

SPEED AND PERFORMANCE

CHARTERPARTY DISPUTES

April 2012

Background

Owners are frequently faced with claims of underperformance and overconsumption. The recent English court case below discusses the problems faced by the parties determining the applicable clauses for the determination of the vessel's performance.

Hyundai Merchant Marine Company Ltd v Trafigura Beheer BV (Gaz Energy) [2011] EWHC 3108 (Comm)

The facts of the case

Owners of the vessel, Gaz Energy, and charterers entered into a time chartered agreement on the Shelltime 3 form with rider clauses and the Gas Form C attached. The vessel was sub-chartered on identical terms with head owners. When a dispute arose between the parties regarding the vessel's performance, the parties were in disagreement as to which clauses were incorporated into their contract for the purpose of determining the vessel's performance and consumption.

Owners argued they had warranted the vessel's performance under Gas Form C in "good weather" i.e. maximum of Beaufort Force 4. On this basis the owners argued the vessel's good weather performance was established and then applied over the whole of the voyage. Charterers disputed that the performance warranty applied irrespective of the weather.

The court took into consideration the following provisions of the charterparty relevant to the construction of the contract:

1. Clause 24

Detailed Description and Performance

"Owners warrant that at the date of delivery under this charter the vessel shall be of the description set out in Gas Form C attached hereto and signed by them and undertake to

use their best endeavours so to maintain the vessel during the period of her service hereunder. Further but otherwise [without] prejudice to the generality of this clause

Owners guarantee that the average speed of the vessel will be not less than knots in ballast and knots fully laden, with a maximum bunker consumption of tons diesel oil/tons fuel oil per day for all purposes excluding cargo heating and tank cleaning. **See**

Additional Clause 42 attached which also overrides any references to over performance herein. [lines 201–216]

The aforesaid average speeds shall be calculated in each yearly or other less period, as defined hereinafter by reference to the observed distance from pilot station to pilot station on all sea passages and over the whole of the time the vessel is on hire during such period [lines 217–219]...

...

In the event of any conflict between the particulars set out in the aforesaid Form and any other provision (including this clause) of this charter, such other provision shall prevail. [lines 241–242]"

2. Clause 42

Speed/Consumption.

"Speed about 15 knots average
Consumption about 40 mts IFO 380 CST at sea plus about 0.2 mts GO and about 10 mt IFO 380CST at port plus about 0.2 mt GO.
Otherwise as per Gas Form C."

3. Gas Form C

"A.1 General Description Owners Sure Gas Shipping SA, Panama A.5 Speed Guaranteed average speed on a year's period and max wind force 4 in Beaufort scale: Loaded about 14.5 knots, Ballast about 15.5 knots A.6 Consumption in metric tons per day:

	At sea	In port
Main engine/HFO	35 mt	-
Aux. engine/HFO/GO	6/0.2 mt	9/0.2 mt
Boiler/HFO		2.5 mt
Inert gas generator/gasoil	285 /h	

4. Clause 21

Offhire

“In the event of loss of time (whether arising from interruption in the performance of the vessel's service or from reduction in the speed of the performance thereof or in any other manner)

(i) due to deficiency of personnel or stores, repairs, breakdown (whether partial or otherwise) of machinery or boilers, collision or stranding or accidental damage to the vessel or any other cause preventing the efficient working of the vessel; or

....

hire shall cease to be due or payable from the commencement of such loss of time until the vessel is again ready and in an efficient state to resume her service from a position not less favourable to Charterers than that at which such loss of time commenced.

Any such loss of time which arises wholly or partly from a reduction in the vessel's guaranteed average speed provided in clause 24 hereof shall be taken to be the difference between the time the vessel would require to perform the relevant service at the said speed and the time actually taken to perform the same and such loss of time shall be added to any loss of time arising from interruption in the performance of the vessel's service.

[Immediately after Clause 40] ***Additional Clauses Nos. 41–74, Gasform C and revised Paramount Clause, as attached, are deemed to be fully incorporated into this Charter Party .”***

Summary of court's decision

The court applied principles set out in *Rainy Sky SA v Kookmin* [2011] UKSC 50 and one principle from *Pagnan v Tradax* [1987] 2 Lloyd's Rep 342.

The first principle set out in *Rainy Sky SA* states that when interpreting a provision in a contract the court must look at what a reasonable person with the background knowledge available to the parties at the time of entering into the contract would have understood the parties to have meant.

Secondly, if the contract uses clear and unambiguous language the court must adhere to the contract, even if it does not make commercial sense.

If the language of the contract can be interpreted in more than one way, the court must apply that which was intended by the parties for the purpose of the contract.

Lastly, in *Pagnan v Tradax* the court highlighted the matter of inconsistency. The court should not approach the question of construction of a contract with the intention to find inconsistencies.

With the application of these principles the court concluded that “upon its proper construction” the charterparty contained an all weather warranty and the average speed of the vessel would be calculated in all weather conditions in favour of the charterers.

The court found clause 24 of the charterparty to be clear to show that it constitutes an all weather speed warranty. The clause applied an average annual speed to all sea passages without regard to the weather and this was evidenced by the following passage in clause 24 “yearly...on all sea passages and over the whole of the time the vessel is on hire during such period.”

Clause 42 was found to be understandable only when read with clause 24. The parties had explicitly stated in clause 24 that clause 42 is intended to override reference to performance in

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clause 24 and has expressly incorporated clause 42.

The parties' intention regarding the provisions was made clear from the fact that they had not inserted specific terms regarding speed and consumption figures into clause 24 but instead entered them into clause 42 to be incorporated.

The court interpreted inconsistencies with a method to avoid conflict with the speed and consumption provisions and the weather warranty clause by applying Gas Form C where clause 42 had not expressly dealt with those details.

The court took into consideration use of the Shelltime 3 form by the parties, as opposed to Shelltime 4. If the parties intended to exclude weather speed warranties they could have used Shelltime 4 which contains a good weather warranty. Instead they had opted to use the Shelltime 3.

Observations

From this case, we highlight the importance of parties carefully choosing and drafting terms of the charterparty to avoid conflicting clauses.