"Maritime Arbitration, Old and New"

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By

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"Maritime Arbitration, Old and New"[1]

Introduction

1. For my old arbitration, I have gone back to a maritime arbitration that took place in the 1870s to see what lessons are available for the present, and to compare it with present day practice.
2. It was an arbitration that arose out of the operation of the ship shown on the flyer for tonight's address, the *C.S.S. Alabama* (the CSS standing for Confederate States Steamer).
3. The Alabama arbitration has been described variously as, the birth of modern arbitration,[2] and as perhaps, the greatest the world has ever seen,[3]- this was not an overstatement in the eyes of Lord Bingham, who thought that this later description of the arbitration was, in his words*, a judicious assessment.*
4. Most articles and books, which have been written about the Alabama arbitration, are concerned with exploring the fascinating and historic events which led to the arbitration and do not analyse the arbitration agreement, nor the procedure followed by the Arbitral Tribunal, nor the

subsequent award, each of which has many lessons for, and parallels with, international arbitration practice today, and which is the aim of this paper.

Factual Background

5. However some very brief factual background is necessary to put the arbitration in context. A far more detailed description of the factual background can be found in the resources footnoted in my paper which will be put up on the AMTAC website.[4]

6. It began shortly after the outbreak of the American Civil War between the Union and Confederate States[5], when in April 1861, President Lincoln issued a proclamation declaring a blockade of the Confederate Ports.

7. The fact that it was a blockade had crucial consequences. Under international law at the time, a nation could close rebellious ports within its own borders, but it could only blockade the ports of another nation. By declaring a blockade of the Confederate ports, other nations could declare a position of neutrality in the conflict between the Union and the Confederate States. Those nations which acknowledged the conflict, and declared themselves neutral, would confer on both the Union and the Confederate States, the status of belligerents under international law.[6]

8. The British government, in May 1861, then issued a proclamation of neutrality, thereby treating both sides as belligerents,[7] and other European states followed suit and made similar proclamations of neutrality.[8]

9. The response of the Confederate States to the blockade, was to appoint Captain James Bulloch and other agents to go to Europe to build and equip a Confederate navy.[9] Their aim was, both to break the blockade, and to disrupt Union shipping.[10] They went on to ultimately obtain some fourteen warships.[11] The arbitration was concerned with the claims made by the US for the damage done by these ships.

10. In order to understand the procedure followed in the arbitration and the subsequent award, it is only necessary to briefly look at three ships, the *Florida*, the *Alabama* and the *Shenandoah.*

The Florida

11. Captain Bulloch arranged for the first ship, the *Florida*, to be built by a shipbuilding firm in Liverpool who were naval contractors to the British Navy. They were thus able to adapt plans for a gunboat to give it greater speed, and more room for larger bunkers to enable the ship to stay longer at sea.[12] Building commenced in late June 1861 and the ship was given the working name of *Oreto*, to support the guise that she was an Italian ship bound for Palermo.

The *Oreto* is also the name of the river that flows through Palermo.

12. The guise of being a merchant ship was necessary, because if it became known that she was intended as a warship, she could be seized by the British government.

13. The proclamation of neutrality meant, as a matter of international law, that warships could not be built for neither the Union, nor for the Confederate States, in neutral England, and there could be no recruitment in England of seamen by either side to fight in the war. The proclamation of neutrality also stated the same prohibitions in English domestic law[13] in section 7 of the *Foreign Enlistment Act* 1819.[14]

14. But this was a time of war, and the Union States had, anticipated that the Confederate States would seek to build warships surreptitiously in England to break the blockade. As a result, the new US Consul in the shipbuilding port of Liverpool, had engaged spies to detect any signs of Confederate shipbuilding activity in the port.

15. In February 1862 the *Oreto* was launched and underwent trials. On the same day, the US Consul in Liverpool wrote to the new US Minister to London, Charles Adams[15] who in turn wrote to the British Foreign Secretary, Earl Russell, asking that action be taken against her, as he believed that she was intended for use as a Confederate warship.

16. The US Consul in Liverpool had kept a close watch on the ship, but Captain Bulloch, had made sure that no arms or weapons of war had been placed on board whilst she was being built to maintain the pretence that she was merely intended as a merchant ship.

17. Captain Bulloch had, however, purchased another ship and had arranged for it to be loaded with British made arms and ammunition to be delivered to the *Oreto* once out of the jurisdiction.

18. The *Oreto* eventually received her arms in the Bahamas and was renamed the *C.S.S. Florida*. Over the next two years she attacked Union shipping and captured or destroyed some 38 Union merchant ships.[16]

The Alabama

19. The second English built Confederate warship was the *Alabama*.

20. She was launched in May 1862.[17] The US Consul in Liverpool again realized that she was intended as a Confederate warship and reported his fears to Charles Adams who again wrote to the Foreign Secretary, Earl Russell, and urged that she be detained.

21. The US Consul in Liverpool and his private detective, also gathered affidavits from seamen who had applied to sail on the ship, and who had been told that they were going to fight for the Confederate government.[18] He also obtained

counsel's advice that the ship should be detained as a warship. He sent the evidence and the advice, to Charles Adams, who sent them on to Earl Russell.

22. Eventually, the Attorney General and the Solicitor General both advised the British government that she should be detained. However, when the British Government finally decided to take action, she had already gone to sea.

23. For the next two years, the *Alabama* hunted US merchant ships wherever she could find them[19] even travelling as far afield as Singapore, and sinking a Union ship in the Malacca Straits.[20]

24. The exploits of the Alabama and the other Confederate warships achieved considerable notoriety throughout the English speaking world. But it was the Alabama which caused the most damage to the US merchant fleet. In the two years after she was built, she captured or sank, some 65 to 70[21] US merchant ships, and took more than 2,000 prisoners, without a single loss of life from either prisoners or her own crew.

25. Charles Adams continued to correspond with Earl Russell. He repeatedly asked for action to be taken and insisted that Great Britain was responsible for the damage which the US was sustaining by the actions of the *Alabama* and the other Confederate warships that had been built in England and carried British Arms and crew.[22]

26. The claims that Great Britain had breached its obligations of neutrality became matters of public concern in England and growing anger in the US.[23] It was admitted during a debate in the House of Commons in May 1864 that the havoc caused by these warships had ruined the mercantile commerce of the US.[24]

27. Eventually, in June 1864 the *Alabama,* returned to Europe. She was badly in need of repairs and put in to the port of Cherbourg. There she was blockaded by the Union warship, the *U.S.S. Kearsarge*.[25]

28. The ensuing battle between the *Kearsarge* and the *Alabama*[26] off Cherbourg was immortalised in a painting by the French impressionist, Edouard Manet, which depicted the *Alabama* sinking stern first, the *Kearsarge* triumphant and looking on, whilst the Captain of the *Alabama* leaves the scene on an English yacht, *The Deerhound*[27], bound for safety in Southampton.[28]

29. Most relevantly, watching the battle between the two warships on that day was an American lawyer, Thomas Balch, then a member of the Philadelphia Bar.[29] It was Balch, who planted the seed that resulted in the US claims for compensation from Great Britain, being the subject of an arbitration.

30. Balch first raised his idea at a celebratory dinner later that month in Paris with the victorious Captain of the

Kearsarge, and some fellow Americans.[30] Balch pursued his idea on his return to the United States, and later that year managed to get an interview with President Lincoln. He repeated his suggestion and President Lincoln is reported as saying that it was "*a very amiable idea but not possible now ... We have enough on our hands ...* [but] *you should start your idea, it may make its way in time as it is a good one*."[31]

31. The development and acceptance of his idea took several years. Eventually in 1869, a Convention[32] was signed between the US and Great Britain which established a Commission to settle the Alabama claims but they were to be submitted to commissioners, and if they failed to reach an agreement, they were required to each choose an umpire, and then those two persons should choose the third umpire by *drawing lots*.

32. When the ratification of this Convention was considered in the US in April 1869, Senator Charles Sumner, delivered an impassioned speech against ratification, ridiculing the suggestion that the umpire should be determined by lot, and criticising the Convention as there was not one word of regret nor was there any semblance of compensation. He claimed that Great Britain was liable because the Confederate States were able to build ships in England and then use them, not to break the blockade, but to destroy US

merchant ships without being liable as pirates. He estimated that the compensation due to the United States for the direct losses caused by the Confederate warships was about US$15 million.

33. This Convention was not ratified by the US but the pressure for a resolution continued and in May 1871, the two nations signed the Treaty of Washington.

34. The arbitration agreement for the Alabama arbitration is found in the first eleven articles of the Treaty.[33]

The Terms of the Arbitration Agreement in the Treaty of Washington

35. These eleven articles responded to the criticisms which had been made by Senator Sumner. He had said that there had been no expression of regret, but in Article I of the Treaty it was stated that Queen Victoria *"has authorised her high commissioners ... to express in a friendly spirit, the regret felt by Her Majesty's government for the escape, under whatever circumstances, of the Alabama and other ships from British ports and for the* [damage done] *by those ships".* One can almost see the hand of an able mediator in drafting a compromise arbitration agreement.

36. Next, in contrast to leaving the choice of the third umpire to a chance of being drawn by lot, Article I provided for the constitution of a court of arbitration of five arbitrators

to decide the dispute. An arbitral tribunal must have an odd number to ensure any decision will be unanimous or be reached by a majority. The Treaty in Article III recognised this and recorded the parties' agreement that all questions should be decided by a majority of all the Arbitrators.

37. The parties agreed that, one arbitrator was to be appointed by the President of the United States, and one by Queen Victoria. They agreed to request the King of Italy to appoint the third arbitrator, the President of the Swiss Confederation to appoint the fourth arbitrator and the Emperor of Brazil to appoint the fifth arbitrator.

38. There were no institutional arbitration rules, or procedural laws that applied to the Alabama arbitration. Accordingly, the parties addressed what was to happen in the case of death, absence or incapacity or in the event of the arbitrator's declining or ceasing to act. The parties agreed that the person that had appointed the original arbitrator, could name another person to act as arbitrator, in the place of the arbitrator originally named.

39. The Treaty also provided that if any of the persons with power to appoint an arbitrator failed to make such an appointment, then the King of Sweden and Norway, would be asked to make the appointment, or appointments.

40. The procedure to be followed by the Tribunal commenced with a requirement to meet in Geneva, Switzerland at the

earliest convenient day after the arbitrators had been named. This, in essence, was a forerunner of a requirement that the Tribunal hold a preliminary conference to establish its jurisdiction and to set out a procedural timetable.

41. Article III of the arbitration agreement then set out a three stage procedure.

42. First the parties were required to deliver their written or printed case to each of the Arbitrators as soon as possible after the constitution of the Tribunal but within a period not exceeding 6 months from the date of the exchange of the ratifications of the Treaty.

43. Second, the parties were required to serve their evidence in reply within four months after the delivery of their written or printed case. If needed, the Tribunal was given power to extend the time within which evidence in reply was to be delivered.

44. Third, within two months of exchanging their cases in reply, each party was required to deliver their written argument to the Tribunal.

45. Interestingly, each party was expressly given the right to call on the other party, through the Tribunal, to produce documents that the other party may have specified or alluded to in the material that it had presented (Article IV). This may be the origin of the now commonplace, but often contentious, practice of a party making a request to

produce documents, which is seen in Article 3 of the IBA's *Rules on the Taking of Evidence in International Commercial Arbitration*.

46. Article VI of the Treaty was of a different character, it was not an agreement on procedure, but was an agreement on the three rules that the Tribunal should apply to determine the merits of the case.

47. It was in effect, a choice of the substantive rules of law to be applied by the Tribunal. This agreement was subject to a caveat by the British government, also couched in language reflecting more of the able mediator's handiwork that it "*cannot assent to the* [three] *rules as a statement of principles of international law which were in force at the time when the claims ... arose, but ...in order to evince its desire of strengthening the friendly relations between the two countries ...,*[it] *agrees that, in deciding the questions ... the Arbitrators should assume that* [it] *had undertaken to act upon the principles set forth in these rules*."

48. Briefly stated, the three rules were;

One, a neutral government is bound to use due diligence to prevent the fitting out, or arming within its jurisdiction of any ship which it has reasonable ground to believe, is intended to cruise, or to carry on war, against the power with which it is at peace, and to prevent the departure of any such ship from its waters.

Two, a neutral state is bound not to allow either belligerent to make use of its ports, as the base of naval operations against the other, or for the enhancement of military supplies or arms, or for the recruitment of men.

Three, a neutral state is bound to exercise due diligence in its own ports so as to prevent any violation of the first and second rules.

49. This freedom to choose the rules, rather than the law, to be applied to resolve the substantive dispute between the parties in international arbitration, is now expressly conferred by Article 28 of the UNCITRAL Model Law on International Commercial Arbitration.

50. Next, Article VII reflects a contemporary demand that awards be delivered promptly in that it required that the decision of the Tribunal to be given, if possible, within three months from the close of the argument on both sides. The award was required to be in writing, dated, and signed by the Arbitrators who may assented to it.

51. The arbitration agreement provided that in the event that the Tribunal found that Great Britain was liable for a breach of the duties set out in the three rules, the Tribunal had two options open to it.

52. The Tribunal could proceed to award a single lump sum for all damages, in which case the sum awarded was to be paid within twelve months after the date of the award (Article

VII). Alternatively, the Tribunal was authorised to refer the assessment of damages to a Board of Assessors for determination.

53. Finally in Article XI, the parties agreed that the result of the arbitration would be accepted as full and final settlement of all claims and that every such claim within the scope of the arbitration agreement, whether the same may, or may not have, been presented, shall be considered as finally settled and henceforth inadmissible.

The appointment of the Tribunal

54. In due course, the US appointed as its arbitrator, the same Charles Adams, who as noted above, had been actively involved as the US Minister to London in attempts to stop the *Florida*, the *Alabama* and other Confederate warships from being built in British shipyards, or from being allowed to leave British waters. This idea of appointing such a partisan arbitrator is now an alien concept in international arbitration.

55. This is not an alien concept in domestic arbitration in the US. An application to set aside a domestic award filed in 2014 in the US District Court for the Second Circuit in New York annexed the award. In the award, which had been written by the presiding arbitrator, he stated that the arbitration agreement provided "*for arbitration by a tripartite panel composed of an impartial arbitrator and*

two party arbitrators, one appointed by [the Claimant] *and one appointed by* [the Respondent]. [The Claimant] *had appointed its general counsel, to serve as its party-arbitrator, and* [the Respondent] *had appointed its Chief Operating Officer, to serve as its party-arbitrator. Under the parties' longstanding past practice party-arbitrators serve as advocates for the positions asserted in the arbitration by the parties they represent and may testify as witnesses if called by either party.*"[34]

56. The British government appointed, Sir Alexander Cockburn, the then Lord Chief Justice of England. Coincidentally, the original commission with Queen Victoria's signature, and her seal, by which she appointed Cockburn as the British Arbitrator, is sitting on permanent display in Darling Harbour at the Australian Maritime Museum, only a few blocks away from here!

57. The King of Italy appointed a distinguished judge and a senator of the Kingdom of Italy, the President of the Swiss Confederation appointed a former President, who had served three terms as President of Switzerland, and the Emperor of Brazil appointed his Minister and Envoy for Brazil at Paris.

The Arbitration Procedure

58. The Tribunal held its first meeting in Geneva in December 1871 and the Tribunal decided that the Italian appointee,

should preside over the Tribunal, as he was the arbitrator named by the first power mentioned in the Washington Treaty after Great Britain and the United States.[35]

59. The Tribunal confirmed that it had been validly constituted, and each party then presented their written case.[36]

60. By way of a comparison with current arbitration practice, at this very first meeting of the Tribunal, both parties gave a written presentation of their respective cases which could be said to serve the same purpose as a procedural measure, recently adopted in present day international arbitration, known as the "*Kaplan Opening*", named after one of the fathers of international arbitration in Asia, Neil Kaplan QC.

61. Neil Kaplan QC, has adopted a "*Kaplan Opening.*"[37] In an attempt to focus the Tribunal's minds and energies on what are the real issues at the earliest opportunity, Neil Kaplan has a practice of calling the parties together and requiring each to open their case at a very early stage of the process, long before the hearing so that the Tribunal is better equipped to case manage the process and to confine matters to the real issues in dispute. And ultimately, to be in a better position to determine the substantive dispute. This is arguably what happened in the Alabama Arbitration.

62. Neil Kaplan QC developed this practice in confidential arbitrations, but procedural matters such as this, are regularly addressed and refined by the arbitration community at conferences and in journal articles. The resulting ripple effect has seen the adoption of this so-called "new" procedure in other arbitrations.[38]

63. Returning to that first meeting on the Tribunal in Geneva in December 1871, the US presented its written case which included a claim for US$15m for the direct losses for the destruction of ships and their cargoes. The US also added claims for indirect losses for the national expenditure in pursuit of those cruisers, the loss in the transfer of the American commercial marine to the British flag, the enhanced payments of insurance, and a claim for the cost of the prolongation of the war.

64. Almost immediately, a public dispute arose about the scope of the arbitration agreement. Did the arbitrators have jurisdiction to rule over the indirect claims? In February 1872, Queen Victoria entered the fray. She said in her speech to the British Parliament that: "*The arbitrators appointed pursuant to the Treaty of Washington, for the purpose of amicably settling ... the Alabama Claims, have held their first meeting at Geneva. Cases have been laid before the arbitrators on behalf of each party to the Treaty. In the case submitted on behalf of the United States, large*

claims have been included which are understood on my part not to be within the province of the arbitrators."

65. Next, the Secretary of the Tribunal met with the parties in April, when evidence and submissions in reply were exchanged and served on the Tribunal in Geneva. In its case in reply, the British government expressly reserved its position on the indirect claims.[39]

66. The Tribunal then met with the parties in Geneva on Saturday 15 June 1872, when the United States, as Claimant, presented its written case. The Agent for the British Government instead of presenting its written case, then asked for an adjournment for *eight* months to allow the two parties to consider and negotiate a new convention to resolve the claims.

67. The application was unsuccessful but the hearing was stood over until the following Monday, and then again to Tuesday, to allow what has been described as intense negotiation[40] to take place. This appears to be the first example of a combined arbitration and mediation procedure, in that these discussions involved not only the representatives of both parties and their counsel, but the presiding arbitrator, and the two party appointed arbitrators, the US appointee, Adams, and the British appointee, Cockburn.[41]

68. On the Tribunal resuming on the Wednesday, the presiding arbitrator, with the agreement of both sides, read a short statement referring to the application for an adjournment, and the disagreement over whether the Tribunal was competent to rule on the indirect claims. The Tribunal, in language and circumstances suggesting that there had been a compromise reached without formal instructions, said:

> *"That being so, the Arbitrators think it right to state that, after the most careful perusal of all that has been urged on the part of the government of the United States in respect of these claims, they have arrived ... at the conclusion that these claims do not constitute, upon the principles of international law applicable to such cases, good foundation for an award of compensation or ... damages between nations, and should ... be wholly excluded from the consideration of the Tribunal in making its award, ..."*

69. The matter was then stood over to the following Tuesday, when the American representative informed the Tribunal that in view of Tribunal's declaration, he was authorised to say that, the US would not press the indirect claims any further.

70. After a further adjournment to the Thursday, the British representative informed the Tribunal that as a result of the Tribunal's decision on the indirect claims, he had been

instructed to seek leave to withdraw his application for an eight month adjournment. This request was granted by the Tribunal and he then presented the case for the British government.

71. The substantive hearing commenced in mid July 1872 and was finished by early September the same year. Shortly afterwards the Tribunal announced that the award would be signed and presented to the parties on 14 September 1872.

The Award

72. The Award is a fascinating document in that it follows precisely the same template as adopted in most current international arbitration awards.

73. It begins with recitals of the parties and their arbitration agreement, then the appointment of the arbitrators, the constitution of the Tribunal, followed by the procedural history, then the hearing and it finally turns to the merits of the dispute, by analysing each of the three rules to be applied by the Tribunal to decide the merits.

74. The Tribunal in the award then considered the facts relating to each Confederate warship and considered whether, in relation to each ship, there had been a breach of any of the three rules. The award finally dealt with the quantum awarded.

75. The first ship examined was the *Alabama*, and four of the five arbitrators found that by failing to detain her during

construction, and thereafter by freely admitting her to British ports, Great Britain had breached the first and third rules. The fifth arbitrator, Cockburn, was noted in the award as agreeing for separate reasons with this decision. This part of the decision was unanimous.

76. Next the Tribunal examined the *Florida* and found, with Cockburn again dissenting, that the British government had failed to fulfil its duties under all three rules.

77. Then the Tribunal examined the *Shenandoah*, and unanimously found that Great Britain had not committed breach of the three rules or any principle of international law before she entered the port of Melbourne in January 1865 but went on to conclude (with both Cockburn and the arbitrator appointed by Brazil, dissenting), that the British government was responsible for all acts committed by the Shenandoah after her departure from Melbourne in February 1865.

78. By way of background to this finding, the *Shenandoah*, had entered Port Phillip in late January 1865 and the officers and the crew, were welcomed as conquering heroes.[42]

79. When opened for visitors two days after its arrival, the Age reported that extra trains were put on to transport the 7024 members of Melbourne society who were booked to travel down to Williamstown to see the Shenandoah. The Age reported[43] that they were welcomed as honorary members

at a dinner at the Melbourne Club, attended by politicians, public servants, judges and senior police. During her extended stay, the ship's officers were welcomed at a civic reception in Ballarat and a ball was held in their honour in Craig's Royal Hotel, Ballarat. Why Ballarat? It may be speculated that there were shared values with the Confederate cause. Ballarat had become Victoria's second city because of the goldrush, with its influx of some 2,900 American migrants, and the memories of Eureka Stockade in 1854.

80. The Age was infuriated by the warmth of the welcome and reported on Friday 27 January 1865;

"We cannot regard the Shenandoah as other than a marauding craft, and her officers and crew than as a gang of respectable pirates. (She) is built for running away from anything more powerful than herself and for overtaking heavily laden and peacefully voyaging ships of the American Republic. Her vocation is not to fight, but to plunder; not to shed the blood of her crew in their country's defence, but to fill their pockets with prize money."

81. Significantly, the Governor of Victoria, Sir Charles Darling, as the representative of Great Britain, ignored a request by the US Consul in Melbourne, to detain the ship

and instead allowed her to be repaired, re-coaled and leave.[44]

82. Most significant of all, having regard to the prohibition on the recruitment of crew in the second rule, it was admitted that some 42 extra crewmen had been recruited the night before the Shenandoah left Melbourne, and continued on her way destroying a further 30 Union ships.[45]

83. The Tribunal's reasons included the statement that Great Britain was liable "*from all the facts connected with the stay ... at Melbourne and especially with the augmentation which the British government itself admits ... by the enlistment of men within that port,* …[and the] *negligence on the part of the authorities*."

84. The award then succinctly dealt with each of the remaining ships and claims, which were all dismissed.[46]

85. The Tribunal also found that it was just and reasonable to allow interest at a reasonable rate and that it was preferable to award a sum in gross rather than referring it to assessors.

86. In the result, by a majority of four to one, the Tribunal opted to award a gross sum and awarded the US the sum of US$15,500,000 in gold as the indemnity to be paid in satisfaction of all claims referred to the Tribunal.[47]

87. After the award had been read in Geneva, the dissenting British appointee, Cockburn, snatched up his hat and left without saying a word. He declined to sign the award even

though he had joined in the decision in relation to the *Alabama*. History has not treated him kindly.[48]

88. The award, including its careful, concise and clear reasons, runs for less than seven pages, whilst Cockburn, later published a dissent which ran to almost 300 pages.

89. His later dissent appears to have been considered by some commentators as justifiable in its public law context[49] but in contrast, in the context of a private arbitration, absent express authority from the parties, there can be no such thing as a dissenting award.[50] An arbitrator's mandate given by the parties is to deliver an enforceable award and give reasons for the award, not for any dissent. An arbitrator is not given a mandate to issue dissenting reasons either in a public document, or in a private document restricted to the parties, which has no future purpose, or utility, other than to possibly undermine confidence in the majority award.

90. Fortunately, such a delayed attack on a modern international arbitration award is less likely in view of Article 32 of the Model Law which provides that, the arbitration proceedings are terminated by the final award and the mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings.

In Conclusion

91. The Alabama Arbitration took place at a time when the means of travel and communication were far different from today. To gather the parties, their representatives and the Tribunal members and their staff in Geneva without the benefit of air travel would have been a major exercise. Photocopying, faxing and emailing were non existent. It is therefore remarkable that despite the voluminous documents presented,[51] a carefully reasoned award was announced some seven days after the hearing concluded. And the whole process took little over nine months from the first meeting of the Tribunal.

92. Considering all the circumstances, this was a very efficient Tribunal, which worked well with only the eleven articles of the Treaty of Washington to guide them. The lessons to be learnt from the arbitration procedure and the award are as relevant today, as they were when the award was handed down on 14 September 1872, that is almost 144 years ago to today.

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1 I would like to dedicate this paper to my late friend and colleague, Colin Wall, who many years ago introduced me to the Alabama. I would also like to acknowledge the considerable assistance in preparing the paper from Peter McQueen.

2 "*Switzerland: The birth of modern arbitration"* by Georg von Segessor and Fabienne Helfenstein, IFLR, 1 May 2011

[3] "*The Alabama Claims Arbitration"*, Tom Bingham, (2005) ICLQ 54

[4] The discussion which follows is largely drawn from *The Alabama Arbitration* by T.W.Balch, Allen, Lane and Scott, 1900 ('***Balch***'), *Manet and the American Civil War; The Battle of the U.S.S. Kearsage and the C.S.S. Alabama,* Juliet Wilson-Bareau with David Degener, The Metropolitan Museum of Modern Art, New York, Yale University Press, 2003 ('***Manet***'), *The Alabama Claims Arbitration*, Tom Bingham, (2005) ICLQ 54 ('***Bingham***'), *British Ships In The Confederate Navy*, by Joseph McKenna, 2010 ('***McKenna***'), "*Switzerland: The birth of modern arbitration"* by Georg von Segessor and Fabienne Helfenstein, IFLR, 1 May 2011 ('***von Segessor'***) and *Australian Confederates: How 42 Australians Joined the Rebel cause and Fired the Last Shot in the American Civil War*, by Terry Smyth, Ebury Pres ('***Smyth***')

[5] Accepted as being 12 April 1861 when the Confederates opened fire on the Federal Fort of Fort Sumter in South Carolina.

[6] Richard Henry Dana, in Henry Wheaton, *"Elements of International Law: The Literal Reproduction of the Edition of 1866 by Richard Henry Dana, Jr., ed.* George Grafton Wilson (Oxford: Clarendon Press, 1936), p. 31 quoted in Manet*,* at page 19, and see fn.3

[7] This was regarded the North as unfriendly and precipitate support for the South, and just hours before the arrival of the new US Minister to London, Charles Francis Adams (Bingham, at 3).

[8] On 10 June 1861 Napoleon III declared French neutrality and other European states followed suit, as did Brazil and the other South American republics.

[9] Captain Bulloch was allocated an initial $1,000,000 and asked to acquire six steam propeller-driven vessels, McKenna, at page 11

[10] The blockade prevented the export of cotton and tobacco by the South to its markets in Europe and nearly 400,000 Lancashire workers were put out of work because of the blockade. McKenna, at page 4. As an aside, the proclamation of the blockade had a surprisingly extensive influence on the history of south-east Queensland, affecting both its population and its agriculture. The American South virtually ceased supplying cotton and within a short time, English cotton mills were slowing to a halt. Mill workers were put out of work, and their situation soon became desperate. At the same time, the price of cotton jumped from 4 pence per pound in 1860 to 26 pence per pound in 1863. The Queensland response was a mixture of opportunism and sympathy. The Queensland government offered incentives to encourage both wealthy capitalists and small farmers into the cotton industry. In 1861, the Government published regulations that allowed investors to take up blocks of 320 to 1280 acres on a small deposit. If they spent a certain amount or more on clearing and cultivation, the deposit was returned and the land was granted free. With these incentives, cotton farms and cotton companies were quickly set up in south-east Queensland. The first four bales of cotton were shipped to England in April 1862. However, it did not take long to make the connection that there was a shortage of labour to produce cotton in Queensland while in England, there were unemployed cotton mill operators looking for work. As a result the Queensland Co-Operative Cotton Growing and Manufacturing Company and in December 1862, published its prospectus in the English Guardian newspaper which caused 1000 families to emigrate in 1863. With the end of the Civil War in 1865 cotton prices gradually returned to normal levels and the Queensland farmers turned to other crops. By the late 1860s early 1870s, following the end of the civil war, these Queensland cotton plantations in the outer suburbs of modern day Brisbane had mostly disappeared.

[11] There were 14 Confederate warships, the *Florida, Alabama, Shenandoah, Retribution, Georgia, Sumter, Nashville, Tallahassee, Chickamauga, Sallie, Jefferson Davis, Music, Boston* and the *V.H. Joy,* and several tenders or auxiliary vessels, the *Tuscaloosa, Clarence, Tacony* and the *Archer*

[12] The result was a steam cruiser of some 700 tons, 191 feet in length, with a beam of 27 feet 2 inches, her draft was 13 feet, in steam her average speed was 9 ½ knots and under sail 12 knots. A steamer alone would not do, as she could only proceed from one coaling station to another and under maritime law regarding neutrality, she could only coal at the port of the same country once in three months. Also it had to be a wooden ship as most dock facilities were not geared up to repairing iron-built ships.

[13] The Proclamation, was originally published on 13 May 1861, was republished in Melbourne during the visit of the CSS Shenandoah in the Government Gazette on 4 February 1865, and the Age on 6 February 1865

[14] Section 7 prohibited "*any person* ... [from aiding, assisting or being] *concerned in the ... fitting out or arming ... of any ship or vessel with intent ... that such ship or vessel shall be employed in the service of any foreign ... state ... or against the subjects or citizens of any ... state with whom His Majesty shall not then be at war ...*[and] *every such ship or vessel ... shall be forfeited; and it shall be lawful for any officer of His Majesty's Customs or Excise to seize such ships and vessels ...."* Some saw a gap in the law in that "*the section did not, at any rate expressly, prohibit the construction in Britain of a ship capable of being adapted for the warlike purposes of a foreign power*", Bingham, at page 9

[15] 18 August 1807 to 20 September 1886, the son of President John Quincy Adams and the grandson of President John Adams,

[16] Until she was captured by the *USS Wachusett*, see Balch, at page 4

[17] She was built by Messrs. Laird & Sons, in Birkenhead, Liverpool

[18] McKenna, at page 81

[19] Bingham, at page 6

[20] Also known as the *Martaban*, the event which occurred on 24 December 1863 was captured in a print published in the London Illustrated News in April 1864, see *The Alabama, British Neutrality and the American Civil War*, by Frank J Merli, Edited by David M Fahey, 2005 at page 184, and Manet, page 23

[21] The final numbers vary e.g., 64 by Bingham, 70 by von Segessor and 69 by Smyth

[22] Balch, at page 19

[23] Bingham, at page 1-2

[24] See the later reference to Richard Cobden's statements by US Senator, Charles Sumner.

[25] Captain Winslow and Captain Semmes had shared quarters for 10 days on the *USS Raritan* during the Mexican War (1844-1848).

[26] By one account, the owner of an English yacht, the *Deerhound*, had offered his children a choice between watching the battle and going to church on that Sunday, see Bingham, at page 7

[27] Flying the flag of the Royal Mersey Yacht Club and skippered by John Lancaster, then owner of coal mines in Monmouthshire, Wales, who later became MP for Wigan from1868 to 1874

[28] *"The Battle between the CSS Alabama and the U.S.S. Kearsarge",* now in The Philadelphia Museum of Art, the John G. Johnson Collection

[29] Balch, at page 40
[30] Balch, at page 42
[31] Balch, at page 43
[32] The Johnson-Clarendon Convention, 14 January 1869
[33] The remaining articles related to other unconnected but outstanding disputes between the US and Great Britain arising out of the Civil War. The other claims included (1) the claims of citizens of the United States against England, and claims of British subjects against the United States, (2) claims relating to American access to Canadian fisheries, (3) the ownership of the island San Juan: the San Juan Islands that dot the strait between what is today the state of Washington and British Columbia's Vancouver Island, (4) the free navigation of American ships on the St Lawrence River, (5) compensation for raids on Canada from the United States.
[34] *Alexander Emmanuel Rodriguez v Major League Baseball and Ors*, US District Court for Southern District of New York, No. 14-244
[35] *Switzerland: The birth of modern arbitration,* by Georg von Segessor and Fabienne Helfenstein, IFLR, 1 May 2011
[36] The Tribunal also directed that the case in reply should be exchanged and delivered to the Secretary of the Tribunal in Geneva on 15 April 1872 and at its second meeting on 16 December 1871 fixed 16 June 1872 for the delivery of the written arguments.
[37] *If It Ain't Broke, Don't Change It,* Neil Kaplan, (2014) 80 Arbitration, Issue 2, at page 172-175
[38] see e.g., *Keep it Simple. Keep it Interesting*, by Sapna Jhangiani, 17 September 2015, Clyde & Co, *An Overview of Procedural Innovations in International Commercial Arbitration,* The Law Gazette, Singapore, 21 August 2014, and *Back to the roots of arbitration,* Julie Soars, Lawyers Weekly, 19 June 2015
[39] Bingham, at 20
[40] Bingham, at 21
[41] Bingham, at 21
[42] See the Age, 26 and 27 January 1865, and McKenna, page 191
[43] *The Confederate War Steamer Shenandoah*, The Age, January 1865,
[44] McKenna, at page 192
[45] On 27 January 1865 the Age reported that she had captured "*eight federal prizes*" on her voyage from Madeira, where she was commissioned, to Melbourne. *"The custom followed was simply to bring the Federal vessels to by firing one blank charge, and then to take possession of the valuables, and destroy the ship, after transferring the crew. No resistance in any case was offered. ... Large numbers of seamen taken from each vessel joined the Confederate steamer, and in this way, during the cruise, her crew was increased from 17 to 63 men, better pay being offered than the Federal merchantmen give."* After leaving Melbourne she headed north to the Bering Sea and was on the verge of attacking San Francisco when she learned that the Civil War had ended. She then spiked her guns, adopted the appearance of a merchant ship and sailed down around South America into the Atlantic and back up to Liverpool avoiding all ports and any contact with other ships. She had circumnavigated the globe.
[46] Except the claims in respect of the tenders to the *Alabama*, the *Florida* and the *Shenandoah*, each of which followed the result of their principal.
[47] Estimates of current day equivalent value vary, see Bingham, at page 1 and Smyth at page 306, AUD$300 million in 2015.

[48] see e.g., Veeder VV, *The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator- From Miami to Geneva,* in *Practising Virtue: Inside International Arbitration*, OUP, 2015 and Bingham.

[49] e.g., *Dissenting Opinions in International Adjudication,* by Edward Dumbauld, June 1942, University of Pennsylvania Law Review 929 at 940-941

[50] A public example of a majority award in a private arbitration was recently seen in the award in *WADA v Bellchambers & Ors*, CAS 2015/A/4059, see paragraph 151(i) at page 34 of the award, available on the CAS website.

[51] At the first stage, the US presented 480 pages with 7 volumes of supporting documents, GB produced 168 pages with 4 volumes of supporting documents, Bingham at 19. At the second stage, GB presented a 1,100 page reply, and reserved its position on the indirect claims, the US "was shorter", Bingham, at page 21.