



Vessel performance precedent restated

The applicable method for the determination of cases concerning speed and performance issues (the ‘good weather’ method) have been enshrined in legal precedent for decades. In the recent case of Eastern Pacific Chartering Inc v Pola Maritime Ltd, Ms Clare Ambrose (a maritime arbitrator sitting as a deputy judge of the Commercial Court), considered Charterers’ proposition of an alternative method for assessing the Vessel’s performance (the RPM method). Summary by [Lucinda Roberts](#), Senior Associate, CJC.

The facts

Pola Maritime Inc., disponent owners (Owners) of DIVINEGATE, a bulk carrier, (the Vessel) chartered the Vessel to Eastern Pacific Chartering Inc. (Charterers) for a trip time charter on an amended NYPE form (the CP). The Vessel was delivered at Rotterdam, upon which it sailed in ballast to Riga to load a cargo of pig iron destined for New Orleans.

The CP contained usual speed and consumption provisions: "*SPEED AND CONSUMPTION BASIS NO ADVERSE CURRENTS AND VALID UP TO AND INCLUDING DOUGLAS SEA STATE 3 / BEAUFORT FORCE 4*". The consumption requirements for both normal and eco speed were included, and there was also a time bar of 90 days (from completion of the voyage) for the submission of speed/performance claims "*in the form of a statement of claim with supporting documents*".

Charterers instructed the Vessel to steam at eco-speed for the laden voyage from Riga to New Orleans, and later brought a claim (by way of a counterclaim) for the Vessel’s underperformance. Both Owners and Charterers used a weather routing service provider to monitor the Vessel’s speed and performance. In addition, Owners relied on the Vessel’s deck logs (which were ultimately accepted to be unreliable).

Before proceedings had been commenced, Owners arrested another vessel, POLA DEVORA, contending that Charterers were the beneficial owners, based on a Lloyd’s List Intelligence Vessel report. Charterers denied beneficial ownership of POLA DEVORA, and 4 days after the arrest provided evidence that it was owned by another company. Shortly thereafter Owners released POLA DEVORA.

The Claims

Owners brought a claim against Charterers for a reconciliation of the final CP account, seeking almost USD 100,000 of outstanding hire, bunkers, and expenses. Charterers counterclaimed by way of set-off, seeking i) USD 93,000 in deductions from hire and damages for breach CP in relation to the Vessel’s performance, and ii) USD 72,600 in damages for Owners’ wrongful arrest of POLA DEVORA.

As to the underperformance claim, Charterers alleged that, on the laden voyage from Riga to New Orleans, i) Owners had breached the CP speed/consumption warranties, ii) the Vessel had not proceeded with utmost despatch, and iii) the hull was fouled with marine growth. It was Owners’ position that i) Charterers’ claim was time barred (as it had not been presented with supporting documents within 90 days of completion of the voyage), and ii) there were insufficient ‘good weather’ periods such that assessment of the Vessel’s performance was impossible.

Initially Owners contended that there was no minimum 'good weather' period against which the Vessel's performance could be measured, such that there should be no deductions from hire. However, at trial Owners' expert conceded that if the 'adverse currents' deck log records were ignored on the grounds of unreliability, during the entire voyage there was a period of 32 hours which would count as a 'good weather' period. Assessment of the Vessel's performance over that period, and extrapolating that over the entire voyage (i.e., the 'good weather' method, in line with the principles long-established in *The Didymi* [1987] and *The Gas Enterprise* [1993]), meant that the Vessel had not performed at the warranted levels, as there was a loss of time of 16 hours.

Charterers asserted that there was a loss of 37.64 hours, established by reference to the measured Revolutions Per Minute (RPM) of the main engine propeller. The Master had set the main engine propeller's Revolutions Per Minute (RPM) at 92 or lower. Charterers' expert contended that the main engine needed to be operated at a speed of at least 96 RPM (including an allowance of 5% for propeller slip), in order to achieve the warranted eco-speed. It was Charterers' case that the reason for the reduction in RPM was to save and/or maintain fuel consumption within the warranted levels, but that there was no evidence of adverse weather to justify maintaining the RPM at 91 for the entire voyage. On this basis, Charterers asserted the Vessel had underperformed.

Issues

The main issues the Commercial Court had to consider and determine were:

1. Was Charterers' underperformance claim time barred?
2. Was Charterers' alternative RPM method preferable to the established 'good weather method' when assessing the Vessel's performance?
3. Were Charterers entitled to damages from Owners due to the wrongful arrest of POLA DEVORA?

Judgement

Ms Ambrose made the following key findings:

1. Charterers' performance claim was not time-barred. The CP time bar provision was intended to encourage a claim to be made promptly, and the requirement for the provision of supporting documents was to enable investigation and preservation of documents. Charterers did not have to support every aspect of their claim with documents, and their communications to Owners made within time were sufficient to meet the CP requirements.
2. Where the 'good weather' method has been adopted in a charterparty, it is the primary means of analysing speed/performance claims and compliance with warranties, but it is not the sole and exclusive method. Alternative methodology is available, but will likely only be relevant where there is insufficient evidence of 'good weather' periods or weather conditions in general, and it must be established as reliable and consistent with the express performance warranty in the charter. Here, Charterers' alternative RPM method was rejected as a "*very theoretical calculation and it was not a reliable measure of loss*".
3. The exclusion of positive currents when assessing performance is only permitted where it is expressly provided for in the charterparty. If there is no specific reference to positive currents in the speed and performance warranty (which "*is tested against actual performance at sea ... rather than a paper calculation of the engine's capabilities*"), the benefit of those will not be deducted when assessing performance.
4. Following the established 'good weather' method, there were two representative 'good weather' periods within the meaning of the CP, during which the Vessel's performance could be measured against the agreed warranty. This established that there was a loss of time of 16 hours.

5. Accordingly, Charterers' counterclaim for underperformance/slow-steaming was successful in respect of the loss of time of 16 hours only, and Charterers were entitled to this deduction from hire. Given Ms Ambrose's rejection of Charterers' claim based on the RPM method, their claim for time lost solely in respect of hull fouling was also rejected.
6. Charterers' counterclaim for damages for wrongful arrest was dismissed. Ms Ambrose reconfirmed the high threshold set by English law: in the absence of an element of malice on the part of the arresting party, a wrongful arrest claim is unlikely to be successful. Here, even though it was established that Charterers were not the beneficial owners of POLA DEVORA, it had not been shown that that Owners were acting maliciously or in bad faith when they made the arrest, rather it was "*a genuine but understandable mistake*".

Comment

This case is a useful re-statement of the current legal framework for the determination of speed and performance claims. It makes clear that the Court will not depart from the established precedent used to determine breach and loss in these cases (even where the established method may not be 100% reliable), unless there are compelling and strong reasons to do so. That threshold was not met here, such that Ms Ambrose declined to adopt the RPM method of performance assessment in this case.

As weather evaluation technology continues to advance, it may be that the 'good weather' method inaccuracies are finessed and/or replaced in the future. However, for the time being, it remains unsettled how, in the absence of good weather periods, a reliable performance assessment can be established. This case offers no guidance on the point.

The decision is also helpful with regard to cases of wrongful arrest. Even if a ship arrest is found to be wrong or mistaken on the facts, it is the arresting party's intent which requires scrutiny to establish whether damages are payable. Where, as in this case, a "*genuine but understandable mistake*" leaves the 'wronged' party uncompensated for its losses, it is an inherent risk in international shipping that a lack of transparency as to ship ownership exposes parties to potentially unfair consequences.

Lastly, the case serves as a reminder that parties should continue to ensure that the costs of litigation are proportionate to the sums at stake. Although, in accordance with the CP terms, the quantum of this claim and counterclaim meant that it required referral to the Court rather than arbitration, Ms Ambrose expressed surprise that the parties chose to incur the substantial costs of pursuing it to a High Court trial. This was particularly the case in circumstances where the court had made directions for ADR at an early stage.

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