

## Speed and Consumption Claims in a Nutshell

A speed and consumption claim permits charterers to deduct from hire (by way of set off) any extra time and bunkers spent performing a voyage. This claim is however not equivalent to putting the vessel off-hire as the method of calculation can lead to different results. (It is important to keep in mind that a vessel can only be off-hire if the reduction in speed is due to an event listed in the “off-hire” clause of the charter party).

When considering such claims, it is important to first check:

- the charter party and what exactly was warranted
- the evidence
- the calculation in accordance with the evidence
- any possible defences

### Step 1: check the charter party

#### 1. Were any warranties given?

The description of the ship’s performance will either be given in lines 9-10 of the NYPE charter party (lines 18-20 NYPE 93) or/and in the description clause in the rider clauses.

If the description of the vessel is given on a “without guarantee” basis there will be no warranty and a performance claim will probably fail. This is however subject to the statement being given in good faith. Showing the lack of good faith is generally very difficult unless, for example, the vessel has consistently underperformed on previous voyages prior to delivery.

#### 2. Was the warranty given for the duration of the charter period?

There are conflicting judgments as to whether the warranty is only given upon delivery (*The Al Bida* [1987] 1 Lloyd’s Rep. 124) or only refers to the vessel’s capacity at the date of the charter (*The Didymi*). In any event, unless the charter specifies that it is “continuing”, the warranty does not apply throughout the duration of the charter.

This is however subject to owners’ duty to maintain the ship in an efficient state.

#### 3. Is the warranty conditional on weather factors?

The warranty will normally be subject to good weather conditions. The charter may define what this means, however in the absence of any specific details, “good weather” will probably be taken as periods where the wind is no more than Beaufort force 4 (11 - 16 knots) (London Arbitration 15/06).

If the charter does not state that the warranty is subject to “good weather” then there will be no such implied term and the warranty will also apply to what are usually considered as bad weather days.

#### 4. Is the warranty given on an “about” basis?

If the details are given on an “about” basis, some margin of error will be allowed. The margin of error is a matter of fact and will depend on the configuration of the ship, size, draft, trim etc. (*The Al Bida*). In practice, the cost of arguing such details may exceed the figure in dispute but it is commonly understood to be 0.5 knots and 5% bunker consumption.

#### 5. Can “about” be taken into account twice?

Where a charter states that a ship is capable of (for example) “about 13.00 knots on about 28.50 mt”, there is no consensus as to whether the owner may benefit twice from the “about” and therefore perform at 12.5 knots and consume 29.9 mt without being in breach of the warranty (see London Arbitrations 12/85 and 2/87), although for the last 10 to 15 years the trend has been for tribunals (at least in the published awards) to give such the double benefit to owners (London Arbitrations 10/01 and 15/07). However, where such a double benefit is given to owners, it is arguable whether the tribunal will award the full 5% plus 0.5 knot as this may end up being an over -generous result towards owners, given that a reduction in speed will, of itself, reduce the vessel’s actual consumption. For the sake of clarity, it is recommended that members clearly define the “about” tolerance to be given in the charter party, stating for example that the ship is capable of “about 13.00 knots on about 28.50 mt where “about”



means +/- 0.5 Knots and +/- 5% consumption, both tolerances to apply”.

## 6. Average speed

Where the charter warranty provides for an average speed, the average is usually defined over a prescribed period. In the absence of any defined charter party period, the averages will be taken over the course of individual voyages (*The Al Bida*).

It is thought that “average” cannot be substituted for “about” and no margin of 0.5 knots and 5% bunker consumption will be allowed (London Arbitration 13/97).

## 7. Are the effects of currents to be taken into consideration?

This issue is not settled and there are conflicting arbitration decisions as to whether the effects of the currents are to be taken into account when the charter is silent on this point. It is for the arbitrators to construe a clause to interpret the parties' intention. The better view is that currents should be taken into consideration (see London Arbitration 21/04 not applying currents and London Arbitration 15/05 applying currents).

## Step 2: look at the evidence

When assessing the performance of the ship, there are mainly two sources of information: the log books and the weather routing reports. The evidential value of these documents will depend on what the charter party states.

### 1. What does the charter party say?

Some charter parties will specifically provide that the weather routing company's finding will be binding on the parties. This is however often not the case.

Such clauses should be carefully drafted to have the required effect (London Arbitration 21/04, “*data supplied by Ocean routes shall be taken as binding on both parties*”, where it was found that only the “raw materials” used in the calculation were binding, not the calculation itself).

### 2. Weather routing vs. deck log

If there is a discrepancy in the data between the weather routing company and the log books, tribunals will usually

prefer the log books. The reasoning behind this is simple: mariners are recognised by the World Meteorological Office as trained weather observers. Furthermore, the information is collected in two separate ways. The weather routing companies will use information from weather buoys and satellite. Weather buoys for example cover areas of about 300 sq/m and can be far away from the ship's actual position and the weather conditions may well be different. The vessel's log will record the weather conditions actually encountered by the ship.

It is however open for charterers to argue that the ship logs are unreliable. Any evidence of inaccurate (or fraudulent) entries in a log book may plant the seed of doubt in an arbitrator's mind, whether they relate to the claim or not. For example, ballast movements may be recorded inaccurately, in order to give the appearance that a ballast exchange has taken place. It may be possible to discredit log entries by comparing them with the ballast log and stability computer records. Similarly, if the vessel's performance is poor due to an unauthorised deviation, it should be possible to compare log positions with AIS data and ECDIS position logs. When checking weather recorded by a vessel, it should be confirmed whether the vessel is a Voluntary Observing Ship. Such vessels should be making more detailed weather situation reports for transmission to a national meteorological authority than would be noted in a deck log book.

If there is information that should normally be recorded, but is occasionally omitted, this may lend weight to an argument that the Master and officers are not wholly diligent in their completion of the log. Contradictions in the recorded weather can often be found by comparing the weather information recorded in the relevant boxes with details of weather entered in the narrative section. For example, the Beaufort scale describes force 3 as being characterised as having a sea-height of 0.6-1.0m. Should the narrative contain words to the effect: “moderate seas” (Beaufort scale sea height of 2.0 - 2.5m) recorded at the same time, then the abilities of the recording officer as a weather observer may be called into question.

## Step 3: calculating the vessel's performance

### 1. Look at periods of “good weather”

Courts and tribunals will look at the “good weather days” and look at the ship's performance on these particular days. If the

ship complies with the warranty on these days the ship is also deemed to comply for the whole voyage. The reverse will apply if the ship does not comply during the good weather days. (*The Didymi* [1987] 2 Lloyd's Rep. 166 and *The Gas Enterprise* [1993] 2 Lloyd's Rep. 352).

When identifying good weather days it is better to look at the deck logs than the log extracts/abstracts. In effect deck logs give a more accurate picture of the vessel's performance as the vessel's position should be recorded at least every two hours, the weather at least every four hours, and the distance made good, as well as the average speed for the preceding day, and for the voyage so far, at every noon as well as upon completion of the voyage. Some vessels may also possess information pertaining to the speed achieved through the water (speed log data) which can be compared to speed achieved over the ground, and may help to show the vessel has encountered adverse currents and/or tides. Further, high "slip" figures in the main engine log can also indicate adverse tides and/or currents. (Slip is the difference between the theoretical distance the propeller should have moved (pitch multiplied by revolutions made) compared to the actual distance achieved over the ground for the same time period).

This is not always the method used by the weather routing companies, who often calculate an average speed which includes those days where the weather conditions were not "good". A weather factor is then applied to the overall calculation to estimate the extent to which the vessel's speed was affected by the conditions apparently encountered.

## 2. Is it necessary to identify "good weather days"?

Unless the charterparty states otherwise, it is not necessary to identify one or more good weather "days" (in the sense of a period of 24 consecutive hours) in order to be able to assess the vessel's performance. Shorter periods can be considered if they are a sufficiently representative sample to enable a breach to be established. This will be a question of fact for the court/tribunal to find. Therefore if, on a voyage, the ship only encountered two periods of 14 and 16 hours of "good weather", the tribunal should consider whether these periods in total amount to a sufficiently representative sample, and they should not automatically be excluded because they are each less than a "day". (*The Ocean Virgo* [2015]).

## 3. Performance calculated over a voyage

When assessing the performance of the ship, the performance will usually be assessed on each individual voyage.

## 4. Calculation

### a. Speed and consumption

The vessel's performance on the voyage should be measured during a good weather voyage, namely by dividing the distance travelled by the time taken (adjusting for current if appropriate). This will give you the vessel's "good weather speed". If the "good weather speed" is not as good as the charter party warranted speed, it is usually assumed that the vessel also underperformed to a similar extent on bad weather voyages. A similar calculation is carried out for the vessel's bunker consumption.

### b. Consumption: credit given for under-consumption?

If slower speed leads to apparent under-consumption of one or both of the types of fuel used, owners can set off bunker under-consumption against a claim for damages for lost time (*The Ioanna* [1985] 2 Lloyd's Rep. 164).

The next question then arises is how much credit is to be given for the under consumption? If the charter states that a ship can perform with a consumption of "about" 40 mts ("about", for argument's sake being 5%) and the ship consumes less than this, is the saving to be calculated by reference to the lower "about" figure of 38 mt, the higher "about" figure of 42 mt or just 40 mt? It has been held in *GAZ ENERGY* [2012] (against vessel owners) that any "over-performance" should be calculated by reference to the best warranted figure, i.e. in this example credit for the vessel's "over-performance" would only arise where the vessel had consumed less than 38 mt.

### c. The breach of warranty is a claim in "damages" and not an "off-hire" claim

The mere breach of warranty will not render the ship off-hire.

A vessel can only be off-hire if the reduction in speed is due to an event listed in the "off-hire" clause of the charter party. If it is so listed and the vessel is off-hire charterers will be able to deduct the additional time taken and fuel consumption equivalent



to the off hire period. This method of calculation can amount to a higher claim amount than charterers would be entitled to claim as damages for breach of the performance warranty.

When a ship's speed is reduced due to the ship's bottom being fouled, owners may have a defence, particularly where the fouling arose during the charter party – see <http://www.westpandi.com/globalassets/about-us/claims/claims-guides/west-of-england-defence-guide---hull-fouling-in-a-nutshell.pdf>.

### Step 4: Defences

When defending a performance claim, depending on the charter wording, we have already seen that owners will usually benefit from the “about” allowance and the fact that the performance warranty may not be a continuous warranty.

The underperformance may also be due to poor quality bunkers supplied by charterers or simply due to bottom fouling occurring as a natural consequence of following charterers' orders. In such circumstances, owners may have a defence to charterers' claim – see <http://www.westpandi.com/globalassets/about-us/claims/claims-guides/west-of-england-defence-guide---hull-fouling-in-a-nutshell.pdf>.

### NYPE 2015

The NYPE 2015 has a new clause (clause 12) dealing with speed and consumption issues. The most significant difference between this clause and the one in the NYPE 1993 charter party is that the speed and consumption warranties given in the NYPE 2015 are continuing warranties, in that they must be complied with throughout the charter period and not only on delivery (as per the NYPE 1993). The clause also provides for a procedure to deal with these claims. Owners are to provide copies of the vessel's deck logs after which the

matter shall be referred to an independent expert or alternative weather service selected by mutual agreement. The independent expert report shall be final and binding on the parties. The cost of such an expert report shall be shared equally. The intention is to try to achieve a quick and cost effective resolution of speed and performance claims. However if the parties do not agree on a mutual independent expert either side is presumably free to pursue the claim through arbitration.

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***This note is for general guidance only and should not be relied upon as legal advice. Should you require specific advice on a particular situation please contact the Club.***