Lloyd's List Intelligence

Reflections on speed and performance claims (Part III)

Establishing liability

By Prokopios Krikris FCIArb, consultant and arbitrator

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Credits

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Introduction

Common disputes have arisen in relation to the interpretation of "about" margins, the effect of ocean currents, the evidentiary weight of deck logs, and the calculation of underperformance losses. The enduring nature of disagreements concerning speed and performance warranties has given rise to a substantial and continuous caseload in maritime arbitration, thereby maintaining a steady demand for the services of counsel, experts, solicitors and arbitrators specialising in such claims.

An analysis of key SMA awards provides valuable insight into the evolution of maritime arbitration and prevailing market practices. The earliest SMA decisions addressing speed and performance disputes concentrated on the following principal issues:

(1) *The S/S Alma*[1] (13 April 1964) is the first published award addressing deductions from time charter hire by the charterers for lost time caused by an alleged breach of warranty as to speed and consumption, which the owners denied. The charterers calculated the time loss by taking the overall distance between each port and allowed the vessel the exact time she would take to make the voyage based on a speed of 9.5 knots every day. They made no allowance for bad weather or seas.

Without evidence that the log abstracts were falsified, the arbitrators were guided by the log abstracts regarding the weather conditions on the voyage. Notably, the panel said:

"Many Arbitrators, Engineers and Masters, experienced with low-powered, single screw vessels, use force 3 as the breaking point between 'good' and 'bad' weather. In this case the Arbitrators used force 4 as the breaking point as vessel maintained between 9 and 9 1/2 knots even on force 4 days".

The arbitrators examined the evidence and were convinced the vessel did not breach its charterparty warranty and maintained its described speed and consumption under good weather as encountered in nine days during the long voyage. Thus, as the ship performed, there was no breach – and no claim. This rationale was applied even in recent London Arbitration awards almost 60 years after this award.

(2) *The SS Areti S*[2] involved a claim for off-hire during deviation. The panel denied the claim since the master used good judgment to deviate to avoid a hurricane. Clause 16 of the charterparty required the master to use his discretion "to deviate for the purpose of saving life and property". As to the speed claim, the arbitrators considered the logs that showed an average speed of 9.5 knots day in and day out, without consideration of the weather, and under bad weather conditions up to gale force it performed well. As to the bunkers, the arbitrators considered the total fuel consumption basis departure and arrival figures, making an average 24.35 mt against the charterparty description of 26/27 mt. Thus, the charterers' claims for speed deficiency and bunker consumption were denied.

[1] SMA 10.

[2] SMA 16. The Owners of the vessel were N J Goulandris Ltd.

(3) In *The SS Nestos*,[3] the charterers claimed failure of the vessel to maintain speed and excessive consumption, making deductions from hire. The panel held that the consumption was measured overall while the vessel was at sea, not daily. One arbitrator dissented, finding that the vessel was slowed down for several days (particularly on the outward voyage) without any corresponding reduction in consumption. The majority of arbitrators preferred to consider final consumption on an overall basis while at sea rather than on a day-to-day basis.

(4) In *The Cuaco*[4] a panel addressed a claim on failure of the vessel to maintain her charterparty warranted speed and consumption were based solely on the previous voyage, Colombo/Rotterdam via Mormugao. This voyage constituted the last one and a half months of a 12-month charter with no complaint being made for any breach of speed or consumption warranty during the preceding period of the charter. It is evident, therefore, that the owners had, in good faith, described the ship's speed and consumption. Otherwise, the lack of speed or excessive consumption would have been apparent earlier in the charter period. The charterers claimed that the delay on the last voyage was due to the owner's failure to clean the hull. The calculations were conducted in periods of no good weather, with instances of heavy weather reducing the speed of the ship substantially while engine revolutions remained the same. For each day the ship was going at half speed due to heavy weather, the vessel would require double the time to make the same distance as per charterparty speed.

The arbitrators disallowed the claim as it would not take many days of this kind of weather and sea, or proportionate weather and sea, to lose three days in a voyage of 34 sea days.

[3] SMA 17.
[4] SMA 60.

Establishing liability

As with all disputes, the initial consideration in performance-related claims is establishing liability. Once liability is determined, the next step involves the quantification of the resulting losses.

Hire deductions

As a preliminary step, the owners challenge the deduction from hire. Furthermore, in the event the dispute is referred to arbitration, the owners may apply for urgent relief by way of an immediate partial award.

Partial award applications

The finality of maritime arbitration awards in New York is based on statutory law, the SMA Rules, and the practice since 1963 of SMA arbitrators to issue partial final awards. Arbitrators have authority under the SMA Rules to issue partial final awards for emergency relief in appropriate cases. A panel[5] in a very recent decision said that courts and arbitrators have often described a shipowner's entitlement to freight as "sacrosanct" and arbitration panels have issued partial final awards to owners where, as here, freight or hire is payable "without discount or set off".

In a recent case,[6] the panel summarised the position about partial final awards as follows. Maritime and SMA arbitrators in New York often issue partial final awards and do so in a variety of contexts. To the extent such a partial final award "finally and definitely disposes of a separate, independent claim", it may be confirmed by a district court, even though further proceedings and disputes remain.[7] In *Southern Seas Navigation Ltd v Petroleos Mexicanos*,[8] Weinfeld, J said that the "very purpose" of an order granting equitable relief "is to clarify the parties' rights in the 'interim' period pending a final decision on the merits".

[5] SMA 4485.
[6] SMA 4420.
[7] *Compania Chilena de Navegacion Interoceanica SA v Norton Lilly & Co*, 652 F.Supp 1512, 1515 (SDNY 1987).
[8] 606 F.Supp 692, 694 (SDNY 1985).

In the seminal maritime case, *Metallgesellschaft AG v M/V Capitan Constante*,[9] the Second Circuit confirmed a "partial final award" for freight due the shipowner even though the parties did not agree to "bifurcate" any issues. The panel issued the award over the objection of the respondent, and factual and legal issues remained to be heard and decided by the panel. One judge dissented, predicting: "After this decision, use of partial final awards will doubtless increase ...". In a footnote, the dissenting judge referred to an amicus brief filed by the SMA in which, even then, in 1985, it was stated "such partial final awards already account for 'a significant percentage' of maritime awards, in excess of 16 per cent of all awards rendered last year, despite the uncertainty as to whether they are subject to confirmation".[10]

Accordingly, by 1985, partial final awards were an important feature of SMA arbitrations, including in cases where one party objected. The practice of issuing partial final awards has continued since 1985.[11]

In another case[12] the panel, having denied the owners' request for a partial final award, made some general observations for partial awards. Under normal circumstances where a charterer wrongfully deducts from hire amounts which are not allowed under the various clauses of a time charterparty, New York panels have ordered charterers to pay to owners the balance of hire calculated to be due. In several recent cases involving interim decisions, New York panels[13] have ordered the posting of security for claims and even counterclaims. Moreover, an interim award is most aptly issued when claims are severable and liability can be separated from damages.

In another case,[14] the panel stated that there is an abundance of arbitral and legal precedent that concludes that unless expressly permitted by the charterparty, a charterer may not withhold payment of hire against underperformance and cargo claims. In *The Stena Consul*,[15] the panel stated that the off-hire provisions of the head charter did not authorise the withholding of charter hire for damages. Absent a specific provision in the off-hire clause authorising a withholding, any other withholding of charter hire is wrongful and is often the subject of a partial final award. *The Caribbean Sun*[16] also followed suit: "The principle that the charterer has no right to withhold hire, absent express provisions in the charterparty permitting such deduction, is well settled in law and has been consistently supported by arbitral awards".

In some instances, panels were clear in upholding the obligation to pay hire without deductions, unless such deductions meet the test of clauses 5 and 15 of the NYPE form, and panels[17] have consistently denied such deductions for alleged speed deficiency claims.

Regarding back-to-back deductions, in *The Dimitris L F*,[18] although the sub-charterer was allowed an improper hire deduction when it failed to subtract excluded weather from its speed deficiency claim, the charterer was not entitled to recover such an unjustified deduction from the owner.

In *The Gedeh*,[19] the charterer was entitled to withhold hire for the excess voyage time resulting from the vessel's intentional failure to steam at the warranted speed, fuel oil consumed during the excess voyage time, and diesel oil consumed throughout the period on which the slow steaming took place. The owner was awarded a credit for fuel savings during good weather as a set-off against charterer's speed deficiency claim.

Austin Dooley, SMA Arbitrator, said for this article, in relation to *The Gedeh*:

> "The *Gedeh* award, a majority opinion, provided owners with a fuel 'savings from expectation'. The vessel was on a NYPE time charter signed in 1979. It was intentionally slow steamed by owners without charterers' authorisation. Charterers' time loss claim amounted to 106.9 hours. The speed reduction resulted in a voyage fuel consumption less than the charterparty allowance. The panel majority awarded owners a credit of about $56,000 for the underconsumption of IFO. There was a MDO overconsumption which charterers were awarded.
>
> The dissenting arbitrator, Jack Berg, disagreed with the panel majority's decision granting the allowance and wrote:
>
> '... I respectfully disagree with the panel majority's decision which is contrary to the uncontroverted facts of this case and the express provisions of

[9] 790 F.2d 280 (2d Cir 1986).
[10] Page 285.
[11] See SMA 4254, SMA 3328 and SMA 2741.
[12] SMA 3479.
[13] See SMA 3074, SMA 3075, SMA 3102 and SMA 3168.
[14] SMA 2964.
[15] SMA 2987.
[16] SMA 3198.
[17] *The Uranus* 1977 AMC 586; SMA 87 and SMA 1775.
[18] SMA 1110.
[19] SMA 1753

> the charterparty. *Gedeh* under-performed with respect to its warranted speed simply because the vessel wilfully and consistently generated insufficient rpms to maintain the 'about' 15 knot speed warranted in the charterparty. Also, the panel majority awarded owners a bunker consumption bonus offset to charterers' claim despite the fact there is no authority expressed anywhere in the charterparty granting such a benefit. There is nothing in the charter to suggest that owners are in any way entitled to a bunker consumption bonus if the vessel achieves its warranted speed – certainly it should not be contemplated under circumstances when the vessel fails to make its warranted speed. Indeed, the consistent interpretation of this charter's speed and consumption wording is that owners are not entitled to a bunker consumption bonus or offset against a speed deficiency claim unless there is express wording to the contrary.'

Mr Berg's point was: '... Owner's fuel consumption offset for the speed deficiency period when the charterparty makes no specific reference to such a practice ...'.

This award was discussed at several seminars I attended in the 1980s. With the basic principle that fuel warranty is a maximum and speed a minimum, with each having to be satisfied, outturns of consumption less than the maximum warranted and speed greater than the charterparty requirement is a satisfaction of the charterparty for which owners do not receive a bonus. Unless of course it is in the charterparty. Recommendations by attendees were for adjustments to the performance clause to allow for offset of fuel and time loss. As the industry has moved on from the *Gedeh* award, in my experience of analysing speed claims, it is the rare time charter that does not have wording such as the following: 'Using the Min allowed speed and the max allowed consumption. Any overall and/or time savings to offset any overall time and/or bunker losses'."

London Arbitration

Aside from High Court cases[20] dealing with "anti-deduction" clauses which treated them as "pay now, argue later", in some London Arbitrations,[21] tribunals allowed an application made early for an immediate partial award for speedy relief, following the principles set out in *The Kostas Melas*.[22] As Robert Goff J said in *The Kostas Melas* on page 27 col 1:

> "... he [the charterer] is not, after all, being asked to prove at very short notice his cross-claim as such, but simply to satisfy a tribunal that he has reasonable grounds for exercising his right of deduction ..."

London maritime arbitrators have ample powers to proceed without delay in making a partial final award. Section 47 of the Arbitration Act 1996 empowers the tribunal to make a partial award, but the tribunal exercises its powers by having regard to section 33 of the 1996 Act, which sets out the general duty of the tribunal in very broad terms.

A tribunal's decision to issue a partial final award is a matter of discretion. Moreover, the burden of defeating this application is light; admitted sums may be considered an exemplary situation where it would be fair and appropriate to render such an award since there is no prejudice to the charterers when there is no counterclaim and no risk of overpayment that needs to be recovered. When there is evidence of fouling, engine issues, intentional slow steaming, or discrepancies between the deck logs and weather routing reports – amounting to a breach of clause 11 – charterers rely on these to resist an application for a partial award.

Furthermore, as most speed and performance disputes fall within the LMAA Small Claims Procedure, given the modest amount, such applications will succeed in exceptional cases; resolving the claim and counterclaim in one final award would be more cost-effective. Readers may refer to the analysis in Part I of this series for further review.[23]

[20] *Fastfreight Pte Ltd v Bulk Trident Shipping Ltd (The Anna Dorothea)* [2023] EWHC 105 (Comm); [2023] 2 Lloyd's Rep 446.
[21] See eg *London Arbitration 1/22*, (2022) 1098 LMLN 4, *Lloyd's Maritime Law Newsletter*, 7 January 2022; *London Arbitration 17/19*, (2019) 1038 LMLN 2, *Lloyd's Maritime Law Newsletter*, 13 September 2019.
[22] *SL Sethia Liners Ltd v Naviagro Maritime Corporation (The Kostas Melas)* [1981] 1 Lloyd's Rep 18.
[23] P Krikris, "Reflections on Speed and Performance Claims"(i-law.com, 26 September 2023).

The nature of the warranty

New York arbitrators[24] have generally interpreted the speed consumption warranties as continuing warranties, not simply ones that must be met on the vessel's delivery under the charterparty. The position is not the same under English law, but it is not significantly different in the context of short-term charter trips. The panel in *The Mount Athos*[25] explained the difference between the approaches: "Owner's authorities on this issue correctly depict the law and commercial practice as it is understood and followed in the United Kingdom. However, New York arbitrators have never accepted the warranties in such a manner".

London arbitrators have expressed a similar view in some short-time charter trips. In *London Arbitration 4/18*[26] the tribunal held that in the context of the time charter trip, the owners' submission that there was no continuing warranty was less than convincing. In *London Arbitration 1/14*[27] the tribunal noted that it was settled law[28] that in the absence of any such express provision, the warranty contained in provisions like clause 29 only applied (at the latest) at the time of delivery of the vessel into the charter service. However, in the context of a relatively short time charter trip, the vessel's speed and consumption in performing the service might be considered good evidence of its capability at the time of delivery. In *London Arbitration 24/05*,[29] the tribunal held that there was no obvious continuous speed and consumption warranty in the charterparty. Words such as "during the currency of this charterparty" or "throughout the duration of this charter" were missing from lines 9 and 10 of the charter.

When an extended port stay caused fouling and speed deficiency, the owner was not responsible.[30] Another panel[31] concluded that when the charterparty does not contain any warranty prescribing limits other than manoeuvring and steaming fuel consumption, nor a remedy for excess in-port fuel consumption, in similar cases other arbitral panels have judged each case on its own merits and awarded what was reasonable in the circumstances.

In *The Norilsk*,[32] in the absence of a speed and consumption warranty in the charter, the arbitrator measured the vessel's performance against the speed it was capable of making on a good weather day.

In another panel,[33] the charterers failed to prove the extent to which the speed warranty had been breached, and the arbitrators awarded only the amount of speed deficiency conceded by the owners. By analogy, in *London Arbitration 20/16*,[34] as a matter of concession, the owners were prepared to split the amount claimed. That was a fair resolution, and the tribunal accepted it. As the matter had been agreed between the parties, no dispute remained for the tribunal's determination.

Moreover, another panel[35] concluded that the charterparty speed warranty was not strictly applicable to a newly built vessel where the charter provided that "All ... details understood to be "'about' and subject to changes as the above vessel is a newbuilding".

In *The Superten*,[36] the panel rejected the charterers' performance claim, which stated that the charter speed warranty required the vessel to be fully loaded (so as to fully submerge the design-sensitive bulbous bow) and in Beaufort 2 weather, conditions that were hardly ever achieved. Although the vessel was capable of the warranted speed only under near-impossible and strictly limited circumstances, that was what the charterer had agreed to.

In *The Karen Naess*,[37] clause 2 of the charterparty imposed a due diligence obligation on the owner to maintain the vessel. The warranty of consumption contained in the preamble and the limited warranty of seaworthiness contained in clause 2, of course, speak as of the time the vessel is placed at the charterers' disposal under the charter.[38] It was not disputed that the vessel was in fact seaworthy and fit for the service at the time it was placed at charterers' disposal, and it was common ground that its consumption was then well within the warranty, as evidenced by its actual consumption on the early voyages. It was therefore clear that there was no breach of warranty. Clause 17, requiring the prosecution of the voyages "with the utmost despatch", had no application to a case such as this; insofar as fuel consumption was

[24] SMA 1570, SMA 1706 and SMA 3145.
[25] SMA 1570.
[26] (2018) 995 LMLN 2, *Lloyd's Maritime Law Newsletter*, 19 January 2018.
[27] (2014) 891 LMLN 2, *Lloyd's Maritime Law Newsletter*, 24 January 2014.
[28] *Cosmos Bulk Transport Inc v China National Foreign Trade Transportation Corporation (The Apollonius)* [1978] 1 Lloyd's Rep 53.
[29] (2005) 681 LMLN 2(2), *Lloyd's Maritime Law Newsletter,* 21 December 2005.
[30] SMA 1570.
[31] SMA 2331.
[32] SMA 3341.
[33] SMA 1538.
[34] (2016) 958 LMLN 2, *Lloyd's Maritime Law Newsletter*, 19 August 2016.
[35] SMA 1725.
[36] SMA 3304.
[37] SMA 291.
[38] *Denholm Shipping Co v W E Hedger Co (The Beech Park)* 47 F.2d 213 (2d Cir 1931).

concerned, the clause would simply appear to make an owner liable if, for example, an extra steaming day was required, and an extra day's fuel was therefore consumed, because of an inexcusable failure to steam at the fastest economical speed.

Not every increase in consumption is the result of a failure to exercise due diligence, breakdown, casualty or inefficiency. There are other possible causes, including the aging of the vessel and the maintenance of extraordinarily high engine speeds. But as the causes, whatever they may be, are peculiarly within the knowledge of the shipowner, when confronted with evidence of a substantial increase in fuel consumption, he should be required to come forward with evidence to explain the increase or at least to show that it was not due to one or more of the causes for which he has assumed responsibility under the charter. While charterers could have recovered if they had proved that the excess fuel consumption during the latter voyages was caused by improper maintenance, no evidence was introduced to suggest a lack of due diligence; therefore, their claim was denied.

Without guarantee

The position differs between US Law and English law on this topic. Under English law the phrase "without guarantee", often abbreviated to "WOG", means that there is no liability for a statement so qualified, unless it is made with fraud or bad faith. Statements of description "without guarantee" constitute mere representations rather than enforceable contractual undertakings. This was decided in *Losinjska Plovidba Brodarstovo DD v Valfracht Maritime Co Ltd (The Lipa)*[39] and has been upheld in various arbitrations thereafter.[40]

However, in cases of slow steaming, fouling, or engine issues, this matter requires further consideration. In an article[41] published by Charles Measter in 2006, a practising member of SMA for over 30 years (as he was then), expressed the view that *The Lipa* had caused debate within the shipping industry, and some professionals disagreed with this decision. In giving an example of a ship being described as "about 13 k on 28 mt IFO" and "without guarantee", of the ship performing during the charter at 9 knots, he would speculate that the owner would be held to have given the description in bad faith, being a reason to negate the application of *The Lipa* in the UK. In US cases, bad faith has been found in cases where the vessel has been purposely misrepresented. As the author further said, in cases of "without guarantee" descriptions, SMA arbitrators would likely apply the usual margins and some may rule as the arbitrators did in *The Lipa*. The chances of these awards being upheld on appeal would be high as US arbitration awards can only be vacated if they violate section 10 of the US Arbitration Act.

This appears to reflect commercial realities, as it is frequently observed that owners provide speed and consumption figures despite knowing that the vessel is incapable of achieving the stated performance. This may arise, for example, where the vessel has remained in warm waters for a prolonged period, leading to hull fouling before the commencement of the charterparty, and the owners have failed to arrange for hull and propeller cleaning.

In cases of misdescription, panels found that the owners, having misdescribed the carrying capacity of their vessel, must respond for reasonable, provable damages.

The more recent SMA award dealing with this point is *The Bavaria*[42] issued in 2006 by a sole arbitrator (Austin Dooley). The arbitrator considered several previous awards dealing with WOG[43] and found the principle defined in *The Treasure Island*[44] pertinent. In that case, the panel found that although the vessel was erroneously misdescribed, the charterers had a right to depend on the description. The panel stated that the description of the vessel was "... the very information which was important to [charterers] in planning the stowage of their cargo, and to the type of ship they were seeking". Applying this principle to this arbitration, the arbitrator found that WOG may offer some protection for "unforeseeable events" beyond the control of the initiating party but does not provide for any special umbrella from speed and fuel performance claims. Thus, the charterers had a right to depend on the description as a warranty.

[39] [2001] 2 Lloyd's Rep 17.
[40] See *London Arbitration 5/06* and *London Arbitration 4/18*.
[41] Measter, C L, "A surprising interpretation of a time charter contract: What does without guarantee mean", 1(2) Malabu: Maritime L Bull 7 (2006).
[42] SMA 3929.
[43] SMA 3536, SMA 3140 and SMA 1983.
[44] SMA 1776. Note that this case may be distinguished as it happened in SMA 3017.

The parties' agreement

English case law and London arbitration awards confirm that numerous disputes have arisen as a consequence of imprecise or overly relaxed drafting. In all these cases, the starting point was to determine what the parties agreed upon, which is sometimes not without difficulty.

It is not uncommon for an unfamiliar owner and charterer, pressured by time constraints, making chance contact in the market place, and who after a brief meeting of minds, hastily or superficially concluded an agreement that each thought at that time clearly expressed their mutual intents, to later find themselves embroiled in controversy.[45]

Moreover, performance clauses are seldom, if ever, drawn up by lawyers; brokers are not pedantic lawyers. As contractual obligations are fixed solely by the parties, the language of a business contract must be construed in the light of what a businessman would reasonably expect to give or receive, to perform or suffer, under its terms. As stated in *Shirai v Bloom*,[46] contracts made between businessmen in the usual course of business should not receive a technical construction which would require a businessman to keep at his elbow a counsellor learned in the law. Moreover, restrictions and limitations must be clearly spelled out in the agreement[47] and important points should not be clothed in adroit and slippery language.[48]

In *The Skyros*,[49] which did not involve a performance dispute, but reflected the notion that New York law realistically applies a plain-language rule for contracts among commercial men, and upheld the principle that such agreements should be interpreted with an ordinary-common sense, the panel said: "we have no quarrel with what lawyers would understand the words to mean. However, the proposals which the parties exchanged were drafted by commercial shipping people". In a similar vein, in *The Sealnes*,[50] the panel said: "Charter Parties are seldom, if ever, drawn up by lawyers, but rather by commercial men, which is why arbitration clauses usually call for the appointment of commercial men. Arbitration is not litigation, and arbitrators are not, and should not be, constrained by purely legalistic technicalities".

Notably, under English law, in *The Didymi*,[51] Hobhouse J (as he was then) draw also a distinction between a commercially and legally drafted clause stating: "At first glance this clause seems reasonably straightforward and so it probably seemed to the parties, but on a closer reading it gives rise to a number of problems. It is obviously a commercially rather than a legally drafted clause". He further noted that: "The words of a contract are used objectively to state the intention of the parties to the contract. They may do so skilfully or clumsily, but the function of the court is to extract from the words used their objective intention".

There are numerous instances, including various London arbitration awards, which illustrate the challenges of contractual construction and interpretation. In *London Arbitration 6/19*[52] issues arose with the construction of the performance clause, including arguments about a typographical error and surplusage. The tribunal noted that "the parties' submissions highlighted the uncertainty that existed in relation to the terminology used in defining good weather conditions in speed and consumption provisions in time charterparties".

It seems that the tribunal would consider "industry standards" as part of the factual matrix, but there were none. In *London Arbitration 16/16*[53] the tribunal noted that "the tribunal would start by considering whether, as submitted by the owners, there was a trade practice to be taken into account as a relevant part of the factual matrix when considering the meaning of the words 'as presently performing'". As discussed in the previous article,[54] SMA panels also considered industry standards in interpreting contractual disputes. For instance, the word "day" (which will be considered below) has not been treated as "24 hours good weather". There is industry practice showing that it requires clear wording, such as "24 hours consecutive good weather noon to noon".

As some cases prove, commercial considerations have played a significant role in shaping prior judicial decisions on specific contractual issues. For example, in *The Apollonius*,[55] Mocatta J observed that there were "overwhelming commercial considerations" supporting the charterers' argument that the speed obligation was

[45] SMA 1270.
[46] 146 NE 194, 239 NY 172 (Ct App 1924).
[47] *Silver King Coalition Mines Co of Nevada v the Silver King Consol Mining Co of Utah*, 204 F.166 (8th Cir 1913).
[48] *In the Matter of the Arbitration between Seneca Falls Central School District and Dorothy Lorenz*, 117 Misc. 2d 879, 459 NYS 2d 689 (Sup Ct 1983).
[49] SMA 2998.
[50] SMA 2055.
[51] *Didymi Corporation v Atlantic Lines and Navigation Co Inc (The Didymi)* [1987] 2 Lloyd's Rep 166.
[52] (2019) 1024 LMLN 2, *Lloyd's Maritime Law Newsletter,* 1 March 2019.
[53] (2016) 954 LMLN 5, *Lloyd's Maritime Law Newsletter*, 24 June 2016.
[54] P Krikris, "Reflections on Speed and Performance Claims"(Part II) i-law.com, 20 May 2025.
[55] *Cosmos Bulk Transport Inc v China National Foreign Trade Transportation Corporation (The Apollonius)* [1978] 1 Lloyd's Rep 53.

to be assessed at the time of delivery. Similarly, in *The Al Bida*,[56] the court examined the reasonableness of the term within the context of the relevant trade and any established commercial practices when determining the appropriate margin to be applied to the term "about".

In *London Arbitration 4/11*[57] (where the owners sought to apply the clause very restrictively to limit liability), the tribunal stated that the language used in the clause was not ideal to support the owners' position. The tribunal was hesitant to limit liability absent clear wording to this effect.

An interesting point arose in *London Arbitration 8/86*[58] where the clause contained the words "about max" daily allowance: so was it "about", which imports a tolerance, or "maximum" which is, as the word means, maximum? It was indeed "maximum", without any allowance for "about".

In *London Arbitration 23/21*[59] and *London Arbitration 32/22*,[60] the weather routing clause in the proforma functioned as a supplementary mechanism rather than a primary determinant of performance. In other words, its core purpose was to extend the sources of performance parameters by allowing input from a weather routing company. The clause itself did not define whether the weather encountered constituted "good weather". This was a point being addressed in practice when the recap did not contain restrictive wording, but the proforma terms included restrictive wording. As the parties turned their minds and formulated their final agreement in the recap, and the term served as a complete code in measuring performance, it was argued that this term must prevail.

Another issue being addressed is whether the owner or the charterer must specify certain conditions in the clause. As stated in a 1980 SMA award:[61] "Vessel description in the maritime industry is an economic consideration determining its market value, and the obligation to fully describe the vessel rests with the Owners".

Further, as a panel said: "under the contra Proferentem Rule of Contract Law, an ambiguous contract ought to be construed against the drafter of the ambiguity",[62] and "Charterparty's terms to be construed against the drafting party and in favour of the non-drafting party".[63] The doctrine of contra proferentem provides that when "one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have a reason to know uncertainties of meaning".[64]

Another panel noted that in the interpretation of the contract, the law requires that all parts of a contract must be recognised and given meaning, and none should be ignored.[65] In some instances, the language in the clause speaks for itself, and arbitrators may not rewrite charter terms if there is no ambiguity involved;[66] or impose rights by arbitral or legal fist after they entered a contract.[67]

Restrictive clauses

In recent times, there has been a growing tendency for performance warranties to incorporate various elements, both related and unrelated to weather conditions.[68] As noted by an LMAA arbitrator, such clauses are to be regarded as "exclusion clauses". Accordingly, they must be clearly and unambiguously drafted, and will be strictly construed against the party seeking to rely upon them. These clauses should not be interpreted in a manner that creates an unfair trap for commercial parties, depriving legitimate claims of their effect or undermining the operation of the contract. This is not to suggest that the parties' agreement should be disregarded; on the contrary, such clauses may form an integral part of the pricing structure and risk allocation under the contract. However, it remains necessary to consider whether these clauses are drafted with sufficient clarity, or whether they are designed to evade other contractual obligations.

In some cases, the parties may seek to limit the loss calculation to the good weather period, thereby avoiding the application of the deficiency to the entire voyage with all relevant adjustments, as per *The Didymi*.[69] However, when there is fouling, engine issues, or intentional slow steaming, the parties disagree whether "no extrapolation" equally applies. In a recent unreported arbitration, the arbitrator applied a loss over the voyage due to fouling,

[56] *Arab Maritime Petroleum Transport Co v Luxor Trading Panama (The Al Bida)* [1986] 1 Lloyd's Rep 142.
[57] (2011) 826 LMLN 2, *Lloyd's Maritime Law Newsletter*, 22 July 2011.
[58] LMLN 178, *Lloyd's Maritime Law Newsletter*, 28 August 1986.
[59] (2021) 1094 LMLN 1, *Lloyd's Maritime Law Newsletter*, 5 November 2021.
[60] (2022) 1120 LMLN 2, *Lloyd's Maritime Law Newsletter*, 11 November 2022.
[61] SMA 1429.
[62] SMA 3294.
[63] SMA 3223.
[64] SMA 3871.
[65] SMA 1929, dissenting arbitrator.
[66] SMA 1224.
[67] SMA 1603.
[68] See also P Krikris, "Vague terms remain in speed and consumption clauses" (*Maritime Risk International*, (2022) 36 MRI 2 19, 18 March 2022).
[69] *Didymi Corporation v Atlantic Lines and Navigation Co Inc (The Didymi)* [1987] 2 Lloyd's Rep 166.

even if the contract stipulated no extrapolation to apply. In essence, the intention was to calculate the "extra" sailing time (or voyage prolongation) as well as the bunkers consumed due to this extra steaming period.

Owners typically contend that the inclusion of the phrase "no extrapolation is allowed" serves to preclude claims arising throughout the voyage, even in circumstances involving a breach of clause 8 (slow steaming) or clause 15 (engine deficiencies, fouling, or intentional slow steaming). Conversely, charterers have, in certain instances, argued that this position is incorrect, asserting that the wording employed is insufficiently clear to encompass such scenarios. The charterers further submitted that this position may be contrasted with the well-established right to claim demurrage under voyage charterparties. Where the owner delays the vessel at berth, the question arises: is the owner entitled to claim demurrage resulting from their *own fault*? There are several published arbitrations and case law which suggests that owners are not entitled to recover demurrage during periods of delay attributable to their own fault.

By extension, similar considerations arise where the owner or master engages in slow steaming or where the voyage is prolonged due to defects in the vessel's hull or machinery. In such circumstances, can the owner rightfully claim hire – that is, the benefit derived from the prolongation of the voyage – when the delay results from their own breach of contract?

These are among the issues frequently debated by parties, with reference to relevant legal authorities under cases involving demurrage claims and intentional breaches of contract or misdescription. The parties also referred to *The TFL Prosperity*[70] and *The Apollonius*[71] in the context of comparing the wording of the BALTIME clause 13 with the wording adopted in the contract under discussion. As said, in cases of misdescription, the owners could not get the benefit of the exception in any event.

For instance, in *The White Manta*[72] the panel found that the owner was liable for the master's failure to follow a reasonable course directed by the charterer and its routing service. The master's refusal was held unreasonable and improper; the owner may not invoke the BALTIME clause 13 defence where it failed to make any serious attempt to raise the issue with the master. In that case, the disponent owners referred to the House of Lords' decision in *The TFL Prosperity*[73] and asserted that the principle stated therein is that clause 13 normally protects an owner against liability for delay where there has been a breach of the master's obligation to prosecute the voyage with the utmost of despatch. The proviso is that there will be no want of due diligence or owner's personal default.

As stated in the above award, the English courts recognise that clause 13 does not offer a blanket exemption from liability for all circumstances and accept the notion that the clause's interpretation and scope should be construed in the charterer's favour because it is included in the charter for the owner's benefit. More importantly, the burden of proof is on the owner to show how and why the delay, loss or damage arose, that it is covered by the clause 13 exceptions, and that it was not caused by or contributed to by the owner.

Moreover, in *London Arbitration 10/00*,[74] the tribunal was uncomfortable with the owners' submission that as long as the vessel was seaworthy they had no further obligations as to the state of the vessel. Taking an extreme example of a vessel with its hull so fouled as to be able only to maintain a voyage speed of two or three knots, the tribunal could not imagine that the owners of such a vessel might be able to simply disregard the obviously adverse effects that such fouling would have on the vessel's ability to perform the voyage at a commercial speed even though it would be technically seaworthy. Accordingly, mere seaworthiness might not always be enough in itself, and there might be circumstances in which an owner would be obliged to take steps to ensure that the vessel was able to perform the laden voyage at something approaching her normal service speed.

In *The Filiatra Legacy*,[75] the panel said that it is a principal of fundamental justice that if a promisor is himself the cause of the failure of performance, either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure.

Other arbitrators were also hesitant to reward the culpable party for its failure to even try to maintain the vessel's warranted speed, even if there was strictly no good weather, but other reasons affected performance. This was also the position of the dissenting arbitrator in

[70] *Tor Line AB v Alltrans Group of Canada Ltd (The TFL Prosperity)* [1984] 1 Lloyd's Rep 123.
[71] *Cosmos Bulk Transport Inc v China National Foreign Trade Transportation Corporation (The Apollonius)* [1978] 1 Lloyd's Rep 53.
[72] SMA 3257.
[73] *Tor Line AB v Alltrans Group of Canada Ltd (The TFL Prosperity)* [1984] 1 Lloyd's Rep 123.
[74] (2000) 545 LMLN 1(2), *Lloyd's Maritime Law Newsletter*, 28 September 2000.
[75] SMA 2024.

The Gedeh,[76] dealing with intentional slow steaming and owners' defence on full bad weather on the voyage.

The dissenting arbitrator said in his view, the undisputed facts of the case established that *The Gedeh* failed to achieve its warranted speed because the owner took it upon himself, for whatever reason, to operate the vessel at reduced rpm. The vessel had no chance of ever achieving its warranted speed in good weather. The reduced rpm also carried over to the bad weather days, so in effect, the vessel was operated at a level well below that which it was warranted for. This is not a simple run of the mill speed and consumption claim in which a vessel is operated at normal levels but simply fails to achieve its warranted speed and consumption. The deficiency here was evident in good and bad weather and charterer was entitled to be reimbursed for the time so lost. The arbitrator agreed that a speed deficiency was difficult to calculate for bad weather days because of a vessel's erratic performance under such conditions. However, the arbitrator said that disregarding the under-performance in these circumstances was rewarding the culpable party for its failure to even try to maintain the vessel's warranted speed.

Equally, in *The Dilmun Tern*,[77] the dissenting arbitrator said: "No one should be allowed to benefit from his own faults he visits on others". In another arbitration, it was submitted that "it is black letter law that a party cannot benefit from its own failure".[78]

In *The Kronos*,[79] the arbitrator found that the preponderance of the credible evidence supported the charterer's case of performance falling well short of the time charter description. The arbitrator said: "I am unaware of any such court decision precedent the effect of which would tempt an unscrupulous owner to misrepresent speed and such owner or master to ignore the speed warranty or the 'Utmost despatch' obligation whenever it might be thought temporarily advantageous to do so".

Another panel[80] found that the charterer's claim for a speed in excess of the vessel's description in the time charter was unrealistic. The provision of "... prosecute his voyage with the utmost despatch ...." and "That in the event of the loss of time from deficiency and/or fault of men ..." could not be construed to expand or enlarge upon such specific and material items in the charter as the represented speed. Those collateral terms have to be viewed within the total framework of the charter and, moreover, in the context of what the intent of the parties was in regard to some designated speed for this vessel.

Therefore, it appears from the above decisions that a restrictive performance clause cannot be used as a shield for improper conduct or as a shield from liability.

Currents

In *The Opal Naree*,[81] the panel agreed with the charterer that the experts' reports correctly included the current factor. In line with previous panels, and further confirming the methodology applied by both parties' weather routing experts, the panel took the position that the charterparty performance warranty in good weather only applies to the vessel's speed through the water and that to the extent currents have influenced her observed speed as calculated on the basis of speed made good over the ground, appropriate adjustments must be made. Without such adjustments, a vessel which had travelled predominantly with the ocean currents would gain a windfall whereas a vessel sailing in the opposite direction would be penalised through no fault of her own. The panel, therefore, rejected the owner's claim for additional credit.

During the period surrounding this decision, there were similarly conflicting London Arbitration awards concerning the treatment of ocean currents. One school of thought was that ocean currents are a natural phenomenon and ought to be taken into account. This approach was not grounded in explicit legal reasoning but appeared to arise by implication, in the absence of express charterparty terms requiring construction. In contrast, another view maintained that where the charterparty is silent on the issue of currents, their impact on the vessel's performance should be disregarded. A further perspective posited that adverse currents fall within the definition of "good weather", prompting debate as to whether currents should be treated as a component of weather conditions for performance assessment purposes.

Under English law, this issue has been settled following the *Divinegate* decision,[82] which established that where the contract stipulates "no adverse currents", time spent

[76] SMA 1753
[77] SMA 3322
[78] SMA 3698
[79] SMA 46
[80] SMS 1110.

[81] SMA 4096.
[82] *Eastern Pacific Chartering Inc v Pola Maritime Ltd (The Divinegate)* [2023] 1 Lloyd's Rep 442.

sailing in adverse currents must be excluded from the performance analysis. Moreover, no adjustment is to be made for the benefit of favourable currents unless expressly provided for in the charterparty. However, it is still debated in practice whether "sub-periods" with adverse currents are enough to exclude the entire day. This was not addressed in *The Divinegate.*

In *London Arbitration 32/22*,[83] the arbitrator determined that "the inclusion of three intervals of adverse current, representing as much as 18 hours within the selected 48-hour period, constituted a breach of the benchmark conditions". Nevertheless, it remains unclear whether the vessel encountered strong or weak currents during this period. Furthermore, no evidence was presented indicating fouling or engine-related issues. Additionally, it is unclear whether the arbitrator would remove a 24-hour period simply because there was adverse current in one sub-interval. The summary of the award is extremely brief on this point. Lastly, this case did not involve fouling, engine damage or slow steaming.

By contrast, in *London Arbitration 23/21*[84] and *London Arbitration 15/23*[85] – both of which concerned cases of fouling and were determined under restrictive wording – the tribunals adopted the vessel's speed through the water as the basis for an objective assessment of the loss sustained. These decisions demonstrate that *London Arbitration 32/22*[86] and *London Arbitration 27/19*[87] do not establish any consistent arbitral practice in excluding periods because of "sub periods" with adverse currents. Each case turns on its own facts and circumstances and must be considered accordingly.

Trivial currents

It has been argued that a promisor may not invoke trivial or insignificant matters as a basis to excuse or justify deficient performance under a contractual obligation. Accordingly, a vessel owner cannot reasonably rely upon marginal deviations in weather conditions from the agreed benchmark parameters as a justification for notable reductions in speed attributable to fouling, slow steaming or engine issues.

Despite that, it is often observed that the parties (or their legal representatives) tend to argue that periods of "net" adverse currents of as little as -0.05 or -0.08 knots are sufficient to exclude the entire period in question (typically a 24-hour noon-to-noon period), notwithstanding the presence of a significant speed deficiency during such periods attributable to factors unrelated to weather conditions, such as deficiencies inherent to the vessel. A tribunal may well be unpersuaded by such submissions. Rather, it may consider such periods appropriate for the objective calculation of loss – see, eg, *London Arbitration 6/21*,[88] where the currents were deemed negligible and there was a substantial loss of time. This approach further elucidates the reasoning adopted by tribunals in several recent awards, where the expression "no swell" has been interpreted to mean "no adverse swell", thereby affording a degree of tolerance with respect to swell height.

The term "no swell" appears in some old SMA arbitration awards and within the description clauses of small-sized vessels, particularly those with low freeboard. Its inclusion is primarily justified by the fact that the performance of such vessels – especially their speed – may be adversely affected by swell conditions. These vessels typically operate in coastal trades or, more frequently, within river ports, rather than in open-sea navigation. As a result, when such vessels are required to transit through open waters, their operational efficiency may be compromised by swell. The effect of the swell on the vessel's performance is a matter of degree.

It is important to note, however, that not all instances of swell have a detrimental impact. Thus, the relevance of incorporating a "no swell" provision in charters for ocean-going vessels – substantially larger and structurally different in design – is questionable and generally lacks practical justification and application, leading to unnecessary disputes. Given that the presence of swell is a constant feature of open-sea conditions, the term has been construed in practice to mean "no adverse swell", thereby introducing a degree of flexibility intended to ensure that the performance clause remains functional and does not become devoid of meaning.

As a matter of construction, when a term is defined, it will prevail over a more general and ambiguous term. In a recent case, an expert (a marine engineer) took the position that the term "no swell" was effectively disregarded, as the relevant clause specified a significant wave height of 1.25 m, which was applicable.

[83] (2022) 1120 LMLN 2, *Lloyd's Maritime Law Newsletter*, 11 November 2022.
[84] (2021) 1094 LMLN 1, *Lloyd's Maritime Law Newsletter*, 5 November 2021.
[85] (2023) 1145 LMLN 2, *Lloyd's Maritime Law Newsletter*, 27 October 2023.
[86] (2022) 1120 LMLN 2, *Lloyd's Maritime Law Newsletter*, 11 November 2022.
[87] (2019) 1042 LMLN 3, *Lloyd's Maritime Law Newsletter*, 8 November 2019.
[88] (2021) 1076 LMLN 4, *Lloyd's Maritime Law Newsletter*, 26 February 2021.

Another term frequently deleted from the description clause is "even keel". This phrase originated in shipbuilding contracts, where speed warranties are typically assessed during sea trials lasting only a few hours, during which the vessel remains on an even keel. In that context, "even keel" refers to the vessel maintaining equal draft forward and aft. However, in the context of a transatlantic voyage lasting 15 to 20 days, it is highly improbable that a vessel would remain on an even keel in the literal sense. Accordingly, a degree of tolerance is applied to give commercial and practical meaning to the clause.

As such, notwithstanding the restrictive language often found in contractual provisions, it appears from the decisions rendered in arbitration references *London Arbitration 23/21*[89] and *London Arbitration 15/23*[90] that tribunals have endorsed the recalculation of loss in appropriate circumstances involving fouling (and by extension engine issues or similar matters). Permitting an owner to rely on an exclusion clause to evade liability would effectively undermine and render nugatory distinct and co-existing contractual obligations and duties such as the obligation to deliver a ship in a proper state in hull, and perform the voyage with utmost despatch.

In *London Arbitration 15/23* the tribunal ignored "*insignificant* swell" and in *London Arbitration 6/21*[91] it ignored "trivial currents" (based on experts, which shows the practice mentioned previously; not exclude representative periods in serious speed deficiencies). Tribunals may equally apply a degree of tolerance to other parameters, eg sea water temperature, bunker specs, or "even keel".[92] In such cases, the tribunal has departed from rigidly literal warranties in favour of a more pragmatic and commercially sensible construction in order to dispense justice. The tribunals adopted a purposive interpretation of the clauses, rather than applying a strictly technical or legalistic approach.

Therefore, the "small" variations cannot justify an appreciable speed reduction or increased fuel consumption. In a claim for general average contribution by owners resulting from the towage of the ship as it ran out of bunkers on its voyage, the owners asserted (to justify the fact that she ran out of bunkers) that the vessel was overloaded at the beginning of the voyage, and consumed more bunkers as a result. In *The Evje (No 2)*,[93] Donaldson J said:

> "It is a fact that the vessel was *marginally* overloaded both when leaving Portland and, applying winter marks, when she entered the winter load line zone at about 143 deg. West. In fact, this did not make the vessel any the less suited to the carriage of the cargo, but I feel constrained to hold that in law it rendered her unseaworthy. It was, of course, a patent defect. However, the degree of overloading was *so small that it cannot have appreciably reduced the vessel's speed or increased her fuel consumption*." (Author's emphasis.)

This reasoning aligns with the approach adopted by the tribunal in *London Arbitration 6/21*, which held that the variation in fuel specification was neither significant nor relevant and, therefore, could not have accounted for the vessel's underperformance. The tribunal also ignored the trivial currents.

This supports the inclusion of other variables within the performance clause, such as "no swell" – where a low swell was similarly deemed "not significant or relevant", as per the analysis above.

Moreover, although parties and their legal representatives argue that periods involving "trivial" adverse currents should be excluded, often citing *The Divinegate*,[94] such reliance appears to be misplaced. In *The Divinegate*, the existence of adverse currents was not in dispute, and thus the case does not support the proposition being advanced.

Recent arbitrations and the above case support that in "appreciable speed reduction or increased fuel consumption", there is always a margin for allowance. If the current is -0.1 kts, and the speed reduction is (say, as an example) 1 kts, it is evident that the adverse current cannot have "appreciably reduced the vessel's speed". The same reasoning applies to bunker consumption claims as well.

These decisions affirm a consistent approach: tribunals may not allow parties to circumvent responsibility for clear underperformance by appealing to marginal environmental factors or invoking literal charterparty wording in a vacuum, divorced from practical reality.

Dr Arun Kasi (barrister and arbitrator) has recently commented on the trivial currents and non-performance as follows:

89 (2021) 1094 LMLN 1, *Lloyd's Maritime Law Newsletter*, 5 November 2021.
90 (2023) 1145 LMLN 2, *Lloyd's Maritime Law Newsletter*, 27 October 2023.
91 (2021) 1076 LMLN 4, *Lloyd's Maritime Law Newsletter*, 26 February 2021.
92 See *London Arbitration 23/21*.
93 *E B Aaby's Rederei AS v The Union of India (The Evje) (No 2)* [1976] 2 Lloyd's Rep 714.
94 *Eastern Pacific Chartering Inc v Pola Maritime Ltd (The Divinegate)* [2023] 1 Lloyd's Rep 442.

> "A trivial adverse current is no adverse current. I think the 'de minimis' rule will apply as a matter of 'interpretation' of the charterparty, when there is no contractual provision to exclude the application of the 'de minimis' rule. A court/tribunal might support this position by reference to the 'overall purpose' of the performance warranty, and interpret it 'meaningfully'."

No good weather

It is noted that the warranty is typically premised on good weather conditions. In *The Didymi*[95] the court affirmed that parties must be held to the terms of their bargain. However, *The Didymi* does not address situations involving underperformance due to fouling, slow steaming or engine damages. The agreement between the parties encompasses more than merely the vessel's performance in good weather conditions. For example, if the vessel is delivered in a fouled condition that adversely affects performance, such a state would constitute a breach of the contractual undertaking. To disregard significant underperformance where weather conditions offer no justification is, in effect, to permit a deviation from the agreed bargain and to fail to hold *both* parties to their contractual obligations.

In *The Divinegate* the court once again emphasised the principle that parties must be held to the terms of their bargain. The judge observed that "the charter provisions are to be applied (whether by the parties themselves, arbitrators, or the court) in light of the fact that the parties, at the time of contracting at least, will generally have expected to achieve certainty and commercially pragmatic solutions".[96] While applying the express wording of the performance clause provides a degree of certainty as a first step in this exercise, where there is credible evidence of additional breaches, it is commercially pragmatic to assess performance by reference to representative periods, if there is strictly no good weather. Nothing in the judgment supports the proposition that a party committing a breach of other clauses (ie clauses 1, 8 or 15) may do so without incurring liability.

In *The Divinegate* both parties submitted expert evidence. Some experts continue to adjust the speed over ground (SOG) by accounting for the effect of currents, thereby determining the speed through water (STW) in order to assess any speed deficiency relative to the minimum warranted performance. This has continued even after the decision in *The Divinegate*, as excluding the effects of weather and currents, it enables any remaining performance deficiency to be attributed to fouling or other issues intrinsic to the vessel. This approach is consistent with the reasoning adopted in *The Pearl C*[97] and is further supported by reported SMA arbitration awards dating back to the 1960s. More recently, in *London Arbitration 15/23*[98] (published after *the Divinegate)*, it was observed that the vessel's speed remained deficient even after applying a 7.5 per cent allowance for propeller slip (which was very generous) relative to engine speed. The residual deficiency was attributed to hull fouling. Even if one applies the speed "percentage" deficiency of the selective period to the actual steaming time, the resulting loss is very close to the one calculated in the summary.

So, does no good weather mean no claim? As stated before, the assumption that claims cannot be pursued without good weather is a misconception. If credible evidence of fouling, engine deficiencies, or other technical issues exist and affect performance, claims remain valid and can be pursued.[99] In most instances, it is not complex to calculate loss objectively. This will be addressed in the next part of this series.

Bunkers

The owners bear the burden of proving that a ship's performance was affected by the supply of unsuitable bunkers. If the bunkers supplied contribute to speed deficiency, the owner is not responsible for the loss.[100]

Another panel[101] held that since the logbook review indicates that the insufficient engine performance existed throughout the review period, they presumed that the inherent problems the chief engineer referred to could include the deplorable dirty state of the engine room with the numerous leaks, dirty filters, absent fuel treatment, defective injectors, improper valve management program without the necessary proper tools in working order and

[95] *Didymi Corporation v Atlantic Lines and Navigation Co Inc (The Didymi)* [1987] 2 Lloyd's Rep 166.
[96] At para 90.
[97] *Bulk Ship Union SA v Clipper Bulk Shipping Ltd (The Pearl C)* [2012] 2 Lloyd's Rep 533.
[98] (2023) 1145 LMLN 2, *Lloyd's Maritime Law Newsletter*, 27 October 2023.
[99] P Krikris, "Alternative loss calculation methods following *The Divinegate*" (*Maritime Risk International*, (2025) 39 MRI 1 20, 20 February 2025).
[100] SMA 1074.
[101] SMA 3606.

improper use of fuel separators. The fuel supplied was within the contracted specifications and thus did not breach the charter nor cause the engine room problems and performance difficulties

However, in *London Arbitration 6/21*, the tribunal held that minor discrepancies in the fuel analysis over the maximum permitted values did not affect the vessel's performance.

In *The Norilsk*,[102] the panel held that the owner could not defeat the time charterer's performance claim by arguing that inferior quality bunkers had been delivered to the vessel while operating under a prior charter; if a bunker quality problem caused the vessel's alleged underperformance/overconsumption, that was an issue for the owner to raise with the vessel's prior charterers.

Fouling

This subsection addressing hull fouling disputes will be elaborated upon in the next part of this series. What follows at this stage is merely a preliminary overview.

In an arbitration case going back in 1969, the panel[103] (consisting also of a mariner) said that it was evident that any ship remaining in tropical waters and not steaming at all was liable to collect an excessive amount of barnacles and other impedimenta on the bottom of the ship's hull, which automatically reduced the vessel's speed. There was a profound speed loss that added almost 50 per cent extra time on the voyage, but as this was after a long period of 30 days idle at Singapore (a tropical port), the panel disallowed the claim.

In the case of *Dampskibselskabet Norden v Isbrandtsen-Moller Co Inc*,[104] the charterer argued that a vessel owner was negligent for not cleaning the vessel's hull after it became fouled. The court said:[105]

> "The Charterer knew the use to which the vessel was to be put, and the waters through she would travel, and if it wished to protect itself against the consequences of marine growths encumbering the hull, specific provision for that contingency should have been made. It will not do to take chances with marine growths, and then at a later date seek to hold the owner to liability under a provision of general fitness contained in the agreement, which was designed to cover an entirely different subject matter."

Following this decision, a panel[106] held that charterers who ordered the loaded ship into storage in tropical waters, knew that the vessel's bottom would become fouled while it was idle; hence owners are not responsible for the vessel's failure to sail from storage early enough to meet as discharge window.

In *The Stove Vlulkak*,[107] the panel held that while owners contended that speed was lost due to the bottom being fouled during a three-week stay in Pascagoula , the panel held that owners' efforts to clean the vessel's bottom only served as evidence that owners were aware of the speed deficiency. The tribunal in *London Arbitration 15/19*[108] made a similar observation.

The owner claimed that speed was affected by bottom fouling that had occurred in tropical ports at which time charterer ordered the vessel to call. The owner had the burden and failed to prove that the fouling was so caused.[109]

The owner was not entitled to an allowance off of speed and consumption warranties for bottom fouling, especially since bottom fouling was not proven.[110]

"About"

The interpretation of the word "about" and the applicable margin have caused considerable debate for decades, both in London and New York arbitration. That prompted the parties to define this term clearly in their contracts. In London Arbitration, it would be interpreted as 0.5 knots on speed and 5 per cent on the bunkers unless otherwise agreed. In some arbitration cases, the qualified word "about" was either deleted in the recap, or there was no "about" before either the speed or consumption description, resulting in disputes whether it applies by implication. In some arbitrations, when the "about" was missing, the tribunal gave no margin.

[102] SMA 3341.
[103] SMA 430.
[104] 43 F.2d 560 (SDNY 1930).
[105] At page 562.
[106] SMA 2548.
[107] SMA 292.
[108] (2019) 1033 LMLN 2, *Lloyd's Maritime Law Newsletter*, 5 July 2019.
[109] SMA 4145.
[110] SMA 2592.

For instance, in *The FFM Matarengi*[111] the panel held that where the charterparty did not preface the speed warranty with the word "about," the owner was not entitled to a half-knot allowance, even though the charter provided generally that "all details about". This position was applied in some London arbitration awards. The same approach adopted in *The Mangalia*.[112] The panel held that since the charter did not contain the term "about" in the preface to the speed warranty, the owner was not entitled to an allowance.

In *The Artesia*,[113] the panel said that in the typical NYPE time charter, the owner warrants the vessel's minimum speed and maximum fuel performance. This is usually done with the qualifier "about" as a form of self-protection by the owner. "About" acts as a downward adjustment in speed and, if it appears in the consumption description, is applied as an upward percentage allowance to the charterparty fuel description. Charterers succeed in a claim for damages if the vessel fails to meet those adjusted warranties. In *The Golden Shimizu*,[114] the panel accepted that "about" imports half a knot on the warranted speed on good weather days.

How much good weather?

This reflects the period of good weather under determination and is not meant to be "24 hours of good weather". In conducting a performance analysis, there will be full sea days of 24 hours of steaming duration from noon to noon, or there can be less than 24 hours in duration from departure to noon or from noon to arrival.

The words "good weather day" or "day" were used in many published arbitrations in London,[115] but also in New York, and it was not suggested or argued that "day" means 24 hours of consecutive good weather. In the article published by Brian Williamson at ICMA 2023, reference is made to industry terminology adopted in performance clauses, and lists "24 consecutive hour"; not "day" but clear wording "24 consecutive hour".

Regarding *London Arbitration 32/22*[116] – a decision that has been widely discussed in the market due to its perceived attempt to narrowly apply the "24 hours good weather" requirement – the "Held" section of the award contains no such restrictive interpretation. Where a key issue is thoroughly examined in an award – particularly one that was the subject of detailed submissions, as in this case where no alternative evidence was adduced to establish other breaches such as fouling or engine-related deficiencies – it is reasonable to expect that the editors would have reflected that point in the "Held" section, had it formed part of the tribunal's reasoning.

It appears that the award does not refer to established industry practices, likely due to the matter being addressed under the LMAA Small Claims Procedure, where no expert evidence on market practices was presented. It remains possible that a differently constituted tribunal might reach an alternative conclusion. So far, the award cannot establish an arbitral practice or market practice in interpreting the word "day" as 24 hours of consecutive good weather.

[111] SMA 2592.
[112] SMA 2839.
[113] SMA 3713.
[114] SMA 2991.

[115] *London Arbitration 20/16* (2016) 958 LMLN 2, 19 August 2016; *London Arbitration 20/07* (2007) 723 LMLN 3, 1 August 2007; *London Arbitration 3/12* (2012) 854 LMLN 3, 17 August 2012; *London Arbitration 17/99* LMLN 519, 30 September 1999; *London Arbitration 8/02* (2002) 589 LMLN 4, 13 June 2002; *London Arbitration 21/04* (2004) 648 LMLN 3a, 15 September 2004; *London Arbitration 20/00* (2000) 547 LMLN 3, 22 November 2000; *London Arbitration 15/05* (2005) 670 LMLN 1, 20 July 2000; *London Arbitration 24/05* (2005) 681 LMLN 2(2), 21 December 2005. All published in *Lloyd's Maritime Law Newsletter*.
[116] (2022) 1120 LMLN 2, *Lloyd's Maritime Law Newsletter*, 11 November 2022.

In instances of engine damage or fouling, a strict literal application of this wording may prevent full good-weather days from being selected in evaluating the vessel's performance, and alternative ways still exist to "objectively" calculate the loss.

Under English law, following the judgment in *The Ocean Virgo*,[117] the charterer can establish underperformance based on periods of good weather being less than 24 hours. The length of the period required is fact sensitive. The learned authors of *Carver on Charterparties*,[118] state that the concept of a "good weather day" has no basis in the authorities and the legal position remains that actual performance should be calculated by reference to any period of whatever length which complies with the charterparty criteria.

In *The Cornilos*,[119] the panel said that charterer's alternative claim calculation is flawed, principally because it takes into account the average lower speed made good on the departure days from Rotterdam and New Orleans, when the vessel was manoeuvring and sea-day was less than 24 hours. In addition, the charterer's calculations incorrectly included three days on the loaded leg of the voyage where greater than Force 4 winds were encountered.

In *The Norilsk Pegasus*,[120] the panel stated that the only good weather days during which the vessel did not achieve a speed of 15 knots were 22 February (for six hours) and 23 February 1995. Even if it was for "six" hours, it was addressed as a "good weather day".

In *The FFM Matarengi*[121] it was stated that bad weather days are determined by days in which the wind conditions exceed Beaufort Force 4 for two of the six four-hour watches. Since the charters do not define moderate or bad weather days, the panel should reasonably conclude a modus operandi based upon the parties' intent, course of performance and industry practice. The charter offered no express criteria in this respect, but it was reasonable and commercially sound to draw the dividing line between a moderate and bad weather day on the basis of a minimum of 12 hours during each 24-hour period. In short, to categorise a day as bad weather the observed wind conditions in excess of Beaufort Force 4 must be recorded for at least three four-hour watches, or a minimum of 12 hours during each 24-hour period.

In *The Gedeh*[122] the owner contended that bad weather days were those for which two or more of the daily six watches recorded wind forces in excess of four, whereas the charterer contended that such days were excluded only when three or more watches listed wind in excess of four. The owner also contended that there was no speed warranty, explicit or implied, for bad weather days.

Deck and engine logs

A frequently contested issue in performance disputes concerns the evidential weight to be attributed to the vessel's contemporaneous logbook entries as compared to third-party weather routing reports. Since this forms part of the exercise of establishing liability and relates to the evidentiary aspects of the dispute, it will be considered in the following parts of this series on speed and performance disputes.

Conclusion

This section has considered disputes arising at the stage of establishing liability in performance claims. The issues examined herein are not intended to constitute an exhaustive catalogue of all potential points of contention. Rather, they represent those matters which most commonly give rise to dispute within the shipping industry. These recurring issues have been the subject of extensive consideration in both judicial decisions and arbitral awards, on either side of the Atlantic, including in the principal maritime centres of New York and London.

[117] *Polaris Shipping Co Ltd v Sinoriches Enterprises Co Ltd (The Ocean Virgo)* [2018] Lloyd's Rep Plus 101.
[118] *Carver on Charterparties* (2nd Edition) at para 7-785.
[119] SMA 3182.
[120] SMA 3341.
[121] SMA 2592.
[122] SMA 1753.

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