Mediation

‘WITHOUT GUARANTEE’

- The legal issues

Imagine that you ask your wife if she would mind buying a bottle of Chardonnay when visiting the supermarket that afternoon. If she replies that she will try to bring a bottle home, but ‘without guarantee’, what does that mean?

To most of us it would probably mean that the intention is to bring a bottle home, but that for a variety of reasons it might not happen. She might forget, the queue might be too long, or her estimate of the duration of the trip would be simply to have a genuine belief in the correctness of his estimate at the time it was made. It was not held necessary for the charterer to have reasonable grounds for believing that his estimate was accurate.

In the example given above, the anticipated duration of the charter was under 40 days without guarantee. The requirement then was simply to have a genuine belief in the correctness of the estimate made. It was not held necessary for the charterer to have reasonable grounds for believing that his estimate was accurate.

The words are most often used in two distinct contexts, one concerning duration (e.g. ‘charterparty to last 40/45 days without guarantee’), the other concerning performance (e.g. ‘vessel will make 13 knots in good weather, without guarantee’). The purpose of this article is to provide a brief summary of existing English case law and, hopefully, to clarify the meaning of the phrase in both contexts.

Duration

Clearly when a vessel is fixed on a time charter, there is a date fixed by which the charterers must redeliver the vessel to the owners, unless there is a provision in the charterparty to the contrary or to extend the duration of the charter.

The charterer must give reasonable notice and without guarantee their estimate of the duration of the trip.

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Mediation

Mediation is not a new concept. In the US, mediation is a key feature of the dispute resolution process. In Commercial Court actions it is quite common to make in good weather, merely ‘to make in good weather’, the other concerning performance (e.g. ‘vessel will make 13 knots in good weather, without guarantee’). The purpose of this article is to provide a brief summary of existing English case law and, hopefully, to clarify the meaning of the phrase in both contexts.

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In order to invoke ADR there are no formal procedures. The parties simply need to have a clause in the governing contract which provides for some form of ADR, or alternatively the parties can agree to ADR on an ad hoc basis.

CEDR, the Centre for Effective Dispute Resolution, is a body established to promote ADR and mediation and has drafted model clauses for incorporation into contracts in order to assist parties in their ADR. CEDR also oversees mediations and has a model mediation procedure for parties to follow. However, in a non-CEDR (or other mediation body such as ICC) mediation, it is essentially the parties who agree upon a procedure for the mediation. It is a ‘without prejudice’ process and therefore matters disclosed in mediation do not disadvantage a party within the legal process.

Once the process has been agreed by the parties, it is usual for a formal mediation agreement dealing with the procedures to be drawn up and signed between the parties and the mediator.

A typical agreement will include:
(a) The time and place for the mediation.
(b) A provision requiring the representatives of the parties who attend any mediation to have the authority to settle the dispute.
(c) A provision addressing the exchange of case summaries – usually limited in length, and possibly a provision that the parties must produce an agreed statement of facts.
(d) A provision for an agreed bundle of documents – again limited to pleadings, statements, expert reports.
(e) A provision that the settlement is not binding until the settlement agreement has been signed.
(f) A provision regarding confidentiality and the agreement that documents or oral statements relied upon in the mediation will be inadmissible in any subsequent proceedings.

Why mediate?

Mediation can be suitable when all the parties want to settle the dispute, but direct negotiations have reached a deadlock. In addition, mediation can preserve a business relationship which may be irreparably damaged by litigation. One of the key elements to the preservation of the relationship is the confidentiality of mediation and if the dispute involves sensitive issues which may affect reputation or attract other claims or regulators or even media attention, then mediation may offer some form of protection from adverse publicity.

Mediation can also be used to obtain a form of commercial settlement that otherwise may not be attainable in the courts or in arbitration. For example, if a contract has broken down, but the parties wish to continue business mediation can assist in re-negotiation of terms.

The net result of these two cases is that the position in English law can be summarised as follows: Where a charterparty incorporates the words ‘without guarantee’, as applied to duration of the hire, owners will succeed in an action either for early redelivery or late redelivery only if they can prove that the hire was una void, or bad faith, on the part of the charterer at the time the estimate was given. This burden of proof is difficult in law (because the standard of proof is a high one), as well as in practice (because of the practical difficulties in uncovering evidence to prove to the satisfaction of the court that the charterer had no genuine belief in the representation made).

Performance

It is commonplace in time charters to find phrases such as ‘vessel capable of steering at about XX knots under good weather conditions on a consumption of about XX tons MDO and XX tons IFO, etc.’

In the recent case of The Lipa [2001] 2 Lloyd’s Rep 17, the Commercial Court was asked to determine an appeal from an arbitration hearing in which the Tribunal had been asked to decide upon a charterparty which, for the purposes of consumption, incorporated a typed clause stating ‘all details given in good faith but without guarantee’. The Tribunal had held that the effect of the words was to lessen, but not to remove completely, the obligation upon owners to meet the consumption provisions in the charterparty. This finding was overturned in the Commercial Court, in a judgement that appears to accord with the reasoning of the cases on duration referred to above. The court explicitly held that “if a provision in the charterparty is qualified by the words ‘without guarantee’ the provision is not a warranty’. As such, the incorporation of these words means that a charterer will have no basis for bringing an action alleging underperformance unless that charterer can prove that the owners made the representation as to vessel performance knowing them to be false. The legal and practical difficulties of establishing this are the same as for duration, but this time these difficulties work to the advantage of the owners rather than the charterers.

Pass the Chardonnay, I need a drink!