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Commercial Aspects of Shipping Part -7 Revisiting Speed and Consumption Warranties in Time Charterparties

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Under a time charter contract between the *Charterer* and the *Ship Owner*, the *Ship Owner* “warrants” that his vessel will perform within the parameters specified under the description clause. Failure to perform as per the speed and fuel consumption specified may cause “breach of contract” and result in a claim for damages by the *Charterer*. It is thus important that the senior shipboard personnel are fully aware of the implications of such a breach.

A “condition” is a term fundamental to the contract, which if there is a failure in its observance, causes the contract itself to be substantially different to that which the parties originally contracted.

A breach of a “condition” entitles the other party to refuse to perform (if he has not already performed) a contract. Damages may be claimed.

A “warranty” is a term not fundamental to the contract, but only “collateral” to it. The innocent party is entitled to damages only for a breach of warranty, there is no right to repudiate the contract.

Generally speaking, whether any particular term is a condition or a warranty depends on the intention, interpretation and construction of each individual contract.

Under a time charter contract, the time charter takes on the role of the Owner (and is called the “disponent owner”) and may either use the vessel for transportation of his own goods or may sublet the vessel to a sub charterer for a time or a voyage charter. The speed and fuel consumption warranty would determine how the vessel is expected to perform and voyage estimates/profitability calculations of the disponent owner will depend on the parameters specified in the time charter party, under the clause termed as “Description”. Thus these parameters form the basis of the calculations that influence the business decision.

Typical Speed and Consumption Warranty - An Example

Typical Speed and Consumption Warranty of a Time Charterparty (Generally mentioned under the Description Clause) :

.....Speed and consumption which Owners guarantee vessel will maintain during the whole currency of this Charterparty, under good weather conditions :

1. Speed loaded about 14 Knots
2. Speed ballast about 14 knots
3. Type of bunkers IFO 380 cst (for Main Engine)
4. Consumption
 - a. at Sea about 28 mt IFO + about 2 mt DO
 - b. in Port idle about 2 mt MDO gear working per 24 hrs about 2.5 mt DO

Good Weather Conditions

For clarity, it is also advisable to include clarification of term “Good Weather Conditions”, usually with reference to weather and sea conditions (e.g. Beaufort Wind Scale and, perhaps Douglas Sea State) against which factors a vessel’s performance should be measured.

Beaufort Scale 3 - Wind Speed 7~10; Gentle Breeze; Large wavelets, Crests begin to break, Foam of glassy appearance, Perhaps scattered white horses; mean height of waves 3 feet.

Beaufort Scale 4 - Wind Speed 11~16; Moderate Breeze; Small waves becoming longer; Fairly frequent white horses; mean height of waves 5 feet.

Time charterers frequently bring claims against owners for underperformance, which means that the vessel is not complying with the speed specifications described in the charter-party. Underperformance claims often go hand in hand with claims for “overconsumption” which means that the vessel is using more fuel per day than specified in the charter-party. In order to defend these claims, Owners rely heavily on accurate and comprehensive data collected by the Master and the officers.

Within the terms of a time charter, the speed of a vessel will be related to a certain number on the Beaufort scale - usually 4 - and the object of this is that the vessel should perform at the prescribed speed with prevailing winds of scale 4 (four). Should she not perform at this speed, then the charterer may make a speed claim against the owners for non-performance.

In order to check whether the vessel is performing as described in the charter-party, the Master should use only information acquired under good weather periods as specified in the charter-

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party.

The basic data that is required to be gathered daily may comprise of factors such as particular sea state, changes in course, effect of tidal waters and currents which are normally recorded, on a watch by watch basis, in the vessel's deck log book.

Data recorded by the routing company can provide expert evidence when a dispute arises about the effect of weather on a voyage. These routing companies collect data from multiple sources and determine the prevailing weather conditions enroute and suitably guide the Master to take the shortest route, as one of its services. They also study the effect of the weather on the vessel speed and thus as an independent party, have an important say in the vessel performance, especially so if the contract stipulates that in the event of a dispute, the opinion of a routing company would be sought.

The question as to whether the time charterer has the right to appoint a weather routing company, in *Society of Maritime Arbitrators Inc. New York Arbitration Award No. 2125*, it was held-

"Because, under a time charter agreement, the risk of delay due to weather is upon Charterer, there is no question that Charterer has the right to nominate a weather routing service of its choice, for its account. However, the Master is not under an absolute obligation to follow the advice of any routing service; he is the sole judge when it comes to deciding upon the best and safest course to take from point of origin to destination, having in mind the best interests of both Owner and Charterer and the safety of his vessel, cargo and crew".

In case of a dispute, it is the weather which parties tend to see in a different light. When Time Charterers employ a performance monitoring company to monitor vessel's performance, the information on which such a company bases its evaluation may be e.g. statistical material for a certain area rather than based on current, factual information at the particular place and time and, hence, the conclusions drawn, i.e. the performance details are bound to differ

from vessel's log book entries.

"Absent any qualifying or instructive language in the Contract, it must be accepted that the parties intended to rely on the vessel to supply the weather data to determine when the vessel was steaming under good weather conditions. This does not mean that Charterers cannot produce evidence which could so impugn the accuracy of the vessel's observations that any reasonable person should question the integrity of such records and, therefore, if necessary, look to other sources of weather information to determine periods of steaming under good weather conditions. Charterers employed the services of Oceanroutes to independently determine the wind, sea and current conditions prevailing at or near the vessel's position and to express an opinion as to the effect these conditions had upon the vessel's ability to steam at about 13 knots on a consumption of about 33 metric tons IFO"

(*SMA Award No. 2005*).

[Clarification : "Absent any qualifying or instructive language in the Contract" means absence of a clause which prescribes that if there are discrepancies between vessel's log entries and a performance monitoring company, then the information submitted by the latter should be considered decisive]

It has been seen that where the discrepancies between the weather data as per the vessel's records and that reported by the weather routing company are not large, most panels will accept the reports by the ship. In *S.M.A. award No. 2040* the panel commented as follows:

"Under most circumstances, where the differences are not major, most panels will tend to accept the reports of the ship, as the Master and Officers are deemed to be the best judges on the spot of actual conditions. A heavy burden is placed upon Charterers to show that the ship logs are not reliable and should be disregarded".

However, if it is found that the disparity between the reports from the two sources is abnormal and the panel finds any

unusual trends in the ship's records then it may scrutinize the ship's records in detail and may even find the reports from the weather routing company more reliable. Referring back to the *SMA Award No. 2040* :

"The testimony and documentary evidence of OceanRoutes submitted by Charterer in this case is detailed and shows that the ship's reports require a closer scrutiny than usual as the disparity is too great to be considered as normal. The Panel spent much time reviewing the figures and noted a pattern in the logs to show adverse currents and winds consistently almost the entire time at sea. The testimony of the weather expert in oceanography was convincing, particularly in describing how the ocean currents are plotted and that they are mostly regular in location and intensity. The Panel also was able to determine that weather patterns reported by the ship were often at direct odds in terms of wind direction to a degree that is most unusual. Certainly there can be subjective differences between the estimates of wind force as seen from the bridge of a ship and those estimates of a weather analysis, based as they are upon reports from many ships and weather reporting stations in a general area surrounding the ship's position. It is however quite different to find a continuous series of directional differences. In summary, the Panel was able to agree that the "fair weather" days reported by OceanRoutes were, in this case, more reliable".

Effect of the word "about"

It is generally accepted that the word "about" will give Owners a 0.5 knot margin. If, for example, the vessel is warranted to perform at about 14 Knots, then there will be no breach of the warranty provided the vessel attains a speed of 13.5 knots. Although this "rule" seems to be applied invariably in London arbitrations, it is not actually the Law. The law says that the extent of the margin "must be tailored to the ship's configuration, size, draft and trim etc." (The *Al Bida* [1987] 1 LLR 124).

In respect of bunker consumption, there is also no fixed margin according to English Law. However, it seems to have

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been generally accepted in the Industry that a margin of 5% will be allowed for "about" (London Arbitration 12/85 - LMLN 158; London Arbitration 2/87 - LMLN 188).

However it was held in *SMA Award No. 2040* that -

"This Panel does not believe that there is any inherent or automatic right to calculate bunkers by adding 5 per cent. to the figure warranted. There is no satisfactory precedent which requires that the Panel give such an allowance. The principle is well established that after making due allowance in assessing the deficiency (if any) in speed warranty, bunkers are to be calculated on the warranted daily figure for the actual time at sea as compared to the consumption at what should have been the voyage duration. Any difference is reflected in the final accounting. The word "about" in describing bunker consumption is not another 5 per cent. on top of that allowance for speed, which is intended to allow for vagaries in currents, short sea passages and other minor effects of the unknown in navigation procedures".

This would mean that the arbitrators declined to give the Owners a "double benefit" of 0.5 Knots and 5% consumption.

In a London Arbitration (reported in *LMLN. 233, page 4*), the panel had to decide upon the effect of the word "about" as included in the detailed Speed/Performance Warranty.

The charterparty provided :

".....economic speed about 11 knots on 4.7 mt IF 180 -

speed/consumption

about 10.0 knots on about 3.7 MT
about 10.5 knots on about 4.2 MT
about 11.0 knots on about 4.7 MT
about 11.5 knots on about 5.5 MT
about 12.0 knots on about 6.6 MT

Although the charter was thus highly specific as to the vessel's performance capabilities, the arbitration considered nevertheless that effect must be given to the word "about" because the parties had expressly agreed to it. However, they limited the allowance to a quarter of a

knot rather than **the usual half a knot given by London arbitrators**, firstly because several speeds were written into the charterparty, and secondly because the speeds was already much lower than that usually stipulated in fixtures of larger bulk carriers.

It is interesting to note here that the Tribunal also held that *the allowance for fuel consumption should be limited to and reduced in accordance with the reduction in speed allowed by the word "about"*. Thus assuming that the vessel was to steam at economic speed (11 knots on about 4.7 mt of fuel oil), the allowance for "about" not only brought the warranty speed down by a quarter of a knot to 10.75 knots but also reduced the permissible fuel consumption to 4.45 mt, thus proportionate to the charter party figures.

However as a general rule the warranted fuel consumption would not be reduced simply because the speed obtained was only CP Speed minus 0.5 Knots, but this would depend upon the actual wordings used in the Charter Party. In the normal case where the warranty is "about V Knots on about Q mt fuel oil per day", the plain meaning of the words is that the vessel will attain a speed of at least V-0.5 Knots on "about Q mt" and there is, normally, no reason to imply a proportional reduction in the bunker consumption.

Evaluation of Under performance - Precedents

In one of the decisions (The *Didymi* 1988.2 LLR. 108), the court had established a two stage test for determining loss resulting from under performance.

This required, firstly, an assessment of under performance based on good weather conditions. Once this was established the second stage required an assessment of the under performance in all weather conditions, with the necessary extrapolations calculated by an expert.

The Court of Appeal, while endorsing above approach further clarified the position by the following three stage approach :

"... First, assess the vessel's performance in good weather conditions as defined on all sea passages from sea buoy to sea buoy, excluding altogether any period of slow steaming at charterers' request.

Secondly, if a variation of speed from the stipulated norm is shown, that variation should be applied with the necessary adjustments and extrapolations to all sea passages from sea buoy to sea buoy and all weather conditions, but excluding the periods of slow steaming at the charterers' request.

Thirdly, if there is a variation of consumption from the stipulated norm, that variation should be applied, with the necessary adjustments and extrapolations to all sea passages from sea buoy to sea buoy and all weather conditions, but excluding the periods of slow steaming at the charterers' request".

Overall then the speed/performance clause to all weather conditions, only excluding the slow steaming where speed reduced at charterers' request.

Speed Claim Calculations - An example

Vessel Name : MV Example

CP Speed : about 14.0 Knots

CP Fuel Consumption : about 24 mt

Vessel undertakes a voyage from Port Top to Port Bottom about 8000 Nm apart, taking 655.7 hrs to complete the voyage with an average speed of 12.2 Knots.

On the days when the weather was good, it is observed that the vessel did not perform as warranted. Charterers had appointed a weather routing company and it is found that even the ship's records showed under performance on the fair weather days.

Thus the deficiency in performance is to be applied for the complete passage after duly taking effect of weather into account for calculations of the Performance Speed.

As per weather routing company, the calculated weather factors are as :

Weather Factor = -0.6 Knots

Current Factor = + 0.4 Knots

(Calculation of these factors is a subject in itself and is not being considered here

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in detail).

Basis above and interpreting “about” as allowing 0.5 Knots to get an effective speed of 13.5 Knots (when CP speed is 14.0 Knots), we achieve the “Performance Speed” as follows :

Performance speed = Effective Speed + Weather Factor + Current Factor
= 13.5-0.6+0.4 = 13.3 Knots.

Chartered Time (basis Performance Speed)

= 8000 Nm / 13.3 Kn = 601.5 hrs

Actual Time Taken = 655.7 hrs

Computed time lost = 54.2 hrs.=2.2583 days

Speed Claim Amount = US \$ 9,000 x 2.2583 = **US \$ 20,324.7**

Where US \$ 9,000 is the daily Charter Hire rate.

Above is an example how claims can arise in such cases. Higher consumption can also result in expensive claims.

An actual case (SMA Award No. 2040)-

Sailed Inchon	28/09/80	Arrived Mizushima	01/10/80
Sailed Mizushima	04/10/80	Arrived Kawasaki	09/10/80
Sailed Kawasaki	10/10/80	Arrived Kaohsiung	19/10/80
Sailed Kaohsiung	22/10/80	Arrived Singapore	02/11/80
Sailed Singapore	02/11/80	Arrived Lagos	04/12/80
Sailed Lagos	10/01/81	Arrived Cape Town	30/01/81
Sailed Cape Town	06/02/81	Arrived Singapore	27/01/81

In assessing the degree of non-performance, the panel adopted the method described by OceanRoutes, making allowance for favorable currents, adverse winds and the customary half knot to cover the word “about” in the warranted description. The basis to determine the warranted minimum speed for the initial C/P has been set at 13.7 knots. The Panel found from the documentary evidence that the ship failed to perform at that speed on “good weather” days and assessed the degree of failure as set out below.

For the first leg of the voyage Inchon/Japan/Hong Kong/Singapore, OceanRoutes was not employed and only the vessel’s log is in evidence. For this period, charterer has impliedly used the same OceanRoutes formula to this leg in asserting its claim.

On the last leg of the voyage, Cape Town/Singapore, OR report shows performance better than the adjusted warranty (10.1 knots), but charterer has made no claim for speed deficiency on that leg, limiting itself to a claim for overconsumption of fuel oil.

The Panel decided that, under the terms of this C/P, the correct method of determining performance is to examine all the sea passages during the period of time charter and apply any deficiency to the entire period. However, in making its calculations, the Panel gave Owner due allowance for the minimum warranty on those passages where a deficiency occurred, and on the last leg where the performance actually slightly exceeded the C/P warranted figure, gave credit for the saving of time based on the C/P figure rather than on the OR formula. This method was adopted as being equitable to both

parties within the terms of the C/P and the custom of the trade.

For the first leg the weather conditions were taken from the ship’s log, but on all the subsequent legs OR weather reports were considered more reliable. In all cases only those days where the weather was Beaufort Force 4 or less were considered, thus reflecting the intent of the parties as expressed in the relevant clause the Charter Party.

The results showed the following:

- A. Westbound.Inchon/Japan/HKG/S’pore 1.57 k deficient 3.11 days lost at \$7,150/day \$22,236.50
- B. Lagos/Port Harcourt/Lagos 6.07 k deficient 5.44 days lost at \$ 5,000/day \$27,200.00
- C. Eastbound. Lagos/Cape Town 2.6 k deficient 1.86 days lost at \$ 5,000/day \$ 9, 300.00
- D. Cape Town/Singapore 0.35 k over 0.37 days gained at \$ 5,000/day \$(1,850.00)

Net: Awarded to Charterer 10 days lost due to underperformance \$ 56,886.50

Avoiding the Underperformance Claims

Can you imagine an under performance claim in today’s market when the freight rates are at levels never ever seen in the history of shipping !

- ◆ Avoid clauses which prescribe that if there are discrepancies between vessel’s log entries and a performance monitoring company, then the information submitted by the latter should be considered decisive for the reasons mentioned in the above text.
- ◆ Maintain proper and correct records during the voyage.
- ◆ Substantiate the logging of “Adverse Current, Head Swell, Heavy to Moderate Swell” etc. by known/accepted documents/publications.
- ◆ Immediately investigate and advise the Head Office if any indication of underperformance becomes apparent.
- ◆ During “fair weather days”, pay additional attention to vessel performance to ensure that vessel is performing better or as per the Speed/Fuel warranty.

Careful monitoring of the Vessel Performance by the Senior most officers on board the vessel and timely action can result not only in savings but also in enhancing the reputation of the Owner/Operator and better the claims record.

References :

1. Institute of Chartered Shipbrokers Course Material
2. Sea Venture (The Steamship Mutual Underwriting Association (Bermuda) Limited Publication) Vol 11, Page 70, Vol. 12, Page 50/51.
3. BIMCO Bulletin 6/84, 3/85, 4/85, 2/86

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