Reflections on speed and performance claims

Prokopios Krikris identifies some contentious issues that persist in speed and consumption disputes and require further consideration. His analysis focuses on recently published LMAA award commentaries and The Divinegate*.*

A. Introduction

It is a frequent feature of time charters to contain express provisions concerning a vessel's performance. From the charterers' point of view, "the speed warranty is clearly of very great importance in relation to his calculations as to the rate of hire it will be possible for him to pay"[1] and the value of bunkers consumed. Disputes over the vessel's performance commonly arise and trigger multiple clauses in the charter, raising questions of law, fact and practice. Typically, the charterers' appointed weather routing company (WRC) will submit a performance report, giving rise to a discussion about potential disputes, but the matter does not quite end there. Subsequently, the parties prefer to resolve such disputes either amicably or by arbitration, and only a few cases go to court to establish precedents; appeals from arbitrators are not granted lightly.

The parties sometimes rely on published award summaries appearing in *Lloyd's Maritime Law Newsletter* when dealing with such claims and seeking guidance on points that remain unsettled by authority. However, if the dispute eventually comes before an arbitral tribunal, the arbitrators are not bound to follow previous awards, but appropriate consideration and respect are shown to awards on similar points.[2] Yet as recent arbitrations corroborate, there are unsettled points that require further review to resolve or avoid unnecessary speed and performance disputes. For example, some cases have been pushed at an early stage on procedural arguments and failed to get off the ground.

[1] *Cosmos Bulk Transport Inc v China National Foreign Trade Transportation Corporation (The Apollonius)* [1978] 1 Lloyd's Rep 53, page 64 (Mocatta J).
[2] See LMAA "Notes on London Arbitration and Frequently Asked Questions", https://lmaa.london/notes-on-london-arbitration (accessed 12 September 2023); Editor's note, *Lloyd's Maritime Law Newsletter*, Issue 165, 27 February 1986.

B. Procedural issues

B.1. Deductions from hire

At the outset, the owners challenge the charterers' right to maintain a counterclaim for underperformance through a contractual right of deduction or a right of equitable set-off (in diminution or extinction of the owners' claim for hire). The prerequisite for deductions of hire is that the charterers should have assessed or estimated the amount in good faith and on reasonable grounds. Otherwise, the owners can urgently apply for a partial award for unpaid hire as a quick weapon to challenge spurious or unjustified deductions, as occurred in *The Kostas Melas*.[3] Recently, in a partial final award, two LMAA arbitrators recognised the usefulness in practice of applications for speedy relief by way of partial awards – "[t]hat is why, over the last forty years or so, we have seen numerous applications based on *The Kostas Melas*, most of which in our experience have succeeded".[4]

B.1.1 Kostas Melas-type applications

London maritime arbitrators have ample powers to proceed without delay in making an "interim" or "partial" award in cases involving underperformance claims.[5] It should be noted that although the terms "interim award" and "partial award" are regularly used interchangeably even today, the term "interim award" "is a constant source of confusion and should be abandoned"[6] (as it will be in the present article). Whether such applications will succeed depend on many factors: section 47 empowers the tribunal to make a partial award, but the tribunal exercises its powers by having regard to section 33 of the Arbitration Act 1996 (AA 1996), which sets out the general duty of the tribunal in very broad terms. Furthermore, as most speed and performance disputes fall within the LMAA Small Claims Procedure (SCP), such applications will succeed in exceptional cases.[7]

Take as an example that the charterers advance a cross-claim or a counterclaim for loss due to underperformance to challenge the owners' claim for hire. In these cases the tribunal is required to determine first whether the charterers have either a right of deduction or set-off against hire and, if so, they will have to establish that the charterers made

[3] *SL Sethia Liners Ltd v Naviagro Maritime Corporation (The Kostas Melas)* [1981] 1 Lloyd's Rep 18.
[4] *Fastfreight Pte Ltd v Bulk Trident Shipping Ltd (The Anna Dorothea)* [2023] EWHC 105 (Comm); [2023] Lloyd's Rep Plus 69, at para 16.
[5] Brian Williamson, "Understanding Performance Claims", Part III (2020) at paras 3 and 51; *London Arbitration 1/22* (2022) 1098 LMLN 4.
[6] *Lorand Shipping Ltd v Davof Trading (Africa) BV (The Ocean Glory)* [2014] EWHC 3521 (Comm); [2015] 1 Lloyd's Rep 67 at para 6; *Rotenberg v Sucafina SA* [2012] EWCA Civ 637; [2012] 2 Lloyd's Rep 54 at para 23.
[7] See LMAA commentary on "The Small Claims Procedure", https://lmaa.london/the-small-claims-procedure/ (accessed 12 September 2023). Paragraph 4 of the Second Schedule of the LMAA Terms 2021 lists an interim award as an exceptional case.

out a prima facie case on the merits of the claim, which would involve that it is made in good faith and on reasonable grounds. The burden to defeat such an application is a light one; the charterers merely need to demonstrate a reasonably bona fide defence. If the charterers fail, the tribunal will decide whether to exercise its discretion to issue a partial award or dispose of all issues (including the underperformance claim) in a final award. If the tribunal proceeds with a partial award dealing only with the owners' claim (it need not determine the counterclaim), the charterers can bring a counterclaim later if they can adequately justify it with evidence.

Putting these in context, in *London Arbitration 1/22*,[8] the charterers advanced a counterclaim as off-hire due to the vessel's underperformance. They relied on a performance report and comments from the WRC to support their claim. However the charterers had not persuaded the tribunal that the above met the test formulated by Robert Goff J in *The Kostas Melas*. In particular, the charterers had neither justified their off-hire claim nor addressed the point made by the owners that the qualified words "in good faith" meant there was no warranty of speed or consumption. Seemingly, the charterers adduced no evidence or offered no indication to support their case to make a prima facie case of off-hire, thus resisting an immediate partial award in the owners' favour. For example, in other instances where the charterers advanced their underperformance claim as off-hire, they submitted a performance report *and* evidence to bring themselves within the ambit of the off-hire clause or other clauses relevant to their claim.[9]

B.2. Jurisdiction of the tribunal

In *London Arbitration 9/23*,[10] the pertinent clause stated: "In the event of a dispute over a breach of speed and consumption warranty in this Charter Party, a mutually agreed weather routing company to be appointed to analyse the vessel's performance whose findings will be final and binding". The owners challenged the tribunal's jurisdiction on the basis that a dispute about the vessel's performance should be submitted to a WRC as agreed in the charterparty.

In practice, challenges to jurisdiction are common and deployed to delay arbitral proceedings. The general rule is that the tribunals can rule on their own jurisdiction (the so-called doctrine of kompetenz-kompetenz), unless otherwise agreed by the parties, as enacted in section 30 of the AA 1996. In *London Arbitration 9/23* the tribunal

[8] (2022) 1098 LMLN 4.
[9] *Bulk Ship Union SA v Clipper Bulk Shipping Ltd (The Pearl C)* [2012] EWHC 2595 (Comm); [2012] 2 Lloyd's Rep 533, *Eastern Pacific Chartering Inc v Pola Maritime Ltd (The Divinegate)* [2022] EWHC 2095 (Comm); [2023] 1 Lloyd's Rep 442, *London Arbitration 23/21* (2021) 1094 LMLN 1.
[10] (2023) 1137 LMLN 2.

was not required to determine the merits of a performance dispute because it concluded it had no jurisdiction to adjudicate on the counterclaim, so that was the end of the issue. However, the tribunal held that the parties must refer this matter to a mutually agreed WRC to determine the vessel's performance as required by the relevant clause in the charterparty and left the door open to adjudicate on the performance claim if any still existed and the parties were unable to resolve it. The position would be different had the parties not agreed at the outset on the appointment process of a WRC. In that case the tribunal would deal with it as a preliminary issue in a partial award or reserve the issue for determination in a final award on the merits. Whether to proceed with a partial award depends on the parties' agreement, and whether this will lead to increased costs and delay. Then, the tribunal would prefer to determine it in a final award (where section 33 of the AA 1996 comes into play).

B.3. Procedural non-compliance

In *London Arbitration 9/23*[11] the owners submitted that the charterers' underperformance claim was time-barred as they had failed to service their defence submissions within the time allowed under the LMAA SCP. The owners relied on the opening words of subpara 5(g) of the SCP, stating: "Any extension to the above time limits must be applied for before expiry of the existing time limit". The tribunal rejected the owner's submission and held that it should not be construed as a barring provision.

It seems that any doubt about the meaning of the opening words in subpara 5(g) is removed when one considers the phrase as it must be, not in isolation but in the context of the provision as a whole. The intention behind para 5 of the LMAA SCP was likely to ensure that the rules of natural justice would be met; the tribunal would treat *both* parties equally and fairly, as enshrined in section 33, and having regard to the powers of the tribunal in case of party's default as enacted in section 41, and the general duties of the parties per section 40 of the AA 1996. Limited published awards deal with this point, but it seems straightforward.

B.3.1 Security for costs

In *London Arbitration 2/22*[12] (following a partial final award), the charterers commenced arbitration for their underperformance claim, and the owners sought security for their costs. The charterers failed to comply with the

[11] (2023) 1137 LMLN 2.
[12] (2022) 1098 LMLN 5.

tribunal's peremptory order to provide additional security sought by the owners (now as respondents) for defending the counterclaim. Therefore, the tribunal made an award dismissing the counterclaim (see section 41(6) of the AA 1996 and para 17 of the LMAA Terms 2021). A tribunal considering exercising any of the section 41 powers must have regard to section 33. The same applies when a tribunal exercises its broad discretion that section 38 confers in making orders for security. This exceptional case ran for almost three years, with substantial costs incurred compared to the claimed amount. The tribunal therefore had to adopt suitable procedures to avoid unnecessary delay or expense.

B.4. Depart or vary the procedure

In *London Arbitration 23/21*,[13] arbitration was commenced under the LMAA SCP and, subsequently, the parties agreed that the reference was to proceed under the LMAA Terms 2017. Seemingly, the parties relied on expert evidence and put several complex factual issues before the tribunal for determination. Given the nature and weight of the case, the tribunal considered it proper to depart from the SCP provisions (para 9 of SCP 2017), as mostly happens in similar circumstances. Typically, the tribunal will draw to the parties' attention early on whether proceeding with the reference under the SCP is suitable based on the nature of the points identified and the admissibility of documents under the SCP. In exercising its power to depart or vary the procedure, the tribunal has regard to the parties' agreement and section 33 of the AA 1996.

B.5. The arbitrator's expertise

In *London Arbitration 23/21*,[14] in a non-typical speed and performance dispute, it was common ground that the charterers canvassed several matters before the tribunal as possible reasons for the vessel's underperformance. It is plain from the summary that the arbitrator (likely a former master mariner) relied on his expertise in dealing with the technical issues. Courts have long recognised the tribunals' specialised experience in dealing with the technical aspects of such disputes.[15]

[13] (2021) 1094 LMLN 1.
[14] (2021) 1094 LMLN 1.
[15] See *Compagnie General Maritime v Diakan Spirit SA (The Ymnos)* [1982] 2 Lloyd's Rep 574, page 580 (Robert Goff J).

In another speed and performance dispute, the parties accepted the arbitrator to use his knowledge and experience (taking the role of an "expert arbitrator"[16]) dealing with the technical issues. The arbitrator had set some formalities, advised the parties of the process, and invited them to raise any issues at the outset to avoid misunderstandings later. For example, a dissatisfied party can challenge the conduct of the proceedings on the ground of procedural unfairness. However, the threshold for the intervention of courts under section 68 is high. As Colman J stated in *The Pamphilos*:[17] "It would be extremely undesirable and totally contrary to the policy of the [AA 1996] if arbitrators were discouraged from approaching issues in this way by the threat of applications under section 68". The overriding objective is to avoid surprise and, therefore, lack of opportunity to respond in a way that the parties had envisaged when setting up the arbitration.

Importantly in *The Pamphilos* Colman J distinguished the arbitrators' duty to act fairly from their duty to make findings of fact. About the former, he held that it was ordinarily incumbent on the arbitrators to give the parties the opportunity to address them on proposed findings of major areas of material primary facts which had not been raised during the hearing or earlier in the arbitral proceedings. But it was not usually necessary to refer back to the parties for further submissions on inferences of facts from the primary facts the arbitrators intended to draw, even if such inferences had not been previously anticipated during the arbitration.

C. Identifying the breach

When it comes to performance claims, the parties commonly put before the tribunal the following issues for determination:

(a) Is there a warranty? If yes, what is the nature of the warranty?

(b) Has the WRC established performance in line with the parties' agreement regarding weather qualifications and the evidence?

Performance claims usually involve issues for determination during the various stages of evaluating the claim; both liability and quantum. However, most of the claims mainly occur at the stage of testing the warranty (first stage of

[16] For a more detailed discussion about the role of "expert arbitrator" see *London Underground Ltd v Citylink Telecommunications Ltd* [2007] EWHC 1749 (TCC); [2007] BLR 391.
[17] *Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd (The Pamphilos)* [2002] EWHC 2292 (Comm); [2002] 2 Lloyd's Rep 681, page 691 col 2.

The Didymi[18]) since once the breach of the warranty is established, the loss calculation follows. Therefore, the starting point to determine these issues should be the bargain struck between the parties. If there is a warranty, the tribunal will, as a matter of construction, consider the owners' actual warranty to determine: (a) the speed and consumption yardstick; and (b) the benchmark weather conditions in which performance is to be measured. This exercise calls for a closer examination of any dependency between the multiple clauses in the charterparty.

In some cases, tribunals resolved such construction issues before turning to their fact-finding exercise (see *London Arbitration 32/22*[19] and London Arbitration 23/21[20]). The determination of the issues depends on the tribunal's reasoning and evidence before it; their views may differ. However, it is noteworthy to mention that recent awards on speed and performance claims highlight a pull of consistency about issues involving questions about the proper construction or interpretation of the charterparty.

C.1. Construction or interpretation

It is common ground that most performance disputes turn on the proper construction or interpretation of the charterparty; recent high authority is abundant on the principles applicable to the construction of commercial documents. Most recent decisions highlight potential challenges in the interpretation of performance clauses, which can never be free of artifice: (i) *London Arbitration 9/23*[21] reflects the relaxed draftsmanship adopted by the parties in the charter, in a clause titled "Evidence of Performance", and the tribunal suggested the parties should amend it if they intend to use this clause in a future fixture, and (ii) *London Arbitration 32/22*[22] was a paradigm case of an over-zealous semantic and syntactical analysis of the clause when a point was over-argued on the effect of the term "and/or" in the performance clause that the charterers sought to avoid the difficulty of taking all good weather indices into account for testing the warranty as there would be no good weather to support their claim. The tribunal found no force in the charterers' argument concerning the construction of the warranty. Notably, chartering brokers who usually draft performance clauses are not sophisticated lawyers; an exercise in "legal gymnastics" or "linguistic acrobatics" should – *when necessary* – be deprecated if it defeats or undermines the presumed intention of the commercial parties.

[18] *Didymi Corporation v Atlantic Lines and Navigation Co Inc (The Didymi)* [1988] 2 Lloyd's Rep 108.
[19] (2022) 1120 LMLN 2.
[20] (2021) 1094 LMLN 1.
[21] (2023) 1137 LMLN 2.
[22] (2022) 1120 LMLN 2.

In some cases, the parties submitted the comments of the WRC as opinion evidence in arbitration. At this juncture, it should be mentioned that London tribunals have viewed with scepticism an attempt by a WRC to reinterpret a contract for the parties.

C.2. Continuous warranty

Although the summary does not clearly mention it, the weather routing clause extended the warranty to the charter period in relatively *short charter trips* (see *London Arbitration 23/21*[23] and London Arbitration 29/22[24]).

C.3. In good faith

The owners' point concerning the meaning and effect of the qualified words "in good faith" has been contested in practice following the publication of *London Arbitration 1/22*.[25] Seemingly, the tribunal did not consider this point when the charterers pursued their counterclaim in *London Arbitration 2/22*[26] (following a partial award) as the tribunal made an award dismissing the counterclaim due to the charterers' procedural non-compliance, ie failure to comply with a peremptory order (see section 41(6) of the AA 1996 and para 17 of the LMAA Terms 2021).

Normally, the owners made their application for security of costs after service of defence submissions (para 7 of the Second Schedule of LMAA Terms 2021), when the tribunal also had the benefit of receiving the owners' reply submissions together with the owners' instructed expert report (see *London Arbitration 3/22*[27]). To the extent that the tribunal might have examined the merits, decisions for the security of costs are usually made before a full investigation of the evidence; the relative merits are only relevant if there is a high probability of success or failure. It is unclear whether the owners' defence on the qualified words "in good faith" affected the tribunal's decision or the claim would fail for want of evidence to bring the charterers squarely within the ambit of the off-hire clause (ie a high possibility of failure). The charterers' P&I Club must have addressed this point in *London Arbitration 2/22*.

By considering the three consecutive awards dealing with this dispute, it is clear that the tribunal considered the owners' point regarding the words "in good faith" when deciding their application for a speedy relief, by way of partial award. However, there is little to be gained from the summaries if the owners' argument would have any

[23] (2021) 1094 LMLN 1.
[24] (2022) 1115 LMLN 2.
[25] (2022) 1098 LMLN 4.
[26] (2022) 1098 LMLN 5.
[27] (2022) 1098 LMLN 6.

force in case the tribunal determined the counterclaim had it not been dismissed for other reasons, ie procedural non-compliance. Therefore, that remains an issue for another day.

C.4. Good weather criteria

While all turns ultimately on the wording of the particular clause in the context of the contract as a whole, certain matters can be stated about the standard good weather qualifications in the performance warranties based on recent LMAA awards and case law (see *The Divinegate*[28]).

- In winds not exceeding Beaufort force 4 – this is uncontroversial.

- Douglas Sea State 3 (DSS 3) – there has been a long-standing debate about the meaning and application of DSS 3. Recent decisions stress that the performance report should separate the wind and swell waves in the data analysis to test compliance with the charterparty provisions. (*London Arbitration 23/21*,[29] *London Arbitration 29/22*[30] and *London Arbitration 32/22*[31]). To prevent unnecessary debate, the parties must identify the limits of the sea and swell wave (eg 1,25 m or any other figure) in the relevant clause, and not by reference to the Douglas Scales. In *The Divinegate*, the judge held that: "The charterparty definition was accordingly decisive and [the Captain's] application of the square root calculation used to measure significant wave height was misplaced".[32] There has been strong criticism about converting DSS 3 to a significant wave height.

- No adverse current (similarly uncontroversial); however, it has been acknowledged (and not surprisingly) that "there is industry debate as to how weather routing companies assess current factors".[33] Ms Clare Ambrose stated that "time spent sailing with adverse currents was not to be treated *as good weather* against which the performance warranty was agreed".[34] The vessel's slip remains a more reliable indicator of current than AIS positioning alone in *moderate weather* conditions (*London Arbitration 29/22*[35] and *London Arbitration 32/22*[36]). Deck log entries recording adverse currents were found unreliable after conducting a careful examination.[37] The

[28] *Eastern Pacific Chartering Inc v Pola Maritime Ltd (The Divinegate)* [2022] EWHC 2095 (Comm); [2023] 1 Lloyd's Rep 442.
[29] (2021) 1094 LMLN 1.
[30] (2022) 1115 LMLN 2.
[31] (2022) 1120 LMLN 2.
[32] *The Divinegate* at para 103.
[33] *The Divinegate* at para 96.
[34] *The Divinegate* at para 102.
[35] (2022) 1115 LMLN 2.
[36] (2022) 1120 LMLN 2.
[37] See the experts' observations in *The Divinegate* at paras 74 and 85.

application of ECDIS printouts for supporting the effect of currents remains an untested point in published awards, with arguments pointing in either direction in practice. So far, it has not attracted the attention of tribunals.

- "No swell" was treated (by implication) as "no adverse swell", ie up to 2 m in height (*London Arbitration 23/21*)[38].

- Positive currents should not be factored in the loss calculation unless the parties have agreed otherwise. The parties to a contract are free to determine the primary obligations that they will accept. It is up to the parties to include express wording allowing the positive currents to be considered for calculating the remedy (*The Divinegate; London Arbitration 29/22*).

C.5. Other qualifications

The vessel's performance description often includes qualifications unrelated to the weather, like "in even keel", "in deep water", "no deck cargo", and certain fuel characteristics. Some of these terms started life in shipbuilding contracts and were later incorporated into charterparties. Only recently, limited published awards offer guidance on these points.

In *London Arbitration 23/21*[39] the tribunal interpreted the term "on even keel" as "on even keel, or a trim by the stern up to 1.5 m, provided within master's control"; maybe there would be little or no tolerance had her trim was by the head for practical reasons. A specialist tribunal, likely a master mariner, gave this interpretation based on the case's particular facts, the vessel's type and the voyage performed. There is little explanation about the tribunal's reasoning on this point as it was likely not disputed by the parties' appointed experts.

In *London Arbitration 6/21*[40] the owners sought to defend an underperformance claim on the ground that the supplied bunkers were off-spec, affecting the vessel's performance. The tribunal rejected this argument, stating that the slight differences in the specification could not justify a significant underperformance. Such cases typically involve factual questions of complexity and difficulty and require the evaluation of highly technical and conflicting expert evidence.

[38] (2021) 1094 LMLN 1.
[39] (2021) 1094 LMLN 1.
[40] (2021) 1076 LMLN 4.

C.5.1. Sample of good weather

In *London Arbitration 32/22*[41] the owners' strength of the case rested on the decision of Teare J in *The Ocean Virgo*[42] which held: "There are no words in the charterparty which justify construing good weather as meaning good weather days of 24 hours from noon to noon". The owners submitted that the recap expressly referred to "days", so the charterers could not submit any claim in case the ship encountered bad weather at any point during the *day*. The tribunal held that: "the inclusion of three intervals of adverse current, representing as much as 18 hours in the 48-hour selected period, was in breach of the benchmark conditions". Also, the tribunal highlighted the importance of the performance report to reflect the necessary information in a six-hourly analysis. Otherwise, it would be impossible to establish whether the WRC had prepared the report in line with the performance description. That is sensible because tribunals make findings of fact based on evidence and draw inferences from evidence and not on speculation of what might be the case. Equally, tribunals adopt a similar approach when weighing the evidence from different performance reports submitted by the parties to advance their case or defence. The tribunal will attach more weight to the one being more comprehensive than the other. The best evidence should lead, and the secondary evidence should be inadmissible.

Regarding the word "day", it is common that words are coloured from its context; the charterers did not argue for a meaning other than the ordinary meaning. Even if the word "day" has a special meaning other than the ordinary meaning in this context, this requires evidence. Therefore, it would be for the charterers to persuade a tribunal that the word "day" was ambiguous or obscure or that the ordinary meaning would lead to a manifestly absurd or unreasonable result. It has been stated that: "Of course, the situation might be different and continuous good weather conditions for 24 hours might be required if the clause referred expressly to 'good weather **days**'".[43] This proposition was based on ordinary rules of construction.

In *The Divinegate* the judge accepted that 24 or 32 hours of good weather were sufficient samples to assess the vessel's performance based on the evidence (two expert reports). On a closer reading, the above periods represented circa 5.8 per cent and 4.4 per cent of good weather for the entire voyage. By analogy, in *The Ocean Virgo*,[44] a sole specialist arbitrator noted that any speed and consumption analysis was a sampling exercise and that

[41] (2022) 1120 LMLN 2.
[42] *Polaris Shipping Co Ltd v Sinoriches Enterprises Co Ltd (The Ocean Virgo)* [2018] Lloyd's Rep Plus 101, at para 18.
[43] Ceren Cerit Dindar, "The performance of the chartered ship: a much clearer obligation under the NYPE 2015?", *Journal of International Maritime Law* (JIML 23 (2017) 6, 425–442).
[44] *Polaris Shipping Co Ltd v Sinoriches Enterprises Co Ltd (The Ocean Virgo)* [2018] Lloyd's Rep Plus 101.

"the sample size must be sufficiently large as to be representative of the voyage in its entirety".[45] The arbitrator held that periods of good weather corresponding to 5.1 per cent and 5.3 per cent were not representative, but this was an approach to assessing the evidence the tribunal was entitled to. That was a finding from a specialist tribunal tailored to the circumstances of the particular case. Courts are generally slow to distort tribunals' findings of fact; arbitrators are the masters of fact. Therefore, it will be for the tribunal to assess this matter on a case-by-case basis.

D. Assessing the remedy

Suppose there is a good weather performance warranty. In that case, whether one seeks to establish a claim under clauses 1 (maintenance), 8 (utmost despatch) or 15 (off-hire), the obligation must be primarily construed in light of the parties' express agreement as to warranted performance during good weather. However, the good weather method is not the sole and exclusive method to establish a breach under clauses 1, 8 or 15. In *The Divinegate* the judge rejected an alternative method of calculating loss that incorporated many uncertain parameters, thus over-compensating the defendants (the charterers) and an approach to the assessment of loss that would lead to a double benefit (not unlikely, for example, in cases where there is a deviation and underperformance claim). The judge held that "any alternative method must be established as reliable and consistent with the express performance warranty".[46]

Putting the matter not merely shortly, but also bluntly, several judges and LMAA arbitrators have upheld the precedent established by *The Didymi*.[47] It sets a two-stage approach: (1) establish liability (test the warranty against the contractual yardstick); and (2) *then* quantify the remedy. For the latter, different views have been expressed on assessing the remedy, with two main methods articulated in literature and various LMAA Awards over the years. In *The Divinegate* it is clear that there was consensus among the experts on the proper method of calculating loss when applying *The Didymi*.

The judgment in *The Didymi* sets the theoretical basis to establish performance in good weather periods, without citing any detailed calculations therein. As a result, there is an industry debate after *The Didymi* on applying the second stage, particularly with the meaning and effect of the words "with all *necessary adjustments* and extrapolated". Many companies state that they apply *The Didymi*, yet there have been different methodologies in the market for years, all pointing to *The Didymi* but each gives different calculated figures. Neither of the rival

[45] At para 11.
[46] *The Divinegate* at para 94.
[47] *Didymi Corporation v Atlantic Lines and Navigation Co Inc (The Didymi)* [1988] 2 Lloyd's Rep 108.

methods is entirely satisfactory; both can produce *significantly different* results leaving the tribunal to decide the one that fits best to the circumstances of the case. It is common ground that this issue falls to be determined by, at least, having regard to these aspects: (i) the tribunal will fit with and test against the other evidence to determine which method applies the contractual criteria; and (ii) will assess the remedy by having regard to well-established rules on damages. *The Divinegate* provides helpful guidance in dealing with conflicting evidence, including conflicting expert's evaluations.

Of interest, the key question remains: why there are rival methods concerning the second stage of *The Didymi*? An approach to this matter is to check what was the position was before and after *The Didymi*, an approach that may help to consider this issue from a different perspective. As found, existing writings from experienced specialist arbitrators acknowledge that this contentious issue started before[48] *The Didymi*, and remains alive after.[49] Furthermore, the literature[50] suggests that London arbitrators have divided views on applying the second stage of *The Didymi*, and sometimes the weather factor was considered in evaluating the vessel's performance. Although the limited published awards tend to support that a weather factor should not apply (this should be examined in the particular facts of the case), the existing literature supports that some tribunals accepted the incorporation of a weather factor in calculating loss. A weather factor may apply in certain circumstances, for example when the vessel is seriously underperforming due to hull fouling or engine issues and there is no good weather to establish underperformance. This adjustment can be necessary to avoid *inaccurately* over-compensating a party (see *The Divinegate*).

It is perhaps no surprise that some imperfections exist in applying the "good weather method" (see *The Didymi*[51]) as recognised in practice. There are at least two methods used (for simplicity, these will be referred to as method 1 and method 2). In *London Arbitration 12/14*[52] the tribunal, by making its own simplified assessment using a "ratio method", concluded that method 2 should be preferred. Although the summary does not state it, the decision confirms an approach to avoid *inaccurately overcompensating* a party (see above analysis). In some cases tribunals departed from the strict application of the extrapolation stage as it would produce loss when no loss existed; an all-weather consumption analysis comparison with the minimum allowed showed no loss. Hence, no loss means no claim, and so the tribunal dismissed this part of the claim.

[48] Donald Davies, "Assessment of Damages for Inadequate Vessel Performance under Time Charters", 14 J MAR L & COM 595 (1983), citing unpublished awards from 1976 to 1980. Mr Donald Davies was a master mariner, barrister, senior lecturer and an active LMAA arbitrator from 1968 to 1989.

[49] Captain Nick Paines, "Speed and Consumption Issues" (LSLC, 2014) page 53; Stephen Kirkpatrick, "Reflections on speed and consumption", (*P&I International*, August 2000, page 173).

[50] C Hill, *Maritime Law* (5th Edition, 1998) pages 183 to 185; C Hill, *Maritime Law* (6th Edition, 2003) pages 176 to 179.

[51] *Didymi Corporation v Atlantic Lines and Navigation Co Inc (The Didymi)* [1988] 2 Lloyd's Rep 108.

[52] (2014) 900 LMLN 3.

Most experts (not weather routing companies) apply the good weather method provided in *The Divinegate* seeking to identify enough representative good weather periods to assess the vessel's performance. As the late Donald Davies stated: "it is up to those presenting cases to arbitrators to investigate thoroughly the technical matters which are relevant". A performance report cannot provide a comprehensive analysis that enables a tribunal to deal with the technical or engineering aspects of complex factual issues. It is common ground that this is a matter for the experts, those giving evidence under CPR Part 35 and complying with certain protocols upon giving evidence in civil claims.

A careful analysis of *The Divinegate* shows that both experts agreed to use method 1, which most weather routing companies apply. The experts' calculations can be explained as follows.

> **Time calculation = (Total Distance/good weather performance speed) – (Total Distance/warranted speed- 0.5 knots)**
>
> Charterers' instructed expert: (6064 / 11.6) - (6064/ 12.5)= -**37.64 hours time loss**.[53]
>
> Owners' instructed expert: (6064/11.83) - (6064/12.5)= -**27.47 hours time loss** (there seems to be a typo at para 71; "2**4**.47").
>
> *Note: the distance steamed was calculated from the noon reports; this was not disputed. For minor discrepancies, most awards support that noon reports will be preferred for the distance steamed.*

All things being equal, though, both methods 1 and 2 have benefits and drawbacks; it depends on the particular facts which method should prevail. Most experts giving evidence will apply method 1, so it is a matter for the parties to consider which method to put before a tribunal to best reflect the facts of their case. In a recent unpublished award, the owners' expert said that method 2 was not in line with *The Didymi* and the tribunal agreed. As said, that was an all-weather method, not as described as a "*Didymi*" method. However the tribunal was not asked to decide which of the two methods was preferred as the method 1 found that the ship performed, which was the end of the issue. The "all-weather method" was not applied in *The Divinegate*, given that both the expert's reports relied on a good weather sample to assess the vessel's performance.

Concerning the above loss calculations deriving from *The Didymi*: "One is not concerned with how loss of time affected the vessel's programme: one is concerned simply with excess time or consumption **while at sea**".[54] It

[53] *The Divinegate* at paras 67 to 71.
[54] *Didymi Corporation v Atlantic Lines and Navigation Co Inc (The Didymi)* [1987] 2 Lloyd's Rep 166, page 171 col 2.

should be noted that in some cases involving several breaches, the charterers would be entitled to damages quite apart from not being liable for hire if they can establish that they have suffered an additional loss.[55] In *London Arbitration 6/21*[56] the charterers claimed the price difference for supplying the over-consumed bunkers on the voyage.

On a separate note, some issues that require attention are as follows.

(a) It would have been a contentious issue for a tribunal to determine the method of calculating loss if the parties referred their dispute to arbitration when the wording of the clause stated "in accordance with *internationally* accepted methods of calculation" (see *London Arbitration 9/23*[57]). That remains a matter for another day.

(b) A forgotten point in practice is to consider whether the report calculates loss *following* a listed event in the off-hire clause (or the maintenance clause) that happened during the voyage, not at the beginning of the voyage as in *The Divinegate*. Depending on the methodology applied, the assessment may produce an inflated loss, bringing into play *Kostas Melas* principles when the charterers make deductions from hire.

In *London Arbitration 29/22*[58] the tribunal rejected the WRC's methodology that sought to consider periods of near-good weather in establishing liability and quantum.

D.1. No good weather

The owners' usual defence to such claims is that the ship encountered no good weather as agreed in the charterparty, thus the claim should fail at the outset. However, take an extreme example when a vessel has fallen short of its warranted speed by 3 to 4 knots in weather conditions that cannot justify this reduction. If it can be objectively demonstrated that there has been a reduction in speed in "no good weather" conditions caused, for example, by a broker cylinder ring[59] or the crew members intentionally performed the voyage at reduced RPM[60] or

[55] See eg *Marbienes Compania Naviera SA v Ferrostal AG (The Democritos)* [1975] 1 Lloyd's Rep 386, page 402.
[56] (2021) 1076 LMLN 4.
[57] (2023) 1137 LMLN 2.
[58] (2022) 1115 LMLN 2.
[59] See *Hyundai Merchant Marine Co Ltd v Trafigura Beheer BV (The Gaz Energy)* [2011] EWHC 3108 (Comm); [2012] 1 Lloyd's Rep 211 at para 48.
[60] *Cosmos Bulk Transport Inc v China National Foreign Trade Transportation Corporation (The Apollonius)* [1978] 1 Lloyd's Rep 53.

due to excessive fouling,[61] will the weather conditions or other qualifications (bunker specs,[62] even keel, etc) provide a complete defence to a significant underperformance claim?

A tribunal would feel uncomfortable had a party answered this vital question in the affirmative. But for minor performance discrepancies and without evidence of other breaches, tribunals are slow to cross the boundaries of the traditional approach (*The Didymi*), given the commercial and legal certainty that exists for decades. *The Didymi* has stood unchallenged for decades, and there is no doubt that several arbitration cases have been decided on that basis, and even more cases have been settled on that basis. It is plain that the decision has established commercial certainty and predictability (which has been a constant theme of English commercial law) in the parties' negotiations and resolution of disputes, but this decision does not resolve all issues concerning the vessel's speed and performance.

Therefore, once liability has been established, it would be a matter of assessing the loss; evidential difficulties may arise to measure it, but lack of precision is not a bar to recovery. Besides, even *The Didymi* method calculates a rough estimate of loss and *sometimes* an inflated loss. If it is clear that the claimant suffered loss and the evidence does not enable it to figure it out precisely, tribunals will assess damages as best they can on the available evidence. The law does not require the claimant to perform the impossible. Common law has taken a pragmatic view of the degree of certainty with which damages must be proved. In some awards, tribunals adopted a "broad" approach to dispense justice in the light of the facts and evidence. For example, in *London Arbitration 2/00*[63] the tribunal awarded its "best estimate" of loss caused by the vessel's inefficiency in making headway against bad weather. In *London Arbitration 7/15*[64] the charterers pursued off-hire claims due to the vessel's underperformance based on their experts' conclusions. The tribunal would not be doing justice if it accepted those figures without qualification but came to a figure, doing its best, representing the loss fairly.

Yet, a challenging point for minor performance discrepancies is that tribunals may find it hard to make a positive finding that the defect and not the weather caused the underperformance; faced with serious doubt (in exceptional cases), they may resort to the burden of proof and dispose of this issue shortly.[65]

Calculating loss may be more challenging in cases falling within the ambit of the LMAA SCP since expert evidence is usually limited. Costs and delay will be significant factors in deciding to vary the reference and proceed under the LMAA Terms, allowing expert evidence and extensive disclosure of documents (section 33 may come into play). Of

[61] *London Arbitration 10/00*, (2000) 545 LMLN 1(2).
[62] *London Arbitration 6/21*, (2021) 1076 LMLN 4.
[63] (2000) 538 LMLN 2.
[64] (2015) 925 LMLN 4.
[65] *London Arbitration 4/94*.

importance, *The Divinegate* decision highlights the drawbacks of applying the RPM method. Equally, it also helpfully reflects the assumptions that could be rectified, thus giving a fair indication of the loss. Not unlikely, a *specialist* tribunal (master mariner or engineer) considers a similar method on the facts of the case. Leaving aside the quantum, consideration of the vessel's RPM[66] may raise inferences about the condition of the engines, the vessel's hull, or any intentional slow steaming. An evidential burden may arise to produce rebuttal evidence.

Of importance, appeals to arbitrations are limited, which has not assisted the law to develop in some areas. So, the alternative way to establish loss under bad weather may be judicially settled in the distant future. Until then tribunals will strive to appropriately compensate a party for its loss tailored to the facts and circumstances of the case. Expert evidence with its *potential* limitations may be necessary, as addressed in *The Divinegate*.

E. Evidence

Parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, subject to a few mandatory provisions on the procedure, and empower the arbitral tribunal, failing agreement by the parties, to conduct the arbitration in such a manner as it considers appropriate. An arbitrator is under the statutory duties, in section 33 of the AA 1996, to act fairly and impartially in conducting arbitral proceedings, in decisions on matters of procedure and evidence and in the exercise of all powers conferred on them. It is generally recognised that arbitrators have great freedom to determine the admissibility of evidence and weigh its probative value in light of the case's circumstances and the parties' arguments.

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. The decision of whether the facts in issue have been proved must be based on examining the totality of the evidence, including any gaps, before the tribunal. 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.

[66] See *Compagnie General Maritime v Diakan Spirit SA (The Ymnos)* [1982] 2 Lloyd's Rep 574; *Bulk Ship Union SA v Clipper Bulk Shipping Ltd (The Pearl C)* [2012] EWHC 2595 (Comm); [2012] 2 Lloyd's Rep 533; *Cosmos Bulk Transport Inc v China National Foreign Trade Transportation Corporation (The Apollonius)* [1978] 1 Lloyd's Rep 53, C Barclay, "Speed and Consumption Warranties" [1974] LMCLQ 13.

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.

In *The Pearl C*[67] two arbitrators, being former mariners, adopted a process by elimination to decide on the most probable explanation between three *probable* explanations concerning the vessel's failure to perform on the voyages. On appeal, Popplewell J held that this was "a legitimate process of reasoning and one which involves no error of law" in the case's particular facts.[68]

In some instances, tribunals will make different findings by examining the totality of the evidence before them, an ordinary procedure of the arbitral process. Some cases turn on accumulating multiple findings of primary fact, from which the tribunal is invited to draw inferences. Those matters go to make the building blocks of the reasoned process. In maritime arbitrations, it is common for the tribunal to pursue its own line of questioning, often arising from the tribunal's particular expertise. In speed and performance disputes, parties may choose arbitrators with technical expertise in dealing with technical issues, like hull fouling or engine damages. This is because the parties expect "to obtain the benefit of that maritime experience and expertise and they could have been expected to bring it to bear in dealing with the reference on written submissions only".[69] In such cases, "the parties take the risk that, in spite of that expertise, errors of fact may be made or invalid inferences drawn without prior warning. It needs to be emphasised that in such cases there is simply no irregularity, serious or otherwise. What has happened is simply an ordinary incident of the arbitral process based on the arbitrator's power to make findings of fact relevant to the issues between the parties".[70]

E.1. The burden of proof – legal and evidential burden

Questions about the burden of proof arise in arbitration, the burden of proof and presumptions that help with the arbitrators' fact-finding task. At the outset, the answer to these questions is not always as simple as expected. What follows briefly discusses this matter.

Strict rules of evidence generally do not apply in arbitration. Conflicts of evidence can be difficult to decide or when there is no satisfactory evidence on a particular point to decide as to what happened, or the scales are evenly

[67] *Bulk Ship Union SA v Clipper Bulk Shipping Ltd (The Pearl C)* [2012] EWHC 2595 (Comm); [2012] 2 Lloyd's Rep 533.
[68] At para 44.
[69] See *Bulk Ship Union SA v Clipper Bulk Shipping Ltd (The Pearl C)* [2012] EWHC 2595 (Comm); [2012] 2 Lloyd's Rep 533, *Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd (The Pamphilos)* [2002] EWHC 2292 (Comm); [2002] 2 Lloyd's Rep 681, and *London Arbitration 23/21* (2021) 1094 LMLN 1.
[70] *Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd (The Pamphilos)* [2002] EWHC 2292 (Comm); [2002] 2 Lloyd's Rep 681.

balanced (which is rare), in which case a tribunal would fall back on the burdens and standards of proof; a form of default rule under the substantive law. As Auld LJ said in *Verlander v Devon Waste Management*:[71] "[t]he burden of proof remains part of our law and practice – and a respectable and useful part at that – where a tribunal cannot on the state of the evidence before it rationally decide one way or the other".

London maritime arbitrators commonly deal with performance claims based on limited evidence, especially under the LMAA SCP. As a London tribunal noted more than two decades ago: "It was worth bearing in mind that London maritime arbitrators were largely experienced in the cases with which they had to deal, and did not require in many instances to be spoon-fed with detailed arguments".[72] Whenever possible, arbitrators could reach a proper decision based on the balance of probabilities without having regard to the somewhat technical questions that arose when the burden of proof had to be considered. As Colman J stated in *The Pamphilos*:[73] "[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. That said, there may be cases where so little evidence is put before them that sensible findings of fact are impossible and burden of proof is all that remains*. An experienced arbitrator should be able to recognise the latter type of case without much difficulty, although sometimes, as happened in this arbitration, *views may differ*".

Notably, other factors require consideration in some instances: there is helpful guidance[74] on approaching the matter without a party participating in the proceedings. Also, tribunals may draw inferences when a material witness does not give evidence or a party fails to comply with the tribunal's orders (section 47(7) of the AA 1996). The burden may shift depending on the pleadings; the burden of proof will not always fall upon the party asserting the claim.[75] Procedural matters may affect the allocation of the burden of proof in a particular arbitral setting; the same also applies to evidential issues.

In *London Arbitration 1/22*[76] the charterers failed to persuade the tribunal that they had established a prima facie case of off-hire. The charterers put forward no evidence other than a weather routing report and the comments from the WRC. It may be that the charterers did not realise that more was needed to establish their case as, more

[71] [2007] EWCA Civ 835 at para 24, and recently cited in *Riva Bella SA v Tamsen Yachts GmbH* [2012] EWCA Civ 303 at para 5 (per Lewison LJ).
[72] *London Arbitration 13/97*.
[73] *Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd (The Pamphilos)* [2002] EWHC 2292 (Comm); [2002] 2 Lloyd's Rep 681, page 691 col 2.
[74] *Interprods Ltd v De La Rue International Ltd* [2014] EWHC 68 (Comm); [2014] 1 Lloyd's Rep 540, at para 33, citing guidance to arbitrators issued by the Chartered Institute of Arbitrators.
[75] Lord Sales, "Default Rules in the Common Law: Substantive Rules and Precedent" (Oxford, 24 March 2023), page 7.
[76] (2022) 1098 LMLN 4.

often, the charterers think that the above suffices to advance a valid underperformance claim. We cannot know. However, it was incumbent upon the charterers to identify with evidence a cause within the listed events in the off-hire provision, resulting in a loss of time and extra bunkers consumed. A weather routing report, as evidence, fell far short of what would be required to establish a causal nexus, including loss. Consequently, the charterers failed to discharge their burden (a light one to defeat this application) and substantiate their entitlement to claim set-off according to the off-hire provision.

In *London Arbitration 23/21*[77] a specialist tribunal went beyond the findings of the weather routing report. It examined all the evidence that persuaded the tribunal that the vessel's hull was fouled on entry into the charter. The performance claim would likely fail had the charterers not advanced an alternative case. The tribunal drew inferences from the primary facts in issue after applying its specialist knowledge on the technical issues (fouling and RPM). The tribunal had no obligation to refer back to the parties on any inference drawn from the primary facts (see *The Pamphilos* and *The Pearl C*).

In *London Arbitration 29/22*[78] a panel of three arbitrators dismissed the charterers' alternative case as there was no evidence to support their case. The charterers failed at that point. Unparticularised assertions (or guessing) are insufficient to discharge the legal burden or shift the evidential burden. There must be evidence to make a finding or draw inferences.

In *The Divinegate*[79] the owners asserted that the adverse weather affected the vessel's performance. The evidential burden was shifted to the owners to substantiate their assertions. However, the owners failed to produce rebuttal evidence; thus suffered the inferences to be drawn.

E.2. Evidence of the weather conditions

The next controversial subject concerns the conflicting evidence of weather conditions that the parties submit to support or defend their case. The usual question is: which source should determine the good weather from which to assess the vessel's performance?

[77] (2021) 1094 LMLN 1.
[78] (2022) 1115 LMLN 2.
[79] *Eastern Pacific Chartering Inc v Pola Maritime Ltd (The Divinegate)* [2022] EWHC 2095 (Comm); [2023] 1 Lloyd's Rep 442, at para 110.

There are some points to be made by amplifying recent awards. The tribunal will first consider the parties' agreement concerning the source of evidence; typically, the "weather routing clause" deals with it. Construed on its specific wording, in *London Arbitration 29/22*[80] and *London Arbitration 32/22*[81] the tribunals held that the function of the clause was to permit the involvement of the WRC to monitor the vessel's performance strictly in line with the agreed good weather criteria. Seemingly, the clause performed a derivative function; it provided the source from where the data of the weather encountered may be drawn. The weather routing clause did not modify, qualify or ameliorate the performance clause.

Following the publication of *London Arbitration 23/21*[82] it has been argued that recent decisions represent a shift from the traditional view, ie when there was no preference clause, London arbitrators preferred the conditions recorded in the logs unless there is evidence to suggest that the logs have been falsified or deliberately exaggerated. However, such generalisations cannot be ventured. Tribunals have an autonomous power to make findings of fact or draw inferences from the primary facts in issue. That involves assessing several factors that must be weighed against each other; this evaluation of the facts is often a matter of degree, and arbitrators can differ. By and large, this award turned upon a specialist arbitrator's detailed factual findings, having applied "*his own expertise*, and having regard to peer publication, and expert reports; and having canvassed prevailing opinion on the relevant matters". To gain an overall view of the relevant evidence, the tribunal prepared a table to test the data for consistency and highlight inconsistencies between the submitted weather data. Clearly, the evidence must be fitted with and tested against the other evidence. The arbitrator was persuaded by his inspection of the data that the ship's records exaggerated the weather conditions and preferred the WRC data as the more reliable source.

All tribunals do not have the same technical expertise. Nor will all references be conducted under the same procedural terms: in some, there will be limited disclosure or expert evidence, with experts providing or not the required assistance to the tribunal. In some, the parties' unwillingness to cooperate during the process imposes more difficulties for issues to be determined fairly. However, the award highlights the fact-finding exercise adopted by the tribunal to make those findings of fact necessary to decide on the issue and evaluate the weight that should be attached to the evidence bearing upon those facts. The primary evidence led, and the secondary was dismissed.

[80] (2022) 1115 LMLN 2.
[81] (2022) 1120 LMLN 2.
[82] (2021) 1094 LMLN 1.

In *London Arbitration 32/22*[83] the tribunal had to weigh the evidence required from "both" sources and make findings of fact or draw inferences from the primary facts. After careful consideration, it preferred the weather routing reports as a more reliable source of evidence.

In *The Divinegate*[84] both experts considered the parties' agreed source of evidence to calculate the currents.

E.3. Final and binding

When disputes over the vessel's performance arise, the parties commonly agree to refer the matter to another routing company or expert whose determination shall be final and binding on the parties, but there is rarely a prescribed methodology inserted in the clause. The starting point is for the tribunal to construe the contract to identify the parties' presumed intention. Usually a party may challenge this process since the WRC or expert departed from the instructions contained in the contract, or the interpretation of the contract was not within his merit, and he has misinterpreted it.[85] The machinery for alternative dispute resolution will be upheld if the process is sufficiently certain and there would be no need for agreement at any stage.[86] As said, in practice the parties rarely insert a prescribed methodology in the clause, and this process fails to get off the ground for many reasons.

There is a difference between appointed a WRC and an expert to resolve the dispute. Clause 12 of the NYPE 2015 identifies two options: a "weather service" or "independent expert" (it distinguishes "weather service" and "expert"), and there is no reference to "conclusive evidence" for practical reasons. BIMCO[87] has expressed concerns that the parties should avoid clauses making the evidence of the WRC reports conclusive. In addition, BIMCO has stated that "generally speaking, reports from performance monitoring companies are considered evaluations rather than statements of facts as it were".[88]

There is some debate when the weather clause states "findings" instead of "data. It has been argued that the word "findings" should be construed broadly to include the methods of calculation; there is no authority on this point in the context of a speed and performance dispute. However, the findings of the WRC report cannot be binding unless prepared in strict compliance with the charterparty. Even if there is no express wording like "strictly in line with the charterparty terms", this can be implied to give business efficacy to the contract. The "findings" (factual issues)

[83] (2022) 1120 LMLN 2.
[84] *Eastern Pacific Chartering Inc v Pola Maritime Ltd (The Divinegate)* [2022] EWHC 2095 (Comm); [2023] 1 Lloyd's Rep 442.
[85] See Lewison, *The Interpretation of Contracts* (7th Edition, 2022), chapter 18, section 7.
[86] Ibid.
[87] Originally published in BIMCO Bulletin No 2, 1985.
[88] Originally published in BIMCO Bulletin No 3, 1996.

cannot include the resolution of complex factual or legal issues that sometimes such claims involve. The position may differ when the parties jointly appoint an expert for conducting a performance assessment.

Take, for example, *London Arbitration 9/23*.[89] It seems that the tribunal reached its decision by considering the relevant part of the clause as a pre-condition to arbitrate. The tribunal directed the parties to refer the issue to a jointly appointed WRC as agreed in the clause. What next? First, there would be insuperable difficulties, and the machinery was more likely to break down; the matter cannot remain alive indefinitely, so the parties would refer the dispute to arbitration again unless they failed to resolve it amicably (likely they would settle given the badly drafted clause). Secondly, "any report other than one prepared in compliance with the charterparty provisions would be non-contractual and therefore unenforceable as a final resolution of performance" (*London Arbitration 32/22*[90]). Therefore, when determining the counterclaim, the tribunal would not just rubber-stamp the "findings" of the performance report but consider all the evidence put before it giving each party an opportunity to put its case (section 33 of the AA 1996) having also regard any agreement by the parties. However, had this process failed at the outset, ie both parties tried to appoint another routing company, but without success, the tribunal would have determined the issue on the evidence available before it (see *London Arbitration 22/18*[91] and *London Arbitration 21/18*[92]). It is plain that the words "final and binding" in this context do not permanently restrict any performance claim to come before a tribunal, but this should happen at the appropriate time.

Many reasons militate against the proposition that a performance report from a WRC suffices to resolve an underperformance dispute between the parties. However, as in every case, it will depend on what the parties agreed and whether/how such an agreement can be enforced.

E.4. Disclosure and expert opinion

Requests for disclosure and opinion evidence remain common in non-typical performance claims. Unless otherwise agreed by the parties, tribunals can exercise certain powers set out in the AA 1996 or under the applicable terms of the reference to avoid unnecessary delay or expense and provide a fair means of resolving the issues to be determined. These confer wider powers to the tribunal as to the procedure. If there is no agreement, section 34 sets out a non-exhaustive list of powers the tribunal uses to comply with its duty under section 33.

[89] (2023) 1137 LMLN 2.
[90] (2022) 1120 LMLN 2.
[91] (2018) 1017 LMLN 2.
[92] (2018) 1013 LMLN 1.

Commonly, the parties adduce expert opinion evidence in arbitrations concerning breach of the performance warranty or separate breaches related to the vessel's performance (hull fouling or maintenance). As noted in *London Arbitration 7/15*:[93] "the charterers had relied substantially on expert evidence … expert evidence must have been expected to be adduced if the owners were seeking seriously to challenge the charterers' expert case". When the expert report is controverted, it will be part of the reasoning that might reduce the weight to be attached to the report; *requests for clarifications can be useful*. So, it is the experts' reasoning that matters and not the conclusions. The same will be tested for internal consistency and the reasons behind its opinion will be examined, requiring evidence to support it. The tribunal needs to be able to understand not only the experts' opinions but the materials on which they have based their opinions and the reasons given for them. The procedural rules may affect this process.

The SCP is a relatively cheap and speedy way of resolving small disputes, with a minimum of evidence – particularly expert and opinion evidence – appropriate. Given the nature and weight of the case dealing with complex factual issues requiring disclosure of documents and expert evidence, the tribunal will indicate to the parties the reference to proceed under the full LMAA Terms or ICP Terms (para 9 of the LMAA SCP 2021). *London Arbitration 23/21*[94] illustrates this approach. The parties adduced expert evidence, and a sole arbitrator found that the vessel did not maintain the warranted speed and that the cause of the vessel's reduced speed was underwater fouling of the hull and propeller by marine growth.

In *The Divinegate*, both parties relied on expert evidence. The courts and tribunals are generally much assisted by expert evidence, but such assistance requires the cooperation of the experts to identify relevant issues; without such co-operation, its assistance is undermined. Turning to the decision, it is plain that both experts had to explain their rival methods applied. They agreed on specific topics, fairly conceded adverse points put to them in cross-examination and acknowledged the limits of their expertise. By way of comment (not stated in the decision), Lady Rose said: "In our adversarial system, cross-examination is the engine that drives the court to discover the truth".[95] Furthermore, one expert acknowledged that others had contributed to the report. He has uncritically accepted and incorporated an opinion and supporting academic articles provided by a separate individual who put forward a figure for loss of time for fouling. Therefore, the judge approached the opinion on hull fouling with caution. The judge accepted the experts' evidence on the market practice. It is noteworthy to mention that the judgment in *The Divinegate* highlights some drawbacks in the experts' analysis, which will be a point for debate and argument when parties submit expert opinion evidence for similar claims.

[93] (2015) 925 LMLN 4.
[94] (2021) 1094 LMLN 1.
[95] Lady Rose, "The Art and Science of Judicial Fact-Finding" (Cambridge, 14 July 2023), page 9, para 33, www.supremecourt.uk/docs/speech-230714.pdf (accessed 12 September 2023).

Applications for disclosure are usually challenged on various grounds. In *London Arbitration 6/23*[96] (under a voyage charterparty), the vessel encountered an engine breakdown on its way to the discharging port. The charterers raised the point that the vessel was unseaworthy at the beginning of the voyage and sought disclosure of engine logs up to one year previous to the date of the breakdown. The arbitrator did not consider that the charterers had made a valid case for disclosure. Requests for disclosure may result in costs and delay in the process. A tribunal may not accede to a party's application to order further disclosure, as on any view the claim was bound to succeed and there would be nothing to be gained from further disclosure or evidence. All in all, there is a balance to be struck between section 33(1)(a), 33(1)(b) and 33(2) of the AA 1996.

F. Costs

In *London Arbitration 23/21*[97] the parties agreed to adopt the LMAA Terms instead of the LMAA SCP given the nature of the case, with the arbitrator making an order that the recoverable costs would be limited to £10,000 according to section 65 of the AA 1996. Two observations can be made here: (i) the cap on the recoverable costs aimed to make arbitration cost-effective. Parties make such applications early before costs have already been incurred; and (ii) section 61 of AA 1996 confers jurisdiction on the tribunal to award costs and to depart from the general principle (costs follow the event) whenever appropriate. In this case, the charterers were successful in their claim. Still, fairness and justice dictated that they would pay part of the costs as the tribunal spent considerable time dealing with errors and exposing flawed methodology in the weather routing performance report.

London Arbitration 1/22,[98] *London Arbitration 2/22*[99] and *London Arbitration 3/22*[100] illustrate that in limited circumstances (as in this case), the costs incurred in pursuing an arbitration may become disproportionate to (and possibly even exceed) the sums at stake. The tribunal examined the expert report and considered that the extent of their work was disproportionately excessive considering the nature of the case and the sum in dispute and that the charterers could not be held responsible for anything like the whole of their costs. Given the absence of arguments by the paying party, the tribunal noted that assessing costs was never an exact science and adopted a broad-brush approach doing the best it could. Whereas in *London Arbitration 11/22*[101] the tribunal recognised that the recoverability of the in-house legal costs was a contentious issue, but it was satisfied that it should exercise its

[96] (2023) 1135 LMLN 2.
[97] (2021) 1094 LMLN 1.
[98] (2022) 1098 LMLN 4.
[99] (2022) 1098 LMLN 5.
[100] (2022) 1098 LMLN 6.
[101] (2022) 1103 LMLN 4.

discretion in the owners' favour and allow them to recover the costs of the legal services provided in-house by their Club. A previous LMAA tribunal reached a similar decision in a case where the P&I Club had to defend allegations about the vessels' seaworthiness relying on expert evidence.

G. Conclusion

There is clearly a need for a fair balance in resolving speed and performance claims cost-effectively and fairly, given that most of these disputes involve relatively small amounts. Arbitration decisions fortify the rival contentions of the parties when it comes to resolving performance disputes, with many commonly debated issues being unresolved judicially: this leads to uncertainty as similar points are arbitrated over and over again. A striking example was the treatment of currents in evaluating performance that caused extensive debate for decades. Only recently *The Divinegate* resolved this issue judicially and highlighted other areas needing improvement. Following *The Divinegate* there seems to be a general market interest in identifying *reliable* alternative ways for assessing the loss when there is no good weather, a hotly debated issue that kept shipping lawyers, junior counsels, arbitrators and weather routing companies (acting as advocates) heavily occupied. The shipping industry requires certainty and commercially pragmatic solutions; some degree of accuracy should be sacrificed to resolve small claims expeditiously and fairly. The evolving emissions regime may add another layer of complexity in resolving such claims. As this is a new matter, it has not yet attracted the attention of the courts or tribunals. That remains to be seen.

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