This award is the latest of a number of court decisions and LMAA arbitration awards dealing with issues that frequently arise in time charterparty underperformance disputes.

The background facts
The vessel, a 1998-built bulk carrier, performed a winter voyage from the U.S. Atlantic Coast to South Korea on an NYPE 1993 time charterparty.

Charterers’ router reported a 50.89 hr time loss (based on a 12.26 kt “good weather” speed net of a 0.2 kt assisting current) and 71 mt IFO over-consumption, and Charterers deducted from hire on the basis of these figures.

Owners’ router reported a 23.98 hr time loss (based on a 12.68 kt “good weather” speed) with no over-consumption, and Owners claimed the US$63,435.10 difference between their admitted underperformance figure (based on their router’s report) and Charterers’ deduction.

The charterparty provided as follows:

- The parties deleted NYPE lines 19-20 (“capable of steaming fully laden under good weather conditions at a speed of...”)
- Clause 63 (“Vessel’s Description”): “…abt 13.5/14.0kts on ifo 380cst 34mt(l)/34mt(b) per day +0.1mt mgo per day …ADA [i.e. “all details about”] …SPEED AND CONSUMPTIONS OF THE VESSEL AS PER DESCRIPTION ARE REPRESENTATIONS BY THE OWNERS AND ARE A CONTINUOUS WARRANTY THROUGHOUT THIS CHARTER.”
- Clause 100 (“Speed Consumption”): “The words ‘good weather conditions’ in line 20 of this Charter shall mean any weather condition in which the wind does not exceed Force 4 at the Beaufort Scale and/or Douglas sea state 3 no advance current/no negative influence of swell...”
- Clause 113 (“Ocean’s Routes clause”): “The vessel shall be capable at all times during the currency of this Charter of steering as per description. For the purpose of this charter ‘good weather conditions’ are to be defined as weather conditions not exceeding Beaufort force 4 and Douglas 3 no advance currents/no negative influence of swell...”

The following issues arose in the arbitration:

1. Did the deletion of lines 19-20 mean that Clause 63’s ongoing performance warranty was given for all weather conditions throughout the charter (as Charterers said); or was it given for “good weather conditions” as defined in Clauses 100 and 113 (as Owners said)?
2. If the warranty was given for “good weather”, did Clause 63’s “no advance currents” criterion allow assisting currents to be taken into account (as Charterers said) so as to allow their routers to reduce the vessel’s “good weather” speed by 0.2 kts for the 0.2 kt assisting current; or was it a misprint that only allowed adverse currents to be taken into account (as Owners said)?
3. Which routers’ report should prevail?

The Tribunal’s decision
The Owners won. The Tribunal upheld their US$63,435.10 claim and awarded them 4.25% quarterly compound interest, for the following reasons:

Issue (1) – all weather or “good weather” warranty?
The Tribunal preferred Owners’ interpretation. The repeated references to “good weather conditions” in Clauses 100 and 113 strongly indicated that, in accordance with general shipping practice, the performance description in Clause 63, to which Clause 113 referred (“as per description”), was given for the “good weather” conditions set out in Clauses 100 and 113. The deletion of printed lines 19-20 was probably a clerical error and did not affect the Tribunal’s construction of the three rider clauses.

Issue (2) – “no advance currents”
The Tribunal again preferred Owners’ interpretation. The essential purpose of a “good weather” definition is to limit the performance warranty to wind/sea conditions in which the vessel can realistically be expected to perform as warranted; and, as is common, currents are mentioned to ensure that the vessel’s performance in those conditions is not impeded by currents. So “no advance currents” really meant no adverse currents.

Issue (3) – whose report should prevail?
The Tribunal preferred the report of Owners’ router for the following reasons:
1. The four wind/sea readings each day reported by Owners’ router suggested greater accuracy than the one reading each day by Charterers’ router.

2. The 0.2 kt reduction by Charterers’ router of the vessel’s “good weather” speed for the 0.2 kt assisting current was incorrect in view of the Tribunal’s ruling on issue (2) – though this made a modest difference.

3. Owners’ router had submitted that Douglas Sea State 3 referred to a 0.5-1.25 metre average wind wave and that this equated to a significant wave height (i.e. the 33% highest wind waves plus swell that were encountered) of 2 metres or less (by multiplying it by a 5/8 fraction); and, on this basis, they treated significant wave heights of up to 2 metres as “good weather”. By contrast, Charterers’ router treated “good weather” as (i) swell of up to 2 metres; and (ii) 1.25 metre wind waves on top of that. The Tribunal preferred the approach of Owners’ router and, therefore, its “good weather” days to those of Charterers’ router. Consistent with this, during various of Charterers’ “good weather” days, the swell was on, or forward of, the vessel’s port beam – constituting “negative influence of swell” which precluded those days from being “good weather” days.

4. Charterers’ router purported to apply the The Didymi's “good weather” performance test (i.e. ascertain the performance during good weather and extrapolate over the whole voyage) in the following manner:

   i. Notional warranted voyage time: 10,960.9 nm (voyage distance) ÷ 13 kts = 843.15 hrs
   ii. Notional voyage time at the “good weather” speed: 10,960.9 nm ÷ 12.26 kts = 894.04 hrs
   iii. Time loss: 894.04 hrs minus 843.15 hrs = 50.89 hrs

However, Owners’ router argued that this failed to factor in the actual time taken during the voyage or any reduced speed during non-“good weather” days on account of operational/navigational reasons, i.e. the “necessary adjustments and extrapolations” referred to by the Court in The Didymi. They applied the following approach, which they said applied the reality of the actual voyage:

   i. “Good weather” speed shortfall: 13 kts less 12.68 kts = 0.32 kts
   ii. Allowed voyage time: 10,988.9 nm ÷ [11.88 kt actual voyage speed plus 0.32 kts] (12.20 kts being the speed she should have achieved in the absence of her 0.32 kt shortfall) = 900.73 hrs
   iii. Time loss: 900.73 hrs minus 924.70 hrs (actual voyage time) = 23.98 hrs

The Tribunal preferred the approach of Owners’ router for the reasons they gave. Consistent with this, they noted that the router’s 12.68 kt “good weather” speed represented a 2.5% shortfall compared with the 13 kt warranty which, netting down the 924.7 hr voyage time by 2.5%, produced a 902.15 hr allowed voyage time and a 22.55 hr time loss figure, which was much closer to the 23.98 hr figure of Owners’ router than the 50.89 hr figure of Charterers’ router.

5. The Tribunal also considered that the 10,988.9 nm voyage distance of Owners’ router, which corresponded with the figure derived from the Master’s, was more reliable than the 10,960.9 nm figure of Charterers’ router.

6. The over-consumption figure of Charterers’ router was incorrect because (i) it failed to allow 5% for “about” with regards to the warranted consumption figure (applying the “ADA” provision); and (ii) its consumption figure was directly linked to its incorrect time loss figure.

Comment

The Tribunal’s decision appears to have properly applied the charterparty’s performance provisions. However, it does highlight the need for parties to be clear whether a performance description applies in “good weather” (“all weather” warranties being very rare) and how/when currents should be taken into account.

In addition, the time loss calculation, which the Tribunal preferred, seems to properly apply the principles set out in The Didymi for the reasons set out above. However, approaches can vary in practice. In London Arbitration 15/05, the Tribunal applied the approach which Charterers’ router was advocating here. At any rate, it is unclear that the calculation by Owners’ router in 4 above was the real reason for the difference between the routers’ time loss figures – applying Owners’ router’s “voyage distance” and “good weather” speed figures to Charterers’ router’s calculation (so as to compare the calculations based on the same underlying figures) results in a 21.33 hr time loss figure (i.e. very close to, and in fact slightly better than, the 23.98 hr figure of Owners’ router). The real difference appears to be due to the different “voyage distance” and “good weather” speed figures – as to which see 2, 3 and 5 above.

Finally, the dispute as to which sea state conditions qualified as “Douglas Sea State 3” highlights the differing views on this and the need for a charterparty to be clear about this so as to avoid confusion.

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