The Marine Law Box
by Dr. Arun Kasi

What is in this Bulletin?

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- ✓ When a Speed-Claim will be an Off-Hire Claim?
- ✓ NYPE and SHELLTIME 4 forms considered

Upcoming Webinars by Dr. Arun Kasi

- ➢ 18 Aug 2021: Maritime Arbitration (LMAA) (UM)
- ➢ 09 Sep 2021: Oil Pollution (Gujarat Maritime Univ.)

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Time Charter: Speed Claim or Off-Hire Claim?

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Every time charterparty will have a speed-consumption warranty, called performance warranty. In tanker trade, the performance warranty will also include a pumping warranty, but we are concerned here with only speed-consumption aspect. The two very popular forms are NYPE (referring to 1946 version) for dry cargo and SHELLTIME 4 (revised 2003) for 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 charterparty will often be evidence of the vessel's incapability at the time of delivery (*The Didymi*;[i] *The Gas Enterprise*;[ii] and *The Ocean Virgo*).[iii] 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 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.

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 SHELTIME 4 form is a little wider that 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*).[iv] However, where the bottom fouling develops during the service, there is somewhat contradictory views (*The Ioanna* and *The Rijn*).[v] 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*].[vi] 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.

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 be paid for that period. Usually, the contract will also expressly allow deduction. But if the amount deducted goes wrong, 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 reasonable estimate (*The Nanfri*).[vii] The question of right of withdrawal upon such deduction will be the subject of forthcoming article here.

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 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 off-hire basis, must exercise caution before doing so.

Further Reading:

Arun Kasi, *The Law of Carriage of Goods by Sea*, Singapore, Springer, 2021

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[i] *Didymi Corp v Atlantic Lines and Navigation Co Inc (The Didymi)* [1988] 2 Lloyd's Rep 108 (CA).
[ii] *Exmar NV v BP Shipping Ltd (The Gas Enterprise)* [1993] 2 Lloyd's Rep 352 (CA).
[iii] *Polaris Shipping Co Ltd v Sinoriches Enterprises Co Ltd (The Ocean Virgo)* [2015] EWHC 3405 (Comm) (HC).
[iv] See *Ocean Glory Compania Naviera SA v A/S PV Christensen (The Ioanna)* [1985] 2 Lloyd's Rep 164 (HC).
[v] *Santa Martha Baay Scheepvaart and Handelsmaatschappij NV v Scanbulk A/S (The Rijn)* [1981] 2 Lloyd's Rep 267 (HC).
[vi] See *Bulk Ship Union SA v Clipper Bulk Shipping Ltd (The Pearl C)* [2012] EWHC 2595 (Comm) (HC).
[vii] *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 Lloyds Rep 201, [1978] 3 WLR 991 (HL).