

AMTAC ADDRESS 2015

A view from the crow's nest: maritime arbitrations, maritime cases and the common law

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16 September 2015

1 Introduction

Chief Justice Allsop, your Honours, ladies and gentlemen. My thanks to AMTAC and the Federal Court for arranging today's event, and to MLAANZ for including it in their annual conference program. AMTAC is to be congratulated for its initiatives promoting Australia a preferred venue for dispute resolution in maritime matters.

When Peter McQueen first asked me to deliver the AMTAC annual address, I felt honoured by the invitation but a little overawed at the scale of the topic. There are hundreds if not thousands of important maritime law cases, many of them with their roots in maritime arbitration. I imagined surveying reports of cases laid out as far as the eye can see; hence the reference to the 'crow's nest' in the title of this address.

The dilemma at hand is well described in a comment made by David Foxton QC, the biographer of the great maritime judge Lord Justice Scrutton.¹ In describing his task of mapping the contribution of that single eminent judge to the field of commercial and contract law, Foxton said:

It is difficult to do justice to the number and quality of judgments in commercial appeals over this period: any survey soon degenerates into a name checking of well-known cases, whose worth is well known to those already acquainted with them and impossible to communicate to those who are not.²

I wish to avoid the trap thus aptly described. I have therefore been selective. After some introductory comments about maritime arbitration, I will then take you to one aspect of the law particularly developed by maritime cases before the English courts and to which arbitration cases made a special contribution: namely the early development of the doctrine of frustration. (As we commemorate the 100th anniversary of significant events throughout the Great War, and given that many of the cases concern the interruptions posed by the Great War, it seems to me that such a reflection is timely.) I will then briefly survey the other maritime cases that have a broader significance in common law. I will conclude by looking 'over the horizon'.

¹ David Foxton QC, *The Life of Thomas E Scrutton* (Cambridge University Press 2013).

² At p249 – 50; as cited by Andrew Phang 'A Legal Giant Revisited – Thomas Edward Scrutton and the Development of English Common Law' (2015) 32 *Journal of Contract Law* 119, 132.

2 Maritime arbitration cases

It is no surprise that almost all of the cases with which we are concerned are cases from England. London has been, for upwards of two centuries, a centre for modern international trade; and not only the shipping trade, but the closely related trades of insurance and sales of commodities. Typically those trades have incorporated into their standard trading documents clauses about how disputes are to be resolved and by whom. Most commonly those documents included either an exclusive jurisdiction clause nominating the courts of England, or a London arbitration clause.³ The result was that London became a hotspot of activity and expertise for resolution of commercial disputes; and its status continues to this day.

Maritime cases that were commenced directly in the commercial courts resulted in published reasons. But a significant number of others were referred to arbitration where they were decided by 'commercial men' – a term that generally excluded lawyers.⁴ (Until the 1980's it was uncommon for lawyers to be involved in arbitration; the parties were commercial men arguing before another.⁵)

One of the attractions of arbitration is confidentiality. This makes it impossible to know precisely how many maritime arbitrations have taken place.⁶ Outcomes of individual cases generally only become public if the matter comes before the courts as a result of an appeal from an arbitrator's award. In the years prior to 1979 it was the practice of parties to request the arbitrator to frame their award as a 'case stated'. This created an easy avenue to challenge the award, and the unsuccessful party could then 'chance its arm' at a more palatable result being forthcoming before a court. Ultimately, legislative intervention in the UK ensured this practice was stamped out as antithetical to the spirit of arbitration: after all, the parties had chosen arbitration as an alternative, not a precursor, to lengthy and expensive litigation.⁷ I will come back to the amendments to the UK *Arbitration Act* later. But the ready flow of arbitration appeals to the courts pre-1979 was good news for the development of the common law.

It was good news for the English economy as well. This hotspot of activity in dispute resolution, of course, was of immense economic benefit to England.⁸ The 'commercial men' of London were in high demand as arbitrators to resolve disputes – and not just those arising in England (although those were plentiful). They were sought after as neutral arbiters of disputes arising anywhere in the world. The exposure of arbitrators, these 'commercial men', to the rich pickings of maritime and commercial disputes gave them the opportunity to hone their knowledge and skill around real world problems. When these matters flowed into the court system, solicitors, the bar and the bench were similarly exposed.⁹ Legal principles were able to be developed with a strong grounding in the gritty

³ It was also possible for parties to agree after the fact to send their dispute to arbitration in London.

⁴ For a recent review of the authorities as to who will satisfy the requirement of 'commercial men' see *Armada (Singapore Pte Ltd (under judicial management) v Gujarat NRE Coke Ltd* [2014] FCA 636; 318 ALR 35 (per Justice Foster).

⁵ Simon Everton & Bruce Harris *50 years of the LMAA* (Lloyd's List Group, London 2010) 30.

⁶ Sir Bernard Eder '30 years before the mast' [2013] *Lloyds Maritime and Commercial Law Quarterly* 42, 43.

⁷ *Arbitration Act 1979* (UK) and *Arbitration Act 1996* (UK).

⁸ In 2012 Justice Bernard Eder, speaking at an event marking the 30th anniversary of the founding of Tulane and Southampton's maritime law centres, noted in the preceding 30 years alone there had been 1750 English cases on shipping matters. Justice Eder guesstimated that in that same 30 years, at least 10,000 and 'probably many more' maritime awards had been handed down by the LMAA alone. Bernard Eder '30 years before the mast' [2013] *Lloyd's Maritime and Commercial Law Quarterly* 42, 42 - 43.

⁹ Indeed many of the leading English jurists of the 20th century had cut their teeth on maritime matters whilst at the bar.

reality of commerce – with a sense of what was important to the parties and to commerce as a whole. At the forefront in all commercial cases were several guiding principles particularly emphasized in maritime cases:

Sanctity of contract: that as much as possible, the parties should be held to their bargain;¹⁰

that court decisions should promote certainty¹¹ and

that contracts should be interpreted in accordance with ‘business common sense’.¹²

For the maritime market, the cases springing from arbitrations have set down key principles and statements absolutely critical for their day to day operations. There are hundreds if not thousands of such cases that have sprung from the decision-making of ‘commercial men’.¹³ They range across the whole gamut of law relating to charterparties. Those cases have been joined by others that originated not with arbitrators but through the courts. The resultant combined body of caselaw has significance well beyond the realm of the speciality of maritime law. One example is body of cases that assisted in developing the doctrine of frustration.

3 Illustrating the contribution of maritime law cases to common law

3.1 The early development of the laws of frustration

The shipping industry was (and is) exquisitely poised to generate seemingly endless fact scenarios involving what lawyers term ‘supervening events’ that complicate performance of a contract already on foot. Ships travel all over the globe. A ship can be captured, wrecked or requisitioned. A ship calls at places that can be politically unstable, geographically challenging, and exposed to extreme weather. A ship can, through fate or circumstance, find itself caught in, or steaming towards, an invidious situation that may be resolved overnight or not for 6 years. Shipping is particularly exposed to risks of delay and as we know, ‘...in merchant shipping, time is money’.¹⁴

In the late 19th and early 20th centuries, the courts were grappling with and attempting to enunciate clear rules regarding the discharge of a contract rendered impossible by a dramatic event. This dilemma was illustrated by, but by no means limited to, shipping cases.¹⁵ The support for keeping parties to their bargain was staunch. In fact the notion of absolute contracts held sway. Obligations that were expressed in absolute and unqualified terms were required to be performed, and would not be excused by supervening circumstances¹⁶ unless provided for in the contract.¹⁷ But this was

¹⁰ As CJ Allsop said, speaking extra curially: ‘It is wise to state at the outset, and to recall at all times, that sanctity of contract, or *pacta sunt servanda*, or party autonomy is a basal principle of law and an accepted international legal norm, though not one without appropriate qualification.’ 2007 AMTAC Address.

¹¹ “In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon.” (Lord Mansfield, as quoted in House of Lords “Jordan II” by Lord Steyn.

¹² Eg *The ‘Antios’* [1985] AC 191 where Lord Diplock said ‘ I take this opportunity of re-stating that, if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.’ (at 201).

¹³ Sir Bernard Eder, ‘30 years before the mast’ *Lloyd’s Maritime and Commercial Law Quarterly* 42, 43.

¹⁴ Lord Mustill, *The ‘Gregos’* [1995] 1 Lloyd’s Law Reports 1, 4.

¹⁵ See GH Treitel, *Frustration & Force Majeure* (Sweet & Maxwell, 2004) 2-011 (‘Treitel’).

¹⁶ Lord Wilberforce, *National Carriers v Panalpina* [1981] AC 675, 693.

potentially unjust. So were there any circumstances in which performance of the contract by both parties ought to be excused? The law had already conceded certain exceptions to that strict rule – such as supervening illegality.¹⁸ Another exception to the rule was where the contract involved a living thing that had perished;¹⁹ but beyond that, other situations of supervening impossibility did not excuse the promisor from performance unless the parties had so provided in their contract.

It has to be conceded that the ‘starting point for the development’ of the doctrine of frustration²⁰ was not a shipping case. It was the judgment of Justice Blackburn (as he then was) in *Taylor v Caldwell*, in 1863.²¹ In that case the parties had contracted for the hire of a music hall and its grounds for an event that looked rather like a Victorian era ‘Big Day Out’. But the music hall was destroyed by fire before the event.

I mentioned that the law conceded an exception to the notion of absolute contracts where a living thing had perished. In *Taylor v Caldwell* Justice Blackburn extended this exception. His honour said the exception should apply where the parties had assumed²² the continuing existence of a ‘thing’ necessary for performance of the contract, whether that thing was living or not:

The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance....that excuse is by law implied, because from the nature of the contract it is apparent that the parties had contracted on the basis of the continued existence of the particular person or chattel.

The parties were held discharged from the contract.

Taylor v Caldwell envisaged that where there was destruction of the subject matter essential for the contract’s performance; and where there were no contractual provisions dealing with the event, then the solution would be that the law would imply a term that the contract would not proceed in those circumstances.²³ These criteria were challenged over the next 40 or so years, in particular by in maritime cases.

The maritime cases enabled the commercial courts to calibrate settings on the ‘blowtorch of justice’ so as to better respond to the question – when will circumstances make performance of the contract so markedly different from that contemplated, that the parties can be regarded as discharged from their contract.

¹⁷ *Paradine v Jane* (1647) [1558 – 1774] All ER Rep 172: ‘in which case it was decided that where a party by his own contract creates a duty and charge upon himself, he is bound to perform it, notwithstanding any accident by inevitable necessity, because he might have provided against it in his contract.’ (*Touteng v Hubbard* (1802) 127 ER 161.)

¹⁸ For example if the port of discharge for goods on board a ship had become enemy territory. See cases discussed in Trietel at 2-011.

¹⁹ Or a person who could no longer perform the personal services contracted eg because he had gone blind. *Taylor v Caldwell* (1863) 122 ER 309, 313 -314.

²⁰ Treitel (2-025): rather than the creation of it.

²¹ (1863) 122 ER 309.

²² In that there was not a guarantee of the continued existence: *Taylor v Caldwell* (1863) 122 ER 309, 312.

²³ See discussion by Treitel at 2-025.

While there are many maritime cases dealing with frustration up to the end of the Great War, I will be briefly dealing with only some more significant ones;²⁴ half of which came from arbitrator decisions.²⁵ Many of the judgments are by the leading jurists of the day and, whether majority or in dissent, repay time invested in reading them.²⁶

*Jackson v Union Marine Insurance Co Ltd*²⁷

*Embiricos v Sydney Reid*²⁸

*FA Tamplin Steamship Co v Anglo Mexican Petroleum Products Co Ltd*²⁹

Scottish Navigation Company Ltd v WA Souter; Admiral Shipping Co Ltd v Weidner.³⁰

Bank Line Ltd v Arthur Capel & Co [1918].³¹

Hirji Mulji v Cheong Yue Steamship Co [1926].

It was only a few years after *Taylor v Caldwell*, the commercial courts were prepared to release parties from their bargain when the object of the common adventure, not a physical object, was destroyed.³²

Jackson v Union Marine Insurance Co

In *Jackson v Union Marine* 1874 the court³³ applied the doctrine to a voyage charter. But here the ship had not been destroyed, so it was not a case of destruction of the subject matter.³⁴ In this case the ship, a sailing ship, was intended to perform a spring voyage from Liverpool to Newport to load railway lines, and thereafter to deliver them in San Francisco. It was to do so 'with all possible despatch, perils of the seas excepted'. On the second day of the delivery voyage she foundered and was badly damaged. The repairs required would take 7 months. Performing the contract thereafter would mean an autumn voyage: and an autumn voyage for a sailing ship was regarded by the court to be a completely different adventure than the spring voyage the contract had contemplated.³⁵ The court held (5:1) that the contract was discharged,³⁶ relying on both the express clause requiring all possible despatch, and an implied obligation to carry out the voyage in a reasonable time.

Baron Bramwell put it thus:

²⁴ Others that could be mentioned include *Geipel v Smith* (1872) LR 7 QB 404; and *Larrinaga & Co v Societe Franco Americaine des Phosphates de Medulla* (1923) 92 LK 455.

²⁵ *FA Tamplin Steamship Co v Anglo Mexican Petroleum Products Co Ltd, Admiral Shipping Co Ltd v Weidner, Hirji Mulji v Cheong Yue Steamship Co*.

²⁶ See for example the powerful dissent from Baron Cleasby in *Jackson v Union Marine*.

²⁷ (1874) LR 10 CP 125.

²⁸ [1914] 3 KB 45.

²⁹ [1916] 2 AC 397.

³⁰ [1917] 1 KB 222.

³¹ [1919] AC 435.

³² *Geipel v Smith* (1871 – 1872) LR 7 QB 404 although it was technically not a frustration case, because the events fell within the exception 'restraints of princes excepted' but it is likely the courts would have implied a term had they not had recourse to an express one.

³³ (1874) LR 10 CP 125. Blackburn J also sat on this court.

³⁴ Or blockade; see *Geipel v Smith* (1872) Law Rep 7 QB 404.

³⁵ At 141.

³⁶ and that therefore the insurance claim for lost freight was good, because the shipowner was not at fault by reason of the perils of the seas exception.

..(L)et us suppose this charterparty had said nothing about arriving with all possible dispatch.... It is impossible to hold that, in that case, the owner would have a right to say "I came a year after the time I might have come...: you must load me, and bring your action for damages." The charterers would be discharged, because the implied condition to arrive in a reasonable time was not performed....

The charter contained a 'perils of the seas excepted' clause. What effect should be given to the clause, given that it envisaged the possibility of such an event? Bramwell went on to say

Now what is the effect of the exception of perils of the seas and the delay being caused thereby? ... I think this: they excuse the shipowner but give him no right. The charterer has no cause of action, but is released from the charter. When I say he is, I think both are. The condition precedent [to arrive in a reasonable time] has not been performed, but by default of neither.³⁷

Thus, the complete - albeit temporary - unavailability of the ship was held to be sufficient to frustrate the adventure the parties had contemplated.

(Incidentally the ship was later wrecked off the Antipodes Island south of New Zealand in 1893.³⁸)

The political events that engulfed the early 20th century, including WW one, caused havoc in ports and seaways. Blockades led to frustration cases coming thick and fast.

Embiricos v Sydney Reid

*Embiricos v Sydney Reid*³⁹ concerned a voyage charterparty. The plaintiff, a Greek shipowner, sought damages for the shipper's failure to load a cargo. The ship had reached its loading port in the sea of Azoff the day before war was declared between Greece and Turkey. On the day the ship commenced loading grain, the charterer became aware that Turkey was seizing all ships passing the Dardanelles. The charterer stopped loading, relying upon the 'restraint of princes' clause in the charter to excuse its non-performance. The ship remained stuck in the Black Sea for 11 months.

This appears a clear case. But the reason the shipowner pursued his claim for failure to load was that the Turkish government had lifted its bar for a number of days. Had the vessel continued to load that day as was planned, it could have completed the voyage without seizure.

Justice Scrutton, as he then was, made two important points as regards frustration.

First, he made it clear a part performed contract could be frustrated.⁴⁰

Secondly, his Honour focussed on the time at which the situation was to be assessed. He said that here the excepted peril protected the charterer from its obligation to load, because as at the date of the failure to load, the peril was preventing the shipowner from carrying out the charter. The fact that, a few days later and unexpectedly, that restraint was removed for a short time does not mean

³⁷ At 144.

³⁸ A sailing barque called 'Spirit of the Dawn'. It was later wrecked off Antipodes Island south of New Zealand in 1893.

[https://en.wikipedia.org/wiki/Spirit_of_the_Dawn_\(ship\)](https://en.wikipedia.org/wiki/Spirit_of_the_Dawn_(ship))

³⁹ [1914] 3 KB 45 (March 1914).

⁴⁰ Pointing to cases involving charters where the ship was already steaming for the load port (including the *Jackson* case), saying they were not executory contracts but actually part executed.

the parties ought to have foreseen it and proceeded when the adventure had seemed hopelessly destroyed. His Honour stated: 'Commercial men... must be entitled to act on reasonable commercial probabilities at the time when they are called upon to make up their minds.'⁴¹ He held there was no breach by charterers.

In 1916, and now with WW1 in full swing, the courts were busy with cases concerning requisitioned ships.

FA Tamplin Steamship Co v Anglo Mexican Petroleum Products Co Ltd⁴² came before the House of Lords as a result of a stated case by an arbitrator. It was the first case to hold that the principles of frustration could in theory apply to a time charter, despite arguments that a time charter did not have the qualities of a 'common adventure'.⁴³ (However, on the facts of the case, and contrary to the arbitrator, the majority of the House held the charter was not frustrated.⁴⁴

In 1912 the parties entered a 5 year time charter due to expire in December 1917, with a 'restraint of princes excepted' clause. In 1914 the ship was requisitioned by the government upon the outbreak of WW1.⁴⁵ During this time it was converted to a troopship then back to a tanker. The case was unusual in that here the shipowner was claiming the charterparty was at an end by reason of the requisition; but the charterer, who had been paying the hire, argued that the charter should continue and were willing to keep paying. This unusual state of affairs was because the government had been paying a sum to the charterer that exceeded the hire rate under the charter. Naturally, the charterer was keen to continue this arrangement!

The arbitrator held the contract had come to an end. The charterer appealed, claiming that frustration did not apply to a time charter as there was no 'common adventure' between the parties; that a war would not automatically terminate it, and the shipowner lost nothing by reason of the current arrangement. Performance was not impossible.⁴⁶

Both at first instance and before the Court of Appeal the charterer was successful, the arbitrator's finding being overturned. The Court of Appeal was upheld 3:2 by the House of Lords.

Their Lordships agreed more than they disagreed. All the judges, albeit some reluctantly, agreed that a time charter could in theory be frustrated;⁴⁷ and they all agreed that the matter was to be determined as at the date of the requisition.⁴⁸ However the majority were not prepared to apply the doctrine in this case; nor would they infer that the requisition would continue for the remainder of the charterparty (although of course we know now the war was to go on well past the charter's expiry).

⁴¹ At 54.

⁴² [1916] 2 AC 397.

⁴³ It had been said that a shipowner is interested only in payment and redelivery in sound condition. The judges all acknowledged that the finding of frustration in time charters was 'much more difficult' than in voyage charters.

⁴⁴ As to which, see Lord Roskill in *National Carriers'* case at 711.

⁴⁵ Initially for a short period, and then immediately again for a second requisition period that was continuing at the date of the hearing.

⁴⁶ At 401.

⁴⁷ Lord Parker (with whom Lord Buckmaster agreed) considered that the time charterparty evinced no 'common adventure' and because it provided for hire to be paid even when there was a restraint of princes, it had provided for the scenario. His Lordship could not see how an implied condition could be framed that would not contradict the express clause: 426 – 427.

⁴⁸ But that didn't stop the judges from observing that the war was still ongoing with no way of telling when it would end and whether the ship would ever be available to the charterer within the 5 year hire period.

The judges agreed that the remaining length of the time charterparty was a crucial factor. If a time charter has substantial period left to run, then an event that temporarily interferes with performance will not destroy the existence of the contract.⁴⁹

The other complicating factor was the 'restraint of princes' clause. Could a contract be frustrated on the occurrence of a peril that had been anticipated and provided for in the contract? Was such a clause even intended to provide for such a dramatic loss of use? And if the doctrine relied upon the notion that the parties would have agreed that in such circumstances the contract would be at an end, how does that sit with the exception? The theoretical basis for the developing doctrine, namely the 'implied condition' was looking less than convincing.

On this, the court was divided. Two judges held that because the exception did not distinguish between long or short period, it was difficult to frame an implied condition that would not contradict the 'restraint of princes' clause.⁵⁰ The minority did not find it inconsistent with an implied term that the contract be discharged upon such a significant event. Viscount Haldane resolved the dilemma of the exception clause by saying the requisition looks to have destroyed the possibility of performance of the contract, such that the entire contract was swept away, and the exception clause with it.⁵¹ Lord Atkinson treated it differently. He said that if the requisition was known to be for the whole remaining period of the charterparty then it could not be anything but frustrated: the charterer would not have what he contracted for, namely use of the ship, nor could he be obliged to pay hire. In reconciling his view with the exception clause, his Lordship went on to say:

*[the clause] saves each of the parties from a claim for damages for breach of contract at the suit of the other, but it does not deprive either of them of the right to free himself or themselves from the contract on the ground that the basis upon which it rested has been destroyed.*⁵²

This case excited much discussion, both as regards its reasoning and the result.⁵³ It was an extremely close decision but it did decide; that time charters could be frustrated; that the length of time remaining of the contract was an important factual element; as well as discussing the impact of express provisions in the contract.

Only a few months later the Court of Appeal handed down another decision involving general exclusion clauses:

Scottish Navigation Company Ltd v WA Souter; Admiral Shipping Co Ltd v Weidner.⁵⁴

⁴⁹ Viscount Haldane, 410.

⁵⁰ Lord Parker (with whom Lord Buckmaster agreed) 427. This brought the foundation of the doctrine into sharp focus; because the basis for the doctrine had been described in previous cases as an 'implied condition' that the parties would agree not to continue in these circumstances.

⁵¹ 411.

⁵² 418.

⁵³ It has been suggested that if the roles had been reversed and the shipowner been arguing to maintain the contract then the court would have found it to be frustrated; although Professor Treitel disputes that view: Treitel, 5-052.

⁵⁴ [1917] 1 KB 222.

It combined two cases with almost identical charterparties; one was a stated case from an arbitrator.⁵⁵ Although each was described as a time charter, its length was determined by the voyage: a 'Baltic round' from an English port. Therefore the risk of delay was borne by the charterer. Both charters contained a long exception clause that included the words 'restraints of princes mutually excepted'. Both ships were stuck in foreign ports in the Baltic by reason of the outbreak of the war. Both shipowners sought hire from the charterers. The arbitrator held the charter frustrated, but the lower courts had held both charterers liable to pay. In other words, that they were not frustrated.

The Court of Appeal agreed with the arbitrator that the charters were frustrated.⁵⁶ In particular, the court held that the exception clauses contemplated only a temporary setback not impossibility of performance, such that the implied condition was not inconsistent:⁵⁷ Lord Justice Bankes said:

*The mere introduction of exceptions or stipulations dealing with certain contemplated contingencies... is not of itself sufficient to indicate an intention to exclude the implied condition.*⁵⁸

We see here a view in keeping with the contemporary view of explicit clauses in the contract; namely that they must be considered carefully to see if they were intended to cover the particular events that have transpired.

The Court of Appeal's views were affirmed when the House of Lords considered frustration in the case of:

Bank Line Ltd v Arthur Capel & Co [1918].⁵⁹

The parties entered a time charter for 12 months from February 1915. Again, the charter excepted loss or damage from restraints of princes. Charter terms gave the charterer two opportunities to cancel the contract if the delivery of the ship was delayed or if it was requisitioned. The key question was – did these cancellation clauses show intent to 'do away' with the operation of the doctrine of frustration?⁶⁰

The vessel was requisitioned before the ship could be delivered under the charterparty, but the charterer did not cancel. The shipowner attempted to get the vessel released to no avail. Some months later the shipowner received an offer to buy the vessel from a third party conditional on

⁵⁵ Interestingly, counsel for the shipowners – arguing no frustration – was Mr Leck KC, who had been the arbitrator who had found the charterparty frustrated in *Tamplin v Anglo-Mexican* subsequently overturned by a narrow majority of the House of Lords.

⁵⁶ The shipowners tried to argue that being time charters there could be no frustration of a common adventure, the shipowner's interest being satisfied by payment. The court noted this had been resolved in *Tamplin* (observing Lord Parker's grudging acceptance of this fact in that case). In any event, there was the quality of a common adventure, and the charters contemplated a particular voyage that would be paid by calculation of time. *Swinfen – Eady J*, at 239; *Bankes LJ*, at 243.

⁵⁷ *Bankes*, 247.

⁵⁸ *Ibid.*

⁵⁹ [1919] AC 435.

⁶⁰ There were some aspects of the case that made it less clear cut. The charter could have been prosecuted at any time as the ship was to carry coal across the channel to France: (so the summer/winter voyage was not an issue here). The shipowner might have, had it chosen to ask, been able to substitute earlier and for the benefit of the charterer (but it was not contractually obliged to try). The charterer claimed would have happily taken up the charter when the ship was eventually released. So the question was, had it been frustrated and by what point?

release by the government. The shipowner negotiated to substitute another of its vessels for the government requisition. The charterer got wind of this and clearly felt 'put out'. It sued for non-delivery of the vessel upon its release from requisition, arguing that the contract was not for delivery on any particular date, and the charter, by reason of the express clauses, 'did away' with the doctrine of frustration'. The shipowner argued the clause did not bar the operation of frustration and that it had been entitled to regard the contract as at an end once the vessel was requisitioned.

The judge at first instance, and LJ Scrutton on the Court of Appeal, held the contract to be frustrated, but two judges of the Court of Appeal gave judgment for the charterers. The majority of House of Lords overturned that decision, finding that the contract had been frustrated. The trial judge and LJ Scrutton were vindicated.

The House of Lords held unanimously that the terms of the charter did not exclude the operation of frustration. A 'restraint of princes' clause should not be so regarded.⁶¹ A reasonable interpretation of the cancelling clause could not require the owners to hold the vessel at the disposal of the charterers for an unlimited period.⁶² Likewise, the cancellation clause simply permitted the charterer to cancel immediately rather than putting it to proof that the detention would have the effect of ending the contract.⁶³

On the facts, a majority held that it had been frustrated,⁶⁴ although as Lord Sumner⁶⁵ said, 'it is certainly a very near thing'. Lord Sumner's judgment in this case pulls together the accumulated wisdom around the doctrine from the various cases, and in the process weaves in some of the 'tatty ends' and inconsistencies in earlier judgments. He dealt with:

Time of assessment. His Lordship said the cases make it clear that the time the courts must assess the effect of the event is the same time that the parties; when they came to know of the cause and the probabilities of delay and had to decide what to do. But the seeming inconsistency of considering facts after that event was given a deft touch – it may assist in showing what the probabilities really were, if they had been reasonably forecasted, although there will come a point where a presumption will operate that a delay has been inordinate.

His Lordship also talked of the theoretical basis for the doctrine and how it interacts with express terms of the contract. While the theory of dissolution by frustration of its commercial object rests upon the implication arising from the presumed common intent of the parties, the effect of the contract terms must be considered as a matter of construction. If the contract does make provision, fully and completely and intended for that reason, for that contingency, then the court will not import a different provision for the same contingency.⁶⁶ A clause may provide for a contingency but only for the purpose of one consequence not for all its consequences. Relief of liability for damages,

⁶¹ Even though that appeared to be the effect of the decision in *Tamplin*, Lord Finlay (at 443) and Viscount Haldane – who sat on *Tamplin* – pointed out that Lord Loreburn appeared to side with the minority judges on this point.

⁶² Lord Finlay, 442.

⁶³ Lord Finlay, 443.

⁶⁴ Viscount Haldane dissenting.

⁶⁵ Lord Sumner quotes a whole host of cases that held frustration did apply to time charters; at 454.

⁶⁶ 455.

or a suspension of liability to pay, is different and distinct from providing for the possible outcome being the complete discharge from further obligation to perform the contract.⁶⁷

The fallacy underlying the respondent's contention appears to me to be this, that such a contract can never be put to an end to through the operation of one of the excepted perils. The... authorities show this is not the law.

How to best express the test: Lord Sumner highlighted the various different expressions used by judges.⁶⁸ Ultimately he asked ***whether the event destroyed the identity of the service and made the charter as a matter of business a totally different thing***. This wording, I submit, echoes through to the modern expressions of the doctrine.⁶⁹ Applying that test, His Lordship concluded that it did.

*The return of the ship depended on considerations beyond the ken or control of either party. Both thought its result was to terminate their contractual relation by the middle of June and, as they must have known much more about it than I do, there is no reason why I should not think so too. I should allow the appeal.*⁷⁰

The idea that the parties' intentions could influence a finding of frustration was something Lord Sumner cleared up in the final case:

Hirji Mulji v Cheong Yue Steamship Co [1926]⁷¹

This case came before the Privy Council on appeal from Hong Kong.

A charterparty for 10 months had been made in November 1916 to commence upon delivery of the ship. The ship was to be delivered in March 1917. But before delivery could take place, the vessel was requisitioned by Government. The charterer did not invoke the cancellation clause under the charterparty. The parties then discussed that they would enter another agreement for the charter of the vessel when it was released, and the charterer said it would want the ship. The court found there was no actual contract made and the parties had been 'overly sanguine', perhaps because at that stage they were expecting a shorter delay.

There was silence between the parties until the ship was released almost two years later in February 1919, and the shipowners sought to deliver it. The charterers refused to take delivery, saying the charter had long since expired. The shipowners attempted to trigger the arbitration clause in the charterparty.⁷² The arbitrator held the charterer in breach. The matter was appealed. The judge held that the charterer in choosing not to exercise the cancellation clause when the ship was

⁶⁷ 456.

⁶⁸ 457: 'frustrate the object of the contract'; 'so great as to go to the root of the matter'; 'so long as to render the adventure which the charterparty was intended to cover absolutely nugatory'; 'impossibility of prosecuting the voyage within the time within which it was necessary to prosecute it' 'an interruption may be so long as to destroy the identity of the work or service, when resumed, with the work or service when uninterrupted'; 'an interruption so great and long as to make it unreasonable to require the parties to go on'; 459 – 460.

⁶⁹ See Lord Radcliffe in *Davis Contractors* [1956] AC 696.

⁷⁰ 460.

⁷¹ [1926] AC 497. Lord Sumner delivered the judgment of the Council.

⁷² The charterers neither appointed an arbitrator nor appeared at the hearing.

requisitioned had ousted the doctrine of frustration.⁷³ The Court of Appeal dismissed the further appeal by a majority.⁷⁴

Before the Privy Council, the charterer argued that the arbitrator had no jurisdiction because the requisition had frustrated the charter leaving no work for the arbitration clause.⁷⁵ The argument about a subsisting dispute that could be brought to arbitration⁷⁶ threw up the question of the nature and effect of frustration on the contract. Lord Sumner delivered the judgment of the court, and some 8 years after *Bank v Capel Line*, provided a succinct summary of the operation of the doctrine.

First, Lord Sumner stated that requisition was now accepted⁷⁷ as of itself terminating the charter as soon as it happened: and uttered what has now become a well-worn quote:

*Throughout the line of cases, now a long one, in which it has been held that certain events frustrate the commercial adventure contemplated by the parties when they made the contract, there runs an almost continuous series of expressions to the effect that such a **frustration brings the contract to an end forthwith, without more, and automatically.***

His Lordship said that outcome was not dependent upon acceptance or action of the parties, even if the wording adopted in some cases appeared to indicate otherwise⁷⁸:

Evidently, therefore, whatever the consequences of the frustration may be upon the conduct of the parties, its legal effect does not depend on their intention or their opinions...but on its occurrence in such circumstances as show it to be inconsistent with further prosecution of the adventure. Sometimes the event is such as to speak for itself, like the outbreak of war. Sometimes the frustration is evident, when the gravity and the circumstances can be known...; sometimes, as in the case of requisition, when it can be known that in all reasonable probability the delay will be prolonged and a fortiori when it has continued so long as to defeat the adventure. Frustration is then complete. It operates automatically... What the parties say and do is only evidence, and not necessarily weighty evidence, of the view to be taken of the event by informed and experienced minds.⁷⁹

His Lordship considered the underlying theory of frustration.⁸⁰

⁷³ 500.

⁷⁴ 501.

⁷⁵ At 501. The Privy Council agreed that both of these propositions were correct and found the arbitrator wrong in fact and in law (502).

⁷⁶ The Privy Council held that by 1919 when the supposed 'dispute' arose, the charter no longer existed and had not for some time. Therefore there was no charter within the meaning of the arbitration clause.

Lord Sumner said 'An arbitration clause is not a phoenix, that can be raised again by one of the parties from the dead ashes of its former self. By its very terms, it had come to an end also....' This view of the survival of arbitration clauses after discharge of the contract was ultimately overturned by the House of Lords. See discussion in *Codelfa* by Mason J, at 385 – 386.

⁷⁷ Something that, in the early cases, was not clear because of the uncertainty as to how long the ships might be required. (see *FA Tamplin*).

⁷⁸ 507 – 508.

⁷⁹ At 509.

⁸⁰ His Lordship contrasted frustration with rescission by reason of breach; pointing out that rescission does not depend in theory on any implied term but is a right given in law in vindication of a breach. However, both rescission and frustration

Frustration...is explained in theory as a condition or term of the contract, implied by the law ab initio, in order to supply what the parties would have inserted had the matter occurred to them, on the basis of what is fair and reasonable, having regard to the mutual interests concerned and of the main objects of the contract...It is irrespective of the individuals concerned, their temperaments and failings, their interest and circumstances.

Tellingly, he then said:

It is really a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands.

This case gave a clear statement, from the highest court, of the nature of frustration, its effect, the theory behind it. Importantly Lord Sumner, in recognising frustration as a device for justice, laid one of the stepping stones that would pave the way for Lord Radcliffe to find, some 30 or so years later, that frustration should not be justified as an implied condition, nor any of the other supposed theories, but recognised rather more simply as a legal conclusion, based on a significant change in circumstances.⁸¹

So what did these maritime cases contribute to the development of the doctrine of frustration? These and the many other cases allowed judges to hone and finesse the law's approach to supervening events in a series of reasonably rapid fire decisions, with the same judges sitting on multiple cases concerning similar types of contracts, often involving the same types of exception clauses.

The continuing legacy of these cases is in their recognition that the **effect of frustration** was automatic and not dependent on the parties;⁸² that the time to assess is the time that the parties had to make the decision,⁸³ and that only contractual exceptions designed to anticipate and provide for that contingency would oust the operation of the doctrine.

As regards the test itself, the maritime cases provide many attempts to encapsulate the essence of the doctrine. The one that still resonates is that of Lord Sumner's test: the court must consider whether ***the event destroyed the identity of the service and 'made the charter as a matter of business a totally different thing.'*** (This test appears to be a direct ancestor of the contemporary

permit the rights already in existence prior to the rescission or frustration to remain and be the subject of a contractual dispute. See 510.

⁸¹ See Lord Radcliffe in *Davis Contractors* [1956] AC 696 at 728-9. Lord Radcliffe points out the difficulties posed if the law relies upon the implied condition theory to justify dealing with a situation that neither party foresaw or were forewarned, and in any event needs to be decided irrespective of the parties' intentions but what parties as fair and reasonable men would have agreed. Lord Radcliffe points out that as the spokesman of the 'fair and reasonable man' is in fact the court itself; so 'perhaps it is simpler to say at the outset that frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by contract.... It was not this that I promised to do....' (at 729.)

⁸² Lord Sumner *Hirji Mulji v Cheong Yue Steamship Co* [1926] [1926] AC 497.

⁸³ 'commercial men need not wait for the end of a long delay to see if they are bound; they are entitled to act on reasonable commercial probabilities when they are called upon to make up their minds...' Justice Scrutton. 'the question must be considered at trial as it had to be considered by the parties when they came to know of the cause and the probabilities of the delay and had to decide what to do' (Lord Sumner in *Bank Line*, 454.) What happens afterwards may assist in showing what the probabilities really were, if they had been reasonably forecasted...'

test from Lord Radcliffe, who asks ‘whether performance would be radically different from that which was undertaken.’⁸⁴

And finally, the cases developed **the theoretical justification of the doctrine**. Although the dominant view at the time was that the doctrine could be explained as an implied term of the contract,⁸⁵ and this problematic explanation has fallen out of favour, the maritime cases also recognised it as a device of justice, or a means of risk allocation.⁸⁶ As such they paved the way, as I have already mentioned, for Lord Radcliffe to brush away the competing theories in *Davis Contractors*.⁸⁷

So there you have it – a snapshot of a legal history and the important role of maritime cases in it.

Naturally, the development of frustration continued its march from this point in time; Shipping cases still featured; although there were noticeably less cases arising out of WWII.⁸⁸ Parties developed contractual clauses to deal with supervening events, whether frustrating events or not: the so called *force majeure* clauses.⁸⁹ In 1943 the UK legislated to apportion losses between the parties more fairly where a contract has been frustrated.⁹⁰

There was another blip of maritime cases from the 1960s through to the early 1990s, many resulting from political strife in various regions.⁹¹ Arbitration cases featured strongly amongst them.⁹² Even in the past few years we have seen frustration cases in the maritime context, including the *Sea Angel*,⁹³

⁸⁴ Above fn 81.

⁸⁵ The 4 other theories were noted by Lord Hailsham in *National Carriers Ltd v Panalpina (Northern) Ltd* 1981 2 WLR 45, at 50 – 52.

⁸⁶ This was recognised even by Lord Blackburn in *Taylor v Caldwell* “And the question we have to decide is whether, under these circumstances, the loss which the plaintiffs have sustained is to fall upon the defendants.” At 312.

⁸⁷ The seminal case of *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 (Lord Radcliffe) reframed the test: namely, had the supervening event rendered the performance of the contract ‘radically different’ from the contemplated contract? For Australia, see *Codelfa Construction v State Rail Authority of NSW* (1982) 149 CLR 337.

⁸⁸ Trietel, 58.

⁸⁹ See Trietel, Chapter 12.

⁹⁰ While the doctrine of frustration is widely acknowledged as a risk allocation device, is actually a rather blunt instrument. At common law the result of frustration can only be that losses lie where they fall, which can be harsh if they fall wholly on one party. Indeed, this outcome may not necessarily be an improvement on the former doctrine of absolute contracts. The UK has attempted a more nuanced response and the *Law Reform (Frustrated Contracts) Act 1943* (UK) attempts to apportion those losses more fairly. In Australia, some state jurisdictions have also enacted legislation; but they are not identical in effect. See Davies & Dickey, *Shipping Law* (4th ed, Thomson) 398 – 400. Generally the Acts do not apply to voyage charters, but do apply to time and demise charters.

⁹¹ Significantly the *Hong Kong Fir* case, which of course is a maritime case, saw the alignment of the test for repudiation with that for frustration. Lord Diplock made it clear that the only difference is whether the event has been caused by one party’s negligence or not. Cases from maritime arbitrations included *Ocean Tramp Tankers v V/O Sovfracht (The ‘Eugenia’)* [1964] 2 QB 226 (notable for Lord Denning’s succinct observation that a charter simply more expensive to perform will not be frustrated); and the *Nema* [1981] 2 Lloyd’s Law Reports 239 (see further below). As to frustration, Lord Roskill stated that the doctrine of frustration was not to be ‘lightly invoked to relieve parties of an imprudent bargain’. At 253. Also see the *Evia* [1983] 1 AC 736; and *Super Servant 2* [1990] 1 Lloyd’s Law Reports 1. In that case Lord Justice Bingham recounts the propositions as to frustration (at 8), and the early maritime cases mentioned above feature prominently as authority for each of the propositions. LJ Bingham held that ‘the interposition of human choice after the allegedly frustrating event [is] fatal to the plea of frustration’ (citing *Maritime National Fish Ltd v Ocean Trawlers Ltd* (1935) 51 Ll.LR Rep 299 (HL).) LJ Bingham goes on to say ‘the real question...is whether the frustrating event relied upon truly an outside event or extraneous change of situation or whether it is an event which the party seeking to rely on it had the means and opportunity to prevent but nevertheless caused or permitted to come about. A fine test of legal duty is inappropriate; what is needed is pragmatic judgment whether a party seeking to rely on an event as discharging him from a contractual promise was himself responsible for the occurrence of that event.’ (at 10)

⁹² It was a maritime frustration case, the *Nema* [1981] 2 Lloyd’s Law Reports 239 in which the House of Lords laid out the factors to which the courts ought to have regard in permitting appeals from Arbitration under the *Arbitration Act 1979*, later enshrined in the 1996 Act. See also the *Kyla* (below).

⁹³ [2007] 2 Lloyd’s Rep 517.

(where Lord Rix usefully restated the approach to be taken to frustration cases, noting that they required a ‘multifactorial approach’);⁹⁴ and *the Kyla* (albeit that that case had more to say about arbitration appeals).⁹⁵ The GFC case of *The Kildare*,⁹⁶ involving Western Australia’s very own Fortescue Metals, could at a stretch be considered as a ‘Clayton’s’ case as the frustration argument was abandoned at the door of the court.

The early maritime cases still feature in both modern judgments and academic analysis. There can be no doubting their contribution to the development of the doctrine.⁹⁷

4 Keeping a proper lookout – ‘the big picture’ contribution of maritime law to general common law

I have chosen to focus on the early development of the doctrine of frustration today. But there are plenty of ‘stand out’ individual cases; as a quick survey of a law degree curriculum would attest.

It is likely that a law student will strike a commercial maritime case within weeks of starting their studies. Certainly, in contract law, the contribution is prolific. If I had to choose a single most significant case for law students it would probably be the *Hong Kong Fir* case. In that case a seaworthiness clause led LJ Diplock to identify the existence of the innominate term, and where his Lordship also aligned the test for repudiation and frustration. But there are many more examples. The attempts to circumvent privity have been notable for their maritime flavour; not only in relation to the development of the Himalaya clause (*Adler v Dickinson*,⁹⁸ a New Zealand contribution *The Eurymedon*,⁹⁹ and an Australian contribution, the *New York Star*¹⁰⁰) the restrictions on tort claims as an alternative (the *Aliakmon*¹⁰¹) and developing the law regarding bailment: *KH Enterprise v Pioneer Container*;¹⁰² more recently, *the Kos*.¹⁰³ The law relating to incorporation of and construction to be given to standard terms is also heavily derived from maritime cases, both cargo and passenger

⁹⁴ “In my judgment, the application of the doctrine of frustration requires a multi-factorial approach. Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties’ knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties’ reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances. Since the subject matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as “the contemplation of the parties”, the application of the doctrine can often be a difficult one. In such circumstances, the test of “radically different” is important: it tells us that the doctrine is not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances. What the “radically different” test, however, does not in itself tell us is that the doctrine is one of justice, as has been repeatedly affirmed on the highest authority... (LJ Rix, 111 – 112).

⁹⁵ [2013] 2 Lloyd’s Law Reports 463.

⁹⁶ *Zodiac Maritime Agencies Ltd v Fortescue Metals Group Ltd* [2010] EWHC 903; [2011] 2 Lloyd’s L. R. 360. The defendant had asserted that the dive in freight rates caused by the GFC had frustrated its 5 year continuous voyage charterparty. The reliance on frustration was withdrawn very close to trial. See [5].

⁹⁷ Although note Lord Roskill’s pointed comment in *the ‘Nema’* [1981] 2 Lloyd’s Law Reports, 253.

⁹⁸ *The ‘Himalaya’* [1955] 1 QB 158.

⁹⁹ [1975] AC 154 (PC)

¹⁰⁰ *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon Australian Pty Ltd* [1980] 2 Lloyd’s Rep 317 (PC).

¹⁰¹ [1986] 1 AC 785.

¹⁰² [1994] 2 All ER 250.

¹⁰³ [2012] 2 AC 164.

claims. Deviation cases derived from maritime law were reimagined into the notion of fundamental breach in *Suisse Atlantique*¹⁰⁴ although thankfully now no more. As to contractual damages, again there is no shortage of principles derived from maritime cases, such as *Albazero*,¹⁰⁵ *Heron II*¹⁰⁶ and the *Achilleas*.¹⁰⁷ Australia adopted the principles of damages for disappointment and distress in the maritime case of *Baltic Shipping v Dillon*.¹⁰⁸ In tort, the student will be exposed to cases of *Re Polemis*,¹⁰⁹ and the *Wagonmound (No 2)*;¹¹⁰ both cases concerning remoteness and foreseeability of damage. Of great significance in Australia is the *Caltex v the dredge 'Willemstad'*¹¹¹ decision. That case held that pure economic loss was recoverable in tort in narrow circumstances.

Even in criminal law, it is possible to find a maritime case: *Crown v Dudley & Stephens*.¹¹²

For the law student there is probably a quiet patch in finding good commercial maritime cases through the middle years of the degree but he or she comes back out into the sun upon reaching conflict of laws and civil procedure. The contributions here are of the highest importance. In England the *forum non conveniens* test is of course a maritime case, *Spiliada Maritime Corp v Cansulex Ltd*.¹¹³ Australia has chosen not to follow *Spiliada*. The Australian test of 'clearly inappropriate forum' was formulated by Justice Deane in a passenger case *Oceanic Sun Shipping v Fay*.¹¹⁴ In terms of remedies, shipping lawyers and judges have been enthusiastic incubators: examples include the *Mareva* injunction¹¹⁵ and the anti-suit injunction.¹¹⁶ The in rem action cannot fail to be mentioned, although that I am singing from the commercial maritime songsheet tonight. Understandably, maritime arbitrations have also contributed extensively to the law and practice of arbitration.

I cannot move on from this without noting that maritime cases simply liven up the curriculum. The fact patterns are always interesting. And for some reason, it is particularly the Australian ones that tend to bear the mark and swagger of the larrikin. Who can forget the Sydney stevedores, who assisted in the development of principles relating to Himalaya clauses though the cases where they managed to lose entire container loads of high value goods such as 37 cartons of razor blades¹¹⁷ containers of frozen prawns & camel cigarettes,¹¹⁸ and to top it off, 2 containers said to contain over 1600 bottles of Chivas Regal (that JA Handley felt compelled to put on the record, in his

¹⁰⁴ [1967] 1 AC 361.

¹⁰⁵ [1977] AC 774.

¹⁰⁶ [1969] 1 AC 350.

¹⁰⁷ [2008] 2 Lloyd's Rep 275.

¹⁰⁸ (1993) 176 CLR 344.

¹⁰⁹ *RE Polemis v Furness Withy & Co Limited* [1921] 3 KB 560.

¹¹⁰ *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd; The 'Wagon Mound' (no 2)* [1967] 1 A.C. 617; see also *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co The Wagon Mound (No.1)* [1961] A.C. 388.

¹¹¹ (1976) 136 CLR 529.

¹¹² (1884) 14 QBD 273. Three sailors shipwrecked with their cabin boy, who was close to death, slit his throat, drank his blood and ate his organs. Two were charged with murder and convicted, despite their pleas of necessity. The law had turned a blind eye to cannibalism in these circumstances in the past; but not this time. It was ruled that 'necessity' was no longer a defence to murder. Sentenced to death, they were conditionally pardoned by Queen Victoria and served a short custodial sentence instead.

¹¹³ [1987] AC 460.

¹¹⁴ (1988) 165 CLR 197.

¹¹⁵ *The 'Mareva'* [1975] 2 Lloyd's Rep 509.

¹¹⁶ *The 'Angelic Grace'* [1995] 1 Lloyd's Rep 87; *The 'Front Comor'* [2009] 1 AC 1138.

¹¹⁷ *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd (The New York Star)* (1978) 139 CLR 231 (High Court) (1980) 144 CLR 300 (Privy Council). The Privy Council allowed the appeal.

¹¹⁸ *Nissho Iwai Australia Ltd v Malaysian International Shipping Corp Berhad* (1989) 86 ALR 375.

opening paragraph, was 'an excellent brand').¹¹⁹ The 'pillage squad' may sound like a second rate ska band from the 1970s, but the court judgements of the time note the squad's existence with a degree of nonchalance. Indeed, counsel for the stevedores in the *New York Star* was Murray Gleeson, later to be appointed Chief Justice of New South Wales Supreme Court and then Chief Justice of the High Court of Australia. His Honour claimed the *New York Star* was his favourite case.¹²⁰ His biography contains this quote:

*'It was the sort of case that would interest practically nobody but me. There was not even an ounce of human interest.... It was about two insurance companies fighting it out over money and not much money at that. It was stripped of any complications that might come from weepy people.'*¹²¹

I dare say that in this room, His Honour would find himself amongst kindred spirits.

5 Over the horizon?

Enough of the past – what of the future?

In his 2009 AMTAC Address titled 'Less Law but more Lawyers',¹²² Professor Davies discussed the fact that the steady flow of cases from arbitration was ultimately slowed by the UK *Arbitration Acts* of 1976 and 1996. Professor Davies quoted the eminent maritime arbitrator Bruce Harris who explained the pre and post reform situation in his Bill Tetley address to McGill University in 2008.¹²³

That was changed by statute in 1979, when it became impossible to get an arbitration decision before the courts on a question of law save by overcoming substantial hurdles. In particular it became necessary to show to quite a high level of probability that the tribunal had gone wrong on the law, and that the determination of the point of law in question substantially affected the rights of one or more of the parties. So, unless it looked to the court as if – depending on the type of case – the arbitration tribunal was obviously wrong on the law, or probably so; and unless the court was satisfied that the question of law in point substantially affected the rights of one or more of the parties, leave to appeal would not be given and the arbitrators' award would be final.

*And that is the position today, under the 1996 Act...*¹²⁴

Unless the question is one of general public importance...it has to be clear to the court, effectively on a simple reading of the award, that the arbitrators' view of the law is

¹¹⁹ *Glebe Island Terminals Pty Ltd v Continental Seagram Pty Ltd* (The Antwerpen) (1993) 40 NSWLR 206.

¹²⁰ Michael Pelly, *Murray Gleeson: The Smiler* (Federation Press 2014) 76.

¹²¹ *Ibid.*

¹²² (2010) 24 ANZ Mar LJ 14.

¹²³ As referenced in Davies and also available at:

https://www.mcgill.ca/maritimelaw/files/maritimelaw/Bruce_Harris_Tetley_lecture_2008.rtf (accessed 24 June 2015).

¹²⁴ *Ibid.*, 16.

*“obviously” wrong. Even if the public importance requirement is satisfied, the decision must still be open to serious doubt.*¹²⁵

Professor Davies compared the different mechanisms for judicial review of arbitral awards in New York, UK and Australia. Of the three, only Australia has implemented the Model Law.¹²⁶ Compared to the restrictions on judicial review under the Model Law, the UK position looks beneficent.¹²⁷

Nonetheless there has been a significant drop in the number of maritime awards subject to appeal in England since the restrictions were imposed. However, that is, after all, what the parties bargained for.¹²⁸ What is more, it lies ill in the mouths of lawyers to complain. The arbitrators and their customers have a high level of satisfaction with the *1996 Act*.¹²⁹

Even with the tight constraints, the highest courts in England have, over the last 15 years, decided some very significant maritime cases on appeal from arbitration.¹³⁰ I need only mention *CMA Djakarta*, *Hill Harmony*, *Rafaela S*, *Achilleas* and *Golden Victory* as examples. Clearly, both maritime law and the common law continue to benefit from maritime cases originating in arbitration.

The restrictions on judicial review may be only one explanation for the slowdown in maritime cases reaching the higher courts in England. Bruce Harris¹³¹ pointed out that there are less arbitrations happening worldwide; that settlements are more attractive to the new professionals in the shipping markets rather than the ‘sport’ of arbitration; and the increased involvement of lawyers, and their penchant to take every point, makes for an expensive and inconvenient contest that the market is looking to avoid. So it may well be that there are a smaller pool of arbitrations in any event. Professor Francis Reynolds proffers another explanation. Reflecting on the contribution of maritime law to the common law and particularly the law of obligations, he said that:

*It also may be that the flow of seminal decisions of principle cannot go on forever: in the context of maritime law, many of the issues of principle have now been decided... other types of cases are coming into prominence....*¹³²

In terms of broad principles, that may well be true. But there will always be work for maritime law to do as it keeps pace with the revolutionary changes in trade, transport and technology, as well as

¹²⁵ 17.

¹²⁶ Notably, Singapore and the Special Administrative Region of Hong Kong have also enacted the Model Law.

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html

¹²⁷ The Model Law allows no appeal on the grounds of an error of law by the arbitral panel. See Article 34. The relevant test for judicial review in relation to New York maritime arbitrations is ‘manifest disregard of the law’ (see Davies (2010) 24 ANZ Mar LJ 14 at 16).

¹²⁸ See Lord Justice Longmore in *The Kyla* [2013] 2 Lloyd’s Law Reports 463: ‘If shipowners wish to be sure that they have readier access to the expertise of this court, they should agree to the High Court resolving their disputes in the first place.’ (467).

¹²⁹ Everton & Harris, above n 5, 39.

¹³⁰ For example, *CMA Djakarta* [2004] 1 Lloyd’s Rep 460 (Court of Appeal)(arbitrator’s decision upheld); *Hill Harmony* [2001] 1 Lloyd’s Law Reports 147 (arbitrators’ decision reinstated) *Rafaela S* [2005] 1 Lloyd’s Law Reports 347. (arbitrator’s decision overturned) *The Golden Victory* [2007] 2 Lloyd’s Law Reports 164. (approved arbitral finding); *The Achilleas* [2008] 2 Lloyd’s Law Reports 275: remoteness in damages (arbitral finding upheld in High Court and Court of Appeal but overturned in HL – so at least the arbitrator was in good company).

¹³¹ As referenced in Davies and also available at:

https://www.mcgill.ca/maritimelaw/files/maritimelaw/Bruce_Harris_Tetley_lecture_2008.rtf (accessed 24 June 2015)

¹³² Francis Reynolds ‘Maritime and other influences on the common law’ (2002) *Lloyd’s Maritime and Commercial Law Quarterly* 182, 192.

responding to challenges flung down by world affairs, as exemplified by those early frustration cases. In 1886, Thomas Scrutton (as he then was) in the preface to his first edition of his seminal work on *Charterparties and Bills of Lading*, talked of the 'great commercial change' that had swept the shipping industry in the prior 20 years. He talked of the introduction of steamers over sail improving the predictability of voyages, the impact of the telegraph meaning shipowners could contact their ships en route; and the change from 'simple' bills of lading to those containing '50 or 60 lines' of closely printed conditions and exceptions.

I wonder what Lord Justice Scrutton would make of the commercial changes in the almost 130 years since that was written. The shipping industry has been 'revolutionized' several times over,¹³³ becoming more streamlined yet more complicated and sophisticated at every turn. Each 'revolution' has required parties, arbitrators and courts to scrutinize key principles of law and adapt to new circumstances. We can be confident that the shipping industry will keep throwing up these challenges. I believe we can be equally confident that the key principles, developed and honed through maritime arbitrations and maritime cases, will act as clear beacons for the challenges we have yet to meet; and that the common law will be richer as a result.

¹³³ Some that spring to mind include containerization, door to door transport and the many changes brought about by GPS and other technology and the internet, such as vessel tracking. The unmanned (drone) ship may well be the next 'big thing'.