

Vague terms remain in speed and consumption clauses

Prokopios Krikris, Mar 18 2022

Performance claims continue to be an extended area of dispute, with complex factual or legal issues being resolved amicably or referred to arbitration over the last decades.

The parties' perspective incorporates a suitably worded performance clause in the Charterparty to safeguard their conflicting interests. Usually, the performance clause spells out the benchmark conditions against which the vessel's performance is to be measured.

However, the benchmark conditions sometimes include other elements unrelated to 'good weather', like *"vessel to be on even keel in deep water, with sea temperature not exceeding 28° Celsius, and based on bunkers supplied are of a net caloric value of 10.200 Kcal/Kg, etc."*. These qualifications make it more complicated to establish breach and loss.

Some of these terms started life in shipbuilding contracts and were later incorporated into the charter parties, thus providing ground for varied interpretation. For example, the speed warranty in shipbuilding contracts refers to *"..clean hull in deep water on the design draught of x meters even keel.."*.

In a charter party, some of these terms may work against the Owners; they will have to prove that these conditions were satisfied and not contributed to the loss. In particular, whether the ship remained on even keel throughout the voyage and the fuel consumed, prior Charterers' supply, was compliant with the agreed fuel specifications.

Even keel

It means that the vessel's draft forward and aft is the same. In the context of a shipbuilding contract, the speed warranty will be tested during the 'sea trials' that will last few hours, and the vessel will remain on even keel. But,

strictly speaking, it is improbable for the ship to stay on even keel during a transatlantic voyage of 15-20 days duration.

When a dispute arises over a breach of the speed warranty, the parties mainly disagree on: (i) whether minor discrepancies suffice to establish breach, e.g., 6.40 m forward & 6.30 m aft (and vice versa); or whether it requires only serious discrepancies (how much?) that should not occur in the ordinary course of a voyage, viewing also the ship's size, type and configuration; (ii) who then is responsible for her not being on even keel; and (iii) whether there is calculable loss when liability has been established.

Deep water

That is a term of art. The speed warranty will be considered during speed trials conducted in deep water and likely close to shore in shipbuilding contracts. But what constitutes deep water is not defined; this will be fact-sensitive, given the ship's characteristics and the fixed voyage, e.g., coastal routing or routing at open seas.

Calorific value

The consumed (and supplied) fuel of a lower calorific value requires extra consumption to perform the warranted speed. Then the issues are: (i) whether a party can benefit out of his wrongdoing, i.e., supplied improper fuel; (ii) whether the laboratory analysis is binding the parties; (iii) whether the discrepancy is immaterial and should be ignored, e.g., 10000 Kcal/Kg against 10200 Kcal/Kg; and (iv) whether there is any proper way to calculate this extra consumption. That can be determined on expert evidence or opinion to be admissible under the applicable rules in arbitration.

Sea temperature not exceeding 28° Celsius

That needs no definition. However, common issues are : (i) whether this term has any meaning considering the voyage details, i.e., what if the ship initially fixed to perform a voyage known to parties the sea temperature

would exceed the 28° Celsius; (ii) how this can affect the vessel's performance and to what degree. For example, a slight increase in sea temperature will not justify a severe reduction in speed.

Conclusion

Undoubtedly, these terms complicate the process of establishing breach and loss. Besides, the words can be clear from their context, so it can be unhelpful in construing some of these words found in other contracts to establish liability and loss under a charter party.

As long as some of these terms remain un-argued, un-settled, and absent clear wording, it will result in varied interpretations that will expose the parties to costly disputes.

Originally published in Maritime Risk International (MRI), Mar 18 2022.

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