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Speed and Consumption Claims

(Part II)

Mapping London Maritime Arbitration Awards (1980-2020)

"Speed and Consumptions were, generally speaking, pretty routine and were matters with which arbitrators had considerable familiarity". (London Arbitration, 1997)

Speed and Consumption claims are usually of relatively low value and most of these cases are resolved either amicably or by arbitration. Only a few cases reach the Courts by way of appeal or application from the arbitration.

Therefore, the parties rely on the numerous awards that have been published in the past years:

(i) when drafting or negotiating a performance clause before finalizing the fixture;
(ii) when attempting to reach an amicable settlement of their dispute;
(iii) when submitting their claim to arbitration or following an alternative dispute resolution process.

The below graph or 'map' provides a quick view of most of the awards issued by London Tribunals and published in LMLN for the period 1980 to 2020. Further, it illustrates that 'speed and consumption claims' regularly involve a plethora of factual and legal issues; as briefly stated in the previous article 'Speed and Consumption Claims (Part I): A practical perspective'.

For easy reference, the awards have been categorized on the basis of issues discussed or determined by the tribunal; and on how often the issue is raised in practice. In particular, the 'map' includes the below categories:

The dispute (the starting point)

- No 'good weather' and the 'near good weather' conditions were considered to establish breach or loss; whether the warranty was a continuing warranty e.g. "throughout the duration of this charter" or "during the currency of this charter"; whether the loss is '*de minimis'* and merits no consideration; and whether the qualified words without guarantee 'WOG' in the speed and consumption figures negate any contractual warranty- this bars a contractual claim for breach of warranty.

Interpretation or Construction

- A high proportion of speed and consumption disputes involve issues of interpretation. Where this is the issue, views may differ about the interpretation of contractual terms. It appears that however hard those who negotiate the relevant terms may try, for different reasons understood by different parties, there will be cases that the parties used vague or inconsistent terms to express their agreement or poor drafting (words or syntax, etc.).

  The below decisions from London Tribunals, randomly grouped in three parts, illustrate some key issues involved during the last decades:

- *Interpretation or Construction Part A*-

- Arb 6/19 (typographical error, contradicting terms in clause, surplusage); Arb 12/14(advance current was a misprint of 'adverse'); Arb 9/18 (use of disjunctive "or" in the clause was considered); Arb 17/99 (reconcile main body with riders, deletions and amendments were discussed); Arb 15/05 (proforma and recap terms were read together to define the benchmark conditions); Arb 4/11(the language used was not ideal to support that the deficiency applies only to certain periods- words appearing else in the clause were considered).

- *Interpretation or Construction Part B-*

- Arb 16/13 (whether good weather qualifications in the proforma were expressly incorporated, implication of 'good weather' qualification was considered); Arb 21/18 (whether the words 'A tolerance' import or not a 'double about', interpretation of words used in the clause); Arb 13/92 (the *contra proferentem* rule of construction applied against the Charterers, terms in the main body were read together with terms in the proforma, whether 'about' implied by viewing the other charter terms, whether the Charterers' ordered speed of 14 knots was warranted, implication of terms was considered); Arb 26/19 (implication of ' no adverse swell' instead of ' no swell' was considered); Arb 15/07 (the implication of 'positive currents' as part of the warranty was rejected)

- *Interpretation or Construction Part C-*

- Arb 21/18 (the implication of 'positive current' factor to apply was rejected, *contra proferentem rule* considered); Arb 15/06 (rectification, the words 'fully laden' were ignored); Arb 9/07(questionnaire considered, *contra proferentem rule applied*); Arb 17/80 (meaning of 'or'/ 'and' in clause, implication was rejected); Arb 5/06 (description provision was not carefully drafted, inconsistent use of terms and syntax); Arb 8/86 (meaning of about max daily consumption- i.e. is it about or max?); Arb 13/97 (clauses 71 & 79 were considered together- whether 'continuous warranty' applies, average speed does not include 'about'), etc.

Whether to imply a positive current factor: endless debate?

- In many cases, the tribunals rejected that a 'positive current factor' was part of the performance warranty by implication (See Arb 15/07; Arb 21/18 as followed in Arb 27/19, etc.). While some tribunals accepted the implication since the express warranty was one of capability (See Arb 4/94; and Arb 4/12- the latter not followed in Arb 21/18). And other tribunals rejected the application of currents, due to: (i) the imprecise calculation of it (See Arb 20/07, etc.); (ii) the express wording of the clause 'Owners to have the benefit of positive currents' (See Arb 22/18); and (iii) the calculated loss was not an 'actual loss' or 'net loss' to award damages when the ship actually performed.
- However, it is often the case that the Owners, the Charterers and the weather routing companies disagree on the adopted methodology that takes into account a positive current factor in evaluating the vessel's performance. Some maintain that, absent binding precedent, positive currents can be considered in subsequent arbitration decisions.
- Since there is no binding precedent on this issue, the parties' dispute often centers on the settled principles by which contracts are to be construed; or emphasizing different aspects of those principles –sometimes referring to the concepts of reasonableness and fairness, or invoking commercial common sense, to justify the implication; thus conflating the distinct principles. This matter will be analyzed no further in this article.

Set -off against hire & Net loss

- Among the issues considered were: whether there is a right of deduction from hire (express right or otherwise) or the clause provided a bar to any deduction-deductions on reasonable grounds and in good faith considered; whether to set-off the time loss claim against the bunker under-consumption (or *vice versa*) in a damages claim; and time bar & Hague Rules defences.

Evidence

- The issues were identified as: whether the weather routing company('WRC') is 'independent'; disclosure of relevant documents to the claim; contrasted reports on methodology or data; whether the logs or the WRC reports to prevail (the usual debate); and whether the WRC reports are binding or ruling (methodology vs analyzed data considered). The arbitration decision 21/18 considers the issue of establishing a claim basis a report from a non-agreed WRC - a point earlier stated in Part I 'Speed and Consumption Claims: A practical perspective'.

Weather criteria

- The issues were as follows: the meaning and application of the 'good weather criteria'; whether a weather factor to apply in the performance assessment; and the meaning and application of DSS3 – sometimes contractually expressed in relation to the significant wave height or the combined sea and swell wave, or any other similar wording. The Arb 6/19 discusses the matter of reconciling DSS3 and the significant wave height.

Current factor

- The issues were: whether implied the positive currents to be considered as to establish breach or loss; the meaning and effect of the adverse currents or 'negative influence of currents' considered; and whether the calculation of currents remains an imprecise science or not. Whether the currents are part of the 'weather conditions' as warranted in the charter party.

Methodology

- The issues were as follows: the proper assessment of liability and loss (The two- stages approach basis *The Didymi, The Gas Enterprise* as referred recently in *The Ocean Virgo*); the meaning of 'about' (or no double about or one about or no about - absolute figures, application of *de minimis*- how strictly to comply?) in the speed and consumption clause; meaning and application of average speed; proper distance steamed basis the masters' reports or the WRC' analyzed positions; and steaming in restricted areas (is it always excluded?).

Weather routing companies

- Some awards discuss whether or not the weather routing companies adopt a methodology that is compliant with the English authorities or the parties' agreement; or apply a methodology being not supported by authority, e.g. The London Arbitration 26/19 stresses that:

> *Closer attention needed to be paid to warranty conditions if weather routing organisations' reports were to be accepted at face value in London arbitration ...*
>
> *There was no doubt that the weather bureau paid lip service to the English authorities in assessing vessel performance ...*

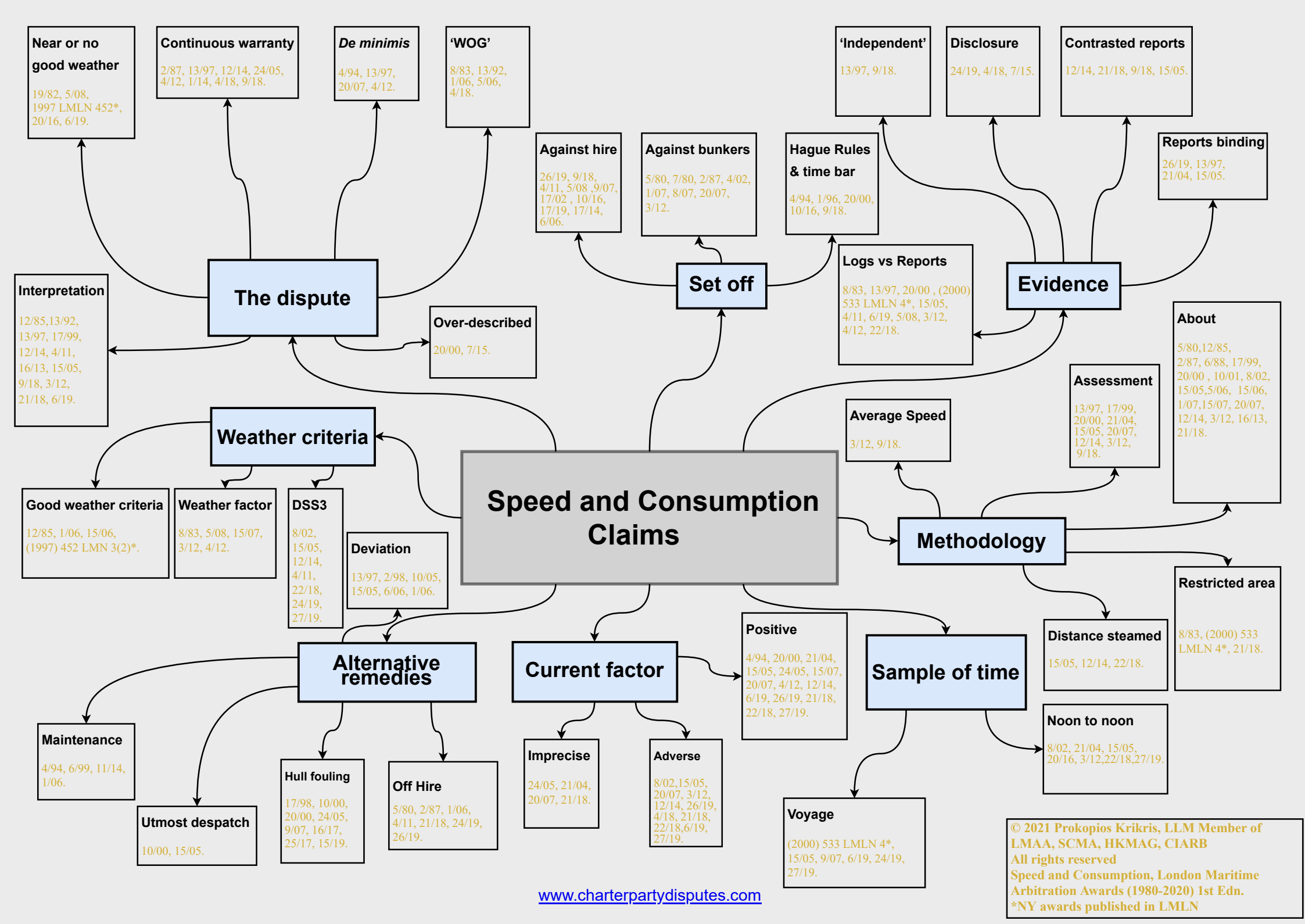
Sample of time

- The issues were: the proper sample of good weather periods to establish a claim: a) between consecutive noon positions; and b) for entire voyage. See also *The Ocean Virgo* (2015). In practice, sometimes, the wording of the clause is different from that considered in *The Ocean Virgo*, which again raises issues of contract interpretation.

Alternative remedies -separate breaches of contract

- The common issues considered (indirectly in some cases) and decided were: maintenance obligations- engine or technical issues affecting the vessel's performance; whether the master complied with his obligation to perform the voyage with utmost despatch; whether deviation (including minor diversion) caused extra time lost and extra bunkers consumed (these decisions were considered in my previous article: Prokopios Krikris, 'How do you calculate loss following a 'triangle form' deviation?'[1] *Maritime Risk International*, August 2021); hull fouling –factual and legal burden to prove liability and loss- even under concurrent causes; and whether there is contractual basis to bring an off- hire claim- the evidence considered and, in most cases, the Charterers had failed to discharge their burden of proof.

[1] https://charterpartydisputes.com/how-do-you-calculate-loss-following-a-triangle-form-deviation/


Speed and Consumption Claims
The dispute
Near or no good weather
19/82, 5/08, 1997 LMLN 452*, 20/16, 6/19.
Continuous warranty
2/87, 13/97, 12/14, 24/05, 4/12, 1/14, 4/18, 9/18.
De minimis
4/94, 13/97, 20/07, 4/12.
'WOG'
8/83, 13/92, 1/06, 5/06, 4/18.
Interpretation
12/85,13/92, 13/97, 17/99, 12/14, 4/11, 16/13, 15/05, 9/18, 3/12, 21/18, 6/19.
Over-described
20/00, 7/15.
Set off
Against hire
26/19, 9/18, 4/11, 5/08 ,9/07, 17/02 , 10/16, 17/19, 17/14, 6/06.
Against bunkers
5/80, 7/80, 2/87, 4/02, 1/07, 8/07, 20/07, 3/12.
Hague Rules & time bar
4/94, 1/96, 20/00, 10/16, 9/18.
Evidence
'Independent'
13/97, 9/18.
Disclosure
24/19, 4/18, 7/15.
Contrasted reports
12/14, 21/18, 9/18, 15/05.
Reports binding
26/19, 13/97, 21/04, 15/05.
Logs vs Reports
8/83, 13/97, 20/00 , (2000) 533 LMLN 4*, 15/05, 4/11, 6/19, 5/08, 3/12, 4/12, 22/18.
Weather criteria
Good weather criteria
12/85, 1/06, 15/06, (1997) 452 LMN 3(2)*.
Weather factor
8/83, 5/08, 15/07, 3/12, 4/12.
DSS3
8/02, 15/05, 12/14, 4/11, 22/18, 24/19, 27/19.
Deviation
13/97, 2/98, 10/05, 15/05, 6/06, 1/06.
Methodology
Average Speed
3/12, 9/18.
Assessment
13/97, 17/99, 20/00, 21/04, 15/05, 20/07, 12/14, 3/12, 9/18.
About
5/80,12/85, 2/87, 6/88, 17/99, 20/00 , 10/01, 8/02, 15/05,5/06, 15/06, 1/07,15/07, 20/07, 12/14, 3/12, 16/13, 21/18.
Restricted area
8/83, (2000) 533 LMLN 4*, 21/18.
Distance steamed
15/05, 12/14, 22/18.
Alternative remedies
Maintenance
4/94, 6/99, 11/14, 1/06.
Utmost despatch
10/00, 15/05.
Hull fouling
17/98, 10/00, 20/00, 24/05, 9/07, 16/17, 25/17, 15/19.
Off Hire
5/80, 2/87, 1/06, 4/11, 21/18, 24/19, 26/19.
Current factor
Imprecise
24/05, 21/04, 20/07, 21/18.
Adverse
8/02,15/05, 20/07, 3/12, 12/14, 26/19, 4/18, 21/18, 22/18,6/19, 27/19.
Positive
4/94, 20/00, 21/04, 15/05, 24/05, 15/07, 20/07, 4/12, 12/14, 6/19, 26/19, 21/18, 22/18, 27/19.
Sample of time
Noon to noon
8/02, 21/04, 15/05, 20/16, 3/12,22/18,27/19.
Voyage
(2000) 533 LMLN 4*, 15/05, 9/07, 6/19, 24/19, 27/19.
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