Speed and Performance

Evaluate conflicting performance reports

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Weather Routing Companies

- First cited in reported cases of Lloyds Law Reports in 1976 (The Washington [1976] 2 Lloyd's Rep. 453) and later in The Evdokia [1980] 2 Lloyd's Rep. 107 as “evidence” to contradict the weather conditions reported by the master during the voyage. Later, the reports were used to evaluate the Vessel’s performance.

- Recently, some London tribunals held that the WRC’ function derives from the parties agreement (the contract) that permit their involvement to assess the Vessel’s performance but strictly in line with the charter-party terms.

- Reports were used as performance evaluations: It is not enough for a party to assert that the Vessel underperformed in order to pursue a claim. It requires evidence (the one who asserts must prove). A tribunal could only decide on the evidence before it; understanding the evidence is part of the reasoning process. A tribunal approaches the case by considering and weighing up all relevant and admissible facts and evidence.

- However, when a party submits a performance report as evidence, it is not treated *per se* as a “fact”(a party contends that “*based on X report it is a fact that the Vessel underperformed*”). Its probative force as “evidence” needs to be analysed: It must be evaluated, tested against the other evidence and be given the weight it deserves **in the circumstances.** It cannot be accepted at face value.

- Its evidential weight would be lower when the report is not comprehensive (requests for clarifications are useful). Expert evidence (independent evidence) may reduce the evidential weight of the report.

Negotiation

Step 1: the starting point is the contract (what did the parties agree?) Any evidence-preference clause? If the parties excluded a company (by agreement) its' report will be ignored(see e.g. Arb 21/18).

Step 2: does the report properly apply the benchmark conditions? any report other than one strictly in compliance with charter-party provisions is non-contractual and unenforceable (see e.g. Arb 32/22). Requests for clarifications; WRC to justify their methodology or missing entries in their report(see e.g. Arb 15/23, 23/21).

Step 3: does the report's methodology comply with both the terms and the substantive law of the contract? (referring to proper application of damages can resolve the conflict). If there is no actual loss, the claim will fail. If there is loss, does the report calculate it properly (see e.g. Arb 12/14; The Divinegate- how the court approached conflicting expert evidence)?

Step 4: expert evidence(if needed)/ 3rd routing company to challenge or strengthen the findings. As this option adds costs, a party will resort to this option later depending on the value of the claim/ progress of settlement negos.

Arbitration

- The Arbitration Act 1996 is founded on the principles of party autonomy and "the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense"(s1 AA 1996).

- Arbitrators are mindful of their cardinal duty "giving each party a reasonable opportunity of putting his case and dealing with that of his opponent" (s 33 AA 1996). It is a balancing exercise between avoiding costs/ delay and giving a reasonable opportunity to a party of putting his case.

- Tribunals strive to give effect to the parties' bargain i.e. a weather preference clause will be given effect . Doing so may prevent unnecessary costs and inquiries, in evaluating multiple reports as evidence. However, even a "final and binding report" may be held to be unenforceable when not prepared in line with the charter terms.

- Requests for further information or clarifications enables the tribunal to make a finding i.e. some entries are missing in one report, or the applied methodology is uncertain (see e.g. London Arbitration 23/21, 15/23, 2/24). Failure to comply with the tribunal's orders can lead to sanctions for a party's non-compliance(s 41, AA 1996) – e.g. "*the defence of Sub-Charterers in relation to underperformance/overconsumption (and by extension the indemnity claim against Owners by Charterers) must be struck out" see here:* London Arbitration- deductions for underperformance and stevedore overtime expenses - Charter Party Disputes

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- Requests for clarifications as to the applied methodology may reduce the weight to be attached to the experts' conclusions (see e.g. Arb 2/24, The Divinegate).

- Costs orders for exposing flawed methodology (Arb 23/21), or for extensive sets of pleadings (new evidence- revised report(s) during proceedings); tribunal may depart from the normal rule that costs follow the event (s 61 AA 1996).

- Tribunal may find both reports unsatisfactory and calculate loss on a different basis (Arb 15/23). When in doubt, tribunals are not obliged to follow one report or the other if the analysis is wrong . Tribunals are alerted to the risk of over-compensating a claimant.

- If both reports find that the ship underperformed by applying the good weather criteria (1st stage), then the proper assessment of the loss may resolve the conflict.

- For more information on these points, you can read: Reflections on speed and performance claims (i-law.com)

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Thanks to Mr Brian Williamson, LMAA Full Member, for reading a draft.