



## Speed and Consumption Claims

### (Part I)

#### A practical perspective

*“..it was trite law that where a charter provided a performance warranty the first step was for the tribunal to establish how the vessel performed in good weather conditions as defined in the charter. If a vessel underperformed by one knot in good weather, it would probably continue to underperform by the same margin in bad weather and charterers should be compensated for that bad weather underperformance as well as the good weather underperformance.” (London Arbitration 24/19)*

#### The common issues

Speed and Consumption claims continue to be a much extended area of dispute between owners and charterers, with most of the cases are resolved either amicably or by arbitration as per the charterparty terms.

Based on extensive experience in handling speed and consumption claims for Owners or for Charterers, some of the regular issues that discussed between the parties were:

1. Whether the Charterers are allowed to make a deduction from hire either as an express right or as an equitable right:
  - ✓ At the end of the charter;
  - ✓ During the performance of the charter:
    - a. Having produced only an interim report;
    - b. Having produced a non-compliant report with the CP terms; or
    - c. Waiting the final report from the weather routing company;



- d. Having not particularized their claim i.e. based on mere assertions.
2. Whether the meaning of the language is open to question. Should a literal or a purposive approach to contractual interpretation be adopted and the threshold required implying terms into the contract. The line between the distinct principles of interpretation and construction discussed.
3. Whether to force the provisions of the charter-party into the straitjacket of the concepts of reasonableness and fairness. The touchstone and the limits of commercial common sense considered.
4. Whether the terms contain ambiguities, wrong words or syntax - poor quality of drafting; thus raising issues of textual or contextual interpretation, construction or rectification. Deletion of words, *Contra Proferentem* rule and pre-contractual negotiations considered. The admissibility of extrinsic evidence discussed.
5. Whether the terms of the recap can be reconciled with the terms of the proforma or other documents being incorporated by reference; and the terms that prevail in case of inconsistencies. The maxim "*specialibus generalia non derogant*" considered.
6. Whether the arbitration decisions set a precedent for matters that have not been decided by the Courts in the efforts to maintain commercial certainty and continuity. Absent precedent, whether the parties can rely on articles published by legal authors or arbitrators in UK or in other countries discussed.
7. Whether the vessel's performance is warranted:
  - ✓ If it is not i.e." WOG" then other potential remedies available discussed. Authorities, arbitration awards, and principles considered.
  - ✓ If it is warranted then when the warranty applies. Case law discussed and evidence sought to prove her previous performance.



8. Whether the loss is too trivial and merits no consideration (*De minimis*).
9. Whether proof of actual weather conditions should be taken from the deck logs or the weather routing reports.
10. Whether (i) the findings of the weather routing company are binding the parties; (ii) the weather routing clause provides a complete code to resolve the dispute or oust the arbitration clause; (iii) the arbitration instigated prematurely (damages as a remedy); (iv) there is no 'dispute' to be referred under the arbitration clause; and (v) the ingredients of waiver or estoppel established after the nomination of a non-agreed weather routing company i.e. excluded by the express terms of the CP.
11. Whether the parties should agree to certain instructions to be given to another routing company (when the clause construed as an expert determination provision) in order to evaluate performance and same to be binding. Distinction between binding data and methodology discussed along with authorities of general application.
12. Whether the performance report applied the contractual yardstick against which the vessel's performance is to be measured. Common issues are:
  - (i) Weather factor; positive and adverse currents;
  - (ii) Meaning of adverse influence of swell or currents or weather;
  - (iii) Wave height, swell, DSS3 or significant wave height;
  - (iv) No Impediments, even keel, deep water, water temperature, bunker quality;
  - (v) Sufficient sample of good weather between noon reports or sample for the whole voyage.
13. Whether the Charterers can bring a claim when the ship encountered only 'bad weather' or 'near good weather'. Other potential remedies discussed. Mixed points of principle and authority considered.



14. Whether the Charterers are allowed to bring a claim for underperformance when the vessel's hull became fouled. Principles of contract interpretation discussed to determine liability. Legal and evidential burden discussed - expert opinion sought.
15. Whether the master failed to follow Charterers' orders in relation to the speed & consumption or to prosecute the voyage with utmost despatch. Case law and evidence considered- expert opinion sought.
16. Whether the vessel was unseaworthy; engine or technical issues affecting her performance. Evidential and legal burden considered. Discussion on 'superficial inspection', disclosure of documents and onboard surveys. The distinct availed remedies of damages and off-hire considered.
17. Whether the ship is allowed to reduce speed when transiting through high risk area or passing canals or complying with orders or directions of local authorities. Evidence sought to be adduced and relied on by the parties.
18. Whether the vessel's underperformance caused by Charterers' breach to supply the vessel with bunkers of improper quality (off spec). Evidence considered.
19. Whether the 'minimum performance rule' in a damages claim applies when Charterers bring their claim under separate breaches of contract. Authorities discussed; evidential and legal burden considered.
20. Whether the Charterers are entitled to request- and the Owners to deny- further disclosure of documents. Application for disclosure before serving submissions. Whether the tribunal can allow this application under the rules.

**Note: The above list is not exhaustive.**