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Application of the word "about" – When does under-consumption start?

16 July 2012

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The Gaz Energy No.2

On 21 June 2012, the High Court handed down its decision[1] on a time charter performance case where the issue was whether, in circumstances where the vessel has performed within the consumption warranty of *"about 'X' metric tons IFO"*, i.e. a daily consumption of IFO between "X –5%" and "X +5%" metric tons (applying the 5% tolerance for the word "*about*"), the saving is to be calculated by reference to the lower figure of "X –5%" metric tons or the higher figure of "X +5%" metric tons.

Insofar as a claim by the Charterers for underperformance (*i.e.* over-consumption) is concerned, the issue has been well and long settled; the ruling of *The Al Bida* is to the effect that when the word "about" is incorporated the upper limit of the range is to be used for the calculation. For example, when the daily consumption is warranted to be "*about 40 m.t.*", the figure of 42 m.t. will be used for calculating the over-consumption. This benefits the Owners as the calculation is on the basis of their minimum legal obligation, that is to say the method least onerous to Owners and the least beneficial to Charterers.

However, what is the position when there is underperformance in terms of speed but there is a contractual obligation to credit the Owners or set off any saving of bunkers under-consumed? What is the figure the parties should use in their calculation in order to find out, in the first place, the allowed consumption and then determine whether there was any saving to be set off against any speed underperformance? Using, for instance, the previous example, should this figure be

42 (*i.e.* 40 +5%) or 38 (*i.e.* 40 –5%) metric tons? In *The Gaz Energy No.2* the Disponent Owners argued that the proper figure should be 42 metric tons. This would apply the same test as for over-consumption as referred to above. The situation was made more complex due to the fact there was an arbitration decision where, in similar circumstances, the LMAA Tribunal (London Arbitration 20/07) had used the contractual consumption holding that the proper figure should be 40 metric tons.

However, the Admiralty Judge, Mr. Justice Teare, ruled that for the purposes of crediting any bunker under-consumption (saving) to set off against an underperformance claim, the figure to be used in the relevant calculation for consumption of bunkers should be the lower of the two figures within the "about" tolerance (in this case 38 m. tons) but for the purposes of calculating over-consumption the higher of the two figures within the "about" tolerance should be used (in this case 42 m. tons). This clarifies the legal position and, essentially, "overrules" the above arbitration decision. The decision meant that there was no bunker saving, so the Owners were not entitled to any credit and should pay in full the underperformance claim of the Charterers.

Paragraph 18 of the Judgment appears to be of particular importance and contains the relevant maxim. The Judge said that *"[w]here the guaranteed maximum consumption is expressed by reference to a range ("about 40 mt" per day) it seems to me to be right in principle to assess underperformance by reference to the upper limit of that range, 42 mt per day, and to assess overperformance by reference to the lower limit of that range, 38 mt per day"*. This dictum is of a general application, not restricted to the factual context of the particular case, and establishes a legal precedent on a practical time charter issue that was previously missing from the relevant case law.

Overall, the above decision is a pro-Charterer decision. Looking ahead, caution should be given when vessels are chartered on a back-to-back basis. However, from a Charterer's perspective, where the "about [X]" consumption is quoted by Owners for chartered in tonnage but this is

changed to "*maximum [X+5%]"* consumption for the same tonnage when chartered out, the Charterer may claim as Owner down the charter line a credit from bunkers saved on the basis of the "*maximum*" provision but will not be obliged to pass such benefit to the Head Owner up the line of the charters, if this was still within the "*about*" range.

This decision displaces the decision of London Arbitration 20/07.

[1] Reed Smith acted for the Disponent Owners in this case.