A Revisit to *The "Ocean Virgo"* [2015] EWHC 3405 (Comm)

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In time charterparties, the owner will give a speed-consumption warranty on sea passages subject to good weather, i.e. that the vessel is capable of achieving a certain minimum speed and that at this speed she will consume so much fuel. For example, the warranty may read like this: the vessel is capable of performing about 12.5 knots speed on about 36 mt IFO 380 per day in good weather conditions of wind force not exceeding code 4 in Beauford scale and sea state not exceeding code 3 in Douglas sea scale.

Ordinarily, a vessel will not enjoy the stipulated good weather throughout a sea passage, but she may enjoy such weather during certain periods of the sea passage. Hence, to find out whether the vessel was capable of the warranted performance, her performance during the good weather periods will be taken as the sample. If it is found that the vessel underperformed during the good weather periods, then the result will be extrapolated to the entire sea passage or passages in question, including bad weather periods, to quantify the underperformance for which the charterer is entitled to be compensated.

For a period to be taken as the sample period, it must be of sufficient length. The question for this paper is whether it must be sufficient to represent the capability of the vessel at the relevant time (which in the case of the standard NYPE 1946 form, the time of delivery) or the entire sea passage or passages in question.

In *Polaris Shipping Co Ltd v Sinoriches Enterprises Co Ltd (The "Ocean Virgo")* [2015] EWHC 3405 (Comm), the parties entered into a time charterparty for a trip. The vessel was warranted capable of certain performance in "good weather/smooth sea, up to max [Beaufort scale] 4/Douglas sea state 3, no adverse currents, no negative influence of swell". The vessel performed one ballast voyage and one laden voyage.

On the ballast sea passage, the charterer's weather routing company (WRC) identified four periods of good weather, of which only two, namely period nos. 1 and 3, were accepted as good weather periods by the arbitral tribunal. The said periods were respectively for 14 hours and 16 hours. The arbitral tribunal rejected them because neither of them was for a minimum of 24 consecutive hours from noon to noon, hence no good weather 'day'.

The background to the preference of the noon-to-noon period to test the performance of the vessel is that the master reports the position of the vessel every noon and the fuel consumed since the last noon report to the current noon, along with some other details. This enables a charterer's WRC to calculate the speed achieved and the fuel consumed during the noon-to-noon period. However, when the relevant period is less than or other than the noon-to-noon period, it is possible for the WRC to calculate the speed based on the automated identification system (AIS) information and the fuel consumption on a pro-rata basis from the noon-to-noon fuel consumption report.

On the laden sea passage, the WRC identified a period of 27 hours as a good weather period. Seemingly, the tribunal accepted only 21 hours of the period as the good weather period. The tribunal rejected this period for two reasons. One was that it was for less than 24 hours. Another was that it constituted only 5.34% of the total voyage, hence relatively too small to represent the entire voyage. On the second reason, the tribunal seemingly directed itself "the sample size must be sufficiently large as to be *representative of the voyage* in its entirety." [emphasis added]

On both sea passages, in any event, the tribunal seemingly was not ready to extrapolate any finding of underperformance to all the sea passages under the charter. This was because the tribunal was of the view that the application of the warranty was limited to periods of good weather only.

Hence, the charterer lost before the arbitral tribunal. The charterer appealed to the High Court, which was listed before Teare J. The judge found that the arbitral tribunal had misdirected itself by looking for 24 consecutive hours of good weather, i.e. good weather 'day', when there was no such requirement in the charterparty. Accordingly, he remitted the award back to the arbitral tribunal to consider if the two periods of 14 hours and 16 hours on the ballast sea passage, whether individually or cumulatively, were sufficient periods to serve as a sample to test the good weather performance of the vessel. This was because the tribunal did not find the 16-hour and 14-hour periods to be too small a sample but rejected them only because they were not for a minimum period of 24 consecutive hours.

However, on the laden sea passage, the judge found this. Even if the arbitral tribunal had not misdirected itself by looking for a 24 consecutive hours period, it would have arrived at the same decision because it decided that the 21-hour period which constituted only 5.34% of the total voyage was relatively too small a sample to represent the entire voyage. Hence, he did not remit back the award on this point.

The question arising from this is whether the sample period must be sufficiently long to represent the capability of the vessel at the relevant time or the entire sea passage in question?

The warranty is about the capability of the vessel at the relevant time, which in this case was the time of delivery of the vessel under the amended NYPE 1946 form. It is opined, with due respect, that the right question would be whether the 21-hour period was sufficiently long for the tribunal to safely assess the vessel's capability at the time of delivery and not whether the sample period was sufficiently large relative to the size of the entire sea passage or the voyage. While the arbitral tribunal was entitled to decide as a matter of fact that the 21-hour period was too small a sample

to represent the capability of the vessel at the time of delivery, it was not entitled to hold that the sample size was relatively small to the size of the entire sea passage or the voyage as it did. Hence, the tribunal misdirected itself also in deciding the question of underperformance on the laden voyage and the award should have been remitted back on this point too.

On the approach taken by the tribunal as to extrapolation, his lordship found that the tribunal had misdirected itself. This was because once a breach was established, the result of underperformance found during the sample period must be extrapolated to all the passages under the charter including bad weather periods. In coming to this conclusion, his lordship well found support from *Didymi Corp v Atlantic Lines and Navigation Co Inc (The "Didymi")* [1988] 2 Lloyd's Rep 108 and *Exmar NV v BP Shipping Ltd (The "Gas Enterprise")* [1993] 2 Lloyd's Rep 352.

In London Arbitration 27/19, a similar question arose as to the sufficiency of the good weather sample period. The tribunal held that a good weather period of 12 hours was not sufficient because it was relatively too small against the charter period of about 26 days covering 7,284 nautical miles. It is again opined that this was not the right approach. The right question would be whether the performance during the sample period can represent the vessel's performance capability at the relevant time, which in this case was the time of delivery under an amended NYPE 1946 form.

In London Arbitration 22/18, a good weather period was seemingly treated to necessarily mean a good weather day between the noon-to-noon report. This position will no longer hold good after The Ocean Virgo.

In recent times, growing practice is seen whereby shipowners, to overcome the effect of The Ocean Virgo holding a sufficient period less than 24 hours to be admissible as the sample period, add a condition to the speed-condition warranty that the admissible sample period must be for a consecutive 24-hour. This can be hard to get and thus practically render the performance warranty no effect. Whether the charter can resist such a condition depends on its bargaining power.

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