

PRACTICAL NOTES ON SPEED AND PERFORMANCE CLAIMS

Prepared for

Prime Navigation Shipping and Services

Prokopios Krikris

www.charterpartydisputes.com

Topics examined during presentation

- Chartering issues- drafting clauses and interpretation; brokers vs lawyers view. Common drafting mistakes; some practical tips.
- Operational issues- ways to mitigate the effects of a “bad term”. From the owners and charterers’ perspective.
- Claims handling- ways to reduce or pursue claims. From the owners and charterers’ perspective.
- Negotiation- how to keep costs low; some practical tips.
- Arbitration- procedural issues based on recent awards.
- WRC’s role in dealing with performance claims; “respect party autonomy”.
- Recent LMAA Awards and Case law (*The Ocean Virgo*, *The Divinegate*).
- Other claims related to vessel’s underperformance: bunker quantity-quality issues, deviation & put back, hull fouling, off hires, maintenance, etc.
- Recent papers on speed claims as presented at ICMA, Dubai, Nov. 2023
- Questions and Answers-
- *Presentation place/ date: PNS offices in Greece / 24.11.2023.*

About me...

- The beginning of my career journey....why shipping?
- Commercial background(non-lawyer), working for Owners and Charterers in various departments: chartering, technical, operations manager (tankers), post fixtures- claims manager(bulk carriers). Later embarked on maritime law and arbitration studies with practical application in handling different types of charter-party disputes.
- Attended vessel's damage repairs in Nigeria (collision, grounding, explosion in pumproom, drydock, etc.), vessel operations during STS or alongside at berth, and cargo holds' cleaning in Rotterdam as a member of a mobile cleaning gang.
- Fellow of the Chartered Institute of Arbitrators (FCIArb), LMAA Supp. Member and a member of the Baltic Expert Witness Association(BEWA). I hold two Masters in maritime studies (MSc) and in maritime law (LLM), a PGc in legal principles (as part of LLM in Dispute Resolution) and a Dip. in Maritime Arbitration (CIArb).
- I can act as evaluator or arbitrator under the LMAA Terms.

Performance claims- introduction

“..time charters generally contain speed and consumption warranties ... Those warranties almost **invariably specify the weather conditions** in which the promised performance will be achieved ...While an owner operating on the spot market is not really concerned with differences in consumption in different weather conditions (because these costs are for its account regardless), **this is a significant issue when a vessel is time chartered because of the qualified terms in which the speed and consumption warranties are given**” - Foxton J, 2020 (The “C Challenger”)

“Where these disputes arise they commonly raise questions of **law, fact and practice**.... The approach adopted in the authorities reflects **commercial practice** in assessing performance and **the specific wording chosen by the parties**, rather than the court imposing legal methodologies” -Clare Ambrose, 2022 (The “Divinegate”).

“Speed and performance claims are dealt with by **experts** with engineering and meteorological expertise **examining** the vessel’s engine logs and deck logs and obtaining **independent** weather information” -Cooke J, 2007 (The “Elli” and The “Frixos”)

Drafting performance clauses

*“Businessmen sometimes make bad or poor bargains for a number of different reasons such as a **weak negotiating position, poor negotiating or drafting skills, inadequate advice or inadvertence**”- (Christopher Clarke LJ, 2015)*

Problems of construction or interpretation commonly arise. Put the above in context:

- ❑ “Weak negotiating position” (chartering brokers): market conditions affect negotiating balances (good vs bad freight market), proposed amendments to clauses: requests for clarifications; put it as a comment in the F/Recap for clarity. Omissions on working CP remain in subsequent fixtures; important clauses were overlooked and require revision.
- ❑ “Poor negotiating or drafting skills”: chartering brokers vs lawyers; a “meeting of minds”? Brokers are not “pedantic lawyers” that will subject the contract to a minute textual analysis
- ❑ “Inadequate advice”: performance clauses drafted by lawyers or P&I Clubs will not be always accepted during chartering negotiations. **Last moment amendments** may be required, direct discussion among brokers or group of people, as biz will fall apart. That may change the meaning of the clause, viewed in its context.
- ❑ Readers may understand the language used differently: “The way in which language strikes a reader is an accumulation of experience of how language is ordinarily used”(Nugee LJ, 2023).

Negotiating performance claims

Costs' management is important. Costs can become disproportionate to the claimed amount. How can the parties reduce costs?

- ✓ Back to back claims in the charter-party chain? **Not always possible.**
- ✓ Parties discussing the issue directly can avoid considerable costs and unnecessary delay in resolving the dispute. When a party is not responding?
- ✓ Value its business relations established between the parties.
- ✓ Role of Barristers, Counsels, external lawyers in obtaining legal advice for settlement purposes. **How can an “expensive advice” pay off?**
- ✓ The P&I Clubs approach (mitigate: Evaluation/ Mediation/ KC Advice) **vs** in-house FDD (litigate).
- ✓ Expert opinion(mariners, engineers)- **potential limitations** (increased costs for small claims, short input vs full report, challenging the report). It is not the role of the expert to argue the case but assist the tribunal in its decision-making process.
- ✓ How Weather Routing Companies are dealing with claims? **A one-size-fits- all approach is not claims handling.** Contract should be viewed as a whole.

Alternative options

- ✓ Early Neutral Evaluation (ENE).
- ✓ Mediation.

Arbitrating performance claims

Performance disputes under charterparties would more commonly be subject to arbitration.. (Clare Ambrose, 2022)

- When settlement negotiations fail, the parties' preferred option remains English law/ Arbitration in London with LMAA Terms to apply.
- Arbitration is in the nature of a judicial adjudication.
- Arbitrators are giving effect to the parties' contract in accordance with substantive and procedural legal principles.
- There must be an agreement; arbitration is a consensual process.
- Appointing an arbitrator: LMAA Members come from many backgrounds, which one to chose? (lawyer, mariner/ engineer , commercial);
- Appointments by default.
- Arbitrator is not representative of the appointing party. Arbitrators should remain impartial and strictly adhere to **their 'cardinal duty' enshrined within section 33 of AA 1996.**
- Settlement during proceedings; only about 15-20% come to an award.
- Small Claims Procedure (SCP) or vary the procedure (See Arb 23/21).
- Costs in arbitration.

Arbitrators' reasoning process

Dividing the process into three stages:

- (1) Arbitrator ascertains the facts; findings of fact in dispute.
- (2) The arbitrator ascertains the law.
- (3) Arbitrator reaches decision on the facts and the law.

As it was said, "In some cases, stage (3) will be purely mechanical. Once the law is correctly ascertained, the decision follows inevitably from the application of it to the facts found. In other instances, however, stage (3) involves an element of judgment on the part of the arbitrator".

Fact-finding tribunal

- Fact-finding is a multi-factorial process. Evaluating evidence is an essentially impressionistic exercise; arbitrators may differ. That is an ordinary incident of the arbitral process: arbitrators are not automatons or clones.
- A key role of the arbitrator is to ascertain the facts before making a finding. Findings of fact must be based on evidence; not speculation or guessing. Tribunals will determine the case before it and not wander outside into realms of speculation.
- There must also be a factual basis for making inferences; either the facts justifying such inference exist or not.
- A mere intuitive hunch is insufficient without facts being found to support a conclusion.

Burden of proof

“[a]rbitrators will no doubt strive to make positive findings on the balance of probabilities *rather than giving up the task and determining material issues only on burden of proof...*”(Colman J, 2002)

- When the evidence has concluded, the scales will be tipped in one direction or another or end up evenly balanced (which is rare).
- If the evidence before the tribunal leaves it in considerable doubt as to one case or the other, the tribunal is not bound to make a finding one way or the other with regard to the facts alleged by the parties.
- When the parties suggest improbable causes, it is not open to the tribunal to decide that the least improbable or least unlikely is the cause. However, **tribunals cannot simply sit on the fence**: they must decide.
- So in exceptional situations, the tribunals would determine a disputed issue by falling back on the burden of proof; a form of default rule under the substantive law.

Continued...

- The burden of proving a fact rests on the person who asserts it.
- Care must be taken to not, inadvertently, reverse the burden of proof; It does not, by the mere assertion, put the innocent party under an obligation to provide evidence to rebut it.
- The party does not bear the burden of proof before any evidence is called (e.g. mere allegations of hull fouling or technical issues).
- Resolving conflicts of evidence: two WRC reports (*Arb 15/23*) or two expert reports (*The Divinegate*) or Deck logs vs WRC reports(see later)
- Specialist tribunals dealing with the technical aspects of such disputes may make different findings or draw inferences (See Arb 23/21, 15/23 re slip/ fouling). The parties “take the risk that, in spite of that expertise, errors of fact may be made or invalid inferences drawn without prior warning” (Colman J, 2002).

Arbitral Precedent ?

- The LMAA website states:
Arbitrators will sometimes have other awards referred to them, but such awards are not precedents and no tribunal is bound to follow the views of another tribunal, even in the rare example of an identical case. However, appropriate consideration and respect is shown to awards on similar points, whether they are from arbitrators in London or in some other centre.
- The arbitral tribunal shall decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute (Section 46, AA 1996).
- For speed and performance claims, the parties refer to the published summaries in their submissions in arbitration. Recent published decisions corroborate that there is a pull of consistency on interpretation issues.
- *Arb 29/22*, an award from a panel of three arbitrators can be more persuasive.
- *The Divinegate* at [101] reflects an “..example of arbitral practice influencing the Court’s approach to the development of maritime law” (D. Semark, ICMA 2023, p. 15).
- Decisions based solely on the factual context can be distinguished- see decisions about the deck logs.

The arbitral proceedings

- Most recent arbitrations failed on arbitral procedural issues. Why?
- Deductions from Hire- Kostas Melas type applications (discretionary- SCP- costs and delay; ss 33 & 47 AA 1996) **Case study- Arb 1/22.**
- Procedural non-compliance, security for costs- Section 41(sanctions) read with s 33 AA 1996; **Case study: Arb 2/22, peremptory order.**
- Arbitrators' jurisdiction(s 30 AA 1996) **Case study: Arb 9/23**(pre-conditions to arbitrate, upheld their bargain vs *potential* strong reasons not to - examples).
- Specialist arbitrator (master mariner, engineer)- **Arb 23/21, Arb 15/23.**
- Costs for exposing flawed methodology. In the circumstances, the tribunal departed from the general principle that costs should follow the event, per s 61, AA 1996 - see **Arb 23/21 & 29/22** (incongruous performance claims).

The starting point: is there a warranty?

- Without guarantee (WOG) performance description.
- “No contractual warranties are given” (*unpublished-settlement during proceedings- request for disclosure was rejected; “bad faith”- a serious allegation*).
- “In good faith” qualification- Arb 1/22.
- Continuous warranty? Arb 23/21 & 29/22.
- Subject to “no deck cargo”.
- “Suspended” warranties (hull fouling clause)- evidential difficulties may arise.
- Fuel specifications (Arb 6/21); off spec bunkers supplied- evidential difficulties may arise.
- Other voyage instructions different from the CP description “alter RPM” or based on maximum consumption [X] per ton, etc.
- London Arbitration 29/22: “Charterers accept that vessel’s speed/consumption will not be guaranteed while the ship will be following Charterers’ slow steaming instructions ...”
- Charterers’ voyage orders to be checked, as in some instances no claim can be formed.

Stage 1- Identifying the breach

- *The Didymi; The Gas Enterprise (not fit for purpose?- B. Williamson, Part IV, at ICMA 2023).*
- In some cases, tribunals required to resolve issues of construction or interpretation before turning to their fact-finding exercise; Arb 32/22 & 23/21. The starting point was to determine the parties' bargain (the contractual yardstick).
- Arbitrators strive to hold contracting parties to their bargain (respect party autonomy) not remake-improve-rewrite their bargain, **but** sometimes there are challenges (see Arb 9/23- relaxed draftsmanship; Arb 23/21- "no swell" = "no adverse swell").
- The role of the WRC: by applying standard methodologies in the market ("one-size-fits-all"), then one does not examine first the words and phrases under consideration **but starts dictating to the parties what their bargain should be**; this is contrary to the principles of English common law on this subject (respect party autonomy).

The good weather criteria

- BF 4- Uncontroversial
- DSS 3- Separate wind wave and swell wave (not SWH).
- No adverse current (**is it uncontroversial?**)
 - i. The *Divinegate* “time spent sailing with adverse currents was not to be treated as good weather.. (net currents?);
 - ii. Vessel’s slip indicates adverse currents in moderate weather (Arb 29/22);
 - iii. 24 hours or “day” or “noon to noon”? –whether to exclude entire day given adverse weather or currents in sub-periods? (Arb 32/22);
 - iv. Experts acknowledged (not surprisingly) in *The Divinegate the industry* debate on assessing currents;
 - v. Arb 29/22 (apply current factor to compensate for adverse currents e.g. 12 knots + (-0.2)= 12.2 good weather speed; wrong methodology).
- Positive currents- this is now settled “*unless otherwise agreed by the parties*”, positive currents are not to be applied in calculating the remedy.

Continued..

- No swell- “no adverse swell” (2 meters height)- Arb 23/21.
- No negative influence of swell (uncontroversial)- Arb 29/22
- Even keel (Arb 23/21); in deep water; water temperature, clean bottom (B. Williamson, Part IV, ICMA 2023, Page 3). Sometimes the Non-environmental elements are ignored. An Over-simplified approach? Or a “one-size-fits-all” methodology? Report will not be final and binding.
- Sample of good weather between two consecutive reports; 12 hours/ 24 hours (Arb 32/22 “day”) or something different (The Ocean Virgo)?
- Sample of good weather on the voyage (a sampling exercise). *The Ocean Virgo* (5.3% was not sufficient) vs *The Divinegate* (5.8% was sufficient). Judge considered expert evidence (*The Divinegate*). Specialist arbitrator (*The Ocean Virgo*). Courts are slow to disturb findings of fact from tribunals.
- An “exclusion clause” or a “restrictive warranty”? (B. Williamson, Part IV, ICMA 2023, Page 4).

Stage 2- calculate loss

- Good weather method- the Didymi vs “no extrapolation” depending on the CP wording. Phrases used in the market that parties intended to exclude extrapolation; the requisite level of clarity? Brokers and lawyers’ views sometimes differ (see previous “drafting performance clauses”).
- The shortcomings of the Didymi (2nd stage, no good weather, inflated loss (When?)- **examples**).
- Other alternative methods? (See 23/21 and 15/23), an “all weather method”? Potential limitations.
- The Divinegate; deciding between two methodologies.
- Overcompensate - undercompensate; difficulties in precise calculation do not bar a claim; but disproportionate costs should be avoided.
- Tribunals re-calculated loss: See Arb 23/21 and Arb 15/23. Compare with Arb 12/14, why the tribunal differed?

Continued..

- Approaching conflicting evaluations- Arb 12/14; *The Divinegate*.
- Experts' assessment of loss- compare it with Arb 12/14 that two different methodologies applied by the WRC.
- Split reports; before/ after hull fouling or technical issues, during ECO/ FULL Speed changes. How can “different methodologies” affect the claim significantly? Kostas Melas type applications may come into play.
- Experts usually apply different methodology; not the “actual sailing time” and “actual bunkers consumed” on the voyage.
- No good weather (D. Semark, presentation at ICMA 2023).
- Near good weather analysis was rejected in some arbitrations.
- Alternative case- Arb 23/21 claim would fail if only based on WRC report, as the WRC' applied methodology was not in line with the CP.
- Damages and off hire (Arb 6/21; *The Democritos*).
- Minor discrepancies and alleged separate breaches; resort to the burden of proof?

Evidence

- The vessel's Logs, weather forecasts, pictures, independent reports, expert reports.
- Pictures submitted by the crew as to the prevailing weather conditions on the spot: **potential issues and challenges.**
- The expert evidence comprises a useful way in which that factual evidence, and the inferences to be drawn from it, can be tested.
- Conflicting Expert evidence and limitations- *The Divinegate*.
- Experts' do's and don'ts.
- When the expert's report is controverted; his reasoning might reduce the weight to be attached; **requests for clarifications** - See Arb 15/23 & 23/21 regarding WRC reports; and *The Divinegate* for experts' reports.
- Disclosure of documents.

Deck Logs vs weather routing reports

- Should the deck logs as evidence be preferred over the WRC's reports? Not always. Compare Arb 6/19 with Arb 23/21, 29/22, 32/22 and 15/23. Tribunals decided the issue differently. **Why?** (see previous pages).
- Deck logs as evidence will be fitted with and tested against the other evidence, see Arb 23/21, 15/23 (2 reports vs logs).
- The veracity of the deck log entries can be tested. **How?**
- “In case of discrepancies between the deck logs and weather routing reports...”.Tribunals must consider all the evidence (Section 33 AA 1996) and the parties' agreement as to the source of evidence that will prevail when there are weather discrepancies, however words like “consistent”, “major”, “substantial” cause a point of argument each time and should be avoided.
- Missing entries in the report; WRC's reflect only the overall net current or not separate wind wave and swell wave. That is wrong. Tribunals will not guess but need to see clearly that the report applies the good weather criteria. As evidence between two reports, the one being more comprehensive will carry more weight. Costs order for extensive inquiries and flawed methodology (see Arb 23/21).

WRC report final and Binding

The clause states: “.....Parties to appoint another routing company their ***data/ findings to be final and binding***”.

- Arb 9/23- the tribunal directed the parties to refer the matter first to the WRC i.e. the tribunal upheld their bargain. Though, there are instances that the tribunal must decide:
 - ✓ The parties cannot agree on the instructions for appointing another routing company. The matter cannot remain alive indefinitely. So the dispute will be referred to arbitration.
 - ✓ Applications for speedy relief by way of Partial Award- Kostas Melas type application may succeed as this was not a deduction made in good faith and on reasonable grounds. For example, based on a report issued by [X] WRC that the parties had excluded in the contract (not unlikely to happen in practice) or for non-compliant reports (*See B. Williamson, ICMA paper, 2023*)
- The tribunal is not expected to rubber-stamp the findings of the independent weather bureau appointed by the parties in case there is still a dispute but will make its own decision.
- **A performance report cannot be held final and binding unless prepared in line with the C/P terms.**

Other related claims

Performance disputes commonly trigger multiple clauses in the charter party and are linked to other disputes:

- Hull fouling; evidential challenges and construction issues.
- Off hire due to engine damages.
- Whether the quality of the bunkers affected the vessel's performance.
- Bunker quantity disputes; damages calculation for short or surplus of bunkers on redelivery.
- Off-hire bunker survey discrepancies; back calculation to ascertain the more probable result. Performance analysis can be useful.
- Deviation. Calculation of off-hire or damages. Whether the masters' decision was justified.
- Stowage issues and damaged cargo; evidence of the prevailing weather conditions on the voyage.

Case Study- The Evdokia

The Evdokia[1980] 2 Lloyd's Rep. 107; dispute over the expenses incurred to discharge damaged cargo.

Deck logs (Winds BF 9&10)- Oceanroutes (max a force 7 gale), Arbitrator believed that some of the entries in the log were exaggerated and found that the vessel encountered gale force winds of force 7 or perhaps at times force 8 but no more.

In its award in the form of a special case (s. 21(1) AA 1950), it was the factual context that the Umpire made the finding that deck logs exaggerated the weather conditions experienced on the voyage based on three reasons:

- (1) no evidence of drastic reduction of engine revolutions.
- (2) evidence of Oceanroutes (max Force 7 Gale).
- (3) soundings being taken on deck forward by the crew.

Donaldson J dealt with the questions of law in relation to the cost of getting the cargo out of the vessel, not acted as an appellate Court on questions of fact. In essence, this was a finding from an arbitrator on the evidence before him, both documentary and oral.

Case Study- The Ocean Virgo

- Vessel performed a ballast voyage and a laden voyage. The ballast voyage was divided into two legs that performed at a different speed. Charterers' claim was for US\$263,832 in damages.
- The arbitrator, Captain Paines, said a period to be "good weather" had to be 24 consec. Hours noon to noon.
- Captain Paines was a master mariner. He had provided an expert opinion on performance claims to various P&I Clubs and lawyers over the years. He became an LMAA supporting member in 2014.
- Appeal under s. 69 of AA 1996 allowed but the s.68 challenge on the award failed . Judgment was handed down in 2015 but not reported until 2018 in Lloyd's Law Reports.
- Held that the appellant had correctly identified an error of law ; the arbitrator had wrongly restricted "good weather" to periods of 24 consecutive hours.
- The arbitrator's exclusion of the periods of good weather on the laden voyage as being too small a sample had not been an error of law, but an approach to the evidence the arbitrator was entitled to make.
- Appeal was remitted to the arbitrator to consider whether the periods of 14 and 16 hours of good weather on the first leg of the ballast voyage were singly or cumulatively a sufficient sample to enable a breach to be established.
- As said: "Any victory might be considered Pyrrhic if the arbitrator were to uphold his original decision". **What do you think?** (consider the arbitrator's profile as well).
- Some say that the case was settled later.....
- Shortcomings of this decision? There are.

Case Study- The Divinegate

- Claims under clause 1, 8 and 15; the starting point is the good weather warranty.
- Both parties relied on expert evidence. Consider the experts' profile and qualifications (Marine Engineer vs Master Mariner).
- Case went directly to court; not as an appeal from a tribunal.
- The “alternative” method to calculate underperformance (no good weather) remains unsettled by authority. Despite some reference in the previous decisions since 1987 and 1993 about performance in less good weather conditions, it still remains untested.
- Commercial certainty and predictability.
 - (i) The claim was not time barred.
 - (ii) 24 hours and 32 hours were representative periods of good weather. Logs were found unreliable but after a careful examination by experts.
 - (iii) the traditional approach is not the only available methodology for making a claim for underperformance. But it must be established as reliable and consistent with the express performance warranty.
 - (iv) On the evidence, the RPM method was not a reliable method to identify loss of time.
 - (v) The researchers suggest that that there is no established formula for the practical measurement of the impact of fouling on speed.
 - (vi) “no adverse currents”: time sailing in adverse currents should be excluded from the calculations. Unless otherwise agreed, positive currents should not apply to reduce the vessel's good weather speed.

Some points for consideration: how to approach conflicting expert evidence and its limitations, question for clarifications, dealing with conflicting evaluations, damages (over-compensation).

Papers presented at ICMA XXII, 2023

- B. Williamson- shortcomings of the Didymi, exclusion clause, deck logs. The paper explains the facts in London Arbitration 15/23, so the readers will find it useful to read this paper together with Arb. 15/23 & Arb 23/21.
- D. Boxall- not one size fits all (methodologies). The role of the WRC's.
- D. Semark- performance claims when there is no good weather, meaning of the word "day" and positive currents.

**ICMA, International Congress of Maritime Arbitrators, held at Dubai, Nov 05-10, 2023.*

Points to remember

- **The starting point is the contract.** English law seeks to hold the parties to their bargain and tribunals are bound to follow the law.
- The performance report is not the end of the matter. One needs to consider first if there is a warranty, the nature and effect of the warranty, and any “suspended” warranties, including voyage orders.
- Then, the performance assessment must comply with the parties’ agreement (the contractual yardstick) in assessing the first stage(liability). Then, it is the stage of assessing the remedy and methodologies can differ for many reasons (split reports, no extrapolation, 2nd stage of the Didymi, etc). Proper application of damages principles will resolve discrepancies. If there is a breakdown **during the voyage** or hull fouling, **the loss calculation needs further attention.**
- There must be evidence to support an off-hire event or lack of maintenance.
- Hire deductions- Kostas Melas type applications; the charterers’ burden to defeat such an application is a light one. However, one should consider carefully the validity of the report before making deductions. Apart from any other remedies for non-payment of hire (suspension etc), a successful application can expose the Respondents to costs.
- Pre-conditions to arbitrate: whether 3rd routing company is binding. Not always. One needs to examine first the agreed terms. Instructions to appoint a 3rd routing company: there are potential challenges; parties will arbitrate.
- The meaning of “good weather **days**”- Arb 32/22. 24 hours consecutive weather and “net overall adverse currents” -this is wrong. Simply put, it goes beyond the language of the contract. Contracting parties should be held to their bargain.
- The report must clearly reflect the application of the CP criteria. Requests for clarifications on the applied methodology are critical – see 23/21, 29/22, 32/22 and 15/23. Costs order due to extensive inquiries, revised reports- submissions on new evidence. Exposing flawed methodology; costs in arbitration – see Arb 23/21.
- “Excluded” WRC from the charter-party. Parties should be held to their bargain; this is not a strong reason not to.
- No good weather and performance assessment. Tribunals will be slow to depart from the traditional way unless there are **strong reasons to do so**. Expert evidence is key, but with its limitations on proper application of damages’ principles (*The Divinegate*).
- The ‘all weather method’ has not been judicially tested or considered in published awards; tribunals are also slow to apply it due to many uncertainties.

Q&A

Thank you for your attention.