Speed and Consumption Claims

A practical perspective and statistics

PROKOPIOS KRIKRIS

CHARTER PARTY DISPUTES
http://www.charterpartydisputes.com
Email: info@charterpartydisputes.com

31 October 2021

©Prokopios Krikris, BA, MSc, LLM, LMAA Supporting Member, SCMA Member, HKMAG Member, MCIArb.

Email: info@charterpartydisputes.com
31 October 2021

Introduction

"[T]hat the traditional manner in which a charterer sought to establish a breach of a speed and performance warranty was to assess the vessel's performance in good weather as defined in the charterparty, excluding any period of slow steaming at the request of the charterer. If analysis of the vessel's performance in good weather established a breach, then the extent of the shortfall in performance should be applied to all voyages in all weather conditions but excluding any period of slow steaming at the request of the charterer (The Didymi [1988] 2 Lloyd's Rep 108 and The Gas Enterprise [1993] 2 Lloyd's Rep 352). It might be that breaches could be established in some other way but no other way had been suggested in the present case." (The Ocean Virgo, 2015).

&

"The appropriate approach was as follows (see The Didymi [1988] 2 Lloyd's Rep 108):

(i) The vessel's performance should be assessed in good weather conditions (generally Beaufort wind force 4 or below or as defined in the charterparty) on all sea passages from sea buoy to sea buoy excluding any slow steaming at charterers' request.

(ii) If a variation of speed from the warranted charterparty speed was shown, the variance should be applied with all necessary adjustments and extrapolated to all sea passages and in all weather conditions (excluding slow steaming at charterers' request).

(iii) If a variation of fuel consumption from that warranted in the charterparty was shown the variation should be applied with the necessary adjustments and extrapolated to all sea passages and in all weather conditions (including slow steaming at charterers' request)"- (London Arbitration 20/00).

©Prokopios Krikris MSc,LLM,LMAA Supporting Member,SCMA,HKMAG, MCIArb.

 31 October 2021

Speed and Consumption Claims
(Part I)
A practical perspective

"[I]t was trite law that where a charter provided a performance warranty the first step was for the tribunal to establish how the vessel performed in good weather conditions as defined in the charter. If a vessel underperformed by one knot in good weather, it would probably continue to underperform by the same margin in bad weather and charterers should be compensated for that bad weather underperformance as well as the good weather underperformance."

(London Arbitration 24/19)

The common issues

Speed and Consumption claims continue to be a much-extended area of dispute between the owners and the charterers, with most cases resolved either amicably or by arbitration as per the charter party terms.

The author's observation, based on extensive experience in handling speed and consumption claims for the Owners or the Charterers, is that the dispute between the parties (and their representatives) involved the following issues:

1. Whether the Charterers are allowed to make a deduction from hire either as a contractual right or as an equitable right:
   - At the end of the charter;
   - During the performance of the charter:
     a. Having produced only an interim report;
     b. Having created a report that does not comply with the CP terms;
     c. While awaiting the final report from the weather routing company;

   d. Not having particularized their claim, i.e., based on mere assertions.

2. Whether the meaning of the language is open to question; should a literal or a purposive approach to contractual interpretation be adopted and the threshold required for implying terms into the contract. The parties relied on commercial considerations in deciding whether a particular interpretation is or is not ambiguous. The parties further considered the line (or suggested overlap) between the two logically distinct exercises with separate rules of interpretation and implication.
3. Whether it is permitted, as part of the interpretation process, the parties force the provisions of the charter party into the straitjacket of the concepts of reasonableness and fairness.The parties considered the touchstone and the limits of commercial common sense to justify their interpretation of the relevant terms.
4. Whether the terms contain ambiguities, wrong words, or syntax - poor quality of drafting, thus raising issues of textual or contextual interpretation, construction, or rectification.The deletion of words, *contra proferentem* rule, and pre-contractual negotiations were sometimes considered. The parties discussed the admissibility of extrinsic evidence.
5. Whether the relevant terms of the recap can be reconciled with the terms of the proforma or other documents being incorporated by reference; and the terms that prevail in case of inconsistencies-the maxim *specialibus generalia non derogant* was considered.
6. Whether the arbitration decisions set a precedent for matters that have not been decided by the courts in the efforts to maintain commercial certainty and continuity.Since there is no binding precedent, the parties discussed whether they can rely on articles published by legal authors or arbitrators in the UK or other countries.For example, the parties relied on published articles to support

©Prokopios Krikris MSc,LLM,LMAA Supporting Member,SCMA,HKMAG, MCIArb.

their position, i.e., whether or not the positive currents are to be excluded, whether 12 hours is a sufficient sample of a good weather period among two consecutive noon positions, etc.

7. Whether the vessel's performance is warranted:
   - If it is not, i.e., "wog," then other potential remedies available were discussed. Authorities, arbitration awards, and general principles were considered.
   - If it is warranted, then when the warranty applies?- Case law was considered, and evidence was sought to prove her previous performance.
8. Whether the loss is too trivial and merits no consideration (*de minimis*)- hence no claim.
9. Whether proof of actual weather conditions should be taken from the deck logs or the weather routing reports to evaluate the vessel's performance.The parties referred to arbitration decisions on this point.
10. Whether (i) the findings of the weather routing company are binding on the parties; (ii) the weather routing clause provides a complete code to resolve the dispute (and not by arbitration);(iii) the parties prematurely commenced arbitration (damages as a remedy); (iv) there is no 'dispute' to be referred under the arbitration clause- primarily when the parties provided no arguments to dispute the findings of the report; and (v) the ingredients of waiver or estoppel were established after the nomination of a non-agreed weather routing company, i.e., excluded by the express terms of the CP.
11. Whether the parties should agree to specific instructions to be given to another routing company (when the clause construed as an expert determination provision) in order to evaluate the vessel's performance and same to be binding.The distinction between binding data and methodology was discussed along with authorities of general application, i.e., what happens if the parties cannot agree to the potential instructions, etc.

©Prokopios Krikris MSc,LLM,LMAA Supporting Member,SCMA,HKMAG, MCIArb.

12. Whether the performance report applied the contractual yardstick against which the vessel's performance is to be measured. The common issues related to:
    (i) Weather factor; positive and adverse currents (establish breach or loss);
    (ii) Meaning of negative influence of swell or currents or weather;
    (iii) Wave height, swell, DSS3 or significant wave height (what applies?);
    (iv) No impediments, even keel, deep water, water temperature, bunker quality (evidential issues and separate defences raised- liability issues);
    (v) Sufficient sample of good weather between noon reports or for the whole voyage(The Ocean Virgo was considered and sometimes distinguished).
13. Whether the Charterers can bring a claim when the ship encountered only 'bad weather' or 'near good weather'; but the ship's speed was seriously affected by technical or mechanical issues. In these cases, the parties discussed other potential remedies. They considered mixed points of principle and authority, i.e., it was to be presumed that the parties would not ordinarily have intended that either should be entitled to rely upon its breach to obtain a benefit from the other, etc.
14. Whether the Charterers are allowed to bring an underperformance claim when the vessel's hull became fouled during the charter-party performance(as the Owners contended), or on her delivery (as the Charterers asserted).The parties (and their representatives) relied on the principles of contractual interpretation to determine where liability lies (sample collection and analysis were conducted as well to a lab). The legal and evidential burden were discussed, and expert opinion sought to establish liability and quantum.
15. Whether the master had failed to follow the Charterers' orders about the speed & consumption (including varied speed/consumption not warranted) or to prosecute the voyage with utmost despatch (deviation, reduced main engine RPM). The parties relied on case law and evidence; expert opinion sought to determine whether it was due to the prevailing weather conditions or that for

©Prokopios Krikris MSc,LLM,LMAA Supporting Member,SCMA,HKMAG, MCIArb.

other reasons, the ship was prevented from increasing main engine RPM or from maintaining reduced RPM.

16. Whether the vessel was unseaworthy, engine or technical issues were affecting her performance. Next, the evidential and legal burden was considered—discussion on 'superficial inspection,'disclosure of documents, and onboard surveys. The parties disagreed on whether the Charterers are entitled to carry out onboard surveys and the work scope of the surveyors' attendance; the survey findings were very speculative (issues with burden addressed). Finally, the parties referred to the distinct remedies of damages and off-hire.

17. Whether the ship is allowed to reduce speed when transiting through a high-risk area or passing canals or complying with orders or directions of local authorities, the evidence sought to be adduced and relied on by the parties. Sometimes, the deck and engine logs did not reveal that the engine worked at different loads- providing a point of argument for the parties.

18. Based on the evidence, whether Charterers' breach to supply off-spec bunkers caused the vessel's underperformance. The parties disagreed on whether the test results from the lab were binding on them or not. Even so, any slight increase on the bunker specifications over the permitted values, as appearing in the test results, could not affect the vessel's performance or justify any severe underperformance.

19. Whether the 'minimum performance rule' in a damages claim applies when the Charterers bring their claim under separate breaches of contract. The parties relied on the authorities, and they discussed the evidential and legal burden.

20. Whether the Charterers are entitled to request - and the Owners to deny- further disclosure of documents. Application for disclosure before serving submissions. Whether the tribunal can allow this application under the applicable rules and whether to apply strict rules of evidence as to the admissibility.

©Prokopios Krikris MSc,LLM,LMAA Supporting Member,SCMA,HKMAG, MCIArb.

Speed and Consumption Claims
(Part II)

Mapping London Maritime Arbitration Awards (1980-2020)

"Speed and Consumptions were, generally speaking, pretty routine and were matters with which arbitrators had considerable familiarity. It was rarely appropriate to address arbitrators by lengthy submissions and detailed experts' reports. That was all the more the case under the Small Claims Procedure."

(London Arbitration, 13/97)

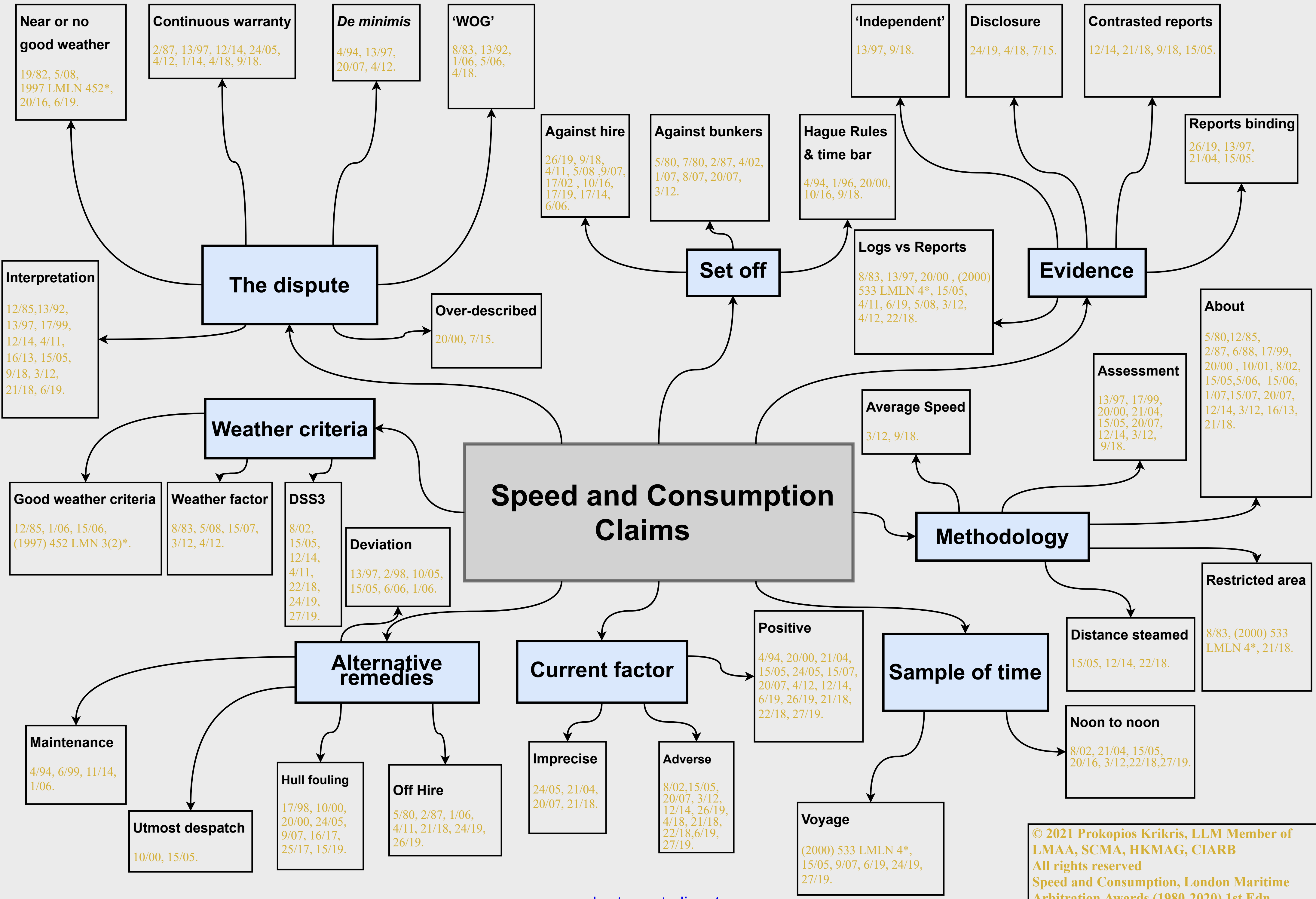
Speed and consumption claims are usually of relatively low value, and most of these cases are resolved either amicably or by arbitration. Only a few cases reach the courts by way of appeal or application from the arbitration.

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

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

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

©Prokopios Krikris MSc,LLM,LMAA Supporting Member,SCMA,HKMAG, MCIArb.


Speed and Consumption Claims
The dispute
Near or no good weather
19/82, 5/08, 1997 LMLN 452*, 20/16, 6/19.
Continuous warranty
2/87, 13/97, 12/14, 24/05, 4/12, 1/14, 4/18, 9/18.
De minimis
4/94, 13/97, 20/07, 4/12.
'WOG'
8/83, 13/92, 1/06, 5/06, 4/18.
Interpretation
12/85,13/92, 13/97, 17/99, 12/14, 4/11, 16/13, 15/05, 9/18, 3/12, 21/18, 6/19.
Over-described
20/00, 7/15.
Set off
Against hire
26/19, 9/18, 4/11, 5/08 ,9/07, 17/02 , 10/16, 17/19, 17/14, 6/06.
Against bunkers
5/80, 7/80, 2/87, 4/02, 1/07, 8/07, 20/07, 3/12.
Hague Rules & time bar
4/94, 1/96, 20/00, 10/16, 9/18.
Evidence
'Independent'
13/97, 9/18.
Disclosure
24/19, 4/18, 7/15.
Contrasted reports
12/14, 21/18, 9/18, 15/05.
Reports binding
26/19, 13/97, 21/04, 15/05.
Logs vs Reports
8/83, 13/97, 20/00 , (2000) 533 LMLN 4*, 15/05, 4/11, 6/19, 5/08, 3/12, 4/12, 22/18.
Weather criteria
Good weather criteria
12/85, 1/06, 15/06, (1997) 452 LMN 3(2)*.
Weather factor
8/83, 5/08, 15/07, 3/12, 4/12.
DSS3
8/02, 15/05, 12/14, 4/11, 22/18, 24/19, 27/19.
Deviation
13/97, 2/98, 10/05, 15/05, 6/06, 1/06.
Methodology
Average Speed
3/12, 9/18.
Assessment
13/97, 17/99, 20/00, 21/04, 15/05, 20/07, 12/14, 3/12, 9/18.
About
5/80,12/85, 2/87, 6/88, 17/99, 20/00 , 10/01, 8/02, 15/05,5/06, 15/06, 1/07,15/07, 20/07, 12/14, 3/12, 16/13, 21/18.
Restricted area
8/83, (2000) 533 LMLN 4*, 21/18.
Distance steamed
15/05, 12/14, 22/18.
Alternative remedies
Maintenance
4/94, 6/99, 11/14, 1/06.
Utmost despatch
10/00, 15/05.
Hull fouling
17/98, 10/00, 20/00, 24/05, 9/07, 16/17, 25/17, 15/19.
Off Hire
5/80, 2/87, 1/06, 4/11, 21/18, 24/19, 26/19.
Current factor
Imprecise
24/05, 21/04, 20/07, 21/18.
Adverse
8/02,15/05, 20/07, 3/12, 12/14, 26/19, 4/18, 21/18, 22/18,6/19, 27/19.
Positive
4/94, 20/00, 21/04, 15/05, 24/05, 15/07, 20/07, 4/12, 12/14, 6/19, 26/19, 21/18, 22/18, 27/19.
Sample of time
Voyage
(2000) 533 LMLN 4*, 15/05, 9/07, 6/19, 24/19, 27/19.
Noon to noon
8/02, 21/04, 15/05, 20/16, 3/12,22/18,27/19.
www.charterpartydisputes.com
© 2021 Prokopios Krikris, LLM Member of LMAA, SCMA, HKMAG, CIARB
All rights reserved
Speed and Consumption, London Maritime Arbitration Awards (1980-2020) 1st Edn.
*NY awards published in LMLN

For easy reference, the awards have been categorized based on issues discussed or determined by the tribunal; and how often the problem appears in practice. In particular, the 'map' includes the below categories:

The dispute (the starting point)

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

  Interpretation or Construction

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

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

  Interpretation or Construction Part A

  ◊ Arb 6/19 (typographical error, contradicting terms in clause, surplusage); Arb 12/14 ('advance' current was a misprint of 'adverse'); Arb 9/18 (use of disjunctive "or" in the clause was considered); Arb 17/99 (reconciliation of main body with riders, deletions and amendments were discussed); Arb 15/05 (proforma and recap terms

were read together to define the benchmark conditions); Arb 4/11 (the language used was not ideal for supporting that the deficiency applies only to certain periods - words appearing in other places in the clause were considered).

Interpretation or Construction Part B

◊ Arb 16/13 (whether good weather qualifications in the proforma were expressly incorporated, the implication of 'good weather' qualification was considered); Arb 21/18 (whether the words' A tolerance' import a 'double about,' interpretation of words used in the clause); Arb 13/92 (the *contra proferentem* rule of construction applied against the Charterers, terms in the main body were read together with terms in the proforma, whether 'about' implied by viewing the other charter terms, whether the Charterers' ordered speed of 14 knots was warranted, the implication of terms was considered); Arb 26/19 (the implication of 'no adverse swell' instead of 'no swell' was considered); Arb 15/07 (the implication of 'positive currents' as part of the warranty was rejected)

Interpretation or Construction Part C

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

©Prokopios Krikris MSc,LLM,LMAA Supporting Member,SCMA,HKMAG, MCIArb.

together - whether 'continuous warranty' applies, average speed does not include 'about'), etc.

Whether to imply a positive current factor: endless debate?

- In many cases, the tribunals rejected that a 'positive current factor' was part of the performance warranty by implication (See Arb 15/07; Arb 21/18 as followed in Arb 27/19, etc.). In contrast, some tribunals accepted the implication since the express warranty was one of capability (See Arb 4/94; and Arb 4/12- the latter not followed in Arb 21/18). And other tribunals rejected the application of currents, due to: (i) the imprecise calculation of it (See Arb 20/07, etc.); (ii) the express wording of the clause' Owners to have the benefit of positive currents' (See Arb 22/18); and (iii) the calculated loss was not an 'actual loss' or 'net loss' to award damages when the ship performed.
- However, it is often the case that the Owners, the Charterers (when acting as disponent Owners), and the weather routing companies disagree on the adopted methodology that considers a positive current factor in evaluating the vessel's performance. To support their position, the Charterers (or their representatives) mainly rely on the previous decision in London Arbitration 4/12 and on the comments of the weather routing company (cited as an expert opinion). Some maintain that absence of binding precedent, any subsequent tribunal may consider a positive current factor in evaluating the vessel's performance.
- Since there is no binding precedent on this issue, the parties' dispute is often centered on the settled principles by which contracts are to be construed. Or emphasizing different aspects of those principles, sometimes referring to the concepts of reasonableness and fairness, or invoking commercial common sense (as an overriding criterion of construction), justifying the implication, thus conflating the distinct principles.

©Prokopios Krikris MSc,LLM,LMAA Supporting Member,SCMA,HKMAG, MCIArb.

The Owners' main arguments

- In practice, the Owners put forward several arguments to reject the implication of a positive current factor:
  - i) The concepts of fairness or reasonableness cannot be the starting point for construing a contract of this kind. That would involve forcefully shading construction into interpretation, thus holding parties to something they have not expressly agreed to.
  - ii) In identifying the parties' intention, the arbitration decisions should be considered as part of the background knowledge that would reasonably have been available to the parties in the situation in which they were at the time of the contract- the 'matrix of fact.'
  - iii) The weather routing companies' opinion carries no weight in determining an issue of contractual interpretation. It does not provide grounds for implying terms by custom or otherwise to express the parties' obvious but unexpressed intentions. And to reflect the merits of the situation as they appear when the issue arises.
  - iv) The contracting parties know better the terms that were freely agreed by them bargaining on equal terms. Thus, there is no need to force the charter party into a Procrustean bed to fit well with any adopted standard methodology or subjective understanding of the contract terms to mean retrospectively, aiming to breathe life into a dead claim.
  - v) The arbitral awards are not binding precedents. However, viewing that the recent decisions point in one direction, there is some certainty, stability, and continuity on this issue. The importance of commercial certainty (or the paramount desirability for certainty) should not be undermined, particularly in contractual interpretation.

©Prokopios Krikris MSc,LLM,LMAA Supporting Member,SCMA,HKMAG, MCIArb.

vi) It is unnecessary to imply 'positive currents' as part of the performance warranty. In Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2016] AC 742, the Supreme Court set out the principles applicable to the implication of terms. On these principles, this term is not necessary to give the contract business efficacy or give effect to what was so apparent that it goes without saying and only if and to the extent that without the term contended for the contract would lack commercial or practical coherence.

vii) As a quantum matter, even if this term passes the tests of implication, it bends the 'least burdensome rule' in a damages claim. Since it sets a new & higher level of performance that the parties had not expected or controlled. And, sometimes, it technically produces a loss when no loss exists.

- Then, the parties settled the dispute commercially (as happens most of the time) or referred to arbitration. The parties rarely agreed to mediate before submitting their case to arbitration. And sometimes, the parties sought counsel's advice to convince the other party to settle before commencing arbitration. Any option depends on the disputed amount, e.g., The parties did not seek counsel's advice for disputed sums below 10k.

Set-off against hire & net loss

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

Evidence

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

Weather criteria

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

Current factor

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

Methodology

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

Weather routing companies

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

  > *Closer attention needed to be paid to warranty conditions if weather routing organisations' reports were to be accepted at face value in London arbitration ...the weather bureau paid lip service to the English authorities in assessing vessel performance*

Sample of time

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

Alternative remedies -separate breaches of contract

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

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

SPEED AND CONSUMPTION CLAIMS

(Part III)

PERFORMANCE CLAUSES STATISTICS

"[T]he 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"

(London Arbitration 6/19)

As stated previously in Part II, the performance clause(s) are not always works of art. Therefore it is helpful to consider the charter negotiations. In particular, how the performance clause was finally agreed upon and structured to reflect the bargaining outcome.

During the charter negotiation process, the parties feel confident relying on clauses drafted by their lawyers or started life years ago into their proforma CPs. These clauses were tested and worked well for them. Not unusual, though, for the parties to request some amendments or additions to be made before 'fixing' the vessel's employment. Then even minor changes made on the clause(s)- agreed unthinkingly (not seemed important), or not able to decide more precise terms, or being a negotiated compromise- can significantly change the effect of the clause, including the parties' subsequent understanding of it. Besides, such is the nature of the bargaining.

The analysis below illustrates the usual issues discussed in the charter negotiations or the settlement negotiations (parties & representatives) and includes some performance clauses statistics for reference only. It relies on 800 circulated vessels in the market ('position list'), analysis of 400 charter parties, the authors' practical

experience in considering the parties' proposed amendments to such clauses, and the feedback received from various chartering brokers.

Figure 1: The performance clause for bulk carriers before the negotiations. Not all circulars contain a detailed performance clause; thus, the figure of about 460 is reflected below.

Fuel calorific value
BF 4
Continuous warranty
24 hours good weather
Negative influence of swell
Positive currents excluded
No Adverse currents
Combined sea and swell 1.25m
Significant wave height 1.25 m
Clean bottom
DSS 3
Deep water
Even keel
Eco 'wog'

0 100 200 300 400 500

©Prokopios Krikris MSc,LLM,LMAA Supporting Member,SCMA,HKMAG, MCIArb.

Figure 2: The performance clause of bulk carriers – after the negotiations and viewing the contract as a whole. Figure 2 relies on 400 charter parties that were randomly selected. The results may change depending on the sample size.

Arbitration clause
Recap vs proforma
clause incorporated by reference
No deductions from hire
Set -off' bunkers with time loss
About' defined in % terms
3rd routing report binding
No extrapolation allowed
Continuous warranty
Bunker calorific value
24 hours good weather
No swell
Negative influence of swell
Positive currents excluded
No adverse currents
Combined sea and swell
DSS 3
Deep water
Even keel
Delete Eco'wog'

0 50 100 150 200 250 300 350 400 450

©Prokopios Krikris MSc,LLM,LMAA Supporting Member,SCMA,HKMAG, MCIArb.

Brief remarks

1) Arbitration remains the parties' preferred method to resolve 'speed claims'; while the CPs were silent about mediation. In less than 2% of the CPs, a 'stepped clause' was added containing an option to mediate, before the parties refer any dispute to arbitration. The difficulty the parties faced was to reach an agreement to avoid mediation, i.e., give reasons to justify their refusal to proceed to mediation and directly refer the dispute to arbitration. The above delayed the process of resolving the dispute since the parties disagreed on that option. As included in very few proforma CPs, the option to mediate was sometimes amended (deleted) in the fixture recap.

2) The described benchmark conditions in the recap often differed from that of the Baltic questionnaire or the rider clauses, or the weather routing clause. Moreover, disputes arose between the parties given the inconsistencies between written terms and incorporated terms.

3) The benchmark conditions sometimes varied on the same clause, e.g., 1st limb states "BF 4/ DSS 3/ no negative influence of swell" and 2nd limb states "BF 4/ Significant wave height 1.25 meters, no swell". Then the first issue in dispute between the parties concerned the proper interpretation of their contract; different parties(and their representatives)expressed different views.

4) Another point of argument(as raised by the parties' representatives) was that the parties must have used the wrong words or syntax, or something must have gone wrong with the language. Sometimes, the parties used the symbols "/" or a comma, alternatively the 'and,' 'or.' Then the issue was which of the criteria defined the "contractual yardstick" by reference to which the ship's performance warranty was given. The parties submitted rival arguments in framing the issue to the clause's structure, punctuation, or

appearance. The Owners said that effect should be given to those words without any particular mental or linguistic acrobatics or perform an exercise in legal gymnastics.

5) Then, the parties tried to exclude some of the restricted criteria (currents, impediments, etc.) from the performance evaluation, thus allowing a claim to be formed or not. The parties contended that brokers, instead of lawyers, do not always draft clauses of this kind. And such clauses may evolve between the contracts with additions or amendments made, adopting different punctuation. Further, the parties argued -and disagreed- about the presumption that some of the used words were indeed surplusage.

6) The recap regularly incorporated (by reference) the vessel's speed and consumption(including her described RPM) as stated in the Baltic questionnaire or other documents- the vessel's description was attached as a file to the recap. The proforma sometimes included the description of another ship, but the relevant clause(s) were logically amended as per the terms of the recap. When a dispute arose concerning the vessel's speed and consumption, the parties referred to the additional documents to extract any information relevant to the claim. The issue was whether the various provisions & documents relevant to the dispute could be read and construed harmoniously to be given effect; alternatively, which terms prevail. The parties disagreed on whether the terms could be read together, as this would affect the case's outcome.

7) The charter party ('CP') frequently included an 'expert determination clause', i.e., a 3rd routing company to be appointed to evaluate the vessel's performance. Usually, this clause did not spell out the methodology to be applied by the expert. However, as found in a limited number of CPs, a detailed clause stated the methods and the law used by a 3rd party when

appointed. So, the parties (or their representatives) argued that the weather routing clause was intended to be a comprehensive code as between the Owners and the Charterers regarding liability for 'speed claims,' and the Owners could not evade this by relying on other clauses in the CP (even the arbitration clause). The parties disagreed on this approach and said it would require unambiguous wording to give up rights, i.e., access to justice is a fundamental ingredient of the rule of law. In essence, the scope of the clause was a 3rd routing company to give an opinion on the weather discrepancies and the parties to refer the dispute to arbitration for a final and binding decision on them.

8) The weather routing clause or the "weather clause" usually provided the conditions triggering the option to appoint another routing company, i.e., when the weather analyzed data and the ships reported data to contradict each other. However, one issue that troubled the parties was that the CPs contained different words to trigger the option to appoint another routing company, resulting in varied interpretations. For example, some of the used terms were: "in case of consistent discrepancies," "substantially contradicted," "major discrepancies"– then the parties disagreed on the ordinary meaning of these words or phrases, thus delaying the process of settling the dispute amicably or commencing proceedings.

9) Further, the weather routing clause contained the following options: 'binding,' 'final,' or 'final and binding.' That caused a point of argument between the parties, e.g., it is final as to the evidence but not binding as a matter of law; 'final' implies it is final save any manifested error; etc. A point of disagreement in the charter negotiations was whether the data or the methodology would be binding on the parties. Sometimes, the parties expressed their agreement in vague terms. Another point was whether the parties agreed only one report to be issued to support a claim. When the CP

contained the wording 'a final report' or 'a report,' the parties argued (and disagreed) that only one (a) report must be issued and not various reports from the same or other weather routing companies, thus seeking two bites of the cherry.

10) The parties have expressly excluded some weather routing companies from the scope of assessing the vessel's performance. At the same time, less often, the CPs provided specific companies to be appointed to evaluate the vessel's performance. Rarely, the parties state a specific 3rd party (company or expert) to be appointed to resolve a technical conflict, e.g., in case of discrepancies or disputes between the masters' reported data and analyzed data of the Charterers' weather routing company a y(3rd party) company to be appointed to evaluate the data and decide on the issue. In the charter negotiations, the parties disagreed on the routing companies being included or excluded.

11) A further issue arose when the Charterers appointed an excluded weather routing company to assess the vessel's performance. The Owners rejected the findings of the report. The Charterers argued that since the weather routing company applied a proper methodology, then the conclusions of the report should carry weight in deciding the issue. Alternatively, the Charterers contended that the Owners are estopped from rejecting the report's findings since they did not object to this appointment so far; hence the Owners varied the contract by their subsequent conduct. Finally, the Owners contended that, as a matter of law, the Charterers could not sustain a defence on the grounds of waiver or estoppel or variation.

12) After spending considerable time dealing with the arguments & defences of variation, estoppel, and waiver, the parties usually agreed to appoint another routing company to conduct a post-performance evaluation. This raised

some procedural issues; the parties disagreed on the instructions to be given to another routing company to carry out this task. More often, the parties disagreed on the adopted methodology to apply, e.g., positive currents to be considered or not, 24 hours of consecutive good weather to apply or less, etc. All of the above issues delayed the commercial settlement of the dispute or the time of commencing arbitration proceedings. Therefore, it seems better to reject the appointment of a non-agreed weather routing company when made by the Charterers to avoid unnecessary delays or costs.

13) The performance clause in the recap, or the additional clauses, is not always provided for a continuing performance warranty, but this was determined by reference to other CP clauses. The parties disagreed on whether there is a continuing performance warranty and whether other terms should be read together to resolve the issue.

14) The parties usually determined the qualified word 'about' in speed and consumption by a fixed figure like 5% or 0.5 knots. That was to avoid any point of argument about the meaning of this word in this context (sometimes adopting a narrow textual approach). However, the word 'about' was occasionally missing from either the speed or the consumption description. For example, the parties disagreed on whether an absolute warranty applies or implies the 'about margin.' Then the parties considered other terms in the contract to determine the issue.

15) In long-period CPs, the parties sometimes decided to amend the performance clause and reflected this agreement in the addendum. As a result, the parties discussed the following issues: (i) whether the revised performance clause is unambiguous and (ii) the string of contracts contains the revised clause, i.e., Head Owners- Head Charterers- Sub Charterers- Sub sub Charterers (if any).

16) The above, in essence, complicates both liability and quantum issues (pass the claim up and down the charter chain) when the performance clause is changed, probably for commercial reasons. Still, the ship could not perform for other reasons, i.e., technical issues or engine issues, etc. Thus, head Owners argued that the ordered speed and consumption -as per addendum- remain unwarranted (no breach = no claim), while the Charterers (as against the Owners) contended that the ship underperformed for technical reasons; the Owners are liable. Further, the sub Charterers argued that the disponent Owners had misdescribed or misrepresented the vessel's performance - distuinguishing between contractual and tortious liability. Thus, the disponent Owners are liable, even if the ship found bad weather on the voyage; or the vessel's speed and consumption description were given on a 'wog' basis. Then the parties disagreed on the direct cause of the loss and the process of calculating the loss inflicted by concurrent causes e.g.bad weather & hull fouling, bad weather & engine issues, etc.

17) For newbuilding vessels, the performance clause was consistent with the speed warranty clause in the shipbuilding contract. However, some terms found in the shipbuilding contract, like 'even keel' and 'deepwater,' may become problematic when incorporated in the performance clause of a time CP, given the different nature of the contracts. For example, the Charterers sometimes argued that the Owners failed to prosecute the voyage with utmost despatch by not maintaining the ship at even keel. However, the Charterers also relied on this term as a potential defence, when the vessel encountered only bad weather on the voyage or the sample of good weather time was minimal (below 5%- The Ocean Virgo) to establish a claim. Then the parties disagreed on whether the words' even keel' should be strictly construed. For example, what impact would that have on the vessel's speed

and consumption when the ship encountered bad weather on the voyage, and who bears the burden of proving or disproving such allegations.

18) The parties regularly agreed to delete "wog" from the vessel's described ECO speed & consumption. During the charter negotiations, the Charterers asked for deletion, especially on a bad freight market, when the fuel prices impact the daily expenses. However, on a rising market (now), the Charterers focused on full speed and consumption. Another point of dispute was whether the parties agreed' wog' to apply, reading the charter party as a whole. Alternatively, other potential remedies are available when the ship seriously underperformed due to technical or mechanical issues. Then the question raised was how any loss will be quantified.

19) The CP was sometimes silent on whether deductions from hire are allowed for speed and consumption disputes. The parties regularly disagreed on this point in the charter negotiations. As found, the CPs stated 'no deductions are allowed' or 'no deductions without the Owners prior consent.' The latter opened discussion and debate as to whether or not a party unreasonably withheld his consent to the deduction. The issue was further complicated when the Owners exercised their remedy of suspension due to 'deficient' hire payment, given the deduction of a performance claim from the hire due.

20) An only a limited number of CPs included a time bar provision. The clause stated that a fully documented claim is to be submitted within 15 days or 30 days from the time of the vessel's arrival at the discharging port, failing which the claim will be time-barred.

21) The parties sometimes expressly agreed 'no extrapolation' to be allowed or used different wording aiming at this result. However, after that, the parties disagreed on this point, stating that the wording of the clause is not clear enough to change the law position, i.e., extrapolation to apply basis The

©Prokopios Krikris MSc,LLM,LMAA Supporting Member,SCMA,HKMAG, MCIArb.

Didymi. Also, the language in the same clause was not the same: 1st limb stated 'periods outside the good weather threshold to be excluded from the evaluation,' and 2nd limb stated 'when there is bad weather the Charterers are barred from bringing any underperformance claim.' Lastly, the 'weather clause' in the proforma provided for a continuing warranty.

22) The parties disputed the above interpretation. The Charterers said that all the terms should be read sensibly and commercially in order to decide this issue. Doing so, there is a force in the proposition that the presumed intention was only to bar any underperformance claim when there was full bad weather on the voyage. And not to restrict the assessment of the loss to the good weather periods; this would likely give the Owners an advantage to escape from other liabilities (separate breaches of CP). And if there is any ambiguity- the language chosen by the parties can bear two distinct meanings- it should be resolved against the party who prepared the clause, the rule of 'last refuge.'Fewer disputes arose when the CP stated 'No extrapolation is allowed to bad weather periods' and deleted the wording of 'The vessel shall be capable, at all times during the currency of this charter'.

23) The CPs contained a specific dispute mechanism to resolve the evidential part of the issue, i.e., another 3rd weather routing company to be appointed, etc. Few CPs included different wording like 'another routing company' or 'other performance specialist' or 'another 'independent Weather Bureau.' One point of dispute was whether the appointed company was independent or impartial, focusing on the fact that there was a close business or professional relationship with specific weather routing company. The second point of dispute was whether a distinction should be drawn between the wording of 'another routing company' and 'other performance specialist' as inserted in the same or separate clauses of the CP. The parties said that the latter refers to an independent consultant and not to a weather routing company;

otherwise, the same wording would have been used in the clause(s)- had this been the parties' clear intention. In general, qualified words like 'independent,' 'well-established,' and similar wording may open debate between the parties.

24) The performance clause does not always state 'savings in bunkers to offset time loss'. In some cases, the parties disagreed on whether the Owners are entitled to the savings, i.e., net loss position, sometimes distinguishing damages and off-hire claims. In minimal cases, the parties had expressly agreed that Owners are entitled to the credit of the bunkers saved regardless of the claim form. In very few CPs, the wording of the clause provided any bunker credit to be calculated by comparing the actual consumption with the maximum warranted consumption (105%)- distinguishing the case from The Gaz Energy.

25) The parties regularly included DSS3 into their CP, despite that the term "DSS3" has often triggered the argument. However, in many CPs, the parties defined it or 'reconciled it' with the significant wave height of 1.25 or 2.0 meters - albeit the difficulties in reconciling these two terms. For example, in the charter negotiations, the parties disagreed on the height of the swell to apply, i.e., 1.25 meters or 1.5 meters, etc. In the settlement discussions, the parties also disagreed on the meaning and application of the DSS3 or combined sea and swell height (some said this is average and not max sea state). Therefore, there was no point of disagreement when the CP stated 'BF4, Significant wave height 1.25 or 1.5 or 2.0 meters'.

26) The performance clause less frequently stated: a) 24 hours as consecutive good weather between noon to noon reports, and b) positive currents to be excluded. In the negotiation process, the parties disagreed on whether the positive currents to be included in the performance clause. Sometimes, the

parties referred to the pre-contractual negotiations to convince the other party to settle the claim amicably. Some parties accepted this approach while others did not.

27) The parties more frequently include the term 'no negative influence of swell' instead of 'no swell.'Then the parties disagreed on whether this term should be strictly construed to include even insignificant swell height or stretch (or strain) the natural meaning of those words to reach an interpretation that supports either party. In particular, the Charterers attributed an extensive interpretation, and the Owners put forward a restrictive interpretation. A common argument was that there is no sea voyage without swell. Then the parties considered the rival meanings against other provisions of the document and investigated its commercial consequences-an “iterative process.”

28) The same issue caused debate when the CP stated 'currentless waters.' The parties (or their representatives) contended that there is no good weather to establish a claim if one adopts a literal interpretation of the terms' currentless waters' or 'no swell.' Again, the parties invoked commercial common sense to justify a less strict approach to interpretation. Another argument presented was that it should be implied that 'no swell' means 'no swell of that size or direction that affects the vessel's performance.' And this was a point for much argument that led the parties to an endless debate.

29) Sometimes, the CP stated 'no negative influence of swell.'The parties disagreed on whether that relates to the direction of the swell or the height of the swell, or both. When the CP stated 'no adverse swell,' the parties less often disagreed on the meaning and its application in this context, drawing an analogy with how the tribunals interpreted the term 'no adverse current.'

30) Similarly, the parties often disagreed on the meaning of the term 'no negative influence of current.' They argued that trivial currents could not affect the vessel's performance, viewing its size & type & age. And, if so claimed, the Owners bear the burden to prove any adverse effect (if any).

Then the parties (and their representatives) disputed the proper interpretation of the word 'influence' and contended that it was added there and had a specific meaning. The clause could stand perfectly well even without the words, e.g., 'no adverse currents.' The Owners said that there is no reason to "blue pencil" this word on the grounds of redundancy or to look for ambiguity. Then the parties attempted to distinguish their case, basis the different wording of the clause(s) or different facts from previous arbitration decisions concerning the meaning of 'no adverse current.' The word 'influence' raised a point of debate on its proper interpretation (extensive or restrictive) and application to evaluate the vessel's performance.

©Prokopios Krikris MSc,LLM,LMAA Supporting Member,SCMA,HKMAG, MCIArb.