Slow Steaming: *Bulk Ship Union SA v Clipper Bulk Shipping Ltd (The "Pearl C") [2012] 2 Lloyd's Rep. 533*

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In his previous article '*The Price of Slow Steaming*' Neil Henderson undertook a review of the likely legal issues that might arise in relation to the now common practice of slow steaming.

At the end of that article he commented that "*There have yet to be any reported decisions on the recent widespread deliberate slow-steaming… However the on-going pressures of depressed freight rates, high bunker prices and environmental constraints mean that slow-steaming is likely to continue for some time yet and a reported decision that will enable further guidance on the issues cannot be far away*".

As it transpires, those words have proved to be quite prophetic following the Commercial Court decision of Mr Justice Popplewell in *Bulk Ship Union SA v Clipper Bulk Shipping Limited (The "Pearl C")*. In this article Tom Burdass and Neil Henderson consider this case and its commercial impact.

The Facts

The owners, Bulk Ship Union SA ("Owners"), had chartered their vessel The Pearl C to Clipper Bulk Shipping Ltd ("Charterers") on an amended NYPE form for a period of about 9 to 12 months. The Charterers withheld hire for alleged underperformance, contending: (1) that the vessel had failed to proceed with the utmost dispatch in breach of clause 8; and (2) that the Charterers were entitled to deduct the time lost due to slow steaming under the first part of the off-hire clause, clause 15, which was amended from the standard NYPE off-hire clause.

The charterparty contained a performance warranty of about 13 knots (in ballast and laden) in good weather conditions. That warranty applied only on delivery and was not a continuing warranty. The Tribunal held that there was no breach of the on-delivery performance warranty and rejected the Charterers' argument that the vessel had not been maintained during the time charter.

The charterparty incorporated the Hague Rules, including Article IV Rule 2 "*Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from: (a) act, neglect or default of the master, mariner ... or the servants of the carrier in the navigation or in the management of the ship*".

In order to assess whether the vessel had complied with the due despatch obligation in clause 8 of the charterparty and whether there had been a net loss of time under clause 15, the Tribunal compared the vessel's actual speed with the warranted speed. The Tribunal held that there had been a breach of clause 8 and a net loss of time under clause 15.

The Owners appealed.

On appeal under Section 69 of the Arbitration Act 1996 the Owners contended that, in relation to clause 8, by using the performance warranty as the benchmark against which the requisite level of utmost dispatch and any loss of time was measured, the Tribunal had erroneously converted the performance warranty from one which applied at the time the vessel was delivered into the charterparty, into a continuing performance warranty which applied throughout the course of the time charter.

The Owners also contended that the Tribunal had failed to apply Article IV Rule 2(a) so as to exempt the Owners from any liability which they might otherwise have been under for breach of clause 8.

In relation to the off-hire clause, the Owners submitted that the same mistake of measuring performance by reference to the speed in the performance warranty, had led the tribunal to the erroneous conclusion that there had been an off-hire event, namely an error of the Master or crew, and to an erroneous conclusion that there had been a net loss of time. The Owners also contended that underperformance resulting in reduced speed could not fall within the first part of clause 15 because reduction in speed was exclusively governed by the second part of the clause; and the second part of the clause was not engaged because the Tribunal did not find any defect in, or breakdown, of the vessel's hull, machinery or equipment.

Popplewell J held that there had been no error by the Tribunal in using the warranted speed as the benchmark against which to assess whether the vessel had proceeded with utmost dispatch. The Judge also held that the Tribunal was correct to reject the Owners reliance upon Article IV Rule 2(a) of the Hague Rules: the Tribunal had correctly referred to *The Hill Harmony* [2001] 1 Lloyd's Rep 147 and had identified the dichotomy between a breach of clause 8 which involved a deliberate decision not to

proceed with utmost dispatch (to which the article 4 rule 2(a) exception did not apply), and a negligent error in the navigation or management of the ship concerning a matter of seamanship, to which the exception did apply.

Discussion

The Pearl C is a potentially important decision in that it identifies the performance warranty in the vessel's description as the relevant yardstick against which the slow-steaming can be measured. The Court approved the approach taken by the Tribunal whereby they decided that deliberate slow steaming was the only reasonable explanation in the absence of any obvious mechanical problem, adverse weather or other reason for the slow performance of the vessel: "*on the evidence before it... there was no other realistic explanation for a vessel which was capable of achieving the warranted speed at the moment she was delivered into the charterparty failing to achieve that speed on the subsequent voyages*".

In the circumstances where: (i) the absence of a good explanation for poor performance may be sufficient to establish a claim for breach of clause 8 or a claim for off-hire; and (ii) the general prevalence of slow-steaming; the decision of *The Pearl C* suggests that more claims may soon be on their way. Whereas before an owner who chose to steam more slowly for commercial or other reasons might think he was able to hide behind a performance warranty which applied only upon delivery, *The Pearl C* suggests that in future this may not protect the slow-steaming owner.

What should such an owner do to avoid such claims?

As a result of the incidence of slow-steaming in the market, BIMCO has developed standard form slow-steaming clauses for both time and voyage charterparties. These clauses have been developed in consultation with industry and technical experts and were implemented in 2011 and 2012 respectively via circular.

The objective of the slow-steaming (time) clause is to deal with the owners' obligations to follow the charterers' orders to slow steam while taking into account the safety of the vessel, crew and cargo and obligations towards third parties.The time clause provides for the possibility of both slow steaming and ultra-slow steaming. Both options are however subject to the proviso that the instructions will not result in the Vessel's engine and/or equipment operating outside the manufacturers' recommendations.

The BIMCO slow steaming (voyage) clause entitles only owners to order the vessel to slow steam; the charterers have no such entitlement. One of the most important aspects of the clause relates to the owners' "due dispatch" obligations under the charter party and contracts of carriage. The slow steaming (voyage) clause specifically addresses this issue by clarifying that the exercise by the owners of their option to slow steam will not be a breach of contract. The charterers are obliged to indemnify the owners against claims for breach of contracts of carriage if these contracts impose or result in the owners facing more onerous liabilities than they have assumed under the Clause.

Both clauses provide owners with a two-fold protection: an express recognition that slow-steaming in accordance with orders (whether given by charterers or owners) will not amount to a breach of the utmost / due dispatch obligation; and an obligation on the charterer to ensure that the terms of bills of lading permit slow-steaming and that charterers will indemnify owners for liabilities arising from claims for breach of the obligation to proceed with utmost and / or due dispatch.

The industry consensus appears to be that slow-steaming is not likely to be a practice which can be maintained once markets begin to improve and the demand from cargo interests for more rapid delivery increases, and also as more fuel efficient new-builds are delivered. However, in the present climate there is no sign of such a phenomenon occurring in the next few years and so slow-steaming is here to stay, at least for the time being. If an owner wishes to implement, or continue to operate, a policy of slow-steaming, then a transparent approach is likely to be the best. In addition to the continuing industry commentary on slow-steaming, the decision of *The Pearl C* reinforces the point that owners would be well-advised to press for the inclusion of the BIMCO slow-steaming clause in either its time or voyage charterparty form in all their future fixtures.

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