The Marine Law Box by Dr. Arun Kasi

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'WOG' Danger in Speed-Consumption Warranties

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In time charterparties, the shipowner will warrant the capabilities of the vessel. This includes the speed-consumption capability. This is important to the charterer as the speed affects the time a voyage will take and in turn the hire the charterer pays, and the consumption affects the cost the charterer has to spend on fuelling the vessel. It is quite common for the charterparties to have a 'vessel description' clause that will set out the speed-consumption warranty. The vessel description may be pulled in from the Baltic Questionnaire frequently furnished by shipowners. In the case of charterparties in NYPE form (referring to the 1946 version), the most widely used form for dry cargo time charters, one may quite often find a rider clause 29 (or some other number) containing the vessel description.

Sometimes, the 'vessel description' clause will be qualified with the words 'without guarantee' (abbreviated as 'WOG'). The effect of the WOG qualification has been deliberated in a few cases, both in the context of vessel description or performance warranty and other undertakings in charterparties. Some of them are discussed below, followed by the negotiation techniques employed by the charterers and the owners and the future of the WOG qualification.

The Trend

In *Japy Fréres and Co v RWJ Sutherland and Co*,[1] decided in 1921, the vessel was described as capable of carrying 600 tons 'without guarantee'. Scrutton LJ held that

[1] (1921) 26 Comm Cas 227 (CA).

the WOG qualification deprived the clause of any effect as a warranty. Hence, a damages claim for breach of the clause cannot be founded. However, his lordship acknowledged, though not decisively, that the untruthfulness of the description can be a reason for the charterer to rescind the charterparty.

A similar decision was reached in *The Lendoudis Evangelos II*,[2] decided in 1997. In this case, it was a time charter for a trip. The charterparty stated the duration of the trip as 'duration about 70/80 days without guarantee'. The charterer redelivered the vessel in about 113 days. Longmore J held that the shipowners had no claim for late redelivery as the WOG qualification deprived the clause of any contractual effect. His lordship found that it would make no difference even if the charterer unreasonably estimated the duration when stating 'about 70/80 days' in the charterparty. However, his lordship pointed out that there will be an action if, and only if, the statement was made in bad faith. In practice, it will be an uphill task for a charterer to prove the bad faith on the part of the shipowner.

These decisions were followed by Andrew Smith J in *The Lipa*,[3] decided in 2001, in the context of an underperformance claim based on a vessel description clause. In this case, parties entered into a time charterparty in an amended BIMCO BALTIME 1939 form. A vessel description rider clause was added which included a statement of the vessel's speed-consumption capability. The speed and consumption descriptions were each qualified by the word 'about'. At the end of the clause, it was added that "All details 'about' – all details given in good faith but without guarantee". The charterer claimed that the vessel overconsumed. Andrew Smith J held that the WOG qualification rendered the speed-consumption statement not a warranty. However, a claim can be made in such circumstances only if the statement was not made in good faith, which was not the case here. Accordingly, his lordship turned down the claim.

[2] *Continental Pacific Shipping Ltd v Deemand Shipping Co Ltd (The Lendoudis Evangelos II)* [1997] 1 Lloyd's Rep 404 (HC).
[3] *Losinjska Plovidba Brodarstovo DD v Valfracht Maritime Company Ltd and another (The Lipa)* [2001] All ER (D) 22 (Feb) (HC).

The Hardened Trend: Double-Stand WOG Clause

In London Arbitration 4/18, while the performance warranty was qualified with WOG, the clause seemed to envisage the possibility of an underperformance claim. It read, in relevant part, as this: “All details about and given in good faith WOG. In case a speed and performance claim of charterers, any saved bunkers at any time are also to be taken into account as well.” However, the tribunal was overwhelmed with the WOG qualification and held that the qualification ruled out the underperformance claim.

The Negotiation Techniques

In practice, what the charterers do to mitigate the dilemma of WOG qualification is to avoid having it in the charterparty. Whether a charterer can successfully negotiate this depends on its bargaining power. The common ground put forward by charterers in this attempt is that the speed-consumption qualified by ‘about’ or ‘double about’ (i.e. both the speed the consumption are qualified by ‘about’), as is often the case, sufficiently protects the shipowner by giving the shipowner a safe margin on the speed-consumption description (usually of 0.5 knots on the speed and 5% on the consumption [London Arbitration 15/07]), hence, a WOG qualification is not necessary to protect the shipowner’s interest.

The speed-consumption warranty is typically about the vessel’s capability in good weather conditions. The recent years have seen a practice whereby the shipowners may not insist on a WOG qualification, but instead implant onerous conditions such as that the good weather capability of the vessel must be established by the vessel’s performance over a consecutive 24-hour good weather period, which can be hard to get and thus practically render the performance warranty effectless. Such an express provision will overcome the effect of *The Ocean Virgo,*[4] decided in 2015, where Teare J held that a vessel’s good weather performance capability can be established by her performance in good weather conditions over a sufficient period which can be less than 24 hours between the noon-to-noon report of the master.

[4] *Polaris Shipping Co Ltd v Sinoriches Enterprises Co Ltd (The Ocean Virgo)* [2015] EWHC 3405 (Comm) (HC).

The Future

Japy Fréres was decided at a time when the UK Misrepresentation Act 1967 was not in place. Although *The Lendoudis Evangelos II* and *The Lipa* were decided when the Act was in force, the Act was not considered in these two cases. The same is true of London Arbitration 4/18. Sec 2(1) of the Act renders a party liable for *negligent* misrepresentation. It puts the burden on the party who misrepresented a fact if he is to avoid liability, to prove "that he had *reasonable* ground to believe and did believe up to the time the contract was made the facts represented were true".

If the WOG qualification does not dilute the value of the description as a representation of fact, then s 2(1) will likely render the shipowner liable for the untruthfulness of the description unless the shipowner can prove that it stated the description on reasonable ground. Scrutton LJ in *Japy Fréres* seemed to have thought, though not decisively, that a description qualified with WOG was a representation of fact when his lordship acknowledged that the charterer could probably rescind the charterparty if the WOG description was untrue based on the law of misrepresentation as it was then. However, the value of a vessel description clause qualified with WOG as a representation of fact for the purpose of s 2(1) is yet to be tested, and it is yet to be seen what the impact of the section will be, when considered, on such qualified vessel description clauses.

For completeness, it must be added that s 3(1) of the Act subjects any clause purporting to exclude or limit liability for misrepresentation to a test of reasonableness under section 11(1) Unfair Contract Terms Act 1977. It has again not been tested whether the WOG qualification can be considered as a clause excluding liability for any misrepresentation of the vessel description.

That leads us to a conclusion that there can be some uncertainty associated with the future of WOG qualifications!

Further Reading:

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

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