

Performance Claims under NYPE 1946 and 1993 (Time Charter):

Establishing and Extrapolating

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1. The warranty in NYPE 1946 and 1993 forms

In NYPE 1946 form, the performance warranty is in lines 9/10 (in the preamble), that must be read from line 3, of the NYPE 1946 form. The said lines are reproduced below:

3 Owners of the good _____ Steamship/Motorship ...

9 which are of the capacity of about _____ tons of fuel, and capable of steaming, fully laden, under good weather

10 conditions about _____ knots on a consumption of about _____ tons of best Welsh coal-best grade fuel oil-best grade Diesel oil, ...

In NYPE 1993 form, the performance warranty is in the preamble. It reads as follows:

Description of Vessel

... Speed about _____ knots, fully laden, in good weather conditions up to and including maximum Force _____ on the Beaufort wind scale, on a consumption of about _____ long*/metric* tons of _____.

The warranty in both forms, quite materially in similar terms, is about the ‘capability’ of the vessel in ‘good weather’ conditions. The warranty here refers to the capability at the time of fixture or delivery and it is not a continuous warranty. Authorities better support the proposition that the warranty is tested at the time of delivery rather than fixture, which will make more commercial sense than the other (see *The “Al Bida”* [1987] 1 Lloyd's Rep 124 CA; *The “Pearl C”* [2012] EWHC 2595 (Comm); *The “Apollonius”* [1978] 1 All ER 322; *The “Pamphilos”* [2002] All ER (D) 94 (Nov)).

The warranty refers only to capability of the vessel in fully laden sea passage but in practice parties will add warranty of capability also in ballast sea passage. The last clause in the standard form is cl 28. It is quite common for parties to add a rider clause, usually cl 29, entitled ‘Vessel's Description’ and set out, among other description of the vessel, the performance warranty in more detail. The rider clause will usually provide for capability of the vessel in ballast sea passage in addition to the ‘laden’ sea passage (rather than ‘fully’ laden performance capability). It is commonly drawn from a questionnaire, frequently in the Baltic Questionnaire format, that the owner usually fills-in and makes available the charterer, containing the vessel's description. Normally, a reference will be made in the lines 9-10 to the rider clause 29.

The rider clause will normally set out the weather conditions in more detail with references to the Beaufort scale and the Douglas sea state scale and likely say ‘no swell or adverse current’ or the like. The wind force commonly admitted by the rider clause for good weather is code 4 of Beaufort scale and the sea state allowed is code 3 of the Douglas sea state scale.

2. Two-stage test: Proving underperformance and assessing damages

Although the question is about the vessel's capability at the time of delivery, in practice this will be proved by the vessel's performance after delivery. The charterer will identify the period or periods of good weather during sea passages that the vessel performed under the charterparty. Then the vessel's performance during the said period or periods will be established. For this, the said period or periods must

be sufficiently long so that the period or periods can be taken to represent the 'capability' of the vessel. If the performance, representing capability, thus established is short of the warranted performance capability, then there is a breach of the warranty. If there is a breach, the next question is what quantum of damages the charterer is entitled to for the breach. It is impractical to assess the damages with any perfection in underperformance claims. But some hypothetical methodology has been accepted by the arbitral tribunals and courts, and they work. Before delving into the methodology, it must be observed that the effect of the breach, i.e. the incapability of the vessel, is on all sea passages that the vessel performed under the charterparty and not merely on the sea passages when good weather was experienced. The methodology is that the underperformance established during the good weather period or periods will be extrapolated to all the sea passages under the charterparty. See *The "Ocean Virgo"* [2015] EWHC 3405 (Comm); *The "Didymi"* [1988] 2 Lloyd's Rep 108 CA; *The "Gas Enterprise"* [1993] 2 Lloyd's Rep 352 CA.

A basic example will help understand the process and methodology. Suppose that the vessel was warranted capable of a speed of 15 knots on 30 metric tons of IFO (380 CST) per day in good weather. The vessel performed a total of 50 days of sea passages under the charterparty. Bad weather was experienced on all sea passage days except one day. Now, this one-day will be taken to measure the vessel's performance capability. It is found that on this one-day, she achieved only a speed of 14 knots on 31 metric tons of IFO (380 CST) per day. This means the warranty has been breached, both by under-speed and overconsumption, as the performance on this one-day shows that the vessel was indeed capable only of this performance when she was delivered. The vessel sailed a total distance of 15,000 nautical miles on all sea passages during the charter period. If the vessel was capable of the warranted performance, then it would only have taken 1,000 hours (i.e. 41.66 days) (calculation: $15,000 \text{ nautical miles} \div 15 \text{ knots}$) to sail the distance, assuming it was all good weather. The consumption would have been 1,250 metric tons of IFO (380 CST) (calculation: $41.66 \text{ days} \times 30 \text{ metric tons}$), again assuming good weather at all times. But, hypothetically, with the actual capability of the vessel, i.e. under-capability, she would take 1,071.43 hours (i.e. 44.64 days) (calculation: $15,000 \div 14 \text{ knots}$) and consume 1,383.93 metric tons of IFO (380 CST) (calculation: 44.64 days

x 31 metric tons) in good weather. Hence, the loss to the charterer is 71.43 hours and 133.93 metric tons of IFO (380 CST). This is what the charterer will be compensated for. Other formulas of calculation have been advocated (see London Arbitration 12/14), but it is suggested that the above basic formula, in principle, will best fit the contractual principles of awarding compensation. The basic formula can be stated as:

$$\begin{aligned}
 \text{Speed claim} &= \frac{\text{Total Sea Passage Distance}}{\text{Minimum Warranted Speed}} - \frac{\text{Total Sea Passage Distance}}{\text{Actual Good Weather Speed Achieved}} \\
 \text{Consumption claim} &= \frac{\text{Total Sea Passage Distance}}{\text{Maximum Warranted Cons.}} - \frac{\text{Total Sea Passage Distance}}{\text{Actual Good Weather Consumption}} \\
 \text{Net underperformance claim} &= \text{Speed claim} + \text{Consumption claim}
 \end{aligned}$$

Notably, it does not matter that the assumption of good weather both on the warranted performance calculation and the actual performance calculation were not true. Indeed, none of the two scenarios happened, but that does not matter. The vessel would have taken, in actual fact, more time and consumed more fuel even than the actual performance scenario used in the above calculation. Again, that does not matter. Doing a perfect calculation of loss of time and fuel to the charter is an impractical task. The methodology used above will arrive at the probable loss and it has been accepted by the arbitral tribunals and courts, although the methodology is indeed a hypothetical one. In London Arbitration 24/19, the methodology was well summarised and said in simple terms, namely, if a vessel underperforms by certain speed, say one knot, in good weather, then she will probably continue to underperform by the same margin in bad weather and this difference is what the charterer is compensated for throughout all the sea passages.

Suppose that the vessel achieved a lower speed at lower consumption, then there is a loss to the charterer by the lower speed and a gain to the charterer by the lower consumption. In such cases, the gain must be offset against the loss that the charterer may claim for (see *The "Ioanna"* [1985] 2 Lloyd's Rep 164; London

Arbitration 1/07; London Arbitration 9/07; London Arbitration 20/07). In total, if the gain is more than the loss, then there is no claim by the charterer. This is because damages are awarded on a compensatory basis for breach of a term of the contract, which includes the performance warranty. The contractual basis of compensating an aggrieved party is to put him in the position that he would have been had the contract been performed (see *Robinson v Harman* (1848) 1 Exch 850 (Ct of Exch); *The “Golden Victory”* [2007] 2 AC 353 HL) subject to a limitation that the loss claimed for is not too remote (see *Hadley v Baxendale* (1854) 9 Exch 341 (Ct of Exch)). It will be different if the claim is premised on off-hire provisions in the charterparty rather than breach of the performance warranty. In the case of an off-hire claim, any gain by lower fuel consumption goes to benefit of the charterer (see: *The “Pearl C”*; *The “Ioanna”*). This is simply because the charterparty provides that upon certain event, the vessel goes off-hire, i.e. the vessel is free of hire for the period in question. The charterer does not make an under-speed claim for the owner to offset the gain made by the charterer in consumption. Of course, when there is a gain to the charterer in the net, the owner cannot claim the gain from the charterer, as the warranty is about minimum performance of the vessel (see *The “Al Bida”*), and any better performance in the net goes to the benefit of the charterer.

It must be noted that the process of establishing an underperformance claim is a two-stage process. First, the incapability of the vessel must be established. Second, the extrapolation of the established incapability to all sea passages under the charterparty. There are some limitations in both stages.

On the first stage, the nearer the sample period is to the delivery, it will better reflect the capability of the vessel at the time of delivery. A sample taken far from delivery, particularly in long charters, may not represent the capability at the time of delivery. A sample taken after the bottom was fouled following a long stay at port, outside port or at anchorage waiting for berth or loading will be no good to represent the capability at the time of delivery. If more than one sample is available and they differ from one another, some difficult questions will arise. One possibility is that both performances must be averaged to find out the vessel's capability at the time of delivery. Another possibility is that the one nearest to delivery must be taken. Yet a further possibility

is that one most favourable to the owner must be preferred to the one most favourable to the charterer. The last option, it is suggested is, the better one. It will be supported somewhat, at least by analogy, by the authorities that have held that the owner is liable for the breach only to the extent that the performance has fallen below the minimum threshold of the warranty (see *The “Al Bida”*). In other words, at the action of the charterer, if there is any doubt, the benefit must be given to the owner. However, again such preference is subject to limitations. For example, in one of the periods the vessel might have achieved a better performance only because of a favourable wind or current, hence that period may be less accurate representation of the vessel’s capability than the other period. Determining which period or periods represents the vessel’s capability, at the closest and on balance of probabilities, is a matter of fact for the arbitral tribunal (or court) to decide in each case.

On the second stage, there may be periods of sea passages where the weather is extreme, hence the vessel’s speed must be reduced irrespective of whether the vessel can perform at higher speed. Such periods must be excluded from the extrapolation. Similarly, the periods when the vessel sails at a lower speed by order of the charterer must be excluded, irrespective of whether the vessel was capable of performing at a higher speed than that. The reason is that in such circumstances, even if the vessel was capable of better performance, she could only have performed at the speed that she did, hence no loss of time for the charterer. But there can be loss of fuel for the charterer, which can be impractical to calculate with any probability, hence likely will be excluded from extrapolation and claim. Bingham LJ in *The “Didymi”* recognised such exclusions from the extrapolation. In long charters, an allowance might have to be given in the extrapolating exercise for reduced performance over time due to ageing factor. If the vessel was not originally capable of performance at the time of delivery but subsequently, by repair, cleaning bottom, etc, was made more capable but not so capable as to meet the warranted performance, then the extrapolation before the repair/cleaning and extrapolation after that will have to be done with different bases.

On both stages, difficulties may arise if performance can only be assessed in laden sea passage but not ballast sea passage, and vice versa. When such a difficulty

arises, it is for the arbitral tribunal (or court) to resolve it on the factual matrix of the case before it.

If bad weather is encountered throughout the charter period, the warranty is still applicable and the hypothetical question arising then is what the vessel was actually capable of performing had the weather been good. This will be very difficult to answer as there is no good weather period experienced in any of the sea passages under the charterparty. However, a charterer may attempt to establish underperformance by other ways such as reference to the vessel's performance under any charterparty prior to delivery to or even after the subject charterer (London Arbitration 24/05; London Arbitration 14/18). This will in practice be an uphill task as it will not be easy for the subject charterer to gain access to the records of the previous charter (see cl 11 of 1946 form; cl 15 of 1993 form; London Arbitration 4/11; London Arbitration 4/18).

The two-stage process was judicially recognised by Teare J in *The "Ocean Virgo"*. Reference was made to *The "Didymi"* and *The "Gas Enterprise"*. In the context of NYPE 1946 and 1993 forms, the caution must be taken in applying the two authorities and necessary adjustment must be made, because in both the cases, it was a continuing warranty on an average basis throughout the charter period, which is not the case with NYPE 1946 and 1993 forms.

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