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## Defence class cover

# Speed and Performance claims

### WHY are speed and performance issues important?

Speed and performance disputes commonly arise between owners and charterers under time charters. These disputes normally take the form of deductions from hire which have either already been made by the charterer or are to be made in the near future. Such claims are equally important to an owner (who wants to realise the entire hire otherwise due under the charter) and for a charterer (who wants to ensure that their operations are cost-effective).

Many factors can affect the efficient performance of a ship on its voyage, including engine performance, fuel consumption, marine hull growth and, of course, weather conditions. When analysing speed and performance claims, however, legal niceties and practical considerations often clash.

### WHICH contract terms govern speed and performance disputes?

Most time charters provide for ships to perform at or within certain parameters. These are usually in the form of contractual undertakings from the owner that the chartered ship is capable of:

- a certain speed;
- using a certain consumption; and
- in certain conditions.

Under the New York Produce (NYPE) 1946 form, for example, the performance of the ship is described as (see lines 9-11) *'...and capable of steaming, fully laden, under good weather conditions about... knots on a consumption of about... tons of... best grade fuel oil...'*

Such undertakings as to speed and fuel consumption will usually constitute **innominate** terms, such that the charterer is (only) entitled to damages for losses suffered as a consequence

of a breach. They cannot ordinarily terminate the charter merely for poor performance.

### WHAT warranties were given as to speed and performance, and if given, what is their scope?

When given, the ship must be capable of performing as warranted on the date it enters into service under the charterparty. The ship's performance on the date that the charterparty is signed is not considered relevant<sup>1</sup>.

Furthermore, whilst historically some have doubted whether a performance warranty is a *continuing* warranty lasting the duration of the charterparty, most standard form charterparties impose on an owner the duty to maintain the ship throughout the charter period (for example, see NYPE 1946 form, clause 1 and clause 21) and the master has a duty to prosecute his voyages with utmost despatch (see NYPE 1946 form, clause 8). These clauses imply that the ship has to maintain her warranted performance, during good weather periods, throughout the charter period and this is now generally accepted in London proceedings as a matter of English law.

The extent of the warranties (usually to be found in the additional rider terms, under the 'ship description' clause) will often be restricted by use of some/all of the following caveats:

#### 'Without guarantee'

If included into the ship's description, this phrase is likely to dilute an owner's obligation in respect of speed and performance to no more than a mere estimate given in good faith<sup>2</sup>.

#### 'Good Weather'

Generally, a ship's performance is warranted as a capability of a certain speed, using a certain fuel consumption, in good weather only. There is often also a 'good weather' clause within the charter which sets out the relevant weather



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conditions. The most common is where the weather does not exceed Beaufort Force 4 and Douglas Sea Scale 3<sup>3</sup>.

#### 'About'/'All details about'

In *The Al Bida*<sup>4</sup>, the English court stressed that no fixed allowance should be made to take account of the phrase 'all details about' (or its usual acronym 'ADA'). Instead, the exact allowance to be given was for arbitrators to decide on a case-by-case basis, based on a ship's '*configuration, size, draught and trim*'. In fact, however, a practice has developed in London arbitrations whereby this phrase or acronym is normally understood to mean that a margin of 0.5 knots should be allowed for the ship's speed.

With regard to a ship's warranted fuel consumption, however, the issue is a little more complicated. Where the word 'about' appears before the warranted fuel consumption and the warranted speed, London arbitrators have varied in their views as to whether or not a 'double allowance' should be granted. However, most take the view that if the word 'about' is included twice in the warranty, before consumption as well as before speed, an allowance should be made on the warranted fuel consumption in addition to the half knot allowance on speed<sup>5</sup>.

#### Currents

The application of currents is sometimes considered a controversial one. There are several conflicting London arbitration decisions<sup>6</sup> where some arbitrators prefer to factor them into calculations as to speed and performance. However, other arbitrators ignore them altogether, noting that they should only be applied where the effect of a current is clear on a particular voyage.

#### WHEN are the warranties complied with?

When assessing a ship's performance, as against the speed and performance warranties given, there will invariably be a difference in approach as to how the assessment is to be done. Usually the charterparty will set out how the ship's performance should be analysed and which source of information should be preferred or binding<sup>7</sup>.

Taking one step back, in order to determine whether there is a valid speed and performance claim, one should properly first perform a 'good weather analysis' (see *The Didymi*<sup>8</sup> and *The Gas*

*Enterprise*<sup>9</sup>). Since a ship's speed (usually) has only been warranted in 'good weather', the ship's capability has to be calculated with reference to the *average* speed achieved during the various good weather periods enjoyed during the voyage in question. Average daily fuel consumption is to be calculated over the same good weather periods. Any periods of bad weather should be excluded from these calculations.

Only if the ship's *average* speed over the good weather period falls below the warranty in the charterparty (taking into account any 'about' allowance) will it then become necessary to determine by how much.

There are several alternative sources of data when it comes to determining the weather conditions experienced during a particular voyage:

#### Log books

Historically, the master's evidence has been preferred by mariners and owners<sup>10</sup> when it comes to determining the ship's performance in good weather. This is understandable given the master is on the bridge and witnesses the weather continuously, compared with an independent weather bureau, which may use daily, or twice daily, satellite imagery.

#### Routing company data

By comparison, many charterers engage weather routing companies to calculate a ship's performance. These companies often base a ship's performance on the voyage as a whole, including periods of good and bad weather. A weather (and sometimes also a current) factor is then applied to the overall calculation to estimate the extent to which the ship's speed (and performance) was affected by the 'bad' weather conditions encountered.

#### Other sources

Information from independent weather bureaus, or local weather stations, may also be applied.

Notwithstanding technological advances, the position remains that independent data doesn't give conclusive evidence of performance, at least as a matter of English law. Conversely, if a ship's log book is viewed to have consistently overstated the weather encountered then a London arbitrator may prefer more independent weather reports<sup>11</sup>.

**HOW to resolve discrepancies?**

It is advisable for parties to seek agreement on all possible common issues and identify those issues that are subject to disagreement. Members should also carry out their own 'good weather' calculations, based on a careful review of the charterparty terms and following the methods set out under approved case law.

Where there is any ambiguity, especially on the more technical issue of how the ship's performance should be calculated, then appointing an independent third-party expert to perform this calculation can be a sensible way to proceed, so as to reach a compromise. A compromise is almost always preferable to a long and protracted arbitration, especially given that the technical calculations in speed and performance claims are invariably complex, often causing the resolution of such claims to become very costly.

**Defence cover is, by its very nature, discretionary in that the club must be satisfied as to the merits and quantum of the claim in question and the likelihood of achieving a successful outcome, if it is to lend support. Essentially, the club wants to ensure that the actions proposed are appropriate, proportionate and financially viable.**

**The club has a good level of experience in speed and performance disputes and members requiring further information on this topic should direct their enquiries to their usual contact at the club.**



- 1 *The Apollonius* [1978] 1 Lloyd's Rep 53
- 2 *The Lipa* [2000] 2 Lloyd's Rep 17
- 3 Although commonly referred to in shipping lexicon, the Douglas Scale was actually abandoned by the UK's Meteorological Office in 1940. Indeed, the World Meteorological Office does not recognise the Douglas Scale as an international standard and instead uses WMO Code 3700.
- 4 *The Al Bida* [1987] 1 Lloyd's Rep 124
- 5 See LMLN 12/85 and LMLN 2/87
- 6 See LMLN 21/04 and LMLN 15/05
- 7 A typical clause in a time charter would read something like this: 'Evidence of weather conditions to be taken from the vessel's logs and the weather service reports. In the event of a dispute, the... data supplied by... shall be taken as binding.'
- 8 *The Didymi* [1987] 2 QB 166
- 9 *The Gas Enterprise* [1993] 2 Lloyd's Rep 352
- 10 See the 'Dimitris Perrotis' Arbitration Award of 1999
- 11 For an example see LMLN 3/12 and 4/12

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