Underperformance Claims from an owner's perspective

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1. Introduction

1.1 Are the underperformance claims common?

(i) At least 20% of the claims assigned for handling

(ii) Due to market fluctuations and anticipated increase in the prices of bunkers, it is envisaged that their number will increase

1. Introduction

1.2 Why are the underperformance claims important?

(i) from a legal point of view

- The law concerning underperformance disputes is relatively settled ("The Didymi", "The Al Bida", "The Pamphilos", "The Gas Enterprise")

- However, certain areas remain grey (eg. Subject of assessment – entire period or each voyage)

- Evidential power of each piece of evidence unclear

- Technical support necessary

- To arbitrate or not (amounts involved, costs)?

(ii) from a commercial point of view

- May damage the Owner's reputation in the market (and thus affect its power/ position in fixtures negotiations)

- May jeopardise the relationship with the Charterer, which is critical in a falling market

1. Introduction

1.3 Main elements of the underperformance claims:

-reduced vessel’s speed (underperformance/speed claims stricto sensu)

-higher bunker consumption (overconsumption claims)

-both of the above

1. Introduction

Underperformance claims are raised in relation to:

(i) Time charterparties

(ii) Voyage charterparties?

- See cl. 3 of BPvoy3 *"…if the vessel fails to maintain Base speed … Owners shall be liable for all costs, losses, damages and expenses arising as a direct consequence thereof…"*

- In principle feasible, rare in practice

(iii) What about hybrid charterparties (e.g. time charter trips)?

Certainly yes

2. The agreement

2.1 A typical recap clause:

"… SPEED/CONS

BALLAST: ABT 14 K ON ABT 33.5 MTS PLUS 0.25 MTS MDO/LSMGO DAILY, LADEN (AT SUMMER DRAFT): ABT 13.5 K ON ABT 34.5 MTS PLUS 0.25 MTS MDO/LSMGO DAILY

UPTO BEAUFORT SCALE 4 AND DOUGLAS SEA STATE 3 (MAX WAVE AND SWELL HEIGHT 1.25M), UNDER NO ADVERSE INFLUENCE OF SWELL AND CURRENT

(ALL DETAILS ABOUT) …"

Two elements

- Promise as to vessel's speed and bunkers consumption
- In certain weather conditions ("the good weather" periods)

2. The agreement

2.2 Undertaking regarding the vessel's <u>capability of steaming</u>. Not promise regarding actual steaming

See: NYPE 1946, lines 9-10

NYPE 1993 lines 18-20

BALLTIME 1939, 2nd part, lines 10-13

Further:

-NYPE 1946, clause 15, lines 98-100:

"... and if upon the voyage the speed be reduced by defect in or breakdown of any part of her hull, machinery or equipment, the time so lost, and the cost of any extra fuel consumed in consequence thereof, and all extra expenses shall be deducted from the hire ..."

-NYPE 1993, clause 17, lines 233-236:

"... If upon the voyage the speed be reduced by defect in, or breakdown of, any part of her hull, machinery or equipment, the time so lost, and the cost of any extra bunkers consumed in consequence thereof, and all extra proven expenses may be deducted from the hire..."

2. The agreement

2.3 In principle, the performance warranty is <u>not</u> a continuous warranty, i.e. the undertaking applies at the start of the charter (meaning at the date of the C/P or at the time of the vessel'sdelivery**) and not throughout the charter service**

-Unless otherwise agreed (see *The Al Bida [1986] 1 Lloyd's Rep. 142*)

-Issues of construction when inconsistent terms appear in the recap and the proforma charterparty/ rider clauses

-What about the duty to maintain?

3. The crucial periods and the “about” description

(a) Good weather periods (why?)

-As per c/p’s definition of “good weather”

-If no good weather provision is included in the c/p, the undertaking applies throughout the charter period

-Identification of good weather periods

-Minimum duration of good weather periods?

-What if a good weather period cannot be identified?

-Is the vessel’s history (previous performance, maiden voyage, voyage after drydock) important?

-Implementation in non good weather periods, i.e. presumption of non conformity in “bad” weather periods

3. The crucial periods and the “about” description

(b) Exempted periods

Periods during which the vessel “legitimately” sails with reduced speed or increased consumption

(i) Pursuant to charterers’ orders (eg. vessel to sail with eco speed/ consumption)

(ii) due to the vessel’s compliance to charterers’ orders (e.g. hull fouling, narrow passages)

(iii) due to other lawful/ significant reason (e.g. sailing through a piracy zone, assisting vessel in distress, etc.)

3. The crucial periods and the “about” description

(c) “About”

-About about

-Al Bida [1986] 1 Lloyd’s Rep. 124

-Each case/ each vessel different **but** 1/2 knot **and** 5% consumption allowance

-What about double about?

Questioned in the past but now definitely accepted

4. The good weather periods

(a) beaufort scale force 4

(b) douglas seastate 3

(c) no adverse current

(d) no adverse swell

4. The good weather periods

(a) beaufort scale force 4

-The two basic sources of information are weather data from vessels and independent weather bureaus (routing companies)

-However, often there is inconsistency between the two

- Historically, vessels' data was preferred (contra "The Evdoxia", in which discrepancies were found between the bridge log book and the engine log book)

-However, independent weather data is increasingly relied upon *not without merited criticism [see for example the "12 hour=24 hour" theory advanced, which was rejected in London Arbitration 22/2018]*

<u>Examples of different approach</u>

London Arbitrations 3/12 and 4/12:*"Log entries were at times made with half an eye on charter warranties"*

London Arbitration 22/18: *"In the Tribunal's experience most masters did their best to provide accurate information"*

4. The good weather periods

(b) douglas seastate 3

Not crystal clear which is the so called Douglas scale (see Brian Williamson's article in the LMAA)

However, pursuant to the World Meteorological Office (WMO) and the practice of London Arbitrations the Douglas scale is used to estimate the roughness of the sea for navigation. The scale has two codes: one code is for estimating the sea state, the other code is for describing the swell of the sea:

(i) wave height= 0.5 up to 1.25 metres

(ii) swell wave (up to 100 metres length and up to 4 metres height)

4. The good weather periods

(b) douglas seastate 3

State of the sea (wind sea)

Degree	Height (m)	Description
0		Calm (Glassy)
1	0-0.10	Calm (rippled)
2	0.10-0.50	Smooth
3	0.50-1.25	Slight
4	1.25-2.50	Moderate
5	2.50-4.00	Rough
6	4.00-6.00	Very rough
7	6.00-9.00	High
8	9.00-14.00	Very high
9	14.00+	Phenomenal

4. The good weather periods

(b) douglas seastate 3

Swell

Degrees	Description
0	No swell
1	Very Low (short or average and low wave)
2	Low (long and low wave)
3	Light (short and moderate wave)
4	Moderate (average and moderate wave)
5	Moderate rough (long and moderate wave)
6	Rough (short and high wave)
7	High (average and high wave)
8	Very high (long and high wave)
9	Confused (wavelength and height indefinable)

4. The good weather periods

(c) no adverse current

- What is the correct treatment of favourable currents?

(a) if a warranty makes no mention of current, no account is to be taken of currents,

(b) if a warranty expressly excludes periods when adverse currents are encountered, those periods must be excluded,

(c) if a warranty excludes adverse currents but makes no mention of favourable currents, no account is to be taken of favourable currents, and

(d) favourable currents should only be taken into consideration if that intention is clearly expressed in the warranty, otherwise they work to owners' advantage.

4. The good weather periods

(d) no adverse swell

Definition of swell: a series of mechanical waves that propagate along the interface between water and air. These series of surface waves are not wind waves, which are generated by the immediate local wind, but instead are generated by distant weather systems, eg. storms

In Greek, swell: αποθαλασσία, σάλος, «βουβό» κύμα

5. The Consequences

(i) Calculation of underperformance (time loss and bunkers overconsumption)

and

(ii) unilateral –even in breach of the c/p- deduction from hire

-Better performance?

In general not to Owner's advantage

-Set off in case of time loss but bunkers' saving?

Most probably yes

6. Conclusions

Underperformance Claims:

-Common and Important

-Main legal principles established but certain areas remain grey

-Evidential issues common and difficult producing uncertain results

-Better to settle or arbitrate? Each case different…

Thank you very much!