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QUALIFICATION OF THE PERFORMANCE WARRANTY BY 'WITHOUT GUARANTEE' AND ITS RAMIFICATIONS IN THE CONTEXT OF TIME CHARTERS(*)

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Abstract: Since speed and bunker consumption of the chartered ship are elements that directly affect the costs (hire - bunker expenses) which the charterer is responsible under a time charter, almost all time charters contain descriptions as to these. If the chartered ship performs less speed or consumes more bunkers than described in the charter, bringing a claim for the deficient performance of the ship and claiming damages for the loss he suffered can be an option for the charterer. However, in order that such a claim succeeds, it must first be established that the parameters given in the charter as to speed and bunker consumption of the ship have a status of warranty. The main objective of this article is to analyse matters that might affect the warranty status of these parameters. In this sense, the article determines the impact of the words 'without guarantee' (WOG) and 'all details about without guarantee' (ADAWOG) on the descriptions given in the charter as to speed and bunker consumption of the ship and analyze different interpretations regarding the meaning of these qualifications. Since the English law is predominant in the field of charterparties, the analysis will be made in this paper from an English Law perspective.

Keywords: Time Charterparties, Performance Warranties, Speed and Bunker Consumption of the Ship, Deficient Performance of the Ship, 'Without Guarantee'.

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ZAMAN ÇARTERLERİNDE GEMİNİN PERFORMANSINA İLİŞKİN TANIMLAMALARA 'WITHOUT GUARANTEE' ŞERHİ EKLENMESİ DURUMU VE SONUÇLARI

Öz: Geminin hız ve yakıt tüketimine ilişkin değerler, zaman çartererinin sorumlu olduğu tahsis ücreti ve yakıt masraflarını doğrudan etkilediğinden, zaman çarteri sözleşmelerinin pek çoğunda bu hususta bazı tanımlar ve değerler yer almaktadır. Tahsis olunan gemi sözleşmede belirtilen değerden daha düşük bir hızla seyrettiğinde veya belirtilen yakıt tüketimi değerinden daha fazla yakıt tükettiğinde, çarterer sözleşmenin ihlal edildiği gerekçesine dayanarak geminin düşük performansından ötürü ortaya çıkan zararını talep edebilir. Ancak bunu yapabilmesi için, tahsis eden tarafından geminin hız ve yakıt tüketimine ilişkin olarak çarter sözleşmesinde verilmiş olan değerlerin, garanti edilmiş olması gerekir. Bu makalenin temel amacı, bu değerlerin garanti edilmiş olması durumunu etkileyebilecek hususları analiz etmektir. Bu açıdan, makale, geminin performansına ilişkin yapılan tanımlamaların ve de değerlerin 'without guarantee' (WOG) ve 'all details about without guarantee' (ADA WOG) ifadeleriyle nitelendirilmeleri durumunda bunun etkisinin ne olacağını belirleyecek ve bu nitelendirmelere ilişkin farklı yorumları analiz edecektir. Çarter sözleşmeleri alanında İngiliz Hukuku hakim olduğu için, bu makaledeki inceleme İngiliz Hukuku perspektifinden yapılacaktır.

Anahtar Kelimeler: Zaman Çarteri Sözleşmesi, Performans Garantileri, Geminin Hızı ve Yakıt Tüketimi, Geminin Düşük Performans Göstermesi, 'Without Guarantee'.

I. THE ROLE OF THE CONTRACTUAL DESCRIPTION OF THE SHIP IN TIME CHARTERS

In time charters, since the charterer pays a fixed hire for use of the ship commercially during the charter period, it is important for the charterer to know details of the chartered ship and have an opinion about the commercial value of the ship. Therefore, it is common to see a clause in time charters which identifies characteristics and capabilities of the chartered ship. The shipowner's obligation under this description clause is to provide a ship which complies with the contractual description[1]. Accuracy and sufficiency of the contractual description is significant because the charterer most of the time decides to enter into a time charter

[1] SÖZER Bülent, **Deniz Ticaret Hukuku (Cilt 1)**, 6th edn., Vedat Kitapçılık, İstanbul, 2022, p. 378; COGHLIN Terence / BAKER, W. Andrew / KENNY Julia / vd., **Time Charters**, 7th edn., Informa, London, 2014, para. [I.33].

and plans his future employment decisions considering parameters stated in the description clause[2].

II. THE ROLE OF DESCRIPTIONS GIVEN IN THE CHARTER AS TO SPEED AND BUNKER CONSUMPTION OF THE SHIP IN TIME CHARTERS

The charterer has two main responsibilities regarding costs under time charters and these two responsibilities are closely related with speed and bunker consumption of the ship during her employment. Firstly, the time charterer is required to pay a fixed hire throughout the period of the charter. The number of the voyages which the vessel perform during the charter does not affect the amount of the agreed hire. If the ship underperforms during her employment, this affects the time it takes to complete a voyage and less voyages may be performed than the ship can be expected to perform during the agreed charter duration. From the charterer's perspective, such a result is undesirable since performing voyages is less than the planned within agreed duration adversely affect the profit which the charterer is planning to earn under that charter[3]. Apart from this, supplying and paying for bunkers which the ship needs during the period of the charter is ordinarily the charterer's responsibility[4]. Therefore, in a particular case, if the consumption of more bunkers than described in the charterparty is an issue, the charterer finds himself in a position of paying more than its planned and this will have adverse impact on his financial plans[5]. In light of these considerations, it can be said that description as to ship's speed and bunker consumption, in other words performance warranties[6] have a significant effect on certain costs which the time charterer must bear with regard to employment of the ship.

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2 ÜLGENER Fehmi**, Çarter Sözleşmeleri II**, 1st edn., Der Yayınları, İstanbul, 2016, p. 95.

3 **ÜLGENER**, p. 97, CERİT DİNDAR Ceren, "The Performance of the Chartered Ship: a Much Clearer Obligation under the NYPE 2015?", **JIML** 2017, Vol. 23, I. 6, p. 426; Shipping Working Group on International Shipping Legislation, "Charterparties a Comparative Analysis", United Nation Conference on Trade and Development, 12th session, Geneva, 22 October 1990, para. [40].

4 **ÜLGENER**, p. 69 and p. 98; **COGHLIN / BAKER / KENNY**, para. [I. 29]. Standard charter forms generally include a term relating the charterer's bunker obligation. See clause 2 of NYPE 1946, clause 7 of NYPE 1993, clause 4 of Baltime, clause 15.2 of BPTime 3 and clause 7/a of Shelltime 4.

5 **ÜLGENER**, p. 98, **CERİT DİNDAR**, p. 426; **Shipping Working Group on International Shipping Legislation,** para. [40].

6 It should be noted that the term 'warranty' is used here to refer to 'promise'.

Performance warranties are also important to the time charterers in terms of being able to accurately predict the manner in which they may exploit the vessel during the charter period. More often than not, a time charterer is a speculator who aims to profit through sub-charter arrangements based on fluctuations in market rates[7]. The parameters related to speed and bunker consumption of the ship can be used by the charterers and their sub-charterers to draw future business plans with regard to exploitation of the chartered vessel. For example, the time charterer may provide a cancellation date to his sub-time charter in light of the stated speed in the head charter. In this case, if the vessel does not arrive at the delivery port until the cancellation date, due to deficiency in speed, this may result in loss of a profitable sub-charter. In the same way, when there is a sub-voyage charter between the head time charterer and the seller who needs a carriage of goods under a sale contract requiring a final shipment date, the seller may enter into a charter relying on an expected loading date estimated by the head time charterer considering the shipowner's speed description. In this case, if the vessel does not arrive on time due to deficient speed and the goods are not shipped on the final shipment date, the seller (sub-voyage charterer) may not conclude the sale contract. The best scenario is that he may convince the buyer to extend the shipment date but it is likely that this will only be possible if the purchase price is reduced[8]. Another solution for the seller may be to arrange another voyage charter for the transportation of the goods. However, in that case he might find himself in a position to pay higher freight to compare with the rate he is required to pay under the previous voyage charter due to quick arrangement of the agreement or the sudden increase in the market. These examples reinforce why the existence and accuracy of performance warranties are also essential to ensure commercial exploitation of the chartered vessel.

III. EXISTENCE OF PERFORMANCE WARRANTIES IN TIME CHARTERS

Since parameters as to performance of the ship have particular significance for the time charterers and their sub-charterers, because of the reasons stated above, almost all charter forms include information regarding

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7 GORTON Lars, **Shipbroking and Chartering Practice**, 6th edn., Informa, Richmond, 2004, p.117.

8 As an example see *Progress Bulk Carrier Ltd. v. Tube City IMS LLC* [2012] EWHC 273.

performance of the ship. The parties may sometimes prefer to describe features of the ship as to the performance of the ship under the general description clause. Alternatively, features of the ship as to the performance can be set out in the preamble to the charter. For example, under NYPE 46, NYPE 93 and Baltime forms, description as to performance of the ship is given in the preamble. In addition, because of the importance of the ship's speed and bunker consumption, specific performance clauses can sometimes be drafted for these elements of the ship's description. For example, Shelltime 4 contains one page long specific performance clause (clause 24). Contrary to the position under previous NYPE forms, NYPE 2015 also contain a specific speed and consumption clause (clause 12). The first part of this clause is worded as follows:

> *"Upon delivery and throughout the duration of this Charter Party the Vessel shall be capable of speed and daily consumption rates as stated in Appendix A in good weather on all sea passages with wind up to and including Force four (4) as per the Beaufort Scale and sea state up to and including Sea State three (3) as per the Douglas Sea Scale (unless otherwise specified in Appendix A). Any period during which the Vessel's speed is deliberately reduced to comply with the Charterers' orders/requirements (unless slow steaming or eco speed warranties have been given in Appendix A) or for reasons of safety or while navigating within narrow or restricted waters or when assisting a vessel in distress or when saving or attempting to save life or property at sea, shall be excluded from performance calculations."*

This part of the clause is actually designed to set aside most of the disputes regarding the assessment of performance of the ship. The clause makes clear under which conditions, the shipowner promises that the ship complies with speed and daily consumption rates as stated in Appendix A. In this sense, stipulations as to performance of the ship is much clearer than previous NYPE forms. In order to bring a claim for underperformance of the ship, the first thing that needs to be focussed on is indeed the applicability time of the warranty given. The beginning words of the clause 12 of NYPE 2015 *"Upon delivery and throughout the duration of this Charter Party"* require the shipowner to provide a ship which will meet the specified performance rate during the whole charter period. It means that when the ship underperforms during the charter period and the charterer brings a claim underperformance claim, it will not be possible for the shipowner to

rely on the applicable time of the warranty as a defence against the charterer under this clause. Apart from this, the clause indicates the limits in terms of weather and sea conditions which the performance rates specified in the clause are promised. If the ship underperforms under while weather and sea conditions heavier than stipulated (up to and including Force four (4) as per the Beaufort Scale and sea state up to and including Sea State three (3) as per the Douglas Sea Scale), the underperformance claim of the charterer will again not succeed again under this clause since the shipowner does not provide any performance warranty for heavier conditions. Similarly, the deliberate reduction of the speed following the charterer's order or safety, saving ship, life and property also prevents the charterer to succeed for his underperformance claims[9]. As it is seen from the clause 12 of NYPE 2015 given as an example, the existence of promises as to performance of the ship in the charter form does not automatically results in that the charterer's underperformance claim succeeds. The clause might contain some conditions only under which the owner warrants the performance of the ships and these should be in consideration during the analyses of underperformance claims.

Whichever method (features of the ship as to the performance given in the preamble or under a separate clause) is used while defining the performance of the ship, if the charterer demands to bring a claim for deficient performance of the ship, firstly it must be established whether the charterparty contains a warranty as to the ship's speed and bunker consumption. In a particular case, the charterparty may contain two pages clause that describes performance of the ship but qualifying the clause by particular words may nullify all warranties and exclude the shipowner's duty to provide the ship which complies with her contractual description. In this sense, the wording of the description given as to performance of the ship needs close examination. At this point, the words which the charterer should approach cautiously and affect the existence of performance guarantee are 'without guarantee' - 'WOG' and 'All details about without guarantee' - 'ADA WOG'. The impact of these wordings will be discussed below in detail.

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[9] More details and critics as to performance related clauses of NYPE 2015 can be found in CERİT DİNDAR Ceren, "The Performance of the Chartered Ship: a Much Clearer Obligation under the NYPE 2015?", **JIML** 2017, Vol. 23, I. 6, p. 425-442.

1. The Impact of 'Without Guarantee' - 'WOG' on Performance Warranties

The term 'without guarantee' or the abbreviation 'WOG' is generally used in two different contexts under time charters. One is regarding to charter duration, the other is relating to performance of the ship. When the wording 'without guarantee' is added in the performance clause, this means that no contractual warranty exists at all and the description as to speed and bunker consumption of the ship is merely a representation[10]. However, it should be noted that there is an implied promise by the shipowner that representations regarding the ship's performance are made in good faith[11]. Therefore, the charterer may still bring a claim for underperformance of the ship relying on this implied promise. Details of the charterer's right in this regard are considered later in this paper.

2. The Impact of 'All details about without guarantee' - 'ADA WOG' on Performance Warranty

The other wording which excludes the shipowner's duty to provide the ship which complies with her contractual description can be the words 'All details about without guarantee' or the abbreviation 'ADAWOG'. Before mentioning about the effect of the 'ADAWOG' acronym on performance warranties, it is important first to note the unusual version of this wording which appeared in *The Lipa*[12]. In this case, clause 26 was a two page typed

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[10] When the term 'without guarantee' or the abbreviation 'WOG' is incorporated into the charter duration such as 'charter duration is 5 months 20 days without guarantee', this means that no contractual warranty exists at all as to the duration of the charter. Therefore, under a such a term, the charterer is not under an obligation to redeliver the vessel at the end of the duration. In this regard, see *Benship International Inc. v. Deemand Shipping Co. SA (The Lendoudis Evangelos II)* (unreported case 14 March 1988) Note of the case can be found in (1995) LMLN 408.

[11] *Jappy Freres v. Sutherland* (1921) 26 Com Cas 227; *Benship International Inc. v. Deemand Shipping Co. SA (The Lendoudis Evangelos II)* (unreported case 14 March 1988) Note of the case can be found in (1995) LMLN 408; *Continental Pacific Shipping Ltd. v. Deemand Shipping Co. Ltd.* (*Lendoudis Evangelos II*) [1997] 1 Lloyd's Rep. 404; *Losinjska Plovidba Brodarstovo DD v. Valfracht Maritime Co. Ltd. and Another* (*The Lipa*) [2001] 2 Lloyd's Rep. 17.

[12] *Losinjska Plovidba Brodarstovo DD v. Valfracht Maritime Co. Ltd. and Another* (*The Lipa*) [2001] 2 Lloyd's Rep. 17. For case comments, see MEASTER L. Charles, "A Suprising Interpretation of a Time Charter Contract: What Does "Without Guarentee" Mean?", 1 **Malabu Maritime L. Bull.** 2006-2007, p. 7-11; GRAINGER Stephen, "All details 'without guarantee'", **Maritime Risk International**, April 2005; BOOTH Liz (general edt.)"The language barrier", **Maritime Risk International**, March 2002.

general description clause which gave details about characteristics and capabilities of the ship such as name, flag and disponent owners of the ship, cargo capacity, details of her engine and speed and bunker consumption of the ship. A part of the clause that gave information as to speed and bunker consumption in *The Lipa* as follows:

> "*Speed/consumption in good weather/calm sea, wind not exceeding Beaufort scale 4, on even keel*
>
> *- about 11 knots on about 14 mt IFO (180 cst) + about 1.5 mt Gasoil.*
>
> *- about 12 knots on about 17.5 mt IFO (180 cst) + about 1.5 mt Gasoil*
>
> *- about 14 knots on about 21 mt IFO (180 cst) + about 1.5 mt Gasoil*
>
> *- about 16 knots on about 33 mt IFO (180 cst) + about 1.5 mt Gasoil*
>
> *In case carrying reefer containers Gasoil consumption increases to about 2.1 mt.*
>
> *Port consumption:*
>
> *- working about 2.4 mt Gasoil*
>
> *- idle about 1.5 mt Gasoil*
>
> *.....*
>
> *All details 'about' - all details given in good faith but without guarantee*"

Although clause 26 gave many details as to characteristics and capabilities of the ship, as it was emphasized in the quote given above, only the parameters given in the clause related to speed and consumption of the ship were qualified with the word 'about' and the clause ended with the following words "*All details 'about' - all details given in good faith but without guarantee*". In *The Lipa*, the main dispute was about the overconsumption of the vessel. The charterer claimed that the chartered vessel consumed more bunkers than the warranted, so that the shipowners were in breach of warranty given in the clause 26. As a respond to the charterer, the shipowners submitted that because of the concluding words of the clause (All details 'about' - all details given in good faith but without guarantee), no warranty was actually given as to the consumption of the vessel. 'Without guarantee' meant that no contractual warranty exists at all.

In the light of these claims, the main question arises in the case was whether the concluding words of the clause 26 would be applied to the description as to bunker consumption of the ship. In this case, three possible interpretations with regard to the concluding words of clause 26 were suggested.

The first was that these words were able to qualify all particular items of the ship stated in clause 26 so it should be accepted that there was no warranty in terms of any items in the two page typed general description clause[13]. In order to accept this interpretation as a true approach, the attention should be given how the words 'details' given at the end of the clause should be considered.

At the end of the clause, the contracting parties used the word 'details' two times once as "*all details 'about'*" and another as "*all details given in good faith but without guarantee*". This repetition should be taken into account when interpreting the clause. At this point, it is important to clarify whether or not repetition of the word 'details' refers to the same items of description. If they refer to the same things, then without guarantee does not have any effect on the descriptions which could not be properly qualified by the word 'about'. For example, one can read the information as to cargo capacity of the ship by adding the word 'about', but you can not read the ship's flag by qualifying this information by the word 'about'. In terms of this example, it can be said that there will be no warranty as to the cargo capacity of the ship but the warranty will exist in terms of the ship's flag. On the other hand, if repetition of the word 'details' does not refer to the same items of description, the expression "*all details given in good faith but without guarantee*" has the effect of converting all descriptions in two page typed general description clause to mere representations made in good faith.

As it is seen that repetition of the word 'details' brings about two different constructions. While determining which one overrides the other, there are indeed two points that need to be considered. The result of a particular construction is one of the considerations for the court in choosing between opposing constructions. If a particular construction causes an absurd and unreasonable result, the court should prefer the construction that

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[13] This interpretation has been suggested by Mr. Smith who appears for the shipowners in *The Lipa*. See *Losinjska Plovidba Brodarstovo DD v. Valfracht Maritime Co. Ltd. and Another* (*The Lipa*) [2001] 2 Lloyd's Rep. 17, p. 19, para. [12].

results in a reasonable rather than absurd outcome[14]. In this case, interpreting the repetition of 'details' as referring to the same items of the description is preferable because otherwise no warranty exists in terms of the two page description of the ship. Such a situation would be an absurd result and it is unlikely it is what the parties would have intended. Furthermore, there is a presumption of construction that the words which appear in the contract more than once should be given the same meaning in the case of ambiguity[15]. Although this presumption is not always reliable, it can be helpful here. Therefore, it could be said that the first suggested approach in *The Lipa* (the words at the end of the clause were able to qualify all particular items of the ship stated in clause 26 so it should be accepted that there was no warranty in terms of any items in the two page typed general description clause) is not a true approach to the particular wording.

The second suggested interpretation would go one step further. Use of the word 'details' twice in the clause was taken into account and it was suggested that concluding words of the clause could apply only to particular items of the ship which could properly be qualified by the words 'about', such as cargo capacity and bunker consumption[16]. Therefore, only in terms of those items, it could be accepted, the concluding words of the clause would be effective and should be accepted that no warranty at all. However, this interpretation missed the point that inverted comas were used with the word 'about' at the end of the clause. The court should take into account punctuation used during construction of the contract[17].

The third interpretation which was suggested by Smith J took into account the inverted comas and the fact that only the descriptions as to speed and bunker consumption were qualified by the word 'about' in the clause despite it being a two page description clause[18]. It was suggested that "*it is*

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[14] *Wickman Machine Tools Sales Ltd. v. Schuler AG* [1974] AC 235, p. 251; *Australian Broadcasting Commission v. Australian Performing Right Association Ltd.* (1973) 129 CLR 99, p.109-110.

[15] LEWISON Kim, **The Interpretation of Contracts**, 4th edn., Sweet & Maxwell, London, 2007, p. 244.

[16] This interpretation has also been suggested by Mr. Smith who appears for the shipowners in *The Lipa*. See *Losinjska Plovidba Brodarstovo DD v. Valfracht Maritime Co. Ltd. and Another* (*The Lipa*) [2001] 2 Lloyd's Rep. 17, p. 19, para. [13].

[17] **LEWISON**, p. 183.

[18] See *Losinjska Plovidba Brodarstovo DD v. Valfracht Maritime Co. Ltd. and Another (The Lipa)* [2001] 2 Lloyd's Rep. 17, p. 19, para. [14].

possible to interpret the words as providing that where particulars are specified to be 'about', that part of the description of the vessel is given in good faith but without guarantee..."[19] Following this interpretation, Smith J held that no warranty existed with regard to bunker consumption of the ship[20]. Indeed, he stated it was possible to reach the same conclusion relying on the other two interpretations. However, the writer is of the view that the first two interpretations do not reflect the intended meaning of the concluding words of the clause because of the deficiencies already mentioned above.

As a result of the preferred interpretation by Smith J in *The Lipa*, it can be said that if the bunker consumption of the ship had not been already specified to be 'about' in clause 26, the outcome of the case would have been different. The warranty in terms of the bunker consumption would have continued to exist and the shipowner would have been liable to the charterer for overconsumption. In future cases, it should be noted that if the general description clause includes an expression which is identical to the closing words, such as in clause 26 in *The Lipa*, the parties should be aware that only the particulars specified by the word 'about' in the clause will be affected by the expression and it will be accepted that this part of the ship's description is given in good faith but without guarantee. With regards to the other items, the warranty will continue to exist. Therefore, the contracting parties should prefer 'without guarantee' instead of wording like that used in *The Lipa*, especially if they want to exclude the warranty with regards to all described particulars of a chartered ship in the clause.

The wording in *The Lipa* is an unusual one. The main expression generally used in the description clause is 'All details about without guarantee', or as an acronym, 'ADAWOG'. The effect of this wording was considered in London Arbitration (2006) 686 Lloyds Maritime Law Newsletter (LMLN) 4. The clause that gives a rise to a problem as follows:

> "*SPEED/CONSUMPTION UP TO AND INCLUDED BEAUFORT SCALE 5: SERVICE SPEED LADEN 12.5 KTS ON 35 IFO 180 - PLUS 2 MT GAS OIL AT SEA SERVICE SPEED BLST 13 KTS ON 33 IFO 180 - PLUS 2MT*

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[19] *Losinjska Plovidba Brodarstovo DD v. Valfracht Maritime Co. Ltd. and Another (The Lipa)* [2001] 2 Lloyd's Rep. 17, p. 19, para. [14].

[20] See *Losinjska Plovidba Brodarstovo DD v. Valfracht Maritime Co. Ltd. and Another (The Lipa)* [2001] 2 Lloyd's Rep. 17, p. 21, paras. [23-24].

GAS OIL AT SEA DAILY CONSUMPTION: VSL IN PORT ABOUT 9 IFO + 2.5 GASOIL WHEN MANOUVERING ABOUT 4MTS MGO TO BE ADDED PER DAY BALLAST PUMP NO.1 ELECTRIC CAPACITY 2500 CU.M.HR AT 2 BAR AT 1180 RPM. ALL SPEED/CONSUMPTION BSS GOOD WEATHER AND SEA CONDITION UP TO BFT4/DGLS3 AND NO ADVERSE CURRENT A.D.A. WOG"

The charterer claimed that only descriptions, which were already specified to be 'about' in the clause, were affected by the statement 'ADAWOG', so that no warranty would exist only in terms of those descriptions. In other words, the charterer tried his luck by relying on Smith J's interpretation in *The Lipa* (quoted above). However, the tribunal rejected this argument and stated that there was no logic to limit the application just for descriptions which were already specified by the word 'about' in the clause and it was determined that existence of this wording at the end of the description clause had the effect of qualifying all statements prior to it[21]. According to the writer, in this particular dispute, it was correct to reject the charterer's interpretation regarding the 'ADAWOG' acronym. This is because the significant issue which leads to this kind of interpretation in *The Lipa* was the word 'about' with inverted commas and repeating the word 'details' two times in the clause, as was mentioned above. There was a two page clause that was drafted in detail and with caution. However, in the above mentioned arbitration case, the description clause was poorly drafted. Only descriptions as to consumption of the ship at port and consumption during manoeuvring was specified by the word 'about' and it was clear that use of the word 'about' with consumption figures was merely surplusage. There was no indication that the intention of the parties was to limit the application of 'ADAWOG' with descriptions that were already specified by the word 'about'. As a result, it can be said that once the contracting parties insert 'ADAWOG' at the end of the clause, the natural meaning of this acronym should be given unless there is a contrary indication (such as inverted comma) with regard to intention of the parties. The natural meaning of this acronym makes it necessary to apply it to all previous statements in the charter. Therefore, all statements given in the clause should be read as 'about' and as 'without guarantee'. It means that no warranty will exist in terms of any information given in that description clause. It is merely a representation given in good faith.

[21] London Arbitration (2006) 686 LMLN 4.

IV. BRINGING A CLAIM FOR DEFICIENT PERFORMANCE OF THE SHIP IN SPITE OF THE EXISTENCE OF THE WORDS 'WOG' OR 'ADAWOG' IN THE DESCRIPTION CLAUSE

As outlined above, the effect of 'WOG' or 'ADAWOG' on performance warranties is "*no guarantee, no warranty and no claim*"[22]. However, this is not necessarily the end of the story. There are still ways for the charterer to bring a claim for underperformance in spite of existence of the words 'WOG' or 'ADAWOG' in the description clause.

The first way is for the charterer to rely on the shipowner's bad faith. As has been briefly mentioned above, the shipowner is bound by the implied promise that representations are made in good faith under without guarantee provisions. Therefore, if the charterer can prove that representations related to performance of the ship are not given in good faith and the shipowner deliberately describes the features of the ship wrongly, the 'without guarantee' provision can be disregarded and the charterer can allege breach of the performance warranty. The test of good faith was considered in *The Lendoudis Evangelos II (No. 2)* and in which it was stated that genuine belief was enough to meet the good faith requirements and that there was no need that estimations were made on reasonable grounds[23]. This means that the test is subjective rather than objective. Therefore, in law, it will be difficult for the charterer to be able to prove the shipowner provided the description in bad faith. Although the standard of proof for serious allegations such as bad faith is normal civil standard of the balance of probabilities, the weight of evidence needed to establish the balance of probabilities should be stronger than other allegations[24]. In other words, the scales of the balance of probabilities may not be tipped easily when dealing with such serious allegations. Therefore, the court is unlikely to find bad faith on the part of the shipowner unless there is cogent evidence which satisfies the court that the shipowner had no genuine belief when describing

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22 GRAINGER Stephen, "All details 'without guarantee'", **Maritime Risk International**, 2005.

23 *Continental Pacific Shipping Ltd. v. Deemand Shipping Co. Ltd. (Lendoudis Evangelos II) (No. 2)* [1997] 1 Lloyd's Rep. 404, p. 406.

24 In this regard, it was submitted by Lord Nicholls in *Re H (Minors)* [1996] AC 563, p. 586 that "*more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability*". Also, see *Re Dellow's Will Trusts* [1964] 1 WLR 451, p. 455.

the performance warranty[25]. It is also difficult for the charterer to prove bad faith in practice because the charterer's task is to ascertain the shipowner's subjective state of mind. Since there is no direct window into the mind of the shipowner, finding evidence to show that the shipowner did not have a genuine belief when he described the performance warranty is not an easy task. The charterer may rely on performance of the ship under previous charters as evidence. If there is an exaggeration in the performance described by the shipowner in comparison with previous performance of the ship, it can be argued that there has been bad faith on the part of the shipowner.

Because of the evidential hurdle outlined above with regard to good faith, the shipowner's implied promise that representations are made in good faith does not usually have any benefit to the charterer in practice. The charterer is generally left without a remedy in the case of non-compliance of the ship to the described performance. Therefore, it can be said that qualifying the warranty by the word 'without guarantee' directly shifts all risk related to performance of the ship from the shipowner to the charterer and at this point the good faith requirement does not provide any useful protection to the charterer. Furthermore, since the only requirement is that representations are made in good faith, even if it is clear that the description as to speed and bunker consumptions of the ship are seriously wrong due to negligence of the shipowner (but made with genuine belief), the charterer does not have any right to bring a claim against the shipowner. This is even if it leads to serious financial consequences with regard to the charterer's expenses. For these reasons, in the writer's opinion, it would be desirable to extend the shipowner's implied promise under a 'without guarantee' provision and construe it in a manner that representations regarding the ship are made in good faith and on reasonable grounds[26]. This kind of approach would be more realistic from a commercial point of view. However, for now, this is not the way that the English courts deal with the matter.

Secondly, in spite of the existence of a 'WOG' provision, this provision may not have any effects on performance warranties and the charterer may still bring a claim for underperformance of the ship. This can be possible in

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[25] *Re Dellow's Will Trusts* [1964] 1 WLR 451, p. 455; *Red Bull GmbH v. Sun Mark Ltd.* [2012] EWHC 1929; *Burns v The Financial Conduct Authority* [2017] EWCA Civ 2140, para. [185].

[26] For more details about this suggestion see SHEPPARD Mandaraka Aleka, "What Obligation Does 'Without Guarantee' in a Charterparty Exclude?", **LMCLQ**, 1997, p. 359-362.

two different scenarios. Firstly, the charter may contain a general description clause (including parameters related to performance of the ship and other particulars of the ship) qualified by the word 'WOG' and also another clause which specifically refers to parameters as to performance of the ship but not contain a 'WOG' provision[27]. In this case, there is an inconsistency between general and specific provisions in the charter. This can be resolved by relying on one of the principles of constructions in that in the case of inconsistency between two clauses, greater weight is to be given to the specific clause[28]. Therefore, in this scenario, a 'WOG' provision in a general description must not be applied to the specific performance warranty, so that the warranty with regard to performance of the ship continues to exist. The second scenario is that the charter may contain a general description clause (including parameters related to performance of the ship and other particulars of the ship) with the 'WOG' provision and may also contain a specific clause which does not contain parameters as to performance of the ship but specifically deals with how the ship's performance is assessed[29]. In this second scenario, since parameters with regard to performance of the ship are only stated in a general description clause and the clause is qualified by the word 'WOG', it may be thought that there is no warranty with regard to performance of the ship. However, this is not the correct approach because this ignores the specific clause worded by the contracting parties. One of the important rules of the construction is that the clause must not be considered in isolation. In order to realise the true construction with regard to a particular clause, the clause should be considered in the context of the whole document[30]. Therefore, when construing the general description clause, the court should not confine itself to the 'WOG' provision in the clause and should collect the intention of the parties from whole contract. At this point, a specific clause that deals with how performance of the ship is assessed has a significant role. Existence of this specific clause is an indication of the intention of the parties and that a warranty with regard to performance of the ship continues to exist. It is true that there is an inconsistency while one clause says there is no warranty with regard to

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27 **GRAINGER**, 2005.

28 **LEWISON**, p. 253.

29 **GRAINGER**, 2005.

30 *Miller v. Borner* [1900] 1 QB 691; *Chamber Colliery Ltd. v. Twyerould* [1915] 1 Ch. 268; *SA Maritime Commerciale of Geneva v. Anglo-Iranian Oil Co. Ltd.* [1954] 1 WLR 492; *Nereide SpA di Navigazione v. Bulk Oil International Ltd. (The Laura Prima)* [1982] 1 Lloyd's Rep. 1.

performance of the ship and the other deals with how performance of the ship is assessed. However, this inconsistency can be resolved again by relying on the presumption of construction that greater weight is to be given to the specific clause. In addition, where possible, the primary aim of the court should be to reconcile both clauses instead of ignoring one of them[31]. These two clauses can be read together so that the 'WOG' provision applies to other descriptions of the ship in the general description clause but the warranty with regard to performance of the ship continues to exist. To date, no case involving such a scenario has appeared before a court or tribunal.

Lastly, when the charter does not contain any contractual warranty as to performance of the ship because of existence of the 'WOG' or 'ADAWOG' provision, the charterer can alternatively try to bring a claim for underperformance of the ship based on breach of other clauses in the time charter such as due despatch clauses and maintenance clauses. The charterer may also be able to rely on an off-hire clause if the charter contains specific off-hire provisions which allow the charterer to make a deduction from hire in the case of poor performance of the ship[32].

V. CONCLUSION

In the light of the analysis carried out above, it is clear that incorporating WOG and ADAWOG provision into the description as to speed and bunker consumption of the ship might have a dramatic effect and the definition can lose their warranty status. Therefore, the charterer should approach cautiously to these wordings. However, it should be noted adding the 'WOG' or 'ADA WOG' provision in the description clause may not always be the end of the story. Thus, the shipowner should not be complacent once they convince the charterer to add these acronyms in the description clause. The charterer may still bring a claim against the shipowner for underperformance although this will be quite challenging for him. If the charterer does not want to face this challenge and to put himself at risk regarding performance of the ship, the first thing the charterer should do is to avoid these acronyms in performance warranties.

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31 *Pagnan SpA v. Tradax Ocean Transportation SA* [1987] 1 All ER 81; *Chiswell Shipping Ltd. v. National Iranian Tanker Co, The World Symphony and World Renown* [1992] 2 Lloyd's Rep. 115.

32 See clause 15 of NYPE 1946, clause 17 of NYPE 1993, clause 17 of NYPE 2015 and clause 21/b of Shelltime 4.

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London Arbitration (2006) 686 Lloyds Maritime Law Newsletter (LMLN) 4.

CHARTER FORMS

NYPE 1946

NYPE 1993

NYPE 2015

Baltime

BPTime 3

Shelltime 4