reason for refusing to take into account the favourable current factor, namely the inherent inaccuracy associated with it or impracticability of calculating it to an acceptable degree of accuracy.

## **Wind and Swell Factors**

Although frequently disputes arise as to whether the charterer or the owner takes the benefit of a favourable current, the same question can also arise in connection with wind and swell waves. Indeed, wind or swell waves can be adverse or favourable to the speed of the vessel. The positive influence that some swells may have on the speed was particularly noted in London Arbitration 24/19.

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