Law And Sea

I, indeed am Lord of the world, but the law is lord of the sea.
The Emperor Antoninus (138-161 A.D.)

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Time Charters. Description of the vessel Condition or Innominate term …

With respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine established by principle as well as authority appears to be that, if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty… the Court must be influenced in the construction of the charter-party, not only by the language of the instrument, but also by the circumstances under which, and the purposes for which the charter-party was entered into.
Per Williams J in *Behn v Burness* (1863) 3 B & S 751.

Description of the vessel is, naturally, very important to both sides of charterparty contract, because it outlines particulars and characteristics of the subject-matter of contract. The charterers obviously expect from the owners a punctual compliance with these provisions and in case of misdescription may be entitled to terminate contract or insist on rectification. In their turn the shipowners must tender the actual ship as per description in charter and, in the absence of a clearly drafted substitution clause, they are neither bound nor entitled to tender another ship.

Contrary to the earlier practice which, in absence of the concept of innominate term, considered most of descriptive stipulations as condition precedent, modern view is that not every aspect of the vessel's description is a condition, non-compliance with which would entitle the charterer to terminate the contract. Lord Wilberforce in *Reardon Smith Line v Hansen Tangen (The Diana Prosperity)* [1976] 2 Lloyd's 621, said:

> The general law of contract has developed, along much more rational lines (eg *Hong Dong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*) in attending to the nature and gravity of a breach or departure rather than in accepting rigid categories which do or do not automatically give a right to rescind,…

Thus, generally, the name of the ship is not treated as a condition of the contract and a change of name would not normally allow the charterer to rescind the contract.

Taking into account this modern approach many descriptive items are likely to be regarded as intermediate terms today, despite earlier authorities which treated them as conditions. For example in *Behn v Burness* (1863) 3 B & S 751 it was held that the statement of the place of the ship is a substantive part of the contract and therefore is a condition. Williams J said in that case:

> A statement is more or less important in proportion as the object of the contract more or less depends

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> upon it. For most charters, considering winds, markets and dependent contracts, the time of a ship's arrival to load is an essential fact, for the interest of the charterer in the ordinary course of charters in general it would be so…

This reasoning clearly falls short of existing view that condition is such a particular primary obligation, that failure by one party to perform it, irrespective of the gravity of the event that has in fact resulted from the breach shall entitle the other party to elect to put an end to all primary obligations of both parties remaining unperformed.

Same analysis can be applied to the statements in a charterparty relating to the guaranty of diameter of the vessel's cargo lines and the position of the heating coils, see *Pennsylvania Shipping Co v Compagnie Nationale de Navigation* [1936] 2 All ER 1167, 55 Ll L Rep 271, with the result that stipulations in the charter related to vessel's measurement or tonnage, are regarded as innominate terms, breach of which, in the absence of contrary stipulation in the charterparty, entitles the charterer to withdraw from the contract only if its effect goes to the root of the contract.

Statement which expressly refers to the carrying capacity of the ship is a condition precedent to the charterer's liability to load, and one to the classification of the ship are condition precedent that she is classed as described at the date of the charterparty. But statement of the flag she flies regarded as innominate term, breach of which, in the absence of contrary stipulation in the charterparty, entitles the charterer to withdraw from the contract only if its effect goes to the root of the contract.

> I do not think it could possibly be held that it makes no difference under what flag a ship sails. The law of the flag is of direct importance as affecting the status of the ship. It is also of importance in its collateral effects, as, for instance, in determining the nationality and therefore to some extent the discipline and morals of the crew and in many other respects. It seems to me that in any particular case of this kind there can be no question that the change of flag is a breach of the charterparty.
> Per Rowlatt J in *Isaacs v McAllum* [1921] 3 KB 377 at 386.

A statement as to a vessel's speed is usually construed as a warranty , i.e. speed warranty in ballast and loaded with reference to wind force and/or sea state in Beaufort scale (e.g. max wind force 4 in Beaufort scale: Loaded about 14.5 knots, Ballast about 15.5 knots). It is generally accepted that the word "about" will give owners a 0.5 knot margin on either side of the stated figure. In an example above, warranty "Loaded about 14.5 knots" will mean that there will be no breach if the vessel maintains loaded speed between 14.0 and 15.0 knots. However more accurate view, which represent the current state of law was expressed in *Arab Maritime Petroleum Transport Co v Luxor Trading Corpn and Geogas Enterprise SA (The Al Bida)* [1987] 1 LLR 124 per Parker LJ at p.128:

> It is often accepted as a 'rule of thumb' that at the warranted consumption the fall-off speed is of the order of 1/2 knot. (This stems from the days when ships were capable of 10 knots and 5 per cent. seemed a reasonable margin); but this allowance is not sacrosanct - a heavily laden tanker will be less affected by moderate weather than a similar sized container vessel. 'About' must be tailored to the ship's configuration, size, draft and trim etc.

When charterparty has several contradictory references as to guaranteed speed as for example in charter itself and in Gas Form C, then the court will construe the document as a whole to determine what a reasonable person would have meant by the terms used and what is the overall commercial purpose of the charter. In *Hyundai* Merchant *Marine* Company *Ltd v Trafigura Beheer BV* [2011] EWHC 3108 (Comm) the court was invited to resolve a conflict between Gas Form C guarantee "… average speed on a year's period and max wind force 4 in Beaufort scale: Loaded about 14.5 knots, Ballast about 15.5 knots" and stipulations contained in cl 24 (Detailed Description and Performance) and cl 42 of amended Shelltime3 form with the following wording:

Clause 24. Detailed Description and Performance

The aforesaid average speeds shall be calculated in each yearly or other less period, as defined hereinafter by reference to the observed distance from pilot station to pilot station on all sea passages and over the whole of the time the vessel is on hire during such period [lines 217-219]…

…

In the event of any conflict between the particulars set out in the aforesaid Form and any other provision (includi

this clause) of this charter, such other provision shall prevail. [lines 241-242]

Clause 42: Speed/Consumption.

Speed about 15 knots average
Consumption about 40 mts IFO 380 CST at sea plus about 0.2 mts GO and about 10 mt IFO 380CST at port plus about 0.2 mt GO.
Otherwise as per Gas Form C.

The court held that lines wording of lines 217-219 represents unqualified all weather warranty which precluded the owners from any deductions otherwise available to them under Gas Form C guarantee.

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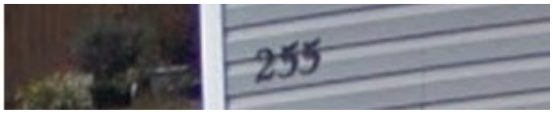

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- **Sub-chapters**