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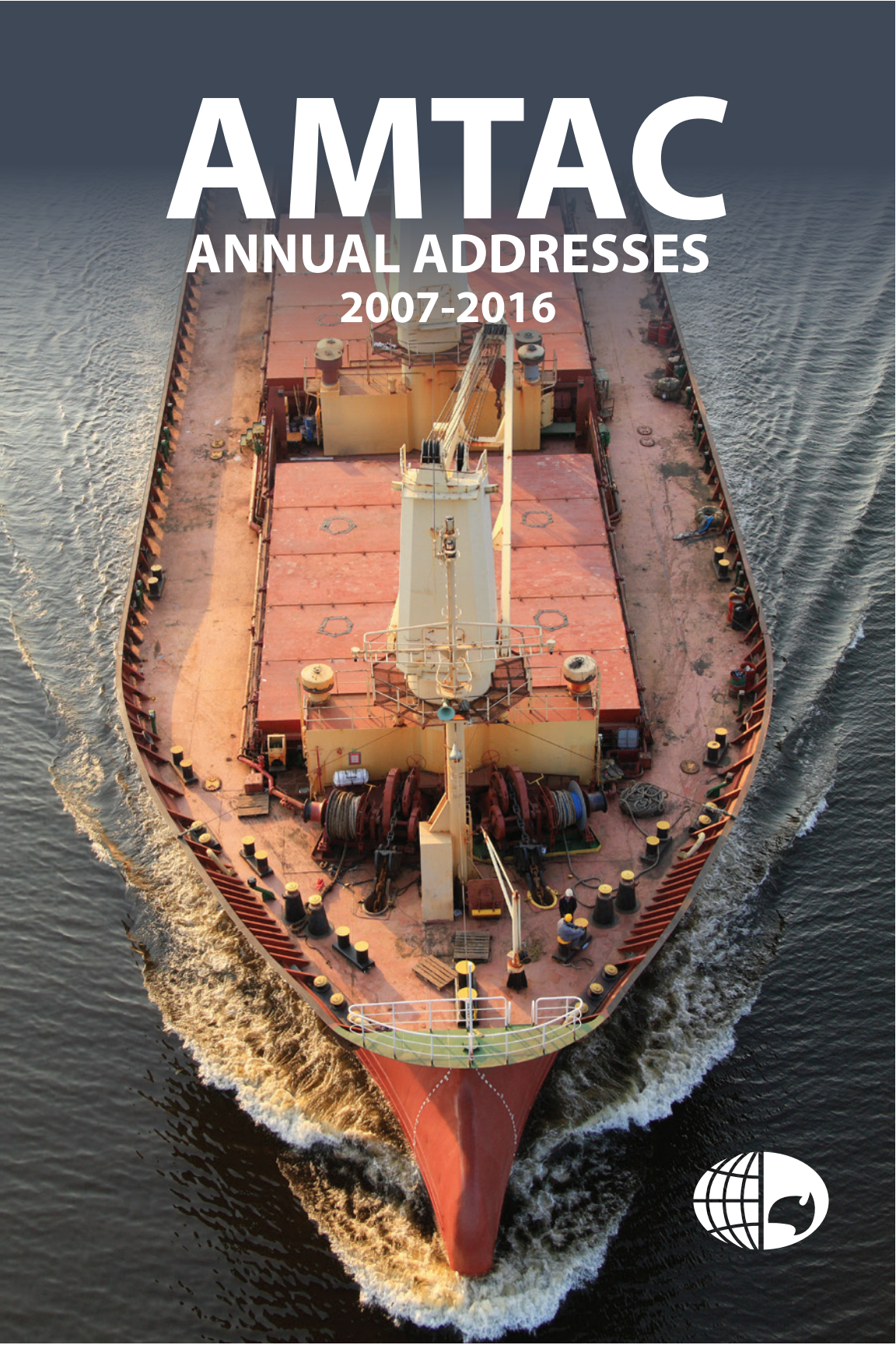

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AMTAC
Australian Maritime and Transport Arbitration Commission

AN ACICA COMMISSION

Contents

Foreword

The Australian Maritime and Transport Arbitration Commission (AMTAC) facilitates the conduct of maritime and transport disputes by arbitration proceedings in Australia, in addition to promoting Australia as a leader in education, scholarship and affairs relating to maritime and transport law, to the practice of commercial arbitration and to the maritime and transport industries.

Each year since its establishment in 2007, AMTAC has convened the AMTAC Annual Address, which has been presented by judges, academics, law and arbitration practitioners and industry representatives in various Australian cities and simultaneously video-cast nationally.

The transcripts of the each of the 10 Addresses have been uploaded onto the AMTAC website at www.amtac.org.au.

It is fitting that, following AMTAC's celebration of its 10th Anniversary in 2016, all Addresses and the biographies of each presenter should be published in this one volume.

AMTAC thanks the presenters for their contributions and both Austrade and the Federal Court of Australia for providing venues and logistical and technical assistance, which have made possible the national presentation of each Address each year.

Peter McQueen
AMTAC Chair
May 2017

AMTAC Annual Address 2007

International Maritime Arbitration: Legal and Policy Issues[1]

4 December 2007

The Hon. J Allsop AO, Justice of the Federal Court of Australia

ABSTRACT

This paper seeks to deal with some important underlying policy questions faced by legislatures, governments and courts in dealing with the issues thrown up by international commerce and dispute resolution, and, in particular, maritime commerce and dispute resolution. The growth and popularity of international commercial arbitration exposes policy issues for both developed and developing countries, such issues having their origin, at least in part, in questions of sovereignty. These issues are best understood in a wider context of international commercial law.

INTRODUCTION – THE ESSENTIAL NATURE OF ARBITRATION AND ITS ADVANTAGES

Arbitration is one method (but only one method) of resolving disputes. It is based on the agreement between the parties to the dispute. This contractual foundation is essential to the understanding of the character and importance of arbitration. Though arbitration is founded on contract, it is affected both by national legislation and international convention. 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. It informs the relations of all participants in international commerce.

In its essential form, arbitration involves two or more parties, often from different legal systems, who anticipate the possibility of disputes about their relationship, agreeing to give a third party their authority to resolve the dispute. They may be merchants buying and

selling goods, parties dealing with the use of a ship or any other agreement dealing with a commercial subject matter.

Disputes are part of commerce. They are immanent within the activity. So how are they to be resolved? There are various possibilities. First, the stronger commercial party may insist on an outcome favourable to it. Secondly, the parties may abandon the arrangement at the point of breakdown, leaving the loss to lie where it falls. Thirdly, the parties may seek recourse to their national courts independently of each other. Fourthly, the parties may agree on one of their national courts. Fifthly, the parties may agree upon a neutral national court. Sixthly, the parties may agree upon arbitration. Seventhly, the parties may agree to mediate or conciliate the dispute. There may be other possibilities, including expert determination.

There are obvious disadvantages to various of these alternatives: arbitrary force is antithetical to the free commercial bargain and the constructive commercial relationship; the abandonment of the commercial enterprise reflects nothing more than failure; national courts of the parties may have defects, as minor as perceived association with one party and a foreignness to the other, at worst, they may be perceived (whether or not they are) to be incompetent or corrupt; national courts of a neutral third country may be worthwhile, but they may represent a form of foreign governmental process outside the control of the parties; mediation and conciliation may have no final result – they are forms of further agreement. Leaving aside other possibilities, this leaves arbitration.

WHAT IS ARBITRATION AND WHAT ARE ITS PERCEIVED ADVANTAGES?

Arbitration is the process of resolving (by deciding) a dispute by someone to whom the parties have entrusted that task by agreement. The agreement will therefore need to specify, at the very least, the subject of the resolution (the scope of that which is submitted to arbitration), who is to hear the dispute and the relevant law and procedure by reference to which the dispute is to be decided. If there is a means of recognising and enforcing the decision of the arbitrator, a compulsory resolution of a defined range of disputes between parties can be achieved (the compulsion being derived from earlier

free agreement to arbitrate together with the willingness of courts or other governmental agencies to enforce the bargain).[2]

There are potentially great advantages for the parties in using arbitration. The ability of the parties to choose the identity of the arbitrator, or the mechanism of choosing the arbitrator, the place of the arbitration, the procedure of the arbitration (including the degree of confidentiality involved), the law to govern the dispute, the law to govern the procedure of the arbitration and the court to supervise the arbitration are all important benefits, important **commercial** benefits, which are, at least intuitively, built into the relationship and the price of the relevant contract.

INTERNATIONAL ACCEPTANCE

International commercial arbitration as a recognised institution or process has been cemented by widespread international acceptance of some of the most successful of international conventions. The most notable, and most relevant for present purposes, are the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention) and the UNCITRAL[3] Model Law on International Commercial Arbitration 1985 (the Model Law).

Arbitration awards made conformably with these conventions are far more widely enforceable than judgments of national courts. For instance, the New York Convention is recognised by well over 100 countries. Thus, an otherwise valid arbitral award is more easily enforced worldwide than the judgment of a court. So, an arbitration award can give wider access to a party's assets than does a court judgment.

AN HISTORICAL PERSPECTIVE AND THE DEVELOPMENT OF HARMONISED COMMERCIAL LAW

Regimes for dispute resolution cannot be divorced from the activity that gives rise to the need for them – here commerce, commercial law and maritime law. A striking contemporary phenomenon is the globalisation of commerce brought about by astonishing changes in communications and the integrated global and regional markets created or fostered thereby.[4] The supranational forces impinging on municipal states have influenced virtually all economies of

the world, creating linkages, dependencies and opportunities quite unrelated to sovereign nation states and their borders. To a degree, however, this is nothing new. Only new are the tools of communication of bringing about and effectuating commercial intercourse. Commerce and maritime affairs are universal and timeless activities.

History tells us to expect rules for human commercial and maritime activity that transcend the political structures of the day and that reflect the timelessness of the activity involved. Important to the development and maintenance of a coherent law merchant in the past were four elements: a degree of unifying commonality of the laws of the places of exchange, such as market places and fairs; a degree of unifying commonality in the laws and customs of the sea; a unifying role of specialised courts dealing with commercial disputes and a unifying role of standard forms of contracts[5]. These elements are recognisable aspects of international commercial life today.

Maritime law has always revealed a striking degree of uniformity. This is hardly surprising. Shipping is a universal activity. It has a history as long as mankind. It has been known across all littoral and riparian parts of the earth. Ample reference to maritime activity and attendant commercial law can be found in many sources[6] concerning the conduct of maritime commerce in all parts of the world: the Persian Gulf, the Arabian Sea, the Tigris-Euphrates Basin, the Mediterranean Sea, Africa and its coast, the Black Sea, India, and the Indian Ocean, South-East Asia, the Pacific, China and North Asia, the North Sea and the Baltic, the great rivers of Europe and Eurasia, and the Americas. The great commercial centres of the Middle East – Baghdad, Damascus, Alexandria and others supported a cosmopolitan commercial society from ancient to modern times. The Indian Ocean has nurtured commercial and maritime activity for millennia. The monsoons enabled trade from the Red Sea to Asia, with seasonal winds to China, the Philippines and North Asia. Malabar teak, coconut fibre, flax, cotton and metals made India a flourishing site of shipbuilding. Ibn Battuta, the Tangiers-born lawyer, merchant and geographer of the 14th century described Calicut in South West India as one of the largest harbours in the world visited by merchants and seafarers from China, Sumatra, Ceylon, the Maldives, Yemen, Persia and "all quarters"; and he described "Zay-

ton"[7] in China as the very largest harbour in the world with hundreds of vessels.

One can see in the past the same forces and elements underpinning international or transnational commercial law today:

- the freedom and mobility of commerce in times of peace
- the international character of commerce and maritime activity
- a degree of uniformity in approach to common and elemental activity – the promise, the bargain, payment, security, insurance, transport and the role of the agent
- dispute resolution closely suited to, and knowledgeable of, commercial and maritime affairs of the merchants involved
- a degree of uniformity in transactional documents

The 20th century saw the development of attempts at the international harmonisation of commercial and maritime law. In the first half of that century, the attempts at unification or harmonisation of commercial law were dominated by maritime law and maritime lawyers. Carriage of goods under bills of lading was an excellent example. The recognition from the 1870s of the fragmentation caused by national legislation[8] counteracting the abuses produced by unbridled freedom of contract practised by shipowners led to the Brussels Conferences in the early 1920s and the establishment of a workable compromise of minimum rights and obligations in the carriage of goods by sea under bills of lading in the Hague Rules. This long and exacting process took over 50 years. At its foundation was the need to qualify unbridled freedom of contract to bring about a fair balance in bill of lading carriage. It illustrated the recognised need for a balance to be struck in the (sometimes competing) demands of commerce: certainty, predictability, party autonomy, despatch and fairness.

Attempts at harmonisation have spawned important, private and public bodies.

Until the formation of the Intergovernmental Maritime Consultative Council (IMCO)[9] later to become the International Maritime Organisation (IMO) and other United Nations bodies whose activities touch on maritime affairs,[10] the Comité Maritime International (CMI) played the leading role in the development of international conventions and rules concerning maritime law.[11] After the 'Torey

Canyon' disaster, the IMO began to undertake the primary burden of promulgation of maritime treaties, conventions and standards at least of a character dealing with safety, the environment and technical matters.[12] The CMI remains significantly influential. Its role has been somewhat redefined to co-operation with intergovernmental organisations seeking to harmonise maritime law.[13]

The formation and development of UNIDROIT (in 1926) and UNCITRAL (in 1966) have fostered the development of conventions, model codes and model laws dealing with private law, especially commercial law, generally.

The pace of development of international commercial law has been remarkable in the last 20 to 30 years. There are international restatements, model laws, principles, conventions, directives and other instruments on many aspects of law related to maritime commerce – contract law,[14] electronic commerce,[15] international sale of goods,[16] agency and distribution,[17] international credit transfers and bank payment undertakings,[18] international secured transactions,[19] cross-border insolvency,[20] securities settlement and securities collateral,[21] conflict of laws,[22] international civil procedure,[23] and international commercial arbitration.[24]

Some of these instruments are not legally operative, whether at the level of public international law, or municipal law. So, such model laws or principles are sometimes referred to as "soft" law. Even if they are "soft", they provide rules and principles of a greater or lesser degree of international acceptance in respect of important elements of commercial life: contracts (and their formation, interpretation and performance), the sale of goods, payment and credit, arbitration and civil procedure. These can be used by arbitrators, including maritime arbitrators, as aspects of accepted international approaches to common international transactions, providing protocols and procedures for the conduct of maritime arbitration as well as a framework of substantive law.

Importantly, these international principles include principles of procedure for the conduct of international litigation. One example of these is the American Law Institute and UNIDROIT Principles of Transnational Civil Procedure. This was no less than the harmonisation of the civil law and the common law dispute resolution procedures. The Principles are an attempt to approximate, in a flexible

way, important issues common to the two dominant legal systems. They are available for adoption and adaption by courts and arbitral bodies. They form a bridge between two very different legal cultures and provide a common and fair basis for hearing international disputes. Importantly, they provide a procedural foundation that can give confidence to parties in litigation including arbitration who come from different legal cultures. It was a major achievement.[25]

HARMONISATION AND ITS EFFECT ON ARBITRATION

The relevance of these kinds of transnational principles as a form non-national law, or *lex mercatoria* is a matter of some debate.[26] This debate has proceeded between proponents and opponents of the view as to whether a *lex mercatoria* exists, and if it does, of its perceived advantages or disadvantages.

Most maritime disputes concerning established markets, such as chartering, insurance, shipbuilding, are based in well-known contracts, with identified law to govern, very often English. So, not surprisingly the strongest opponents of the utility and even the existence of the *lex mercatoria* often come from established legal systems.[27] But maritime disputes sometimes arise from circumstances not limited by standard form contracts with London arbitration applying English law. What cannot be denied is the utility to parties and arbitrators of understanding how the respected authors and proponents of model laws and principles, and how state parties in coming to agreement in international conventions, have addressed issues of relevance. For instance, the availability of relevant rules and principles may enable an arbitrator to choose an available body of rules about substance or procedure when the parties have failed to identify the relevant law. This choice might be made by reference to available unattached "soft" law, rather than by recourse to conflict rules to choose one particular municipal law.

It is important to recognise that the maritime affairs to which consensually agreed dispute resolution may apply are wide. They arise from the rich diversity of activity concerning the affairs of the sea: the financing, building, sale and acquisition of ships, the deployment of ships, the carriage of goods by sea (the primary use of the working commercial vessel), fishing, the insurance of ships, cargo and other marine adventures and the other *ad hoc* contractual relationships arising from the use of ships, for example salvage.

Many of the contracts about these subject matters are made between relatively equal commercial partners. Others can be better characterised as contracts of adhesion. The difference is demonstrated by the different approach the law takes to charterparties and bills of lading.[28]

In maritime commercial contracts, given the stability of markets such as those for the chartering of working ships and the frequency of usual transactions, such as shipbuilding or the sale of goods, it is usual to have a definite legal system and proper law governing the relationship. However, the development of fundamental common legal principles of contract, sale of goods, agency, international credit, bank undertakings and the like will, in all likelihood, have a harmonising effect on international maritime and commercial contracts and also provide for the arbitrator a norm of international principles that can guide him or her. Also, internationally recognised standards of procedure are invaluable to any arbitrator, however experienced he or she may be.

THE SCALE AND SCOPE OF INTERNATIONAL COMMERCIAL ARBITRATION

The last 40 to 50 years, in particular the last 20 to 30 years, have seen changes to dispute resolution that reflect the growth of international commerce and the transnational principles governing it. There has been a significant shift away from municipal courts towards commercial arbitration. This is particularly so in the resolution of international commercial and maritime disputes. This shift, in what might be referred to as the consumption patterns of parties to commercial litigation, and the public policy now recognising the legitimacy of such choice, has occurred for many reasons, the majority of which have been already mentioned – flexibility, expertise, party autonomy, control or a sense of control, confidentiality, perceived greater speed, perceived or real lower cost and better or wider enforcement of the arbitral system. In part, but only in part, the shift is explained by the failures or inadequacies of court systems. The reality of any advantage in speed, skill and cost of arbitration over courts may, in many cases, be debatable. Nevertheless, the arbitral process remains significantly dominant.

It is important to recognise that this growth and development of commercial arbitration is no more or less than the setting up, in the field of international commerce (including maritime commerce) of a world-wide delocalised private (or semi-public) dispute resolution system (a surrogate worldwide private court-system) made up of a large number of self-created and self-administered, largely non-governmental, organisations. There are now numerous arbitral institutions worldwide catering for international commercial arbitration, including maritime arbitration.[29]

In many countries, the legislatures and the courts themselves have recognised the need for efficient skilled commercial and maritime courts.[30] In some countries, it must be said, the quality of the national legal systems is less than internationally acceptable. Commerce, however, will not wait for the antecedent development of skilled, unbiased and efficient commercial courts. In countries where the national courts are not seen as adequate, arbitration is not seen as a better alternative than a local commercial court, but as the only viable alternative. In such places, the availability of commercial arbitration is essential to underpin investor confidence and economic development. These issues of quality of dispute resolution raise important policy questions. It is possible that countries at various levels of development display a disconformity between the skill of participants in commercial arbitration and national court systems. The two systems are, however, closely related.

The court system can be vital for the health and well being of arbitration in any country. Skill and efficiency of the courts in supervision, enforcement and collateral assistance to the arbitration process taking place on the territory in question can substantially assist the arbitration process. In that sense, arbitration and the court system have, to a degree, a symbiotic relationship.

POLICY

What does this all mean for policy?

Legislative and government policy

One important policy area concerns the relationship between courts and arbitration, the basis of supervision and the scope for independent existence of the arbitral process.

As can be seen from the relationship between the arbitral award and national recognition mediated through international agreement in the New York Convention and the Model Law, arbitration obtains much of its efficacy from national recognition. The New York Convention and the Model Law require national courts to enforce arbitration clauses in effect by staying their own proceedings if brought in contravention of the agreement.[31]

The method by which the result of a determination of a dispute under contract is translated into enforcement of a monetary judgment where a defendant has assets, necessarily relies on the court and governmental systems of different states:

- the state where the arbitration took place if an attack on the arbitration process or award is made;
- the states where the awards will be recognised and enforced against the assets of the defendant.

The New York Convention and the Model Law set out the circumstances in which states and their courts can operate in these areas.[32] Significant place is given to local public policy.[33]

This control framework of national court systems can act as an enhancement of arbitration by ensuring its fairness and honesty.[34] The use of the court system can also act as a mechanism to disrupt the resolution of the dispute by the arbitral forum. The tendency, however, of modern national arbitration legislation is to lessen the grounds of available curial supervision. This leads to an increasing independence or autonomy of the arbitration process itself and the consequent award. Merely because the arbitrator makes an error of law may not be sufficient to justify redress.

This independence or autonomy of the arbitration process may lead to a lessening or weakening of legal doctrine, if, without appeal, arbitrators reach conclusions based on the law of X country, but are in part free to make mistakes about that law, or interpret that law without strict supervision of the courts of X country. If X country wants its law applied in contracts and wants arbitration business within its borders using its law, there is a tension – keep a light hand on arbitration and risk fraying of the chosen national law, or tighten supervision to maintain purity of legal doctrine at the risk of overly interfering with the freedom of the parties to choose their own

method of dispute resolution. These are not straightforward issues. To the extent that supervision and control remain light, one can see the increasing role for the *lex mercatoria* to supplement or complement any chosen national law, as interpreted by an arbitrator.

These issues involve subtle questions of sovereignty and of the value any particular country may place on maintaining the international public clarity of its own law. They also involve the subtle questions as to how much control or supervision by courts is best for the long term stability of, and the world commercial community's confidence in, the process of arbitration, as a transnational institution or structure.

Issues of national sovereignty can arise from the operation of the contracting autonomy of the parties in other ways. The ability of a State to resolve or assist in the resolution of disputes that affect its citizens' rights is, or can be seen to be, an important aspect of government. This is especially so if the so-called free contractual will of the parties can be seen to be manifested in contracts of adhesion under the control of powerful foreign interests.

For instance, liner bills of lading may contain arbitration clauses requiring any disputed cargo claim (however small) to be resolved by arbitration or court process in the country of the carrier. This may be thousands of miles from the trade carried on by the carrier and from the place of out-turn or delivery. The liner trade may well be part of a recognised cartel of carriers, sharing capacity on a route. In these circumstances, cargo interests may be, effectively, denied a remedy if they have to circle the globe to vindicate a modest claim. To the contrary, obviously, is the position of the commercial charterer who time charters a vessel agreeing to New York or London arbitration.

The different considerations that affect, or might affect, national policy about these two circumstances are not difficult to appreciate. Some of them are considerations of a not dissimilar kind that led to the need for an international convention in the 1920s on bill of lading, but not charterparty, carriage of goods: the need for a fair balance of interests between those with, and those without, bargaining power.

An insight into differences of view can be seen in some United States cases as to how foreign jurisdictional and arbitration clauses

in maritime contracts have been viewed. The discussions of the relevant elements in these cases reflects the clear policy issues involved, though here enunciated in the development of legal doctrine as opposed to legislation or government policy.

In 1971, in *The Bremen v Zapata Off-Shore Co*[35], the United States Supreme Court discussed forum selection clauses. The contract was an international towage contract for a drilling rig to be towed from Louisiana to Italy. The contract contained a London jurisdiction clause (the High Court of Justice in London). The Court discussed forum selection clauses and developed a policy reflecting a mid-way position between the protection of domestic judicial authority in all cases, on the one hand, and enforcement of contractual autonomy as a matter of policy, on the other. The approach was based on the prima facie validity of the arbitration clause unless it was shown to be "unreasonable" in the circumstances.[36] This approach would give to the court power of review over the reasonableness of the circumstances of entry into the contract and, in particular, it was thought, whether it was a contract of adhesion or a contract freely entered between the parties. It represented a loosening, but not a complete release, of a mistrustful and parochial view about arbitration that had hitherto prevailed.

Twenty years later, in *Carnival Cruise Lines Inc v Shute*[37] a contract for a cruise designated the courts of Florida for the resolution of disputes. It was not a negotiated contract. The Supreme Court refined the Bremen doctrine and rejected the view of the Court of Appeals for the Ninth Circuit that a non-negotiated forum selection clause in a so-called "form ticket" is never enforceable simply because it was not the subject of bargaining. The considerations as to reasonableness were diverse and included the interests of both sides to the bargain. It was recognised that there might be good reason for non-negotiated terms and for channelling litigation into one place.[38]

Four years later, in '*The Sky Reefer*'[39], the Supreme Court dealt with foreign arbitration clauses in a bill of lading. A fruit distributor's produce was damaged in transit from Morocco to Massachusetts aboard a Panamanian owned vessel, chartered to a Japanese carrier. There was a Tokyo arbitration clause. The argument was that the inconvenience and costs of proceeding in Japan would

lessen the liability of the carrier under the *United States Carriage of Goods by Sea Act 1936*[40] (COGSA) and so the clause, it was said, was void. This was rejected. The majority of the Supreme Court rejected this and expressed itself in strong terms in favour of international comity and party autonomy. Justice Stevens, in dissent, had a different view about the width of the relevant provision of COGSA equivalent to Art 3 r 8 of the Hague/Hague-Visby Rules.[41] Justice Stevens made clear his strong view that in practical reality foreign arbitration clauses can provide such a cost barrier as to deny a remedy to a claimant, and so cut down the claimant's rights under COGSA, thereby being made void by the equivalent of Art 3 r 8 of the Hague/Hague-Visby Rules.[42]

Neither the Hague or Hague-Visby Rules deal expressly with jurisdiction or dispute resolution of cargo claims. Thus, the topic may be seen to be left to national law. Though the Rules do not expressly deal with the subject, on one view (and it was that of the dissenting justice in '*The Sky Reefer'*, Justice Stevens) Art 3 r 8 of the Hague/Hague-Visby Rules should be read broadly and so can be seen, indirectly, to deal with it.

The Hamburg Rules provide the cargo claimant with a choice of places to sue. Art 21[43] of those Rules provides that the cargo interest may sue at the place of the defendant, where the contract was made, the port of loading or discharge any other place mentioned in the contract. It may also arrest the ship anywhere else, but only for security.

Article 22 of the Hamburg Rules deals with arbitration.[44] The Rules recognise arbitration, but provide for a regime of arbitration whereby the cargo interest may seek arbitration in the same places as mentioned in Art 21.

In both regimes provided for by Arts 21 and 22 a choice is given to the cargo claimant, who is not finally constrained by the terms of the arbitration agreement. Party autonomy is thereby modified.

The national legislation of a number of countries deals with exclusive jurisdiction clauses in bill of lading carriage. An example is the Australian *Carriage of Goods by Sea Act 1991*, s 11[45] which strikes down clauses (other than Australian arbitration clauses) which preclude or limit the jurisdiction of Australian Courts.

Similar provisions exist in national legislation in New Zealand, South Africa, the Nordic countries and Canada.[46] These might be said to be a species of "jurisdictional cabotage", but for the kind of reasons that are entirely understandable, and which were expressed by Justice Stevens in '*The Sky Reefer*'. They protect a country's cargo interests by providing a forum where their complaints can be resolved. It might be said that it is not a hardship on the liner trade involved, which does business carrying goods on a regular basis to a particular country. They also reflect the recognition in the Hamburg Rules of the need to give cargo claimants a choice. Effectively, they entrench the availability of the place of delivery as a place for suit.

Such statutes will not, however, necessarily be recognised in other jurisdictions. Recently, in *OT Africa Line Ltd v Magic Sportswear*[47] the English Courts deployed the tool of the anti-suit injunction to enforce an English arbitration clause in a bill of lading with an English choice of law clause in circumstances where Canadian legislation gave the claimant a right to sue in Canada. The Australian provision would probably be treated similarly. Provisions like it in other contexts have been ignored by English Courts.[48]

These issues represent important policy questions involving the weighing up of competing interests, including the weight to be given to party autonomy, the particular interests in protecting local cargo claimants and their insurers in countries relying on foreign liner shipping, which might well be undertaken by (legally sanctioned) cartels and the importance of developing local skills in dispute resolution.

The principle of party autonomy is fundamental to this discussion. It is an underlying norm of any *lex mercatoria*. It is reflected in one of the basic obligations on parties to the New York Convention, Article II, which provides for the basic recognition and enforcement of the parties' autonomous bargain. The terms of Article II contain within them the fundamental architectural framework of the New York Convention: party autonomy, arbitrability and court enforcement.[49]

The notion of "capable of settlement by arbitration" or "arbitrability" found in Art II is also found in Art V dealing with recognition and enforcement of an award. Likewise, Arts 34 and 36 of the Model Law dealing with setting aside, and recognition and enforce-

ment of, awards pick up this notion. It is a central balancing conception in the Convention's limiting of the reach of party autonomy.

The decision as to what is "capable of settlement by arbitration" or "arbitrable" has been left by both the New York Convention and the Model Law to Contracting States. These words are to be understood in both the New York Convention and the Model Law as dealing with the question whether the dispute is of the type that comes properly within the domain of arbitration (as judged by national law). Article II of the New York Convention is directed to disputes that are capable of settlement by arbitration. If there is an award in respect of a dispute that is not capable of settlement by arbitration the award may be set aside or will not be enforced.[50]

The types of disputes which national laws may see as not arbitrable and which were the subject of discussion leading up to both the Convention and the Model Law are disputes such as those concerning intellectual property, anti-trust and competition disputes, securities transactions and insolvency. This is not the place to discuss the concept in detail.[51] It is sufficient to say two things at this point. First, the common element to the notion of non-arbitrability is that there is a sufficient element of legitimate public interest in these subject matters making the enforceable private resolution of disputes concerning them outside the national court system inappropriate. Secondly, the identification and control of these subjects is the legitimate domain of national legislatures and courts.

Thus, there are within these conventions dealing with arbitration both a recognition of the common good in promoting international arbitration and party autonomy, on the one hand, and a recognition of legitimate national interests, on the other. The former is given effect to by national legislation which provides for a stay of court proceedings commenced in contravention of the arbitration clause and courts of other jurisdictions, in particular the place where it is agreed that the arbitration would take place, issuing anti-suit injunctions, restraining a party from commencing or continuing with court proceedings in contravention of the arbitration clause.

The legitimacy of particular national policy inhibiting arbitration, is encompassed within the notions of arbitrability and public policy. An example of such national policy in the maritime field is a provision such as s 2C of the Australian *International Arbitra-*

tion Act 1974 which Act incorporates into Australian domestic law Australia's international obligations under the New York Convention and the Model Law. By s 2C, however, the Act is stated not to affect, amongst other things, s 11 of the *Carriage of Goods by Sea Act 1991* to which reference has been made. So, foreign arbitration clauses in bills of lading are ineffective in Australia to prevent cargo claims being brought in Australia.

The policy questions inherent within these issues are being discussed at an international level at the UNCITRAL Working Group Meetings on Transport Law and the Draft Convention on the carriage of goods [wholly or partly] [by sea], and on Arbitration.[52]

There are other policy questions for national governments. What priority, if any, in the organisation and development of the national judiciary should be given to developing judicial skill in maritime law? Should this be left to the courts themselves? Should policy be developed to encourage the growth of skilled professional arbitration? Such policies may have their roots in educational reform of the legal profession and judiciary and may extend to encouraging overseas practitioners appearing in local arbitrations (as an advocate or an arbitrator).

These are questions of policy for the legislative and executive branches of government. They should be addressed not only by reference to perceived national needs, but also by reference to the recognition of the importance of international arbitration to international commerce and thus domestic well-being.

Judicial policy

There are also important questions for the judiciary to address. For instance, should, and if so how far, legal doctrine be developed by courts to reflect the advancement of national public policy? We have already seen in the three United States Supreme Court cases how the different strands of national interest (differently perceived) affected the US case law. Of course, if legislation requires that approach it will be obeyed. But what if no such valid legislation exists?

An illustration of the importance of this question can be seen in the questions posed by Justice Stephen in the High Court of Australia in 1978 in '*The New York Star*'.[53] Justice Stephen there asked whether it was in Australia's interests to take a generous approach

to enforcing so-called *Himalaya* clauses, giving the benefit of exemptions in the contract of carriage to non-party actors in the carriage activity, such as stevedores – that is, whether it was in Australia's interests to permit carriers to widen the protected circle to all its agents and sub-contractors, when Australia relied on foreign carriers to bring in, and take out, its imports and exports.[54]

In the context of arbitration, this kind of question can also arise for the courts in the choice of an approach to the construction of the arbitration clauses. Should such clauses be interpreted broadly and liberally, thereby increasing the scope of the dispute which may be removed to the chosen (perhaps foreign) arbitral forum? If that chosen foreign arbitral forum is overseas and if one of the contracting parties is local, there may be a temptation upon the local court to allow the local party to litigate before it as the chosen local forum, in preference to the foreign arbitral forum. This temptation will be heightened if there is a local statute relevant to the claim which may not be recognised by the foreign arbitral tribunal giving effect to a relevant choice of law rule governing the arbitration.

There is much to be said for the proposition that the courts should resist both these tendencies and for similar reasons, unless, of course, the contrary is required by local statute. The first tendency, the desire of courts to intrude national or chauvinistic public policy into the maritime law, may reflect a failure to understand the essential character of maritime law. Maritime law is a body of law with its roots in public international law, civil law, international commerce, international agreement and the law of nations. This international foundation of an otherwise municipal law in each nation was clearly expressed by the United States Supreme Court in 1875 in *'The Lottawanna'* as follows:[55]

> *...Each state adopts the maritime law, not as a code having any independent or inherent force, proprio vigore, but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it. And without such voluntary adoption it would not be law. And thus it happens, that, from the general practice of commercial nations in making the same general law the basis and ground-*

> *work of their respective maritime systems, the great mass of maritime law which is thus received by these nations in common, comes to be the common maritime law of the world.*

This account of the maritime law, if correct, plainly shows that in particular matters, especially such as approach a merely municipal character, the received maritime law may differ in different countries without affecting the general integrity of the system as a harmonious whole.

Across the Atlantic, in 1946, Lord Justice Scott said in *'The Tolten'*[56]*:*

> *The language of Lord Watson there echoes many previous judicial opinions that British maritime law derives originally, and continues to get inspiration from the general law of the sea prevailing amongst maritime nations; e.g., of Lord Mansfield who in 1759 said in Luke v. Lyde (1759) 2 Burr. 882, 887 "the maritime" law is not the law of a particular country, but the general "law of nations," meaning that admiralty judges should still look for inspiration to the parent source.*

This recognition of the immanent international character of maritime law (albeit ultimately municipal[57]) is important to remember. It is too often ignored. Naturally, a degree of national diversity is to be expected – it is in the order of things one might say. However, if maritime law disintegrates into a multitude of conflicting commercial laws no one who regularly engages in international commerce will ultimately gain. In the end such fragmentation increases costs of transactions, mistrust and uncertainty, and increase the need for lengthy and costly negotiation of international agreements.

The second tendency, that of courts to give in to the temptation to keep part of the case within the chosen local jurisdiction, fails to pay sufficient respect to the importance of the efficient disposition of international commerce. The New York Convention and the Model Law deal with one of the most important aspects of international commerce – the resolution of disputes between commercial parties in an international or multinational context, where those parties, in the formation of their contract or legal relationship, have, by their own bargain, chosen arbitration as their agreed method of dispute

resolution. The chosen arbitral method or forum may or may not be the optimally preferred method or forum for each party; but it is the contractually bargained method or forum, often between parties who come from very different legal systems. An ordered efficient dispute resolution mechanism leading to an enforceable award or judgment by the adjudicator, is an essential underpinning of commerce. Disputes arising from commercial bargains are unavoidable. They are part of the activity of commerce itself. Parties therefore often deal with the possibility of their occurrence in advance by the terms of their bargain. Unreliable or otherwise unsatisfactory decision making, or the fear of such, distorts commerce and makes markets less efficient, raising the cost of commerce. Similar effects can occur if parties can be forced to submit to fora of which they may have no or little knowledge, in circumstances where they have agreed to enter the overall bargain on an entirely different basis of anticipated dispute resolution. It may be of no, or little, comfort for such parties to be assured that any particular forum is reliable and otherwise satisfactory (as may be the case). It was not what was agreed. If parties can be forced to submit to fora different to those which they have chosen, a significant unstable variable is introduced into the performance of the international bargain – the uncertainty as to the legal system and the law to govern an international dispute, including doubts about venue and departure from what may be familiar procedures, or at least procedures in which they have sufficient confidence to agree as those to govern the resolution of any dispute. These considerations are especially important in well-understood and stable markets, such as the chartering of working commercial ships as in the present case. It is another illustration of the importance of consistency in the working of international commerce illuminated so clearly by Lord Diplock in '*The Maratha Envoy*'[58] in his discussion of the role and place of well-known or usual forms of contract in international commerce and the place of courts in their consistent interpretation. This approach can be seen to be part of the law of international commerce.[59]

The above considerations ground the importance to be given to party autonomy and holding parties to their bargains in international commerce. Yet, balanced against these considerations are the entirely legitimate considerations of nations for their own citizens

and their own commerce in areas such as bill of lading carriage especially in liner trade.

Within boundaries that are recognised internationally as reasonable, legislatures may legitimately protect national interests in the way earlier described.

All policy, however, should recognise that commercial law, maritime law and dispute resolution between parties from different countries require an international perspective based on underlying commonality of principle and approach.

INTERNATIONAL AND REGIONAL POLICY

One particular area of policy that may assist countries to develop their skill and expertise in arbitral dispute resolution, is the development of regional or multi-national structures to harmonise the arbitral framework. Commerce is de-localised. Commercial law is becoming de-localised. Arbitration is capable of de-localising the method of resolution. In this context, there is no reason why countries cannot pool resources to create a virtual or synthetic network of arbitration law and structures, of arbitrators and of skilled professionals.

On a regional basis, with uniform rules as to the law of the arbitration, as to rules of procedure, with available transnational principles of contract and contractual interpretation, and with a uniform approach to curial supervision, enforcement and collateral assistance based on international conventions, a regional or multi-national organisation could call upon the combined maritime skill of a region or the group of participating countries – arbitral, judicial, scholarly and professional for the resolution of disputes. Hearings could take place at the most convenient place. Video link facilities could be used. Parties could be given the choice of language and identity of arbitrator. A uniform approach to the *lex arbitri* and law of procedure would enable the development of a truly transnational arbitration structure to deal with maritime disputes in the region. A generous right of appearance could be given to lawyers of the litigants' choice who would not necessarily be admitted in the place where the arbitration takes place.

Whatever skill was possessed in the various countries it could be harnessed or pooled in the formation of such a regional body. Mari-

time scholars and maritime lawyers, arbitrators and judges could be brought together throughout any given region.

The advantage of such a structure would be the harmonisation of the laws and rules of the arbitration, the harmonisation of the place of courts in support of the arbitration process, the deepening of the available pool of arbitrators for any particular dispute, the strengthening of the reputation of the region or group of countries in the provision of maritime dispute resolution, the removal or amelioration of apparent fragmentation of approach by individual countries, the harmonisation of procedural law and the fostering of the development of a more consistent body of substantive maritime law.

In order to ensure harmony and comity it would be necessary to have a clear regime dealing with the law of the seat of the arbitration[60] and a clear regime of inter-jurisdictional curial supervision.

The topics of dispute resolution, international commercial arbitration and maritime arbitration throw up important questions for national policy development (legislative, executive and judicial) for all trading countries and countries engaged in maritime affairs. There are few universal answers. Though, perhaps, one theme should be kept close by – the international character of the general maritime law and the danger to it of chauvinistic municipal policy, which is not based on considerations reasonably reflected in international norms and expectations.

A coming challenge for all countries is the development of reliable skilled arbitral structures outside the established centres to serve a rapidly developing world commercial community and in which all countries feel they have some part to play.

BIOGRAPHICAL DETAILS

From 1981 to 2001 Chief Justice Allsop practised at the Bar in New South Wales and elsewhere in Australia. He was appointed Senior Counsel in New South Wales in 1994 and Queen's Counsel in Western Australia in 1998.

From 7 May 2001 to 1 June 2008 he served as a Judge of the Federal Court of Australia, undertaking the roles of trial and appellate judge on a full range of Federal Court

work. From 2 June 2008 to 28 February 2013, Chief Justice Allsop was President of the New South Wales Court of Appeal. He was appointed Chief Justice of the Federal Court of Australia as of 1 March 2013.

From 1981 to 2014 Chief Justice Allsop taught part-time at the University of Sydney as a tutor and lecturer in property, equity, bankruptcy, insolvency, corporate finance and maritime law. He currently teaches part-time in maritime law at the University of Queensland. From 2005-2009, he was a member of the board of World Maritime University in Malmö, Sweden. From 2008 to 2011 he was a member of the Board of the Australian Maritime College. On January 2010, he was elected as an Honorary Bencher of the Middle Temple. On 19 March 2013 he was elected a member of the American Law Institute.

From 1 July 2016 Chief Justice Allsop was appointed Adjunct Professor by the School of Law, The University of Queensland, for a period of 3 years.

NOTES TO CHAPTER

1 The paper is an edited version of a paper delivered at the World Maritime University at an International Seminar on Maritime Law and Policy on 14-16 May 2007 and to the Australian Maritime and Transport Arbitration Commission on 4 December 2007. The early part of the paper is based on the author's FS Dethridge Memorial Address at the Annual Conference of the Maritime Law Association of Australia and New Zealand in September 2006.

2 Expressed in this way one can already begin to appreciate the symbiotic relationship between courts and the arbitration process.

3 United Nations Commission on International Trade Law

4 See Galgano, F "The New Lex Mercatoria" (1995) 2 *Annual Survey of International and Comparative Law* 99; and Bonell, MJ *An International Restatement of Contract Law* (Transnational Publishers 3rd Ed 2004) at 11-13.

5 See Schmitthoff, CM "International Business: A New Law Merchant" (1961) II *Current Law and Social Problems* 129 in Cheng, C-J Clive M Schmitthoff's *Select Essays on International Trade* (Martinus Nijhoff 1988) ch 3.

6 See generally Tetley, W *International Maritime and Admiralty Law* (Editions Yvon Blais 2002) pp 5-30; Sanborn, FR *Origins of the Early English Maritime and Commercial Law* (William Hein & Co rep 2002) chs 1, 2 and 4; McFee, W *The Law of the Sea* (J B Lippincott Company 1950) chs 3-6; Gold, E *Maritime Transport: The Evolution of International Marine Policy and Shipping Law* (Lexington Books 1981) ch 1; *Benedict on Admiralty* (7th Ed) vol 1 chs 1 and 2; Gilmore, G and Black, CL *The Law of Admiralty* (2nd Ed, The Foundation Press 1975) pp 1-11; Schoenbaum, TJ *Admiralty and Maritime Law* (West Publishing) ch 1; Beutel, FK Brannan's Negotiable Instruments Law (7th Ed, The WH Anderson Company 1948) Part 1 ch 1; Day, C *A History of Commerce* (Longmans, Green & Co 1922, Garland Publishing facsimile edition 1983); Hourani, GF *Arab Seafaring in the Indian Ocean* (Princeton University Press 1951); Laing "Historic Origins of Admiralty Jurisdiction in England" (1946) 45 *Michigan Law Review* 163; Marsden, RG *Select Pleas*

in the Court of Admiralty (Selden Society 1897, 1953 Reprint) Vol 1; Selfridge, HG *The Romance of Commerce* (Bodley Head 1918); Mangone *United States Admiralty Law* (Kluwer International, 1997) ch 1; Mears "The History of Admiralty Jurisdiction" 2 *Select Essays in Anglo-American Legal History* 312; Mookerji, R *Indian Shipping: A History of the Sea-Borne Trade and Maritime Activity of the Indians from the Earliest Times* (Longmans, Green & Co 1912); Oakeshott, WF *Commerce and Society* (Oxford 1936); Anand, RP *Origin and Development of the Law of the Sea* (Martinus Nijhoff, 1983); Abu-Lughod, JL. *Before European Hegemony; The World System* AD 1250-1350 (Oxford 1989); Charlesworth, MP *Trade Routes and Commerce of the Roman Empire* (Ares Publishing Inc 1974); Mathew, KS *Shipbuilding and Navigation in the Indian Ocean Region. AD 1400-1800* (Munshiram Manoharlal Publishers 1997); Chaudhurt, KN *Trade and Civilisation in the Indian Ocean – An Economic History from the Rise of Islam to 1750* (Munshiram Manoharlal Publishers 1985); Milburn, W *Oriental Commerce Vols 1 & 2* (Munshiram Manoharlal Publishers 1999 facsimile of 1813 Edition).

7 A port on the coast of China described by one writer, Oakeshott, in 1936, as "modern Chiian-Chau".

8 See for example the *Harter Act 1893* in the United States; the *Sea-Carriage of Goods Act 1904* (Cth) in Australia; the *Shipping and Seamen Act 1903* (NZ); and the *Canadian Water Carriage of Goods Act 1910*.

9 Established by convention in 1948 which came into effect in 1958.

10 The United Nations Conference on Trade and Development (UNCTAD); UNCITRAL: The United Nations Commission on Uniform Trade Law created by unanimous resolution of the General Assembly of the United Nations on 20 December, 1966; UNIDROIT: The International Institute for the Unification of Private Law was established by multilateral treaty in 1926.

11 Covering transport of goods, carriage of passengers and luggage, collision and navigation, salvage and general average, limitation of liability, pollution liability and compensation therefor, maritime liens and claims, registration of ships, mortgages, arrest, classification societies, off-shore mobile craft and stowaways. See CMI *Handbook of Maritime Conventions* (Lexis Nexis 2001).

12 The following is a list of IMO sponsored Conventions:

Maritime Safety: International Convention for the Safety of Life at Sea, 1974; International Convention on Load Lines, 1966; Special Trade Passenger Ships Agreement, 1971; Protocol on Space Requirements for Special Trade Passenger Ships, 1973; Convention on the International Regulations for Preventing Collisions at Sea, 1972; International Convention for Safe Containers, 1972; Convention on the International Maritime Satellite Organization, 1976 The Torremolinos International Convention for the Safety of Fishing Vessels, 1977 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978; International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel, 1995; International Convention on Maritime Search and Rescue, 1979.

Marine pollution: International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto; International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties), 1969; Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972; International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990; Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances, 2000; International Convention on the Control of Harmful Anti-fouling Systems on Ships, 2001; International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004.

Liability and compensation: International Convention on Civil Liability for Oil Pollution Damage, 1969; International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971; Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, 1971; Athens Convention

relating to the Carriage of Passengers and their Luggage by Sea, 1974; Convention on Limitation of Liability for Maritime Claims, 1976; International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996; International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001.

Other subjects: Convention on Facilitation of International Maritime Traffic 1965; International Convention on Tonnage Measurement of Ships 1969; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988; International Convention on Salvage, 1989.

13 CMI's contribution to the work of the Legal Committee of the IMO has been huge, in particular in drafting conventions on carriage, limitation of liability, maritime assistance and salvage and arrest, harmful and noxious substances, places of refuge, fair treatment of seafarers and wreck removal.

14 As to international private law, see generally Goode, R et al *Transnational Commercial Law: International Instruments and Commentary* (Oxford 2004). The UNIDROIT Principles of International Commercial Contracts 2004, produced by a group of international scholars and practitioners under the direction of Prof Joachim Bonell (Part I of which was published in 1994); the Principles of European Contract Law completed in 2003 prepared by scholars from all member states of the European Community.

15 UNCITRAL Model Laws on Electronic Commerce (1996) and on Electronic Signatures (2001); EC Directives on Electronic Commerce (2000) and on Electronic Signatures (1999); CMI Rules for Electronic Bills of Lading 1990; the Bolero (an acronym from Bill of Lading Registration Organisation) bill of lading prepared through the co-operation of the Through Transport Mutual Insurance Association (the TT Club) and the Society for Worldwide Inter Bank Financial Telecommunications (SWIFT) which operates through a joint venture company; and the ICC rules as to electronic presentation of documents.

16 The United Nations Convention on Contracts for the International Sale of Goods done at Vienna 11 April 1980 ("CISG") which superseded the Uniform Law on the Formation of Contracts for the International Sale of Goods, 1964 and the Uniform Law on the International Sale of Goods, 1964; and the ICC Official Rules for the Interpretation of Trade Terms (Incoterms 2000), replacing earlier versions.

17 The First Company Directive (EEC) (1968); the EEC Directive on Commercial Agents (1986); the UNIDROIT Convention on Agency in the International Sale of Goods done at Geneva 17 February 1983; and the UNIDROIT Model Franchise Disclosure Law (2002).

18 UNCITRAL Model Law on International Credit Transfers (1992); ICC Uniform Customs and Practice for Documentary Credits (1993) (UCP 500) and electronic supplement (EUCP); ICC Uniform Rules for Demand Guarantees (1992); International Standby Practices (ISP 98) by the Institute of International Banking Law & Practice Inc; UN Convention on Independent Guarantees and Stand-by Letters of Credit done at New York 11 December 1995; ICC Uniform Rules for Contract Bonds (1993).

19 The European Bank for Reconstruction and Development (ERBD) Model Law on Secured Transactions (1994); the Model Inter-American Law on Secured Transactions (2002); the various maritime conventions dealing with security: on Maritime Liens and Mortgages (1926 and 1993) and on Arrest (1952 and 1999); the Convention on the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft done at Rome on 29 May 1933; the Convention on the International Recognition of rights in Aircraft done at Geneva on 19 June 1948; the UNIDROIT Convention on International Financial Leasing done at Ottawa 28 May 1988; the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment and Protocol done at Cape Town on 16 November 2001; the UNIDROIT Convention on International Factoring done at Ottawa 28 May 1988; the UN Convention on the Assignment of Receivables in International Trade done at New York 12 December 2001.

20 The UNCITRAL Model Law on Cross-Border Insolvency (1997); the European Union Convention on Insolvency Proceedings; and the EC Council Regulation NO 1346/2000 on Insolvency Proceedings.

21 The EC Settlement Finality Directive (1998), 98/26/EC; and the EC Directive on Financial Collateral Arrangements (2002), 2002/47/EC.

22 The Convention on the Law Applicable to Agency done at the Hague on 14 March 1978; the Convention on the Law Applicable to Contracts for the International Sale of goods done at the Hague on 22 December 1986; the Convention on the Law Applicable to Contractual Obligations done at Rome on 19 June 1980; the Inter-American Convention on the Law Applicable to International Contracts done at Mexico on 17 March 1994; and the Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary done at the Hague in 2002.

23 The European Convention on State Immunity done at Basle on 16 July 1972; European Community Council Regulation No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters; a MERCOSUR Convention and Protocol on jurisdiction in civil and commercial matters; the Buenos Aires Protocol to the Treaty of Asuncion signed on 26 March 1991, on International Jurisdiction in Contractual Matters done at Buenos Aires on 5 August 1944; the Convention on the Service Abroad of Judicial or Extra-judicial documents in Civil or Commercial Matters done at the Hague on 15 November 1965; the European Community Council Regulation No 1348/2000 of 29 May 2000 on the service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters; the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters done at the Hague on 18 November 1970; European Community Council Regulation No 1206/2001 of 28 May 2001 on Cooperation of Courts of Member States in the Taking of Evidence in Civil or Commercial Matters; and the American Law Institute and UNIDROIT jointly developed Principles of Transnational Civil Procedure.

24 The Convention on the Recognition and Enforcement of Foreign Arbitral Award adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its 24th meeting (the New York Convention); the Inter-American Convention on International Commercial Arbitration done at panama City on 30 January 1975; the UNCITRAL Model Law on International Commercial Arbitration (1985); the UNCITRAL Arbitration Rules (1976); the ICC Rules of Arbitration (1998); and the London Court of International Arbitration Rules; UNCITRAL Notes an Organising Arbitral Proceedings; International Bar Association Rules on the Taking of Evidence; International Bar Association Guidelines on Conflicts of Interest; the International Centre for Dispute Resolution Arbitration Rules; International Centre for the Settlement of Investment Disputes Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings; the London Maritime Arbitrators' Terms 1997, 2002; the London Maritime Arbitrators Association Small Claims procedure.

25 *ALI/UNIDROIT Principles of Transnational Civil Procedure* (Cambridge University Press 2006).

26 For reference to the literature, see van Houtte, N *The Law of International Trade* (Sweet & Maxwell 2002) pp 24-28; Pryles, M "Application of the *lex mercatoria* in international arbitration" (2004) 78 *Australian Law Journal* 396; and Petrochilos, G *Procedural Law in International Arbitration* (Oxford University Press 2004) at 36 [2.04] ftnt 79.

27 See in particular, Mustill, M "The New Lex Mercatoria" in Bos, M and Brownlie, I (Eds) *Liber Amicorum for Lord Wilberforce*; and Mustill, M (1988) 4 *Arb Int'l* 86.

28 Bill of lading carriage or carriage under similar documents has been regulated by international convention since the 1920s. Charterparty carriage has been subjected to no international convention.

29 For example, the International Court of Arbitration, the London Court of International Arbitration, the Inter-American Arbitration Commission, the Singapore International Arbitration Centre, the Australian Chamber of International Commercial Arbitration, the Chartered Institute of Arbitrators, the American Arbitration Association, the London Maritime Arbitration Association, various national associations of maritime arbitration, the Paris Chambre Arbitrale Maritime, the Regional Centre for Arbitration

Kuala Lumpur, the Association of Maritime Arbitrators Canada, Vancouver Maritime Arbitrators Association, the Society of the Maritime Arbitrators Inc, the Houston Maritime Arbitrators, the Japan Shipping Exchange, the Tokyo Maritime Arbitration Centre, the China Maritime Arbitration Commission, the Australian Maritime and Transport Arbitration Commission. The list can go on, and on.

30 The National Arrangement used by the Federal Court of Australia in which nominated judges (13 in all) undertake the first instance and appeal work in maritime matters is, in effect, a working maritime court. China has a system of dedicated maritime courts. England has an Admiralty Court and a Commercial Court. Malaysia is to set up a maritime court. Many other courts have specialist maritime judges.

31 See the New York Convention Art II and Model Law Ch II.

32 The New York Convention Arts IV and V and the Model Law Ch VIII.

33 The New York Convention Art V r 2(b); the Model Law Art 36(1)(b)(ii).

34 See for example the discussion of the enhancing role of the court in respect of international arbitration Park, W (1980) 12 *Brooklyn J Int'l Law* 629; (1989) 5 *Arb Int'l* 230; and (1989) 63 *Tulane Law Rev* 647.

35 407 US 1 (1971)

36 See in particular, 407 US at 9-10 and 12-13 as follows:

Forum-selection clauses have historically not been favored by American courts. Many courts, federal and state, have declined to enforce such clauses on the ground that they were "contrary to public policy," or that their effect was to "oust the jurisdiction" of the court. Although this view apparently still has considerable acceptance, other courts are tending to adopt a more hospitable attitude toward form-selection clauses. This view, advanced in the well-reasoned dissenting opinion in the instant case, is that ***such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be "unreasonable" under the circumstances.***

[citations omitted and emphasis added]

The argument that such clauses are improper because they tend to "oust" a court of jurisdiction is hardly more than a vestigial legal fiction. It appears to rest at core on historical judicial resistance to any attempt to reduce the power and business of a particular court and has little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets. It reflects something of a provincial attitude regarding the fairness of other tribunals. No one seriously contends in this case that the forum-selection clause "ousted" the District Court of jurisdiction over Zapata's action. The threshold question is whether that court should have exercised its jurisdiction to do more that give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause.

There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect.

[footnotes omitted and emphasis added]

37 499 US 585 (1991)

38 At 499 US at 593-94

First, a cruise line has a special interest in limiting the fora in which it potentially could be subject to suit. Because a cruise ship typically carries passengers from many locales, it is not unlikely that a mishap on a cruise could subject the cruise line to litigation in several different fora. … Additionally, a clause establishing ex ante the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions. … Finally, it stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the

form of reduced fares reflecting the savings that the cruise line enjoys by limiting the for a in which it may be sued.

[citations omitted]

39 515 US 528 (1995)

40 46 US Code 1300

41 Art 3 r 8 reads:

Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connexion with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in this convention, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

42 At 515 US 550-551

[T]*his view* [that Art 3 r 8 and the equivalent provision isn COGSA should be construed to refer only to substantive rule to define a carrier's legal obligations] *is flatly inconsistent with the purpose of* [the provision]. *That section responds to the inequality of bargaining power inherent in bills of lading and to carriers' historic tendency to exploit that inequality whenever possible to immunize themselves from liability for their own fault. A bill of lading is a form document prepared by the carrier, who presents it to the shipper on a take-it-or-leave-it basis. … Characteristically, there is no arm's-length negotiation over the bill's terms; the shipper must agree to carrier's standard-form language, or else refrain from using the carrier's services. … COGSA represents Congress' most recent attempt to respond to this problem. By its terms, it invalidates any clause in a bill of lading "relieving" or "lessening" the "liability" of the carrier for negligence, fault, or dereliction of duty.*

When one reads the statutory language in light of the policies behind COGSA's enactment, it is perfectly clear that a foreign forum selection or arbitration clause "relieves" or "lessens" the carrier's liability. The transaction costs associated with an arbitration in Japan will obviously exceed the potential recovery in a great many cargo disputes. As a practical matter, therefore, in such a case no matter how clear the carrier's formal legal liability may be, it would make no sense for the consignee or its subrogee to enforce that liability. It seems to me that a contractual provision that entirely protects the shipper from being held liable for anything should be construed either to have "lessened" its liability or to have "relieved" it of liability.

43 Article 21. Jurisdiction

1. In judicial proceedings relating to carriage of goods under this Convention the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:
   (a) the principal place of business or, in the absence thereof, the habitual residence of the defendant; or
   (b) the place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or
   (c) the port of loading or the port of discharge; or
   (d) any additional place designated for that purpose in the contract of carriage by sea.
   2. (a) Notwithstanding the preceding provisions of this article, an action may be instituted in the courts of any port or place in a Contracting State at which the carrying vessel or any other vessel of the same ownership may have been arrested in accordance with applicable rules of the law of that State and of international law. However, in such a case, at the petition of the defendant,

the claimant must remove the action, at his choice, to one of the jurisdictions referred to in paragraph 1 of this article for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgement that may subsequently be awarded to the claimant in the action.

(b) All questions relating to the sufficiency or otherwise of the security shall be determined by the court of the port or place of the arrest.

3. No judicial proceedings relating to carriage of goods under this Convention may be instituted in a place not specified in paragraph 1 or 2 of this article. The provisions of this paragraph do not constitute an obstacle to the jurisdiction of the Contracting States for provisional or protective measures.

4. (a) Where an action has been instituted in a court competent under paragraph 1 or 2 of this article or where judgement has been delivered by such a court, no new action may be started between the same parties on the same grounds unless the judgement of the court before which the first action was instituted is not enforceable in the country in which the new proceedings are instituted;

(b) for the purpose of this article the institution of measures with a view to obtaining enforcement of a judgement is not to be considered as the starting of a new action;

(c) for the purpose of this article, the removal of an action to a different court within the same country, or to a court in another country, in accordance with paragraph 2(a) of this article, is not to be considered as the starting of a new action.

5. Notwithstanding the provisions of the preceding paragraphs, an agreement made by the parties, after a claim under the contract of carriage by sea has arisen, which designates the place where the claimant may institute an action, is effective

44 Article 22 Arbitration

1. Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to carriage of goods under this Convention shall be referred to arbitration.

2. Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and a bill of lading issued pursuant to the charter-party does not contain a special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier may not invoke such provision as against a holder having acquired the bill of lading in good faith.

3. The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:

(a) a place in a State within whose territory is situated:

(i) the principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or

(ii) the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(iii) the port of loading or the port of discharge; or

(b) any place designated for that purpose in the arbitration clause or agreement.

4. The arbitrator or arbitration tribunal shall apply the rules of this Convention.

5. The provisions of paragraphs 3 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith is null and void.

6. Nothing in this article affects the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage by sea has arisen.

45 (1) All parties to:

(a) a sea carriage document relating to the carriage of goods from any place in Australia to any place outside Australia; or

(b) a non-negotiable document of a kind mentioned in subparagraph 10(1)(b)(iii), relating to such a carriage of goods;

are taken to have intended to contract according to the laws in force at the place of shipment.

(2) An agreement (whether made in Australia or elsewhere) has no effect so far as it purports to:

(a) preclude or limit the effect of subsection (1) in respect of a bill of lading or a document mentioned in that subsection; or

(b) preclude or limit the jurisdiction of a court of the Commonwealth or of a State or Territory in respect of a bill of lading or a document mentioned in subsection (1); or

(c) preclude or limit the jurisdiction of a court of the Commonwealth or of a State or Territory in respect of:

(i) a sea carriage document relating to the carriage of goods from any place outside Australia to any place in Australia; or

(ii) a non-negotiable document of a kind mentioned in subparagraph 10(1)(b)

(iii) relating to such a carriage of goods.

(3) An agreement, or a provision of an agreement, that provides for the resolution of a dispute by arbitration is not made ineffective by subsection (2) (despite the fact that it may preclude or limit the jurisdiction of a court) if, under the agreement or provision, the arbitration must be conducted in Australia.

46 New Zealand; *Maritime Transport Act 1994*, 210(1); South Africa: *Carriage of Goods by Sea Act 1986*, s 3(1); and the Nordic countries: the Swedish Maritime Code c 13 ss 60 and 61; and see also the Canadian position under the Marine Liability Act 2001 c 6 s 46.

47 [2005] 1 Lloyd's rep 252; and [2005] 2 Lloyd's Rep 170

48 For example *Akai Pty Ltd v People's Insurance* [1998] 1 Lloyd's Rep 90; though importantly cf Sheen J in *The 'Al Battani'* [1993] 2 Lloyd's Rep 210 who suggested at (224) that an English Court might recognise the effect of foreign legislation on a contract governed by English law because of comity of nations.

49 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a **subject matter capable of settlement by arbitration.**

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

[emphasis added]

50 Article V sub-article 2(a) of the New York Convention and Articles 34(2)(b)(i) and 36(1)(b)(i) of the Model Law.

51 See generally Redfern, A and Hunter, M *Law and Practice of Commercial Arbitration* (Thomson/Sweet and Maxwell 2004) at 138 et seq; Mustill, M and Boyd, S *Commercial*

Arbitration 2001 Companion at 70-76; Sutton, D St. J and Gill, J *Russell on Arbitration* (Sweet and Maxwell 2003) at 12-15.

52 See UNCITRAL website http//www.uncitral.org for the papers of Working Group II on Arbitration and Working Group III on Transport.

53 (1978) 139 CLR 231

54 139 CLR at 258-59:
There is a further public policy consideration which at one and the same time bears upon the question of international commercial comity. While it is in the interests of great fleet-owning nations that their ocean carriers, and the servants and independent contractors which they employ, should be as fully protected as possible from liability at the suit of shippers and consignees, the interests of those nations which rely upon those fleets for their import and export trade is to the contrary. It was in response to such national interests that the United States of America and Australia, which both fell into the latter category, enacted the Harter Act of 1893 and our own Sea Carriage of Goods Act 1904, measures which circumscribed the carrier's freedom to contract out of liability. Each was more stringent than were the subsequent Hague Rules. Many nations, particularly developing nations, have come to regard those Rules as unduly favouring carriers at the expense of cargo owners, especially because of the quite restricted duration of the carrier's compulsory period of responsibility which they impose, ending as it does immediately upon discharge. It is not clear to me that Australian courts should regard it as in any way in the public interest that carriers' exemption clauses, effective before loading and after discharge, should be accorded any benevolent interpretation, either so as to benefit carriers or so as to benefit independent contractors by extending the scope of such clauses to include such contractors. If public policy does not dictate such a course, neither do considerations of comity. To read the transactions of the seminars on International Trade organized by the Attorney-General's Department is to appreciate the powerful movement among trading nations in a contrary direction, towards extension of the period during which both the ocean carrier and its land-based agents are to be denied the ability freely to exclude themselves from liability for damage to or loss of cargo. The draft Convention on carriage of goods by sea adopted at the ninth session of the United Nations Commission on International Trade Law (UNCITRAL) in 1976 provides evidence of this.

55 88 US 558 (1875) at 573

56 [1946] P 135 at 155-156. A 19th century Scottish advocate and scholar James Reddie put it as follows in Researches Historical and Critical in Maritime International Law vol 1 (Elibron Classics) at pp 18-19 and 19-20:

In considering, in a separate work, the private law of Maritime commerce, which, though common, and very similar among most civilized states, forms a part of the private internal law of each state or jurisprudence, we found that its principal doctrines might be arranged under the following heads. In the first place, property in vessels, as the instruments by which Maritime commerce is carried on; the right and duties of the persons by whom the vessel is put in motion, or navigated; the rights and obligations of the persons by whom the vessel is converted to use, under the contracts of affreightment and charter party; and the rights and obligations arising out of the arrangements by which the Maritime exchange of commodities is effected. In the second place, those contracts and arrangements among individuals, by which Maritime commerce is rendered more safe for the individual, by the diffusion of the risk under the contract of insurance; by which it is enlarged or extended, under the contract or copartnership; and by which it is facilitated, through bills of exchange.

In this amicable and pacific intercourse, questions as to property in vessels – disputes between the owner, part owner, masters, and crew, or persons employed in the navigation of the vessel – questions between the owner or master of the vessel, and the charterer or freighter of the vessel, or owner of the cargo shipped for conveyance – the reciprocal rights of the merchants who order or purchase, or who sell, or consign for sale, the goods shipped and conveyed – the reciprocal rights and obligations of copartners, of the insurers and insured, and of the parties to bills of exchange, drawn or granted for the value of the goods conveyed, are all judged of and settled, although between parties who stand in the relation

of foreigners to each other, according to very similar principles and rules, by the judicial tribunals of their respective nations. And in such questions of private right, between the individuals of separate independent states, the judgments of the courts of law of civilized states, have, in peace, in general, been satisfactory, notwithstanding national bias; and have not required, or, at least, have not led to the establishment of regular, international courts, for the decision, during peace, of such question s between the members of different nations.

57 The 'Tojo Maru' [1972] AC 242

58 [1978] AC 1 at 8

59 *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40; *Threlkeld & Co Inc v Metallgesellschaft Ltd* (London) 923 F 2d 245 (2d Cir 1991); and *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45.

60 Involved in that is the question whether to make it central or peripheral.

AMTAC Annual Address 2008

The Challenges for International Arbitration in Australia

27 November 2008

Professor Doug Jones AO

INTRODUCTION

I am delighted to be given the opportunity to deliver the annual AMTAC address. The work of AMTAC is an essential part of the development of International Arbitration in Australia. Firstly, I would like to take this opportunity of congratulating the AMTAC Executive on their achievements since the establishment of AMTAC on 30 August 2007.

I am speaking tonight on the challenges facing international arbitration in Australia. This is a particularly relevant subject since the release last Friday (21 November 2008) of a review of the International Arbitration Act by the Commonwealth Attorney General, The Honourable Robert McClellan MP. When launching his review of the International Arbitration Act the Attorney General commented in his speech to the ACICA International Arbitration Conference upon the importance of International Arbitration to the development of Australia as an economic centre in our region.

The establishment and maintenance in this country of a vibrant centre for International Commercial Arbitration is critical to the development of Australia as a place for international commerce. No financial centre can be successful without having the ability to offer its users an effective, reliable, independent and predictable means of resolution of commercial disputes.

The growth and development of International Arbitration for the resolution of commercial disputes involving parties who involved in international trade has arisen, at least in part, because of the desire of those parties to commit the resolution of their disputes to a neutral forum which will hear the dispute at a place geographically independent of both parties. International Commercial Arbitration has been a Eurocentric and North American phenomenon for many

years but is rapidly developing as an essential part of the resolution of commercial disputes in our region. Given the trade flows between countries in our region this is unsurprising. Australia is well placed to provide these neutral venue services to those involved in international trade in our region. The Attorney General's review of the International Arbitration Act provides an opportunity to tweak an already effective system for International Commercial Arbitration in our country.

I would like firstly to comment upon some aspects of the Attorney General's discussion paper and then turn to an overview of the present landscape for International Arbitration in this country.

ATTORNEY GENERAL'S DISCUSSION PAPER

A. Amendment of the meaning of the 'writing' requirement in Part II of the International Arbitration Act

Part II of the International Arbitration Act provides that the requirement that an arbitration agreement be an agreement in writing and that the term "agreement in writing" has the same meaning as in the New York Convention (s 3(1)). Generally, the requirement for writing in the New York Convention has been subject to a range of different interpretations in foreign jurisdictions. In Australia, the interpretation of what constitutes as "agreement in writing" has been broad. For example, the Attorney General's discussion paper gives the example of *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192 where the Court held that the writing requirement may be satisfied by "clear mutual documentary exchange as to the terms of, and assent to, the arbitration agreement."[1] The Attorney General also notes that this broad interpretation of the New York Convention is consistent with international best-practice as indicated in the 2006 UNCITRAL Recommendation on interpreting the writing requirement.

In order to make the common law position clearer, the Attorney General has asked if the meaning of the writing requirement for an arbitration agreement in Part II of the International Arbitration Act (s 3(1)) should be amended? Furthermore, the paper asks whether elements of the UNCITRAL Model Law be used in the amended definition?

Despite the writing requirement not being the subject of as much controversy in Australia as in other jurisdictions the International Arbitration Act should be amended. By adopting the international trend, Australia will be part of a common international approach to this issue.

B. Grounds on which a court may refuse to enforce a foreign arbitral award

Section 8 of the International Arbitration Act provides that a court may refuse to enforce a foreign arbitral award if one of the listed grounds (at ss8(5), (7), and (8)) is satisfied. Controversially, this has been interpreted broadly with the Court in *Resort Condominiums International Inc v Bolwell and Another* [1995] 1 Qd R 406 stating that a court retains a general discretion to refuse enforce a foreign arbitral award even if none of the grounds listed in section 8 are made out. For the sake of clarity, the International Arbitration Act should be amended as suggested to provide expressly that a court may refuse to enforce an arbitral award only if one of the grounds listed in section 8 is made out.

C. Should the International Arbitration Act exclusively govern international commercial arbitration to which the UNCITRAL Model Law applies?

The question is asked by the Attorney General whether the International Arbitration Act should be amended to provide expressly that the Act governs exclusively an international commercial arbitration in Australia to which the UNCITRAL Model Law applies. It is noted that this would exclude any potential application of the State and Territory Commercial Arbitration Acts to international commercial arbitrations subject to the model law.

Such an amendment would be advantageous. As indicated by the Attorney General, such an approach would help ensure that the laws governing international arbitration in Australia are simple and consistent. These are vital elements if Australia is to become an effective forum for international arbitration.

D. The adoption of arbitral rules and the 'opting out' of the UNCITRAL Model Law

In Australia, parties can agree that a dispute between them is to be settled otherwise than in accordance with the UNCITRAL Model Law.[2] The application of this provision was considered in the case of *Eisenwerk v Australia Granites Ltd* [2001] 1 Qd R 461. In this case, the Court found that by agreeing to settle their dispute in accordance with the ICC Rules, the parties had opted out of the UNCITRAL Model Law. This decision was followed by a Singaporean decision concerning a similar provision in the Singaporean International Arbitration Act. While the effect of the Singaporean decision was the same as in *Eisenwerk*, it was subsequently reversed by an amendment to the Singapore International Arbitration Act. The Attorney General therefore asks whether the Singaporean approach should be followed and the International Arbitration Act amended to reverse the *Eisenwerk* decision?

The *Eisenwerk* decision constitutes a significant impediment to the encouragement of international arbitrations in Australia. For that reason, ACICA wrote to the Office of the Attorney-General in May 2005, strongly recommending that the IAA be amended to make it clear that the parties will not exclude the Model Law simply by choosing a set of arbitration rules in their arbitration agreement, whether those rules be those of an arbitral institution or ad hoc rules. The current position has not changed, ACICA strongly supports the overturning of the *Eisenwerk* decision by legislation.

E. Drafting inconsistencies in Division 3 of Part III of the International Arbitration Act

It is noted in the discussion paper that there are drafting inconsistencies in Division 3 of Part III of the Act. Section 22 provides that these provisions (s25-27) apply on an opt-in basis, however, section 25-27 are stated to apply on an opt-out basis. The Attorney General therefore asks whether these inconsistencies should be remedied and if so should it be amended such that sections 25-27 apply on an opt-out basis?

As stated in the speech by the Attorney General, the Act must provide a clear and comprehensive framework for international arbitration in Australia. Through this arbitration proceedings can be

both efficient and effective. To this end, such inconsistencies should be remedied with sections 25-27 applying only on an opt-out basis.

F. 2006 amendments to the UNCITRAL Model Law

A range of amendments were made to the Model Law in 2006, these included.

- amendments aimed at promoting uniform interpretation of the UNCITRAL Model Law;
- altering the definition of an 'arbitration agreement' such that when adopting the revised article, States must choose between either a requirement that an 'arbitration agreement' be in writing, albeit broadly interpreted, or removing the writing requirement all together.
- adoption of more extensive provisions in a new chapter IVA on interim measures and preliminary orders.

The most controversial aspect of the amendments was that of Article 17 which provided for *ex parte* interim measures of protection (i.e., measures obtained by one party from the Tribunal, in the absence of the other party), which the ACICA Rules do not, and probably should not pick up. The Government is to be applauded for not intending to implement amendments allowing for *ex parte* preliminary orders

The Attorney General asks whether the International Arbitration Act should be amended to reflect these recent changes to the UNCITRAL Model Law?

It is suggested that the International Arbitration Act should be amended to reflect these recent changes to the UNCITRAL Model Law, obviously with the exception of ex parte interim measures of protection in section 2. This would bring Australia up to date with current practice and learning in the area.

G. Should a court or other authority perform the functions under the UNCITRAL Model Law?

Article 6 of the UNCITRAL Model law provides that certain functions, such as appointing arbitrators and hearing challenges to arbitrators, may be performed by a court or other authority designed for that purpose. In Australia, all such functions are performed by designated courts. However, in other jurisdictions including Sin-

gapore and Hong Kong, certain functions have been conferred on a national arbitration centre (Singapore International Arbitration Centre and Hong Kong International Arbitration Centre respectively). In line with the need to promote Australia as an attractive venue for international arbitration the Attorney General therefore asks whether the International Arbitration Act should be amended to follow Singapore and Hong Kong and allow arbitral institution to appoint arbitrators? Furthermore, would it be appropriate for other functions referred to in Article 6, such as hearing challenges to arbitrators, to also be performed by an arbitral institution similarly designated under the International Arbitration Act?

The current situation represents a real competitive disadvantage for Sydney and Australia. The International Arbitration Act must be amended to nominate the functions of appointing arbitrators and hearing challenges to arbitrators to an arbitral institution. The Australian Centre for International Commercial Arbitration is ideally suited to perform this. The function of appointing arbitrators is performed by the Singapore International Arbitration Centre (SIAC) and the Hong Kong International Arbitration Centre(HKIAC). This is a step necessary to recognise the reality that arbitral centres such as ACICA, SIAC and HKIAC have Panels of International Arbitrators and a knowledge of the ability and availability of such arbitrators beyond that of parties or the courts. One has to look no further than the UNCITRAL Rules for the Conduct of Commercial Arbitration to see the international recognition that is accorded to institutions in the context of both appointment of arbitrators and the hearing of challenges to arbitrators. Parties adopting the UNCITRAL Model Rules, without a designation of an appointing authority are directed to the Secretary General of the Permanent Court of Arbitration in The Hague whose function it is to designate an appointing authority for the purpose of appointing arbitrators. A similar role is provided in relation to challenges to arbitrators. An appropriate course for amendment would be to designate ACICA for the purposes of both appointment of arbitrators and the initial hearing of challenges.

It is interesting to note that in both Singapore and Hong Kong there are vibrant Domestic Arbitration Institutions whose responsibility it is to develop and promote arbitration and other forms of

ADR domestically. These co-exist with and supplement the efforts of the HKIAC and the SIAC whose responsibility it is to promote International Arbitration and other forms of international ADR. A very similar situation exists here in Australia with a vibrant Institute of Arbitrators & Mediators Australia co-existing with the Australian Centre for International Commercial Arbitration.

H. Jurisdiction under the International Arbitration Act

Currently, both the Federal Court of Australia and the State / Territory Supreme Courts have jurisdiction for matters arising under the act.

When releasing the discussion paper the Attorney General announced that he would be shortly introducing a bill to the Commonwealth Parliament to give the Federal Court jurisdiction under Parts III and IV of the International Arbitration Act. This will have the effect of the Federal Court then having concurrent jurisdiction with the State and Territory Supreme Courts for all matters arising under the Act. The issue of whether this jurisdiction should be conferred exclusively on the Federal Court has been raised by the Attorney General. He saw one advantage of such a move to be the development of a more uniform body of jurisprudence in applying the International Arbitration Act. This is an interesting proposal deserving of detailed consideration.

OTHER CHALLENGES

I would like to now share with you some views in relation to the development of International Arbitration in Australia.

A. A coordinated approach

ACICA is the strategic vehicle for the development of a cluster of excellence in International Arbitration in our country. ACICA was formed in 1985 but was reinvigorated in 2003 and enjoys the financial support and resources of its corporate members, Blake Dawson, Clayton Utz, Corrs Chambers Westgarth, DLA Phillips Fox, Freehills, Mallesons Stephen Jaques and PricewaterhouseCoopers. It also has a substantial individual member base. However, ACICA alone cannot achieve excellence. The strategy of ACICA is to form part of, and support a virtuous circle consisting of academic institutions, other arbitral bodies committed to the development of an

International Arbitration practice in Australia, and those individuals committed to the development of the area.

There is already strong support academically for the study of International Arbitration in our country. Currently a host of the finest academic institutions are offering lawyers, business people and professionals an opportunity to study domestic and international arbitration law under the guidance of some of the world's leading arbitration scholars and practitioners. Such institutions include: Murdoch University, University of Melbourne, Monash University, University of Sydney, University of Technology Sydney, University of New South Wales, University of Queensland, and Deakin University. For International Arbitration in Australia to thrive, the development of great arbitrator practitioners and arbitrators is vital. In return, Australians overseas represent the success of International Arbitration in Australia.

So far as other ADR bodies are concerned ACICA enjoys strong support from each of them including:

- Australasian Forum for International Arbitration (AFIA) - founded in 2004 to promote international arbitration amongst 'younger practitioners' the AFIA provides a valuable platform for the communication of issues regarding international arbitration.
- Chartered Institute of Arbitrators (CIArb) - a professional body dedicated to the promotion of disputes by arbitration, mediation and conciliation. To this end, the Institute provides education and training as well as qualified persons to act as arbitrators, mediators and expert witnesses.
- Australian Commercial Disputes Centre (ACDC) - an independent, not-for-profit organisation, which aims to advance the practice and quality of alternative dispute resolution services, such as arbitration, in Australia.
- Institute of Arbitrators & Mediators Australia (IAMA) - founded in 1975, membership includes some of Australia's eminent and experienced professionals from a diverse range of sectors including commercial, legal, industry, education and government.
- Western Australian Institute of Dispute Management (WAIDM) - founded in 2006 it is currently the Western

> Australian Registry of ACICA. The aim of the institute is to provide a centre of excellence in domestic and international dispute management, research and training together with the provision of arbitration, mediation and negotiation services to the legal and business communities of Western Australia.

By way of example the recent International Arbitration conference held last week was supported by each of these ADR bodies. It is vital that there is cooperation between the various parties for Sydney and Australia to succeed as a venue for international arbitration. I am happy to say that this is happening.

For example, CIArb and ACICA have been active in the establishment and promotion of the Diploma in International Commercial Arbitration in conjunction with the University of New South Wales for the last 3 years. The intensive course teaches participants the practice of international commercial arbitration, including all major forms of arbitration and related dispute settling mechanisms. Notably the course organisers have recognised the need for specialist teaching with a range of lectures and expert commentary given by a range of distinguished arbitrators lawyers, and judges.

B. ACICA initiatives

ACICA itself has established a number of initiatives.

Despite already having a set of arbitration rules which provide an advanced, efficient and flexible framework for arbitration ACICA have not rested on their laurels. Recently, in a response to the market need for an accelerated arbitration process, ACICA has created the 'Expedited Arbitration Rules'. These changes further encourage the use of ACICA rules and arbitration clauses.

However, there needs to continue to be strong encouragement of the use of the ACICA Rules and arbitration clauses by Australian enterprises engaging in international trade.

To this end, ACICA has been active in capturing the diaspora of Australians practising International Arbitration around the world. Judith Levine, now the Legal Counsel at the Permanent Court of Arbitration at The Hague, is a member of the ACICA board. We have also recently established a new category of ACICA membership open to Australians working, studying, or teaching in the field of International Arbitration outside Australia. Currently this

includes over 20 people, based mainly in London, Paris and New York, but also in Singapore and Hong Kong, have now joined as overseas members. We expect that this number will grow in the coming months. We plan to keep in touch with our new members through regular newsletters. Also we expect, in due course, to be able to set up a "chat room" facility, so our overseas members can communicate directly with one another.

In the name of cooperation, ACICA has also been increasing our engagement with the Law Institute of Victoria (LIV). This has involved exploring the ways in which ACICA and the LIV can collaborate to further our mutual goals of developing and promoting the legal profession. Such initiatives include ACICA contributing to the LIV's conferences and publications, and working out ways in which the two organisations can share facilities.

We also enjoy strong links with WAIDM and the strong and enthusiastic support of Professor Gabriël Moens at Murdoch University.

To emphasise the geographic diversity of Australia, two Deputy Secretaries General are based in Melbourne (Jonathon DeBoos) and Perth (Professor Gabriël Moens) with responsibility for our Melbourne and Perth registries.

ACICA is active in the promotion of International Mediation. ACICA offers a range of mediation administrative services for international mediations, including recommendations and/or appointments of experienced international mediators, collection of fees and holding of a security deposit.

These initiatives are in addition to the general promotion of Sydney and Australia as a venue for international arbitration, this is achieved through a variety of means including:

- establishing and maintaining high level contacts with overseas centres, organisations and key individuals;
- ensuring ACICA representation at important overseas conferences and meetings;
- hosting conferences and seminars (alone and with other bodies);
- acting as the Asia/Pacific representative of significant overseas arbitral institutions; and
- producing and distributing appropriate publications and literature.

C. AMTAC initiatives

We are very proud of the development of AMTAC which has been established as an ACICA Commission with the support of the Federal Attorney General's Department and comes at a time when approximately 12% of world trade by volume either comes into or out of Australia by sea.

AMTAC's objectives are :

- to support and facilitate international and domestic arbitration and mediation;
- to promote Australia and the Asia Pacific region, maritime and transport scholarship and affairs and dispute resolution; and
- to establish registers of arbitrators, mediators and experts with experience in maritime and transport matters.

The structure of AMTAC consists of an Executive of a Chair and three Vice Chairs, a Secretary General, Foundation Members and Members.

Membership of AMTAC is open to any organisation or person, having an interest in maritime and transport arbitration and mediation and being approved by the Executive.

AMTAC will work closely with industries to promote an understanding of, and provide services for, maritime and transport dispute resolution in Australia and the Asia Pacific region.

To achieve its objectives, AMTAC:

- promotes its recommended arbitration clause in standard form maritime and transport contracts;
- promotes the ACICA Expedited Arbitration Rules and ACICA Mediation Rules;
- provides access to established expertise in arbitration and mediation of disputes for the maritime and transport industries;
- convenes conferences and training programs for arbitrators, mediators and practitioners; and
- provides mutual assistance in the promotion of AMTAC members and their activities.

D. Future issues

So much for the positive side of things. It would be foolish not to recognise and accept that we face significant challenges. Among these are:

The success of SIAC and HKIAC as International Arbitral Centres in our region. While these institutions are a formidable opponent, the flow of international trade within our region suggests that this is an expanding market and we can identify and build upon the niche that Australia offers to participants in these trade flows. This will of course be dependent on the bargaining power of the parties to the various contracts which contain the arbitration clauses, but it will also be dependent on other factors which lead parties to choose the seat of an arbitration.

The tyranny of distance is also a significant issue. This has undoubtedly delayed the development of Australian Centres for International Arbitration. However, all of the potential venues for International Arbitration in Australia are attractive both geographically, and from a logistic and cost perspective. The development of a cluster of excellence is a key issue in the development of this work. Furthermore, Australia is a stable democracy with a well established common law system whose predictability and longevity is not open to question.

Training and practise in the field is essential in order to develop our planned awareness and credibility. The development of a local expert arbitrator base is also critical.

All of the initiatives which I have identified above are designed to meet these challenges.

This is a medium term objective, Rome was not built in a day but lasted for a long period of time. May I suggest to those who find the challenge daunting that being part of the process of building has huge rewards for all those involved.

BIOGRAPHICAL DETAILS

Professor Doug Jones AO is a leading independent international commercial and investor/state arbitrator.

The arbitrations in which he has been involved include infrastructure, energy, commodities, intellectual property, commercial and joint venture, and investor-state disputes spanning over 30 jurisdictions around the world.

Doug is an arbitrator member at Arbitration Place in Toronto and a door tenant at Atkin Chambers in London, and has an office in Sydney, Australia.

Prior to his full time practice as an arbitrator Doug had 40 years' experience as an international transactional and disputes projects lawyer.

Doug is acknowledged as a leading arbitrator and is highly ranked in a number of leading publications. Most recently, in 2017, Chambers Asia-Pacific recognised Doug as "without question the leading Asia-Pacific-based arbitrator for construction disputes", and he maintained his Band One ranking in the International Arbitration Category.

Doug has published and presented extensively, and holds professorial appointments at Queen Mary College, University of London and Melbourne University Law School.

Doug is an officer of the Order of Australia, and one of only four Companions of the Chartered Institute of Arbitrators.

NOTES TO CHAPTER

1 at 152.

2 s 21, International Arbitration Act.

AMTAC Annual Address 2009

More Lawyers but Less Law: Maritime Arbitration in the 21st Century

2 July 2009

Professor Martin Davies, Admiralty Law Institute Professor of Maritime Law, Tulane University Law School. Director, Tulane Maritime Law Center. Professorial Fellow, Melbourne Law School.

1. INTRODUCTION

Maritime arbitration is increasingly dominated by lawyers, both as arbitrators and in argument before the arbitral tribunal. At the same time, judicial review of arbitral awards is becoming increasingly restricted. That leads to greater autonomy for the arbitral tribunal but also less scope for the development of precedent in judicial decisions. Finding the right balance between autonomy and reviewability is an important but difficult task for a country that seeks to establish itself as being hospitable to arbitration. On the one hand, the parties to an arbitration generally favour finality of result and are uneasy at the prospect of arbitration being merely the first step in a protracted dispute resolution process that goes on to be fought out in court. On the other hand, there must be some scope for judicial review of what the arbitral tribunal does in order to maintain the integrity of the arbitral process. In the home of the two main centres of maritime arbitration, London and New York, the law is in some degree of flux in relation to finding the right point of balance between autonomy and reviewability. In Australia, there has as yet been little opportunity to test the relevant statutory provisions.

Section 2 of this paper is concerned with the increasing involvement of lawyers in maritime arbitration. Section 3 is concerned with the restriction of judicial review of arbitral awards. The combined effect of these two phenomena is the rather paradoxical situation alluded to in the title of the paper. There may be more lawyers involved in maritime arbitration but the end result may be less law, in the sense of judicially created precedent that can be applied by future courts and arbitral tribunals.

2. MORE LAWYERS

The 2008 William Tetley Maritime Law Lecture at the Tulane Maritime Law Center was delivered by Bruce Harris, a full-time maritime and commercial arbitrator in London and former President of the London Maritime Arbitration Association (LMAA). Mr Harris has enormous experience as an arbitrator: he has been appointed as arbitrator more than 8,000 times and is signatory to more than 2,000 arbitral awards. He does not, however, have formal legal training and he is not admitted to practice as a barrister or solicitor. In his Tetley Lecture, Mr. Harris noted that in that respect, he is something of a dying breed. Speaking of the LMAA, of which he has long been a member, Mr Harris said:[1]

> *"Even once the LMAA was formed, in 1960, its membership was almost entirely made up of brokers and others directly involved in day-to-day shipping activities. Nowadays, though, all that has changed. Today's maritime arbitrators – or at least those who do the majority of the work in London – are mainly people (sadly only men, in fact) who have a legal background. A couple have worked in law firms, at least one has practised as a barrister, and a number have worked in P&I Clubs, usually after obtaining a practising certificate as a lawyer.*
>
> *This is a phenomenon that is often the subject of complaint. There are not, we are told, enough truly commercial arbitrators: we need more people from the industry, not lawyers."*

If maritime arbitration in London is perceived as being the domain of lawyerly interpretation, maritime arbitration in New York is still seen as being the domain of "truly commercial" arbitration. That is because membership of the Society of Maritime Arbitrators (SMA) is confined to commercial people, recognized as leaders in their respective sectors of the industry, who have held a responsible commercial position for at least ten years.[2] Maritime lawyers, no matter how experienced, cannot become SMA members unless they also have the requisite ten years of senior experience in some sector of the shipping industry. The "truly commercial" nature of New York maritime arbitration is jealously guarded. In *WK Webster & Co v American President Lines Ltd*,[3] the losing party in a New York maritime arbitration resisted confirmation of the arbitral award on

the ground that one of the arbitrators was not a "commercial man" as required by the arbitration agreement, because he was an attorney. The SMA participated as *amicus curiae*, supporting the argument that an attorney could not be a "commercial man". The US Court of Appeals for the Second Circuit ultimately confirmed the award but only because the attorney had spent most of his career on the commercial side of the maritime industry. If he had obtained his commercial experience solely as a practicing member of the legal profession, he would not have qualified to act as an arbitrator.[4]

Because so much of the American shipping industry has moved off-shore to tax havens and flags of convenience, the "commercial people" restriction on membership of the SMA means that there is a dwindling, aging pool of maritime arbitrators in New York. There are presently 72 members of the SMA.[5] Of those 72, only one is under 50 years of age and 35, almost half of the pool, are over 70 years of age. Eleven (15.27% of the pool) are over 80 years of age. One obvious consequence of this is that the number of maritime arbitrations in New York has been going down as New York loses business to London. In his Tetley Lecture, Bruce Harris observed:[6]

> *"In the past ten years or so, however, New York's maritime arbitration practice has dwindled very substantially, such that there is now no real question that London has at least half and probably three-quarters – or more - of all the maritime arbitration that takes place in the world."*

In other words, maritime arbitration is migrating from the "truly commercial" arbitrators of New York to the lawyerly arbitrators of London.

Where do Australia and New Zealand stand in comparison? Of the 26 people on the Panel of Arbitrators of the Maritime Law Association of Australia and New Zealand, 23 have legal qualifications.[7] Only five[8] have the kind of industry experience that would qualify for membership of the SMA in New York. In short, Australia and New Zealand are more like London in this respect than New York.

Not surprisingly, the increase in the proportion of lawyers sitting as arbitrators has led to a concomitant increase in the number of lawyers appearing before arbitral tribunals. Again, Bruce Harris's Tetley Lecture marked the shift:[9]

> *"*[N]*owadays, solicitors on behalf of the parties handle most London maritime arbitrations, and those solicitors often employ barristers in addition. That, I believe, has come about partly because of the increasing complexity of the matters... But it is also because at some point in, I think, the 1970s, shipowners and charterers and their brokers decided not to replace a whole generation of internal insurance and claims managers who had, until that time, run the majority of arbitrations on behalf of their principals. And at around the same time, the P&I Clubs who had also been assisting shipowners in particular by running some arbitrations for them, started to farm work out to solicitors. The result was that lawyers became involved in almost every case."*

In summary, it should be clear that maritime arbitration in two main centers of London and New York is increasingly the domain of lawyers, as it would be in Australia and New Zealand.

3. LESS LAW - RESTRICTING JUDICIAL REVIEW OF ERRORS OF LAW

Obviously, the presence of more lawyers in maritime arbitration means that there will be more legal argument before the arbitral tribunal and awards will increasingly be based on interpretation of the law. Of course, arbitral awards have no precedential effect. Precedent can only come from courts. As a result, the availability of judicial review becomes a pressing question, particularly judicial review for errors of law. Unless at least some cases can find their way to court for judicial review, there will be no possibility of correcting errors of law and no possibility of developing and honing legal principles that do have precedential effect. In London, there is presently some concern that judicial review has been restricted to such an extent that the development of English commercial law is being stifled. In New York, judicial review of arbitral awards for errors of law is extremely difficult to obtain. Indeed, according to some interpretations of a recent Supreme Court decision, it is non-existent. That has led to the very thing now feared in London, namely the stifling of development of areas of maritime law in which disputes are commonly arbitrated. I shall argue that in Australia, the possibility

of judicial review for error of law in an international maritime arbitration is non-existent.

3.1 London

Judicial review of arbitral awards in the UK has passed through three stages. Under the *Arbitration Act 1950* (UK), s 21, there was virtually unlimited right to appeal to court on points of law by making a Special Case to the Commercial Court on any issue of law. That was changed by the *Arbitration Act 1979* (UK) s 1(3)(b), which made judicial review much more difficult to obtain. Review became discretionary and was only available with leave of the court. The criteria for review were not set out in the statute but were established by the decision of the House of Lords in *BTP Tioxide Ltd v Pioneer Shipping Ltd (The Nema)*.[10] The procedure for review remained much the same when the *Arbitration Act 1996* (UK) was passed, but the Nema-like criteria were included in the statute. The procedure for appeal on a point of law is now contained in s 69 and the relevant criteria are that "on the basis of the findings of fact in the award: (i) the decision of the tribunal on the question is obviously wrong; or (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt".[11]

The 1996 version of appeal on a point of law has been narrowly interpreted. Because appeal is only available if the decision is questionable "on the basis of the findings of fact in the award", it has been held that there can be no appeal to court on the arbitral tribunal's findings of fact nor that the evidence did not support the tribunal's findings of fact.[12] The "obviously wrong" standard is a higher hurdle to jump than mere error. In *Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd*,[13] Akenhead J said:

"To be 'obviously wrong', the decision must first be wrong at least in the eyes of the judge giving leave. However, any judge of any competence, having come to the view that it is wrong, will often form the view that the decision is obviously wrong. It is not necessarily so, however, as a judge may recognise that his or her view is one reached just on balance and one with which respectable intellects might well disagree; in those circumstances, the decision is wrong but not necessarily 'obviously' so."

A judge's decision to refuse leave to appeal cannot itself be appealed unless the judge considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.[14] In *CGU International Insurance PLC v Astrazeneca Insurance Co Ltd*,[15] the Court of Appeal held that the Court of Appeal cannot itself give leave to appeal unless there was unfairness in the process by which the judge came to the decision about leave. In other words, the Court of Appeal cannot give leave to appeal simply because it disagrees with the first instance judge about whether the question is one of general importance.

As I have already noted, there is some concern in the UK that the restriction on judicial review of arbitral awards has gone too far. The Commercial Court Users' Committee asked Lord Mance to chair a Working Group to review the impact of the *Arbitration Act 1996* (UK) s 69 and, in particular, whether there is any case for making access to court easier in the limited area of maritime law. In May 2009, the Committee issued its First Interim Report, which contained a statistical analysis of the number of cases that underwent judicial review in each of the three eras described above.[16] The First Interim Report shows that in 1978, the last year of the first era, 300 Special Cases were set down for hearing in the Commercial Court. The Committee estimated that probably about 175 of them were from maritime awards, although there were no reliable statistics. In the ten-year period between 1968 and 1978, 107 Special Cases from maritime awards were reported in Lloyd's Law Reports. Fifty-seven of the reported Special Cases went up to the Court of Appeal and 10 to the House of Lords. In other words, the old system produced a healthy flow of precedent-creating judicial review. In contrast, in 1990, during the second era, there were 39 applications for judicial review of maritime awards, which amounted to 58% of the total of 67 applications for review of arbitral awards under s 69. In 2008, in the third era, there were 41 applications for judicial review of maritime awards, which amounted to 72% of the total of 57 applications for review of arbitral awards under s 69. Significantly, leave to appeal was granted in only 14 of them. Only six challenges were successful.

The First Interim Report shows quite how dramatic the change has been in London. Three hundred cases in 1978 may well have been too many but the very existence of Lord Mance's Committee is testament to the concern that 14 cases in 2008 were too few. Delivering the Cedric Barclay Memorial Lecture at the 15th International Congress of Maritime Arbitrators (ICMA XV) in 2004, Robert Finch, then Lord Mayor of London, delivered a plea for more appeals to be allowed through the net of s 69, saying:[17]

> "[T]*he present day restrictive system of appeals from arbitration is having a stultifying effect on the development of English commercial law and there is a danger that if this situation persists it may do long-term damage.*"

It must be said that that concern is not universally shared in London. Nevertheless, if one looks to the situation in the United States, one can see clear evidence of the atrophying effect that restricted judicial review can have on development of maritime law.

3.2 New York

Judicial review of arbitral awards is very difficult to achieve in the United States. The grounds upon which an arbitral award can be vacated are set out in the Federal Arbitration Act, 9 USC § 10. It is a limited list of procedural irregularities, such as fraud, corruption, evident partiality, the arbitrators exceeding their powers, etc. There is no mention of review for mistakes of law. However, judicial decisions did create another ground for review, known as "manifest disregard of the law". In 2008, in *Hall Street Associates LLC v Mattel Inc*,[18] the Supreme Court of the United States held that the parties cannot agree to expand the list of grounds for vacatur set out in 9 USC § 10.[19] Because "manifest disregard" is not on the list in 9 USC § 10, some circuit courts of appeal have held that *Hall Street* has produced the result that manifest disregard of the law does not constitute an independent, non-statutory ground for vacating awards under the *Federal Arbitration Act (FAA)*. That is the position adopted by the Fifth, Eighth and Eleventh Circuits.[20] In contrast, the First, Second, Sixth and Ninth Circuits have applied the "manifest disregard" standard after *Hall Street*.[21] The inclusion of the Second Circuit on the latter list is significant for purposes of

maritime arbitration because New York City is in the Second Circuit. Thus, for the time being at least, "manifest disregard" lives on as a ground for reviewing maritime arbitration awards in New York.

However, the post-*Hall Street* Second Circuit decision that applied the "manifest disregard" standard has been appealed to the Supreme Court of the United States.[22] At the time of writing, the Supreme Court had not decided the case. Some believe that the appeal will give the Supreme Court the opportunity of resolving the circuit split and ruling definitively on whether "manifest disregard" is a ground for vacatur. I doubt that myself, because the questions on which the Supreme Court granted certiorari (equivalent to leave to appeal) did not include whether "manifest disregard" is a ground for review.[23] Whether or not the Supreme Court resolves that question on this occasion, it must surely do so soon because the circuit split on that question after *Hall Street* already covers most of the circuits in the country.

Thus, there is a real prospect that "manifest disregard" will soon no longer be a ground for vacatur of maritime arbitration awards in New York. Despite the view taken by the First, Second, Sixth and Ninth Circuits, the straws in the wind in *Hall Street* make the Court's opinion fairly clear. The majority said:[24]

> *"[T]he text compels a reading of the §§ 10 and 11[25] categories as exclusive. To begin with, even if we assumed §§ 10 and 11 could be supplemented to some extent, it would stretch basic interpretive principles to expand the stated grounds to the point of evidentiary and legal review generally."*

Even if "manifest disregard" has survived *Hall Street*, it is a very narrow ground for review of an arbitral award. Manifest disregard can be found where an arbitrator understood and correctly stated the law but proceeded to ignore it,[26] or where the error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator.[27] Significantly, "manifest disregard" requires something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand and apply the law.[28] Thus, the "manifest disregard" standard (if it exists at all) produces an oddly inverted basis for judi-

cial intervention. The more difficult the legal question considered by the arbitrators, the less likely it is that there can be judicial review because any mistake that they make would amount to "mere error in the law" not "manifest disregard of the law". Judicial review is only available when the law is clear and well established but has been ignored. Thus, there is no scope at all for the courts to expand and develop the law when considering an application for vacatur of an arbitral award.

The result has been an almost complete atrophying of US maritime law in relation to charterparties because almost all charterparty disputes go to arbitration rather than litigation. For example, there has been a circuit split for nearly 20 years about whether a safe port/safe berth provision in a charterparty imposes an absolute obligation on the charterer to nominate a safe port or berth, or merely an obligation to exercise due diligence. The Second Circuit held the former in 1974,[29] the Fifth Circuit held the latter in 1991.[30] There has been no further development of the law since then, despite the practical importance of the question. Safe port or safe berth cases in the United States generally go to arbitration and stay there.[31] Similarly (and coincidentally), 1991 was also the last time that a federal court reviewed an arbitral award about whether notice of readiness had validly been given under a voyage charter, another question frequently considered by maritime arbitrators and one that has been considered over and over again by English courts. The decision went unreported.[32]

In summary, it can be said that the United States is an example of the stultifying effect feared by Robert Finch in his Cedric Barclay Memorial Lecture. The extreme narrowness of American judicial review for errors of law has meant there has never been a steady flow of cases coming up from arbitration and allowing the courts to hone the principles of charterparty law in the way that their counterparts in the UK have done over the years.

3.3 Australia

Australia has adopted the UNCITRAL Model Law on International Commercial Arbitration.[33] Article 34(1) of the Model Law states that recourse to a court against an arbitral award may be made only by an application for setting aside. The grounds for setting aside are

listed in Article 34(2). They are very similar to the grounds upon which recognition and enforcement of foreign arbitral awards may be refused under Article V of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, to which Australia is also party.[34] The grounds for setting aside are concerned mostly with procedural irregularities, such as one of the parties being under an incapacity, or a lack of notice of appointment of an arbitrator, etc. With one possible exception that will be considered shortly, there is no mention of error of law as a ground for setting aside.

Before we go on to consider whether an arbitral award can be set aside under the UNCITRAL Model Law for error of law, we must first make a detour to consider the decision of Giles CJ Comm D in *American Diagnostica Ltd v Gradipore Ltd*.[35] In that case, Giles CJ Comm D held that the *Commercial Arbitration Act 1984* (NSW) applies to international commercial arbitrations, notwithstanding the fact that the *International Arbitration Act 1974* (Cth) specifically deals with international arbitrations. Section 21 of the *International Arbitration Act 1974* (Cth) provides that the UNCITRAL Model Law does not apply if the parties to an arbitration agreement have agreed that the dispute between them should be settled otherwise than in accordance with the Model Law. Giles CJ Comm D held that the parties' agreement that their arbitration should be governed by the UNCITRAL Arbitration Rules was sufficient to exclude the UNCITRAL Model Law by operation of s 21.[36].

If *American Diagnostica* is right on this point, then the UNCITRAL Model Law will almost never apply to international commercial arbitrations in Australia. Any time the parties agree to use a set of arbitration rules, they would thereby exclude the whole of the Model Law, including the provisions about setting aside awards. With respect, that cannot be correct. It seems unlikely that that was what the Commonwealth Parliament intended when it enacted s 21. The Model Law would apply only when the parties chose to apply it or when they failed to choose any arbitral rules at all.

Furthermore, as a purely textual matter, Giles CJ Comm D's interpretation of the effect of s 21 cannot be supported. Section 21 provides:

> *If the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the Model Law, the Model Law does not apply in relation to the settlement of that dispute.*

If the parties agree to use a particular set of arbitration rules, then they have undoubtedly agreed that the dispute between them should be settled in accordance with those rules rather than by the procedures set out in the UNCITRAL Model Law. What should be excluded as a result are those parts of the Model Law that deal with the conduct of the arbitration, namely Chapters IV, V and VI. Chapter VII, which deals with recourse against the award, is not concerned with "the settlement of [the] dispute" between the parties, so it is not excluded by s 21. The UNCITRAL Arbitration Rules, which the parties in *American Diagnostica* had agreed to use, say nothing about grounds for setting aside the award. No arbitration rules do, because by definition setting aside is something that must be done by a judicial authority exercising jurisdiction conferred upon it by the law of the country in which it sits.[37] When an award is made by the arbitral tribunal, the dispute between the parties has been settled in the manner that the parties agreed on. If one of the parties goes to court seeking to have that award set aside, there is a new dispute about a different question, namely whether the award should be vacated. The parties made no agreement that *that* dispute should not be settled in accordance with the Model Law, so the Model Law should be applied because it has not been excluded for the purposes of s 21.

If Article 34 of the Model Law is not excluded by operation of s 21 simply by reason of the parties' agreement to use arbitration rules, then it clearly states an exclusive list of grounds for setting aside. Article 34(2) provides that "An arbitral award may be set aside...only if..." one of the listed grounds is present. The UNCITRAL Secretariat itself wrote of Article 34 that it creates "an exclusive list of limited grounds".[38] That is significant in this context because the International Arbitration Act 1974 (Cth), s 17(1)(a) permits recourse to UNCITRAL documents when interpreting the

UNCITRAL Model Law. Thus, notwithstanding *American Diagnostica*, there seems to be no room for concurrent operation of the state Commercial Arbitration Acts.

The only one of the Article 34 grounds for setting aside that might apply to an error of law by the arbitral tribunal is that in Article 34(2)(b)(ii), namely that "the award is in conflict with the public policy of this State". ("State" is here used in the international law sense, meaning country.) Courts in several countries have held that Article 34(2)(b)(ii) does *not* authorize setting aside for error of law. Speaking of the equivalent provision in the New York Convention, Article V(2)(b),[39] the US Court of Appeals for the Second Circuit said in *Parsons & Whittemore Overseas Co Inc v Société Generale de L'Industrie du Papier (RAKTA)*,[40] that an award offends against US public policy only if it "would violate [our] most basic notions of morality and justice". Referring to that test in the context of Article 34 of the UNCITRAL Model Law, the Ontario Court of Appeal said in *Corporacion Transnacional de Inversiones SA v STET International SpA*:[41]

> *"Accordingly, to succeed on this ground the Awards must fundamentally offend the most basic and explicit principles of justice and fairness in Ontario, or evidence intolerable ignorance or corruption on the part of the Arbitral Tribunal. The applicants must establish that the Awards are contrary to the essential morality of Ontario."*

Similarly, Chan Sek Keong CJ of the Singapore Court of Appeal said in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank* SA:[42]

> "[W]*e are of the view that the Act will be internally inconsistent if the public policy provision in Art 34 of the Model Law is construed to enlarge the scope of curial intervention to set aside errors of law or fact. For consistency, such errors may be set aside only if they are outside the scope of the submission to arbitration. In the present context, errors of law or fact, per se, do not engage the public policy of Singapore under Art 34(2)(b)(ii) of the Model Law when they cannot be set aside under Art 34(2)(a)(iii) of the Model Law."*

Similarly, in *Downer-Hill Joint Venture v Government of Fiji*,[43] Wild and Durie JJ of the New Zealand Court of Appeal said:

> *"I would not have regarded any failure by the arbitrator to apply clause 2.2 of the head contract in the present case as even approaching the level required to establish a conflict with the public policy of New Zealand as that phrase is used in Article 34(2)(b)(ii). The enforcement of an award containing an error of that nature would certainly not shock the conscience."*

On the other hand, in *Oil & Natural Gas Corp Ltd v SAW Pipes Ltd*,[44] the Supreme Court of India held that an error of law by an arbitral panel amounting to "patent illegality" was contrary to public policy of India for the purposes of UNCITRAL Model Law Art 34. This is definitely the minority view, though.

In summary, it can be said that if Article 34 of the UNCITRAL Model Law provides the exclusive grounds for setting aside an international commercial arbitral award, which I believe to be the case, then there cannot be review for error of law unless Australian courts side with the Supreme Court of India against the US Court of Appeals for the Second Circuit, the Ontario Court of Appeal, the Singapore Court of Appeal and the New Zealand Court of Appeal. If *American Diagnostica* is right about the concurrent operation of the state Commercial Arbitration Acts, then parties to an international commercial arbitration in Australia may appeal a question of law to the relevant state Supreme Court, with leave of the court, if there is a "manifest error of law on the face of the award" or "strong evidence that the arbitrator or umpire made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law".[45] That would leave the door open for at least some development of commercial law, including maritime law, but it is questionable whether the court's decision was correct about the operation of the *International Arbitration Act 1974* (Cth), s 21.

4. CONCLUSION

The autonomy of arbitral proceedings is an important feature, one that is emphasized by the UNCITRAL Model Law. If the parties have chosen arbitration, then in the ordinary course of things

their dispute should be settled only by the arbitral tribunal without review by a court. Having made their bed with arbitration, the parties must lie in it. Of course, the more complete the autonomy of the arbitral process and the more difficult it is to get judicial review by a court, the more important it is to have well qualified arbitrators. From a lawyer's perspective, the trend towards having more lawyers involved in maritime arbitrations would seem therefore to be a good thing, because all those lawyers should be more likely to produce a legally sound or defensible result. They must have some law to apply, though. Restricting judicial review can stultify the development of the law in areas where disputes are typically arbitrated, as the experience in the United States shows. Arbitral autonomy can come at a price that may be too high, as some in London are now worriedly thinking about maritime arbitration. Finding the right balance between arbitral autonomy and judicial review is a delicate task, particularly for any country that does not already have a developed body of maritime jurisprudence. No such body of jurisprudence will develop in a country that keeps some kinds of maritime dispute locked in arbitral proceedings, as the United States does with charterparty disputes. As my title suggests, the trend in the early part of the 21st Century has been towards more lawyers, but less law. Let us hope that we do not reach the position where there are too many lawyers and not enough law.

BIOGRAPHICAL DETAILS

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He holds the degrees of M.A. and B.C.L. from Oxford University, England, and an LL.M. from Harvard Law School. Before joining Tulane, he was Harrison Moore Professor of Law at The University of Melbourne in Australia and before that he taught at Monash University, The University of Western Australia and Nottingham University. He has also been a visiting professor at universities in China, Italy, Azerbaijan and Singapore.

He is author (or co-author) of books on maritime law, international trade law, conflict of laws, and the law of torts. He has also published many journal articles on these topics. He has extensive practical experience as a consultant for over 30 years on maritime matters and general international litigation and arbitration, in Australia, Hong Kong, Singapore, and the USA. He has advised on cargo claims, arrest and admiralty matters, drafting bills of lading, sea waybills and charterparties, collisions and limitation of liability, oil pollution, salvage, marine insurance, maritime arbitrations and international sale of goods.

NOTES TO CHAPTER

1 Bruce Harris, "Maritime Arbitration in the US and the UK, Past Present and Future: The View from London", unpublished paper, delivered 4 March 2008 at the Tulane Maritime Law Center at Tulane University Law School, New Orleans, p 6.

2 Society of Maritime Arbitrators, "Maritime Arbitration in New York", available at http://www.smany.org/sma/about2.html (last viewed 7 April 2010).

3 32 F 3d 665, 1995 AMC 134 (2d Cir 1994).

4 Id, 32 F 3d at 668, 1995 AMC at 139.

5 Society of Maritime Arbitrators, "Roster of Members 2009-2010", available at http://www.smany.org/sma/members.html (last viewed 7 April 2010).

6 Harris, supra note 1 at p 10.

7 Maritime Law Association of Australia and New Zealand, "MLAANZ Panel of Arbitrators", available at http://www.mlaanz.org/Uploads/docs/Panel_of_MLAANZ_Arbitrators_17.02.2010.pdf (last visited 7 April 2010).

8 Two of whom, like the attorney-arbitrator in *WK Webster & Co v American President Lines Ltd*, 32 F 3d 665, 1995 AMC 134 (2d Cir 1994), also have legal qualifications.

9 Harris, supra note 1 at p 8.

10 [1981] 2 Lloyd's Rep 239 (HL).

11 Arbitration Act 1996 (UK) s 69(3)(c)(i),(ii). The court must also decide that it is just and proper in the circumstances for the court to determine the question: s 69(3)(d).

12 *Demco Investments & Commercial SA v Se Banken Forsakring Holding Aktiebolag* [2005] 2 Lloyd's Rep 650.

13 [2008] 1 Lloyd's Rep 608 at 614.

14 Arbitration Act 1996 (UK) s 69(8).

15 [2007] 1 Lloyd's Rep 142.

16 Lord Mance's Advisory Committee on Section 69 of the Arbitration Act 1996, "First Interim Report on the Workings of Section 69 of the 1996 Act in Regard to Maritime Arbitrations in London Before the Commercial and Admiralty Court", available at www.lmaa.org.uk/uploads/documents/FirstInterimReport/Mance

17 Robert Finch, A Collection of the Cedric Barclay Lectures: ICMA X-ICMA XV (Singapore International Arbitration Centre, 2006) p 111.

18 552 US 576, 128 S Ct 1396, 2008 AMC 1058 (2008).

19 The French Cour de Cassation has held the same in relation to arbitration in France under the Code Civil: see *Société Buzichelli v Hennion*, reported in 1995 Revue d l'arbitrage 263, comment by P Level. In contrast, in *Royal & Sunalliance Insurance PLC v BAE Systems (Operations) Ltd* [2008] 1 Lloyd's Rep 712, it was held that the Arbitration Act 1996 (UK) does permit the parties to expand the grounds for review.

20 *Citigroup Global Mkts Inc v Bacon*, 562 F 3d 349 (5th Cir 2009); *Crawford Group Inc v Holekamp*, 543 F 3d 971 (8th Cir 2008); *Sterling Heights LLC v American Multi-Cinema Inc*, 579 F 3d 1268 (11th Cir 2009).

21 *Asociacion de Empleados del Estado Libre Asociado de Puerto Rico v Union Internacional de Trabajadores de la Industria de Automoviles*, 559 F 3d 44 (1st Cir 2009); *Stolt-Nielsen SA v AnimalFeeds International Corp.*, 548 F 3d 85 (2d Cir 2008); *Coffee Beanery Ltd v WW LLC*, 300 Fed Appx 415 (6th Cir 2008); *Comedy Club Inc v Improv West Assocs*, 553 F 3d 1277 (9th Cir 2009).

22 *Stolt-Nielsen SA v AnimalFeeds International Corp*, 129 S Ct 2793, 2009 AMC 2999 (2009), granting certiorari – ie, leave to appeal.

23 The petition for *certiorari* can be read on Westlaw at 2009 WL 797583.

24 552 US 576, 586 (2008).

25 9 USC § 11 deals with modification of the award for such reasons as miscalculation of figures or imperfections of form.

26 *Siegel v Titan Industrial Corp*, 779 F 2d 891, 893 (2d Cir 1985).

27 *Merrill Lynch, Pierce, Fenner & Smith Inc v Bobker*, 808 F 2d 930, 933-34 (2d Cir 1986).

28 *Collins v D R Horton Inc*, 505 F 3d 874, 879 (9th Cir 2007); *Bosack v Soward*, 586 F 3d 1096, 1104 (9th Cir 2009).

29 *Venore Transportation Co v Oswego Shipping Corp*, 498 F 2d 469, 1974 AMC 827 (2d Cir 1974).

30 *Orduna v Zen-Noh Grain Corp*, 913 F 2d 1149, 1991 AMC 346 (5th Cir 1991).

31 Not surprisingly, New York arbitrators generally follow the Second Circuit position. See, eg, *In the Matter of the Arbitration between T Klaveness Shipping A/S and Duferco International Steel Trading*, SMA Award No 3686, April 18, 2001. SMA decisions are available on the Lexis database.

32 *Jamaica Commodity Trading Co Ltd v Connell Rice & Sugar Co Inc*, 1991 WL 123962 (SDNY 1991).

33 International Arbitration Act 1974 (Cth), s 16, Sch 2.

34 International Arbitration Act 1974 (Cth), s 8, Sch 1.

35 (1998) 44 NSWLR 312.

36 Id at 323.

37 Some institutional arbitration rules provide for review of the award by an entity that is part of the arbitration institution, such as the ICC's International Court of Arbitration, or the London Court of International Arbitration. This is not the kind of "court" review to which I refer. That process of internal review is agreed upon by the parties. External review by a judicial authority in a setting aside application is not.

38 UNCITRAL Secretariat Note (A/CN.9/309), published in 19 *UNCITRAL Yearbook* 117 at 122 para [42].

39 This provision authorizes a court to refuse to recognize or enforce a foreign arbitral award. Article 34 of the UNCITRAL Model Law authorizes a court to set aside an award made in Australia on identical grounds.

40 508 F 2d 969, 974 (2d Cir 1974).

41 (1999) 45 OR (3d) 183 per Lax J, affirmed (2000) 49 OR (3d) 414 (Ont CA).

42 [2007] 1 SLR 597 at 621.

43 [2005] 1 NZLR 554 at para [80], quoting Randerson J in *Connect Ltd v Pot Hole People Ltd* (2004, unreported).

44 (2003) 5 SCC 705.

45 Commercial Arbitration Act 1984 (all states) s 38(5)(b).

AMTAC Annual Address 2010

Keeping an even keel – resolving maritime and transport disputes through arbitration to maintain commercial relationships

1 July 2010

The Hon. Robert McClelland MP

First, may I acknowledge the traditional owners of the land we meet on - and pay my respects to their elders, both past and present.

It is a pleasure to deliver the annual Australian Maritime and Transport Arbitration Commission address. Your conference comes at an exciting time for the arbitration profession, with a number of reforms aimed at making Australia an international leader in the field.

Today I would like to discuss these developments and their relevance to maritime and transport arbitration within the region.

Australia is an island nation whose economy depends on sea trade. Further, we are a nation in a region which is full of shipping nations and major sea routes. The Straits of Malacca are the main shipping channel and shortest trade route between the Indian Ocean and the South China Sea, one of the most important shipping lanes in the world. The Indian Ocean contains major sea routes connecting the Asia Pacific region with Europe, Africa and the Americas.

Australia uses the sea to transport 99 per cent of our exports. Consequently, when maritime disputes arise, they have the potential to adversely impact our national economic wellbeing.

Given our geography and experience as a sea trading nation, Australia enjoys a natural advantage as a venue for resolving international maritime disputes. That advantage extends to our arbitrators and other legal professionals. We have the advantage that the Australian legal profession is highly regarded internationally. Additionally, the number and expertise of maritime arbitration practitioners

is testament to the fact that Australia is a key centre of expertise in maritime law.

However, I think it is fair to say that Australia is yet to turn these natural advantages into commercial advantages. The Government has pursued a number of reforms aimed at exploiting our advantages. In addition to reforms at the industry level to encourage commercial players to resolve commercial disputes through arbitration, we have also focused on reforms to Australia's international arbitration regime.

These reforms are underpinned by two key arguments. First, international arbitration is typically the most effective way for businesses to resolve cross-border disputes. A vibrant international arbitration culture is an essential tool for Australian business in the modern, global economy. Secondly, promoting the international dispute resolution industry here in Australia benefits not only lawyers and arbitrators, but also the economy in general.

The value of the international arbitration industry is demonstrated by the success of regional commercial arbitration centres in Hong Kong and Singapore - which heard around 700 disputes between them last year.

The centrepiece of the Government's reforms is the International Arbitration Amendment Bill which was passed by Parliament earlier this month. The Bill amends the International Arbitration Act 1974 to:

- implement amendments to adopt the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration;
- provide guidance to the courts on the interpretation of the Act;
- provide additional tools to help parties resolve their disputes quickly and fairly, including assistance for the parties to obtain evidence;
- clarify the relationship between the Act and State and Territory legislation relating to domestic arbitration; and
- improve the general operation of the Act.

As I have outlined, the Bill includes new interpretation provisions which provide greater guidance to the courts in exercising

powers and functions under the Act and in interpreting provisions. Amongst other things, these provisions encourage the courts to bring certainty and finality to the resolution of international disputes. In effect this means they should only rarely interfere with arbitral proceedings and awards and even then, only with considerable circumspection.

The Bill also clarifies the circumstances in which the courts can refuse to recognise and enforce foreign awards. These provisions are intended to emphasize the importance of speed, fairness and cost-effectiveness in international arbitration. While at the same time, clearly defining and limiting the role of the courts in international arbitration without compromising the important protective function they undertake.

These reforms will strengthen the use of Alternative Dispute Resolution and equip Australian arbitrators and mediators to resolve commercial disputes efficiently and effectively.

STATE AND TERRITORY ARBITRATION REFORMS

In May this year, States and Territories also agreed to adopt new uniform national laws on domestic arbitration based on the United Nations Commission on International Trade Law Model Law. Once implemented, this will mean that Australia will have a harmonised system of international and domestic arbitration. This will almost certainly increase our attractiveness to international customers and establish Australia as a global leader in the arbitration field.

However, before we can offer ourselves as the place to resolve international maritime disputes, I believe that Australia needs to create and promote a local arbitration culture to establish itself as a better alternative to existing locations. AMTAC has an important role to play in promoting Australia as an attractive venue to resolve international and domestic maritime and transport disputes. I would also particularly like to acknowledge the role of Justice James Allsop and Peter McQueen in establishing AMTAC.

Through their guidance, it is already pursuing a number of commendable initiatives including, for example, its model dispute resolution clause referring parties to mediation or arbitration and the AMTAC 'Rocket Docket'. The Rocket Docket service, which guarantees a Final Award determination within 3 months of the com-

mencement of arbitration proceedings, is yet another way to positively differentiate arbitration and mediation from often long and costly court processes.

THE AUSTRALIAN INTERNATIONAL DISPUTES CENTRE

In addition to reforms of Australia's legal framework, we also need the facilities to accommodate these disputes.

Earlier this year, in conjunction with the New South Wales Attorney-General, John Hatzistergos, I announced the creation of the new Australian International Disputes Centre. This has been established as a partnership between the Commonwealth and New South Wales Governments, the Australian Commercial Disputes Centre, and the Australian Centre for International Commercial Arbitration.

The Centre - which is due to formally open in the near future - will be equipped with state of the art dispute resolution facilities. Together with the depth of arbitration expertise and support services already here in Australia, the Centre will make Sydney a key regional centre for international arbitration.

It is a first step - but an important first step in developing our international mediation and commercial arbitration infrastructure.

AUSTRALIAN BRAND OF ARBITRATION

It is my hope that together, the measures I have described will spark cultural reform in Australian arbitration. Australia has the potential to become a leader in international arbitration, but only if we can promote a truly cutting-edge and internationalised model.

Creating a system that does away with unnecessary formalities and get on with identifying and solving the real dispute in issue. A system that ensures that arbitration delivers swift and cost-competitive outcomes.

In short, the Australian brand of arbitration means we need to become known as the place to come to when you want your problem fixed fast and fairly. The promotion of this uniquely Australian brand will allow the undoubted talents and reputation that exist in the arbitration community to flourish.

I know I am likely preaching to the converted that before Australia can best present ourselves as the place to resolve international maritime disputes, we need to create and promote a local maritime

and transport arbitration culture. This will help to establish ourselves as a better alternative to existing locations.

Fostering local maritime arbitration means that maritime disputes will no longer need to be resolved at great cost and in the quasi-judicial fora of the traditional seats of maritime arbitration - New York and London.

In that context, AMTAC has an important role to play in promoting Australia as an attractive venue to resolve both international and domestic maritime and transport disputes.

BIOGRAPHICAL DETAILS

Justice Robert McClelland has a BA LLB from the UNSW and an LLM from the University of Sydney and he is a Visiting Fellow at the University of New South Wales. After being admitted to practice in 1982, Robert commenced working as an associate to Evatt J in the Federal court of Australia. He has practised as a solicitor and barrister. He was elected to Federal Parliament in 1996 and served as Commonwealth Attorney General between 2007 and 2011. He was appointed a judge of the Family Court of Australia in June 2015.

As Attorney General, Robert McClelland undertook an extensive review of the International Arbitration Act. That review formed the basis of amendments to the Act that were introduced in 2010. The Amendments gave arbitral tribunals a wider degree of flexibility in controlling arbitral proceedings and included inserting an object to emphasise the importance of international arbitration in facilitating international trade and commerce. Provisions were also introduced to require Courts applying the Act and the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration Law to have regard to the fact that arbitration is an 'efficient, impartial, enforceable and timely' method of dispute resolution.

AMTAC Annual Address 2011

Unlocking the Potential within the Australian Maritime Industry

21 July 2011

Peter Mannion, General Manager, Operations, Rio Tino Marine & Director of Australian Shipowners Association

A pleasure to be here and an opportunity yet again for me to proselytise about the subject that I believe in very, very avidly. But before I start, I might, as an employee of a large corporate, issue a disclaimer in that what I say are the views of myself; they are personal to me and not my employer. However, I like to think that they are shared certainly by the members of the association of which I am an office bearer, the Australian Shipowners Association, in that I stand before you as a true believer. I am utterly convinced and thoroughly persuaded that within the Australian maritime industry there lies an enormous untapped potential.

The question is how do we realise that potential? How do we unlock that potential that I honestly believe lies within? And the answer, I think, is relatively simple in that if we create in Australia a maritime business location that is both attractive and compelling as a business proposition to people who have an interest or a desire to operate and run and own ships, they will locate themselves here, as they have in similar jurisdictions that offer that attraction. If we can create in Australia an environment, a maritime business environment that is attractive, competitive, sustainable, we will grow the industry here and those of you who participate in that industry will enjoy the benefits of that growth. The question is how do we do it?

So the key issues that I leave – and I will change the slide now so we will go – for those jurisdictions, if you could go to the next slide. And moving directly – I should have done this already – to the next slide, the key issues that I leave with you are these, but the reality is something very different. Australia is not an attractive maritime business location. Indeed, it is a hostile jurisdiction within which to

own and operate ships. It is singularly unattractive to be an owner and an operator of ships in this country. The reason for that is to be found in various – what we call or I call – inhibitors to that potential. The current tax regime within which ship owning and operating may operate is positively hostile. Royalties withholdings tax, as an example, that exists even if I didn't want to own but just simply operate and charter in, I have to pay royalties withholdings tax.

Fair Work Australia, a new development, is something held in some suspicion by some who operate in our world, and there is still some uncertainty as to the application and implication that that piece of legislation has for ship owning and ship operating activity, and that is just to name a few. But why are we trying to do this? Why are we wanting to unlock this potential? And I will move to the next slide. And that is simply because there are significant benefits to be had by stimulating and growing the maritime industry within Australia. We have looked at in this way where there are obvious direct benefits by increased maritime activity. Ship owning is one, ship operation, there is freight earnings, there is employment and there is skills development. Those are direct benefits that come from that, but probably the most important – certainly to this audience and to the general economy – is what is referred to in the industry worldwide is the maritime cluster effect.

If you stimulate the core activity of owning and operating, what happens is you have this development of what some might say is parasitic industries. I would like to say they are symbiotic industries. And that is that they breed and feed around a core, an essential, thriving maritime business. And so indeed, our business, the legal profession and the professions of arbitration and mediation, would enjoy the benefits of an enlivened and growing maritime industry and particularly ship owning and ship operating activities out of Australia. And the knock-on effect and this cluster speak for themselves: ship management, bunker supplying, provedoring, repairs. Those sort of indirect benefits will flow, and then the skills development that comes from the increased activity spills over into R&D, finance packaging and those sort of things. The list is endless.

And by way of example, we will look at some of those jurisdictions that have done some of what I am proposing and what we propose and enjoying the benefits as we speak. And moving to the next

slide is probably the most important issue, and that is, well, that's all well and good and we do that, but what is it that we have in this country that is different to others? And the simple issue, as his Honour Mr Rares just alluded to, is we sit on a mountain of cargo. Indeed, if you look at just three dry bulk imports – exports –iron, coal and grain – we probably have the largest type in the world, and of all the dry bulk products I think it's about the third lot. That is an amazing competitive advantage or differentiate that we have that other jurisdictions don't. And as his Honour alluded to, we don't seem to be mindful of that or we don't even know it exists.

And the harsh statistic is simply this: that in the year 2010-11, 750 million tonnes of dry bulk cargo left Australia. Now, I think that 750 million dry bulk tonnes left Australia in around 2010-11.750 million dry bulk tonnes. The harsh reality of that is Australia and Australian interests carried less than half of one per cent of that type. 750 million tonnes was exported out of this country and we carried less than half of one per cent. That is shocking. It should be; it is to me. Now, I asked the bright people in my office to do some number-crunching. That doesn't include me, and as we all know, being lawyers, lawyers and numbers don't necessary go together, but what I asked them to do was to try and work out what the value in that statistic would be.

So for every one per cent, let's say, of that type, if we could have garnished that and harnessed that percentage and increased our percentage, what would that do for us? And this is what they have done. And without going into the finer detail, the simple answer is there are millions and millions of dollars tied up in those direct and indirect benefits to this country and contributions to the GDP of this country in participating in that dry bulk type. Now, one of the observations I must make in this area – and it's one that those of us that work in this area and have spent some time looking at it it's quite frustrating – there has been very, very little studies done or studies made economically of the benefits of shipping and the costs associated with shipping and the contributions with shipping in the maritime industry at large makes to the GDP.

Back in 2003, I know the association of which I am an officer did some work, and I understand the government has done some recently, but that is their work. So it's very difficult to collect statis-

tics, and the statistics are varied, various and spread over various agencies within the government. So to get a clear picture of what these statistics are telling us is difficult, and that's why I have a further disclaimer, if you like: the numbers used here are rubbery. They are my numbers and they are not cast in stone, but the point I am trying to make – and it's an obvious point – is that there is enormous value in participating in this cargo type, and at the moment we don't have a presence in that type. Moving to the next slide, let's just look at the status quo. Where we are now and what does that look like? Well, it's not necessarily a pretty picture.

We have a small industry and the number of employees, albeit it says there 4500 full time employees, my guess is if you just took those participating in Blue Water sector that would be much, much lower, probably in the order of 1200, if that. The value associated with that at the moment is obviously low, but even still there is a significant contribution made. And the best study we have done to date is the one that the association did back in 2003, I think it was, and you can see that even then on a small and low participation base, relatively speaking, there was a significant contribution made to the GDP by way of participation. The numbers currently tend to be inflated because the offshore oil and gas industry is enjoying a boom. Indeed, it's part of the maritime industry as a whole, but its long term longevity is questionable in an expansion mode. At the moment, there is a lot of construction going on.

There is a lot of employment there now that in five years' time when all of these projects are finished, yes, there will be a core support team available but the balance will have gone and the trade will have slackened off. Where do those people go? And they are not in the Blue Water trade at the moment. There are questions to be asked around that. So what do we do and how do we develop this? Building on that economic theme, moving to the next slide, I asked our bright people to try and just simplify these issues. And looking at the early statistics that were done by the association and taking the numbers used there, I leave you with the idea, I hope, that just on a small percentage participation, as it was back in the early 2000s – and the numbers used by the association then – at 20 per cent – or at 20-fold increase, which frankly I think our participation then was

bigger than .5 per cent, but a 20-fold increase there delivers to you a contribution directly to the GDP in the order of $5 billion.

But just looking at our own participation in the sense of where we are today, taking that point – less than .5 per cent participation, if we increased that 0.5 per cent to just 10 per cent, look at the contribution that could be made to the GDP and to the country as a whole through an enlivened maritime industry, and that's just the direct contribution. We haven't tried to capture the indirect stimulus and the catalytic, as we call it, or the peripheral industry benefits that may be enjoyed. And the simple answer – well, sorry, the simple point that I want to leave with you is that there is something to be made here. There is a potential here – there is an economic potential, an industry that you would want to participate in as service providers to that industry.

And a slice of a $5.4 billion industry without the catalytic effects and the indirect benefits is an industry, I would imagine, that you would all enjoy being part of. But how do we make that happen? And unfortunately, moving to the next slide, I have to bring us back to some reality. And the reality is, alas, that our fleet is small and declining. When we did the studies, as I was referring to earlier, in 2002/2003, we had almost 100 ships in our fleet. Today, I think that is less than 30. We are probably in the low 20s in the Blue Water trade. But at the same time, look what has happened to our cargo type. Our cargo type has grown from less than 120 million to, as I said, 108 – and I am just talking about dry bulk type in certain categories. If you put them all together, the number that you take home with you is 750 million dry bulk tonnes that are exported out, and that is an enormous pie, if you like.

And if we can slowly and, nothing happens overnight, but if we can incrementally set our type that we want a share of that on an incremental basis, that will stimulate, drive and grow the maritime industry enormously. And they are challenges, enormous challenges. And his Honour Justice Rares alluded to this in his opening, because it's a mindset. And I have grappled with this concept of why is it – why is it that we have politicians – and there is a celebrated case where the Minister of Transport some years ago – probably before my time – was heard to say in parliament, "We are a nation of shippers." Well, I say, no, we are not a nation of shippers

or we shouldn't be. We should be a shipping nation. Being an island is where the benefits come from; that is where the money is spent locally. That's what we are getting.

And the third element is – you have got a good registry, you have got a got physical environment, tonnage tax would be good. The third element is the crew. Now, Australia traditionally has a very, very good reputation for providing well-trained, well-educated, decisive officers who make good decisions when necessary and are reliable. Our ratings are equally as good in the sense that they are reliable, but they are expensive. The reality is that our ratings have become prohibitively expensive on a domestic basis, compared to international ratings – and now I am talking about able seamen and the lower ranks, if you like, on vessels – they are prohibitively expensive. That is not unique to Australia; that has happened in all first-world countries.

As the development has taken place, so the standard of living rises, and people just simply do not want to do that kind of work for lower wages. They want a decent amount of earning. People don't want to go to sea anymore; that's all. If you took the income tax that our seafarers have to pay – and by the way, we are one of the few countries left in the world where income tax is still payable by seafarers earning their money offshore – there is another inhibitor that we could, with the stroke of a pen, get rid of. And that would open the doors to enormous employment amongst the officer ranks. They could go to sea competitively because their scale of pay is absolutely almost the same as international, very little difference. It's the tax element that makes them expensive from an employment point of view.

Take that away and they are perfectly competitive and very marketable. Very easy to fix. So crewing is something we can do; we just gave to have a bit of an attitudinal switch in our heads, a mind change, about the way we do this and the way we conduct ourselves. And I will come back to that a little bit later, because this is a very, very important aspect of the whole issue and it's something I don't want to lose sight of as we go, because it underpins the success of the story. But as I do – and I will move to the next slide – let's just look briefly at what has happened elsewhere and see if there is not something to be learned by way of example. Now, I could have

looked at Singapore just as easily as the UK, but these figures speak for themselves. The UK introduced the tonnage tax system, so they got their fiscal bit right.

They have already got a first-class flag state regulator in the MCA; they have fixed their fiscal regime and created a tonnage tax system which effectively allows ship owning to operate within a ring fence, if you like, a compound of tax-free – basically a tax-free environment. There is a nominal tax paid on tonnage – you know, a pound a tonne or something – for your vessel, but there is no income tax paid on the profits of your business. It's a very attractive way to conduct business and shipping likes it and tends – in the UK, they have seen enormous benefit from creating just that tonnage tax environment. Enormous benefit. I would encourage you to go and have a look because in updating all of this I understood that Oxford Economics that we make reference to here, has done an update of this data which I did last year, and there is even further evidence of the benefits that a revitalised maritime industry has brought to the UK.

So there is a lot of benefit there that is clearly evident by simply creating an environment that is attractive to do business. Moving to the next slide, you can see that the benefits are tangible. Their fleet has increased remarkably over that period of 10 years and their contributions to GDP are similar, whereas if you look at the lower right hand side, while our cargo type has gone through the roof, our shipping fleet has dropped away. Their fleet has increased; ours has dwindled. But the big difference and the key thing here – and I will come back to this issue of what the key differentiator is – this success – and the success here I could almost mirror in Singapore. Their AIS scheme, their registry may not be as buoyant, if you like, at the moment. It's growing. It's a little bit behind, but it's getting there. But their scheme is attracting the same growth that this evidence is showing.

But both of those jurisdictions have achieved this without any cargo. They don't have 750 million dry bulk tonnes on their doorstep. We do; they don't. They have done it purely by creating an environment to operate out of. Registration of vessels, fiscal environment and some crew. And they are reaping the benefits without any cargo. Indeed they are sending their ships here to take our cargo away, so we need to address that. Moving to the next slide, what do

we do about it? Well, what we have got to do about it is we have got to change the environment within which we currently operate. We have got to create in Australia a maritime business location that is attractive and compelling and a place where people want to own and operate ships. That's what we need to do.

The current Minister of Transport initiated a policy package of reform back in 2008. Tonnage tax is being looked at, and the fiscal environment is being looked at around income tax on foreign earnings for seafarers and removing royalties withholding tax, those kind of issues. And creating a register that is attractive and meaningful to shipowners.

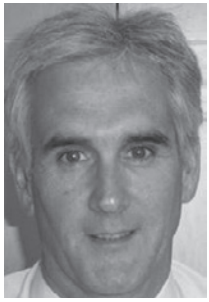
There has to be an underpinning of this structural reform by a recognition and a reform in relation to productivity in the labour market. Labour has to look at itself and say, "How do I contribute to this change? What am I going to do to make this better?" And indeed, they are the ones who are going to benefit as much as anybody else. They also participate in this industry, but there has to be a reform there, a recognition that the way of doing business has to be efficient, it has to be productive and in a sense, as best we can make it trouble-free, there is a weariness around Australian labour that just is a reality. And until we can dispel that weariness and assure the industry that there is no concern around labour, that will remain a concern.

But if we get those three things like: great for fiscal environment, get the registry sorted and get the cultural change in our mindset about yes, we want to participate in this in a trouble-free way and be efficient and competitive, I think we have got a winning chance. We have the expertise, we have the willingness and we have the education. We just need the basis for work.

And to create that work, we have to, have to attract shipping to this country as a country of choice and as a location to which people want to run. And from there, the rest will flow. This is about developing our participation in the international trade, and the industry itself will grow and thrive and all of those supporting services will develop around it. Proselytise this to everyone who cares to listen. I honestly believe that it's just ludicrous that we are not out there taking charge of what is an enormous opportunity. 750 million tonnes – remember that number – and less than half of one per cent was

carried on Australian ships. We have got to change that and we can, and we would all be then busy doing arbitrations and mediations and there would be a plethora – we would be too busy. So I will leave you with that thought and I am happy to take your questions. Thank you very much for your attention.

BIOGRAPHICAL DETAILS



Peter Mannion (BSc LLB/LLM – University of Cape Town) an admitted attorney in South Africa, moved to Australia in 1996 and was admitted to practise in Australia 2000. Peter has worked, as a commercial and legal P&I correspondent and maritime lawyer both in South Africa and Australia, for 25 years.

Whilst in South Africa, Peter worked for Safmarine Limited, as Corporate Counsel and with the Cape Town law firm Fairbridge, Arderne & Lawton in their shipping department. In Australia, Peter worked with Middleton's Lawyers Transport & International Trade Group, until joining Rio Tinto Shipping Pty Ltd as its maritime Corporate Counsel in 2004. He is currently General Manager – Fleet Operations, Rio Tinto Marine and a director of Rightship Pty Ltd and Maritime Industry Australia Limited.

AMTAC Annual Address 2012

The Prospects for International Arbitration in Australia

25 September 2012

The Hon. PA Keane, Chief Justice of the Federal Court of Australia

Sir Edward Coke said in *Vynior's Case*,[1] in 1609, that an award debtor was free to "countermand [an arbitration agreement], for a man cannot by his act make such authority, power or warrant not countermandable which is by the law or of its own nature countermandable …".

It was not unusual for Sir Edward Coke, when making a lofty pronouncement, to be a little less than disciplined in his language. Sometimes, the grandiose claims he made for the common law in the course of his judgments went beyond what was strictly necessary for the decision. *Dr Bonham's Case* is an example.[2]

Sometimes, his pronouncements had little to do with the actual decision at all. Vynior's Case is an example of such a case. In that case, the Court did not permit the award debtor to countermand the arbitration agreement. Indeed, it ordered the judgment debtor to pay the amount due under the award plus damages for the breach of the arbitration agreement. But Sir Edward Coke's *obiter dicta* have cast a long shadow down the centuries.[3]

The basic tenets underlying arbitration are no doubt familiar; but it does not hurt to remind ourselves of them.

Courts enforce arbitral awards because parties, by their own voluntary agreement, bargain to have certain matters referred for the determination of a third person and to be bound by that determination. As Lord Mansfield recognised in *Robinson v Bland*,[4] this approach reflects the value accorded by the common law to party autonomy. Courts enforce arbitration agreements because the common law insists that *pacta sunt servanda*: promises are to be kept.

The perceived advantages of arbitration are well-known. Arbitration enables parties to resolve their disputes while preserving their

privacy. The importance of privacy to international traders who seek, for good or ill, to avoid scrutiny by government agencies or by local or international news media should not be underestimated.

There are also perceived advantages in terms of speed and efficiency. In this regard, the parties do not need to line up in a queue with those waiting for an audience in national courts.

And, because arbitration is thought to be quicker and more expert, there is an expectation that it will, in the long term at least, be cheaper than the lengthier and more elaborate proceedings in court with associated levels of appeals.

The well-resourced and well-advised parties who engage in international trade on a global scale can be expected to customise their agreements to their particular needs, both in terms of the allocation of the risks of their venture, and in their choice of dispute resolution mechanisms.

This means that, in terms of the substantive law to be applied to dispute resolution, those engaged in international trade and commerce look to their contract lawyers, rather than prescriptive national laws, with which they may not be familiar or comfortable, to protect their substantive interests.

Where a dispute is resolved by a person or persons whose authority to decide is derived from the parties' voluntary agreement, the parties are able to choose the forum in which their dispute is to be heard. These sophisticated parties, and the lawyers who advise them, will more and more look to have their disputes resolved by arbitration seated in legal systems which are known to be fair, efficient and supportive of their bargain including its bespoke dispute resolution mechanisms.

For these, and perhaps other reasons, there is a growing preference among those engaged in international trade and commerce in the Asia-Pacific region for international arbitration as the mechanism for the resolution of international trade disputes.

Against that background, I turn to discuss the prospects for international arbitration within the Asia-Pacific region. I propose to survey some recent developments which bear upon the relative attraction of Australia as an arbitral seat in comparison with its competitors in the region. The point to be made here is the obvious one, that our principal competitors, Hong Kong and Singapore,

share our common law inheritance and the use of English. With that inheritance and advantage, their embrace of international arbitration has been energetic and unequivocal. In Australia, however, our attitude may perhaps be described as two steps forward and one step back[5].

TWO STEPS FORWARD …

Governmental Reforms

In Australia, reform of the law governing arbitral procedure has been directed to the modernisation and clarification of existing arbitration practice.[6]

The amendments to the *International Arbitration Act 1974* (Cth) (IAA), passed in 2010 by the Australian Parliament, facilitate the conduct of international arbitration in Australia and the enforcement and recognition of arbitral awards made outside Australia.

By virtue of the combined operation of the IAA, the Model Law and the New York Convention, arbitral awards are almost universally enforceable in Australia subject to the supervision of the courts. With a view to ensuring that Australian courts discharge their functions in accordance with the "pro-enforcement and pro-arbitration policy that underlies the IAA", an objects provision has been included as s 2D of the IAA.[7] As the Explanatory Memorandum to the International Arbitration Amendment Bill 2010 (Cth) states, these objects "emphasise[] the importance of arbitration in facilitating international trade and commerce …".[8]

As Foster J of the Federal Court recently noted in *ESCO Corporation v Bradken Resources Pty Ltd*,[9] it is in keeping with the pro-enforcement preference of the New York Convention, that s 8(3A) of the IAA provides that the award is to be enforced unless one of the grounds in s 8(5) is proved by the party against whom the award is sought to be enforced or unless public policy, per s 8(7), "requires that the award not be enforced".[10]

Importantly, "public policy" is now defined in s 8(7A) of the IAA so that an Australian court may decline to enforce an award only on the grounds stated in the Model Law and not on local grounds of public policy which previously might have been invoked to prevent recognition or enforcement of a foreign judgment.[11]

As to the enforcement of awards in Australia, there is a discretion to adjourn enforcement proceedings in s 8(8) of the IAA (as amended in 2010). That discretion appears to be wide, but must be understood in light of the IAA as a whole.

The operation of the adjournment provision in subsection (8) is also tempered by subsections (9)-(11) which allow the Court to resume proceedings that have been adjourned under subsection (8) when one of the four circumstances listed in subsection (10) obtains. In *ESCO v Bradken*, Foster J said that "these provisions recognise the need for the Court to keep a close and active eye on the progress of foreign proceedings which will have underpinned any adjournment granted under subsection (8)".[12]

Other governments in the Asia-Pacific region have also been active.

Singapore[13] and Hong Kong[14] have recently reviewed their respective arbitration regimes with a view to bringing them into line with the Model Law. While amendments made to both the Singaporean and Hong Kong regimes are largely consistent with the 2010 amendments to Australia's IAA, they are, in some respects, more flexible.

One example of that flexibility concerns the opt-out procedure. In Australia, the Model Law applies exclusively to arbitrations with an Australian seat. Section 21 of the IAA, as amended in 2010, precludes the possibility of parties opting out of the Model Law in favour of a foreign arbitral procedural law or the uniform Commercial Arbitration Acts (CAAs) of the States and the Northern Territory,[15] which allow for a right of appeal on a question of law arising out of an award where the parties agree that an appeal may be made and the court grants leave.[16]

I note that Professors Garnett and Nottage have suggested there may be a lacuna in the new s 21.[17] The question they raise is whether the new s 21 has procedural or substantive effect and thus whether it applies retrospectively or prospectively only.[18] If Parliament intended that s 21 should only apply prospectively, an agreement made before 6 July 2010, in which parties to an international arbitration have chosen to opt out of the Model Law, would remain effective.[19] The *lex arbitri* of that agreement would be the old CAA. And if the Parliament of that State or Territory subsequently decides

to enact the new CAA, thus repealing the old CAA before the parties commence arbitration, there will be no *lex arbitri* to govern that arbitration.[20]

While the Singaporean and Hong Kong regimes, by preserving the opt-out procedure,[21] allow greater scope for party choice, the other side of the coin is that the invocation of the opt-out procedure means that parties may opt-out of the national legal system entirely.

That the Model Law "covers the field" under the IAA does not preclude parties from supplementing it by the adoption of innovative rules of arbitral procedure such as the ACICA Rules (as revised in 2011), the AMTAC Arbitration Rules, the MLANZZ Arbitration Rules and the IAMA Rules. "In other words, arbitral rules and the Model Law can co-exist".[22] The possibility of co-existence reflects the underlying doctrinal distinction between arbitral rules which "amplify[] the agreement of the parties" and the Model Law which is the *lex arbitri*.[23]

The 2010[24] Queen Mary College, University of London, International Arbitration Survey *Choices in International Arbitration*[25] describes Singapore as the regional leader in Asia.[26]

The Singapore International Arbitration Centre (SIAC) secretariat is comprised of a staff of 20 full-time employees recruited from countries within and outside the Asia- Pacific region.[27] That SIAC received some 188 cases in 2011[28] confirms Singapore's rapidly growing popularity as an arbitral seat for international disputes. SIAC's success is confirmed by the ICC figures. In 2010, 24 ICC arbitrations were commenced with Singapore as the chosen venue.[29]

In comparison, Australia was chosen as the venue in two ICC arbitrations commenced in 2010, and in only one in 2011![30]

The Singaporean Attorney-General has emphasised his government's intention to solidify Singapore's reputation as a hub for international arbitration,[31] attracting business and legal expertise from within the region and beyond. The fact that such eminent Australian lawyers as The Hon Tony Fitzgerald AC QC, The Hon James Spigelman AC and Professor Michael Pryles are registered with SIAC attests to the Singaporean government's success to date in its pursuit of that goal.

CHOICE OF LAW

China has also been an active participant in our region's increasing openness to reform to facilitate greater international engagement. In particular, China has made significant advances in the area of choice of law for international contracts. Its outward-looking Foreign-Related Civil Relations Law[32] aims to give primacy to the choice of contracting parties. It is consistent with major developments in national and regional codifications in the region, and it also reflects a movement in the private international law of China towards greater flexibility in aid of party autonomy.

In relation to Australia, two very broad points may be made. First, the momentum which has developed within the region should provide "a fresh impetus" to reform Australia's choice of law regime for contract.[33] The Law Reform Commission first recommended reform 20 years ago.[34] Its Choice of Law Report stated that "the proper law of the contract as developed by the common law is ill-defined and uncertain in scope and inadequate to deal with modern developments in international contracts". It made numerous recommendations, modelled on the European Community's Rome Convention 1980 on the Law Applicable to Contractual Obligations,[35] that have not been adopted by any Australian legislature.[36]

Secondly, uncertainty in a forum's choice of law regime necessarily increases "the risk that a transaction cannot be implemented according to its terms, defeating the parties' expectations".[37] Parties can reduce this risk by selecting "a forum with a choice-of law regime which respects party autonomy, and only exceptionally gives effect to [mandatory and] overriding mandatory rules …".[38]

For this reason some of Australia's high-minded domestic laws, if given an expansive interpretation by the courts, may diminish Australia's relative attractiveness as an arbitral seat.

While many domestic Australian laws can be avoided by simply including a choice of law clause in favour of the laws of a less prescriptive foreign jurisdiction, the same cannot be said for overriding mandatory laws of the Australian forum; that is, statutes which contain self-limiting provisions.[39] These laws cannot be side-stepped simply by a contractual stipulation that the law of another country applies. Their application is immediate and precedes any sort of conflict of laws analysis.

Such laws serve to safeguard the forum's political, social or economic interests and to protect the broader public interest. Examples include the *Competition and Consumer Act 2010* (Cth) (CCA), the *Carriage of Goods by Sea Act 1991* (Cth) (COGSA) and the *Insurance Contracts Act 1984* (Cth) all of which seek to impose higher standards of conduct on business.

It is no doubt true that these laws serve to create minimum standards for the protection of the national community. Whatever their domestic value, however, they are not likely to be welcomed by parties to multi-national agreements as a lucky door prize which comes with the choice of an Australian forum. That is especially so if Courts are disposed to take an expansive view of the application of these statutes.

Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd[40] affords a recent example of the expansive view. In that case, the Federal Court held that an arbitration clause, in a voyage charterparty, referring disputes to London arbitration was void on the basis that a voyage charterparty falls within the definition of "sea carriage document" in s 11 of the COGSA.

In so deciding, the Court disagreed with the ruling by the Supreme Court of South Australia in *Jebsens International (Australia) Pty Ltd v Interfert Australia Pty Ltd*[41] to the effect that "sea carriage document" is confined to bills of lading or similar, and not charterparties.[42] One might query whether the negotiation of charterparties involve the same imbalances in party bargaining power as affect the negotiation of bills of lading so as to warrant, as a matter of policy, an expansive application of the mandatory provisions of the COGSA.

On the other hand, the decision of the Federal Court in *Nicola v Ideal Image Development Corporation Inc*[43] affords an example of a Court giving a provision of this type a narrower operation. There the Court rejected the submission that claims arising out of laws proscribing unconscionable or misleading conduct in trade or commerce in the *Trade Practices Act 1974* (now the CCA)[44] involve issues of public policy that are not suitable for arbitration.

The Court held that although these consumer protection provisions "serve the public interest by fostering competition", this does not mean that claims arising out of them "are anti-trust or competi-

tion disputes" so as to affect interests broader than those of the parties to the dispute.[45]

It is worth noting that the Queen Mary College Survey reveals that parties usually select the governing law first, followed by the arbitral seat and then the arbitral institution and rules.[46] Sixty-eight percent of survey respondents "believe[d] that the choices made about these factors influence one another, particularly in relation to the governing law and seat".[47]

Accordingly, it is to be welcomed that the Australian Standing Council on Law and Justice, cognizant of the inter-connected nature of choice of law, choice of forum, and jurisdiction, is now actively exploring the possibility of legislative reform with a view to harmonising these rules.[48]

… ONE STEP BACK

Luke Nottage and Richard Garnett recently suggested that, if Australia wants to meet competition in the region, "a bolder and more progressive stance would highlight Australia as a … forward-looking player in the field …".[49] They, like other commentators, argue that, given some of the infelicities in the drafting of the 2010 amendments to the IAA, further legislative action is needed.[50] I have already mentioned one of these infelicities. I will now mention another.

You will recall that Part III of the IAA gives the Model Law force of law in Australia, and that Part II of the IAA introduces the terms of the New York Convention, concerning the enforcement of foreign awards, into domestic law. By virtue of s 8(4) of the IAA, for the New York Convention to apply, the award must have been made in a Convention country, or the person seeking to enforce the award must be domiciled or ordinarily resident in a Convention country or Australia. Where an award is not made in a Convention country, and the person seeking to enforce the award is not domiciled or ordinarily resident in a Convention country or in Australia, that person must apply to have the award enforced under article 35 of the Model Law. A person seeking to enforce an award made in an international arbitration in Australia (ie a non-foreign award) must also apply under article 35 of the Model Law.

An award will be enforced under article 35 on application in writing to a "competent court".

Rares J, in an address to the Senior Counsel Arbitration Seminar of the New South Wales Bar Association in September 2011,[51] noted that the expression, "competent court" is not defined in the Model Law or in the IAA. The IAA does not expressly confer jurisdiction on the Federal Court or the courts of the States and Territories in respect of applications under article 35 of the Model Law.

Rares J went on to explain, by reference to ss 2D and 39(1)(a)(iii) of the IAA, that the Federal Court, by virtue of s 39B(1A)(c) of the *Judiciary Act*, and State Courts, by virtue of s 39(2) of the *Judiciary Act*, have jurisdiction to entertain an application under article 35 as a matter arising under a law made by the Parliament.

He concluded that, so far as the Federal Court is concerned, the power to enforce a foreign award from a non-convention country (where the person seeking to enforce the award is neither domiciled nor ordinarily resident in a convention country nor in Australia) or a non-foreign award, to which article 35 of the Model Law applies, is a matter arising under a law made by the Parliament.

It was by this process of reasoning that Murphy J, in *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd*[52] (Castel) at [57], held that the Federal Court had jurisdiction to enforce a non-foreign award under article 35 of the Model Law.

So far as I know, the reasoning of Rares J, which was applied by Murphy J in *Castel*, has not been challenged. One should note, however, that there is a challenge to the decision of Murphy J which is currently pending in the High Court in its original jurisdiction. The matter before the High Court is due to be heard in November. I will return, in a moment, to the interesting contention which is to be agitated in that proceeding.

AUSTRALIAN COURTS AND ARBITRAL TRIBUNALS

I turn now to mention some aspects of the debate about the different roles and powers of arbitrators and Australian courts.

There are obvious differences between the decision of a judge and an arbitrator's award.

A judicial decision of a particular case is the most concrete expression of the law of the land. In a hierarchical judicial system

which observes the doctrine of *stare decisis* (ie. adherence to precedent) judicial decisions affect not only the immediate parties to the dispute but all other persons in like cases.

Decision making by the courts is not merely a matter of dispute resolution between private parties. Each decision by a court involves the compulsory application of the law of the land upon at least one unwilling party. That party is the losing party. That party, and the community at large, all have a vital interest in the quality of the judicial process and in the reasons given for the decision.

The giving of a comprehensive statement of reasons for judgment as to why the power of the state is to be exercised against an unwilling subject is an essential requirement of the exercise of judicial power as we conceive it. This requirement stems from that maxim that justice, as dispensed by the Courts, must not only be done, but be seen to be done.[53]

In international arbitration, there is less call to be concerned about an unwilling party. On the contrary, it is the will of both of those parties to submit to arbitration from which the power of the arbitrator is derived.

That is not to say, of course, that private commercial arbitration should be completely insulated from the supervision of the courts. The commercial entities who seek the benefits offered by arbitration as a method of dispute resolution are not indifferent to the quality of the decision-making process by which they have agreed to abide. No party to a commercial dispute would be content to be bound by a dishonest or blatantly incompetent decision. There is, therefore, a legitimate place for some intervention by the judicial organs of states in which arbitrations are conducted to ensure that the arbitration process is carried out fairly in conformity with the reasonable expectations of the parties to the dispute.

But that having been said, it seems tolerably clear that the commercial parties who value speed, commercial expertise, privacy and finality do not bargain for the rigour and processes in judgment writing and the availability of levels of appeal which characterise the work of Australian courts. Professor Adrian Briggs, Professor of Private International Law at Oxford University, has said, a principal objective of agreements for international arbitration is to "keep the resolution of disputes as far away from the courts as practicable."[54]

The nature and extent of the reasons that an arbitrator must give in a domestic arbitration was recently the subject of controversy between the decision of the New South Wales Court of Appeal in *Gordian Runoff Ltd v Westport Insurance Corp*[55] *(Gordian Runoff)* and earlier in the Victorian Court of Appeal in *Oil Basins Ltd v BHP Billiton Ltd*[56] *(Oil Basins)*. The High Court granted special leave to appeal from the *Gordian Runoff* decision and allowed the appeal.[57]

The appellant in the High Court, relying on the *Oil Basins* decision, contended that the reasons given by the arbitrators for the award were inadequate. The Victorian Court of Appeal in *Oil Basins* had said at [55] that: a "judge is bound to enter into the issues canvassed before the court and to provide an intelligible explanation as to why the judge prefers one case over the other. In our view, an arbitrator is subject to similar obligations".[58]

The New South Wales Court of Appeal in *Gordian Runoff* rejected that view. Allsop P, with whom Spigelman CJ and Macfarlan JA agreed, stated that the provisions of the old NSW *Arbitration Act* require only a statement of factual findings and legal or other reasons which actually led the arbitrators to conclude as they did, and not a statement and assessment of the arguments rejected.[59]

As I mentioned, the High Court allowed the appeal against the decision of the New South Wales Court of Appeal, but accepted, in *obita dicta*, that s 29(1)(c) of the NSW *Arbitration Act* could not be taken to suggest that an arbitrator's reasons must be sufficient to satisfy the standards required of an exercise of judicial power. In this regard, it was said that the reference in *Oil Basins* to reasons of a judicial standard was "an unfortunate gloss". See *Westport Insurance Corp v Gordian Runoff Ltd*[60] at [53] per French CJ, Gummow, Crennan and Bell JJ and at [169] per Kiefel J.

In relation to the NSW *Arbitration Act*, the High Court observed at [18]-[20] under the sub-heading "The Arbitration Act and the Supreme Court":

> *"An award, subject to the Arbitration Act and to any contrary criterion in the arbitration agreement, is final and binding on the parties to the agreement (s 28). The award may order specific performance of a contract if the Supreme Court would*

have power to decree specific performance (s 24). By leave of the Supreme Court, judgment may be entered in terms of an award and an award may be enforced in the same manner as a curial judgment or order … (s 33). The Supreme Court is empowered by s 44 to remove an arbitrator who has misconducted the proceedings or who is incompetent or unsuitable to deal with the particular dispute.

These statutory provisions indicate that the making of an award in arbitration proceedings is more than the performance of private contractual arrangements between the parties … They also suggest the importance which the provision of reasons by arbitrators has for the operation of the statutory regime. That statutory regime involves the exercise of public authority, whether by force of the statute itself or by enlistment of the jurisdiction of the Supreme Court. It also … displays a legislative concern that the jurisdiction of the courts to develop commercial law not be restricted by the complete insulation of private commercial arbitration.

No doubt it is true to say that the provision of an award under the [NSW Arbitration Act] lacks distinctive hallmarks of the exercise of judicial power, namely the maintenance of public confidence in the manner of its exercise and in the cogency or rationality of its outcomes, and the operation of the appellate structure and of the case law system. However, it is going too far to conclude that performance of the arbitral function is purely a private matter of contract, in which the parties have given up their rights to engage judicial power (cf Melbourne Harbour Trust Commissioners v Hancock (1927) 39 CLR 570 at 585-586, 590-591) and is wholly divorced from the exercise of public authority."

The majority referred, with approval, to the statement of Donaldson LJ in *Bremer Handelgesellschaft mbH v Westzucker GmbH (No 2)* [1981] 2 Lloyd's Rep 130[61] on the standard of reasoning couched in terms similar to the Model Law.[62]

Beyond that, their Honours contented themselves with the observation that what is required by way of reasons in a given case will

depend upon the circumstances: See *Westport Insurance Corp v Gordian Runoff Ltd*[63] at [53] and [170].

Broad statements of this kind are susceptible to a range of judicial applications. For that reason, they are not likely to be seen by international traders, and those who advise them, as an unequivocal acceptance of the proposition that it is sufficient for an arbitrator to state the findings and reasons which lead to his or her decision without stating the arguments which have been rejected and the reasons why.

It will be appreciated that the case was not directly concerned with the IAA. When *Westport Insurance Corp v Gordian Runoff Ltd*[64] reached the High Court, Mr Stephen Gageler, SC, then the Commonwealth Solicitor-General, appeared as amicus curaie on behalf of the Attorney-General. He submitted that "the equation by the Court of Appeal in [that] case and the Victorian Court of Appeal in *Oil Basins* of the duty imposed by s 29(1)(c) of the [State Arbitration Act] and Article 31(2) of the Model Law was wrong".[65]

The Solicitor-General argued that articles 5, 31(2) and 34 of the Model Law require no more than a statement of reasons which demonstrates that the arbitrators have addressed the dispute referred for determination. In relation to these submissions, the High Court said at [22]-[23] under the sub-heading "The federal scheme":

> *"Section 16 of the federal Act gives the force of law in Australia to the*
>
> *... Model Law … If the Model Law applies to an arbitration, State or Territory law relating to arbitration does not apply to it (s 21). In exercising a power to recognise and enforce an arbitral award under the Model Law, a federal, State or Territory court must have regard to the objects of the federal Act and the circumstance that awards are intended to provide 'certainty and finality' (ss 39(1)(a)(iii), 39(2)(b)(ii)). The federal Act in this way enlists the judicial power of the Commonwealth in aid of the operation of the arbitration system established by s 16 and the Model Law.*
>
> *Article 31(2) of the Model Law requires that an award 'shall state the reasons upon which it is based'. However, the Solic-*

itor-General submitted that this appears in a context where Art 5 provides that 'no court shall intervene except where so provided in this Law', and there is no provision for appeal on a question of law. An award may be set aside only under Art 34 and relevantly only on the ground of a breach of the rules of natural justice. The Solicitor-General contended that here these rules require no more than a statement of reasons to demonstrate whether the arbitrators have addressed the dispute referred for determination. Whether this is the proper construction of the federal Act and the Model Law may be left for determination on another occasion. The provisions of the federal scheme may be put to one side in construing the Arbitration Act, upon which this litigation turns."

These observations seem to acknowledge that the provisions of IAA exhibit a lesser degree of concern for the standard or quality of the reasons required of an arbitrator than the provisions of the State and Territory Arbitration Acts, and that this is significant.

Unlike the State and Territory Arbitration Acts, and the uniform CAAs, the IAA, does not contemplate an "appeal", as such, to a Court. Rather, by article 34 of the Model Law, the IAA grants a right of recourse in limited circumstances, the most significant of which is where the court finds that the award is in conflict with public policy.[66] This difference between the supervisory regimes of the IAA, on the one hand, and the State and Territory Arbitrations Acts and the uniform CAAs, on the other, might well affect how the role of the arbitrator is conceptualised and thus the nature and standard of the reasons that they are required to give.

It is possible that the High Court may soon have occasion to consider the extent and nature of reasons required of an arbitrator under the IAA in the proceeding, to quash the decision of Murphy J, in *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia and Castel Electronics Pty Ltd (TCL)*.[67]

The substantive contention to be advanced in *TCL* does not "[touch] to the slightest degree" (to use the words of Mr Walker SC for the plaintiff) the decision of Murphy J. The contention is, as I understand it, that Arts 35 and 36 of the Model Law, read with s 7 and Pt III of the IAA, purport to confer the judicial power of the

Commonwealth on arbitral tribunals contrary to the requirements of Ch III of the Constitution explained in *Boilermakers' Case*.[68]

The contention seems to be that these central provisions of the IAA interfere impermissibly with the judicial power of the Commonwealth and are invalid as inconsistent with Ch III of the Constitution. That is said to be because remedies characteristic of judicial power may be enforced by Ch III courts even though the foundational reasoning behind the decision to grant the remedy is neither transparent, nor in substance that of a Ch III court.

On the hearing of the plaintiff's application to show cause in *TCL*, Justice Gummow remarked that "[o]nce you get into that territory …" (by which his Honour was referring to modern arbitration statutes which provide for specific performance orders and injunctions):

> *"… you get an enlistment of a court in the enforcement stage which can have an impact on third parties. For example, a banker, in effect, intermeddles in the performance of an injunction by paying out when he should not pay out, that sort of thing, even though the banker has not[,] obviously not[,] been a party to this private agreement. So I think the 19th century cases did not have to cope with some of these sophistications we now have in the system. That is part of the problem I think."*[69]

The respondent alluded to the famous passage in *Dobbs v The National Bank of Australasia Ltd* (1935) 53 CLR 643. The Court in Dobbs comprised of Rich, Dixon, Evatt and McTiernan JJ said at [652]-[654] that:

> *"A clear distinction has always been maintained between negative restrictions upon the right to invoke the jurisdiction of the Courts and positive provisions giving efficacy to the award of an arbitrator when made or to some analogous definition or ascertainment of private rights upon which otherwise the Courts might have been required to adjudicate. It has never been the policy of the law to discourage the latter. The former have always been invalid.*
>
> …

By submitting the claims to arbitration, the parties confer upon the arbitrator an authority conclusively to determine them. That authority enables him to extinguish an original cause of action. His award will do so if it negatives the existence of liability … The award given under authority of the parties operates as a satisfaction pursuant to their prior accord of the causes of action awarded upon

…

It is true that, apart from statute, such an authority was revocable. It must subsist up to the making of the award … [That] authority was by its nature countermandable and no act or contract of the party could make it otherwise (Vynior's Case) … But, when an arbitrator, exercising a subsisting authority, delivered his award, the law gave full effect to it ... [I]t was never considered that the Court's jurisdiction was ousted by an award, notwithstanding that it concluded the parties with respect to matters which otherwise would be determined by the Court."

Obviously, I do not propose to enter upon a discussion of the merits of the arguments to be agitated before the High Court in *TCL*. One may say, however, that, whatever the value of Sir Edward Coke's *obiter dicta* in *Vynior's Case* as a statement of the common law, it had nothing to do with a statutory authorisation to the judiciary to hold parties to their bargain where one of the parties is disposed to seek to countermand it.

In this regard, s 7 of the IAA provides for a stay of proceedings pending in a court constituted by a party to an arbitration agreement to which the section applies. Under s 7(2) of the IAA, a court is required to grant a stay if "the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration". It may be argued that a case of the kind postulated by Gummow J at the show cause hearing in *TCL*, ie. where third parties' rights are in issue, is outside the mandatory operation of s 7. If that were so, there would be no statutory attempt to "enlist" a Ch III court to the performance of a non-judicial function.

Having summarised the issues which might arise in *TCL*, I will not comment further on the case.

The crucial question for the prospects of international arbitration in Australia remains as to where the balance is to be struck between the maintenance of necessary standards of fairness and competence on the one hand and the respect for the manifest desire of commercial parties for speed, expertise and economy on the other. One feels that the last word has not been said in relation to this question.

Whether the extent of judicial supervision is a matter of "strict scrutiny" or a lighter touch may be thought to reflect the extent of judicial scepticism about the benefits claimed for arbitration. For example, in *Westport Insurance Corp v Gordian Runoff Ltd*,[70] some comments of Heydon J reflect scepticism as to the wisdom of the choice of arbitration as a dispute resolution mechanism. His Honour said of that case at [111] that:

> *"The attractions of arbitration are said to lie in speed, cheapness, expertise and secrecy … [I]t must be said that speed and cheapness are not manifest in the process to which the parties agreed. A commercial trial judge would have ensured more speed and less expense. On the construction point it is unlikely that the arbitrators had any greater relevant expertise than a commercial trial judge. Secrecy was lost once the reinsurers exercised their right to seek leave to appeal. The proceedings reveal no other point of superiority over conventional litigation. One point of inferiority they reveal is that there have been four tiers of adjudication, not three."*[71]

It might respectfully be said these criticisms do not recognise that the failings of the arbitral process identified in *Westport Insurance Corp v Gordian Runoff Ltd*[72] reflect the Court's view of the extent of the proper level of judicial intervention in the process. If it were the case, understood from the outset, that the law required only the light judicial touch suggested by the NSW Court of Appeal, there might have been no occasion for his Honour's criticisms. Further, whatever perception the judiciary may have of the relative merits of litigation and arbitration, it is the perception of the parties and those who advise them that matter.

Again it may be said that the High Court's decision in *Westport Insurance Corp v Gordian Runoff Ltd*,[73] strictly speaking, applies only to domestic arbitrations governed by the old NSW Arbitration Act. It will no doubt assist courts called upon to interpret the provisions of the new uniform CAAs. It may also be persuasive for courts called upon to interpret provisions of the IAA.

In this regard, Croft J of the Supreme Court of Victoria recently said extra-judicially:

> *"as both the IAA and CAA apply the Model Law provisions, judgments under one regime can and will inform judgments under the other … [I]nternational and domestic parties are likely, and entitled, to assume that a decision on similar or identical provisions under one regime will be found to apply with equal force under the other regime".*[74]

The views of Croft J draw support from the exhortation in s 2A of the CAA that courts are expected to interpret its provisions and the IAA consistently. Whether the view put by the former Solicitor-General in *Westport Insurance Corp v Gordian Runoff Ltd*[75] will prevail remains to be seen.

A UNIFORM APPROACH

The desirability of developing a uniform body of jurisprudence on the Model Law in Australia has prompted Albert Monichino SC to argue forcefully that the Commonwealth Parliament should amend the IAA to provide for all appeals from State and Territory Supreme Courts to be heard by the Full Court of the Federal Court comprised of judges with international arbitration expertise.[76]

Such an approach is not without precedent. For example, s 24(1)(c) of the *Federal Court of Australia Act 1974* (Cth), in conjunction with other legislation, confers jurisdiction on the Federal Court to hear and determine appeals from single judge decisions of State and Territory Supreme Courts in some intellectual property matters.[77]

It might be thought that this approach has appeal, given that the development of a uniform body of jurisprudence depends, at present, on the rarely heard voice of the High Court. As Mr Monichino has noted, the High Court considered the IAA only once, in 1990, in *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332.[78]

CONCLUSION

In the market-based economies of the Asia-Pacific region, the development of international arbitration as the preferred mechanism for the management of performance risk has become one of the "facts on the ground" of the flourishing trade between our nation and those within our region.[79]

There can be no doubting the high quality of Australian courts and Australian justice. The question is whether, notwithstanding the high quality of our judicial institutions and their work, a strongly interventionist approach to the supervision of international arbitrations accords with the expectations of the parties to those proceedings. These parties have an unprecedented freedom to choose their dispute resolution arrangements; and they vote with their feet.

At a practical level, the views of international traders, and their priorities and perspectives, are crucial to the prospects for international arbitration in Australia. One is reminded of the observation that it makes little sense for sheep to pass resolutions in favour of vegetarianism while the wolves remain of a different opinion.

BIOGRAPHICAL DETAILS

Patrick Keane was awarded the degree of BA by the University of Queensland in 1973. In 1976 he was awarded the degree of LL.B. (Hons.) with First Class Honours and the University Medal in law. In 1977 he was awarded the degree of B.C.L. (Oxon.) with First Class Honours, and the Vinerian Scholarship and J.H.C. Morris Prize. In December 1977 he was admitted as a Barrister of the Supreme Court of Queensland appearing principally in commercial and constitutional cases. In November 1988 he was appointed Queen's Counsel. From 1992 to 2005 he was Solicitor-General for Queensland. On 21 February 2005 he was appointed to the bench of the Court of Appeal, Supreme Court of Queensland. On 22 March 2010 he was appointed Chief Justice of the Federal Court of Australia. On 8 December 2011 he was awarded the degree of Doctor of Laws honoris causa by the University of Queensland. On 1 March 2013 he was appointed to the High Court of Australia. Justice Keane was appointed a Companion in the General Division of the Order of Australia in 2015.

NOTES TO CHAPTER

1 8 Co Rep 81b, 82a; 77 ER 597, 598-599 (England, King's Bench).

2 *In Dr Bonham's Case* 8 Co Rep 113b; 77 ER 646 (England; King's Bench), Sir Edward Coke said at 652 "… in many cases, the common law will … controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void …".

3 For example, in *Dobbs v The National Bank of Australasia Ltd* (1935) 53 CLR 643.

4 (1760) 1 Black W 234 (Lord Mansfield).

5 cf I-Ching Tseng and Khory McCormick, "One Step Forward, One Step Back: Part I" *International Bar Association Legal Practice Division Arbitration Newsletter* (September 2011); cf Khory McCormick and I-Ching Tseng, "One Step Forward, One Step Back: Part II" *International Bar Association Legal Practice Division Arbitration Newsletter* (April 2012); See Albert Monichino, "International Arbitration in Australia: The Need to Centralise Judicial Power" (2012) 86 *Australian Law Journal* 118.

6 The Hon. Marilyn Warren AC, Chief Justice of Victoria, "Australia as a 'Safe and Neutral' Arbitration Seat" (Speech delivered at the Australian Centre for International Commercial Arbitration, People's Republic of China, 6-7 June 2012) 2.

7 Gregory Nell SC, "Recent Developments in the Enforcement of Foreign Arbitral Awards in Australia" (2012) 26 *Australian and New Zealand Maritime Law Journal* 24, 37.

8 Explanatory Memorandum, International Arbitration Amendment Bill 2010 (Cth) 2.

9 [2011] FCA 905.

10 *ESCO Corporation v Bradken Resources Pty Ltd* [2011] FCA 905 at [85] (ESCO v Bradken).

11 IAA ss 8(7)(b) and 8(7A).

12 [2011] FCA 905 [57].

13 The *International Arbitration (Amendment) Act 2009* (Singapore) commenced on 1 January 2010.

14 The *Arbitration Ordinance* (Hong Kong) cap 609 came into force 1 June 2011.

15 Neither the uniform CAAs nor the old State and Territory Arbitration Acts have residual operation when the IAA applies: IAA s 21. To date, New South Wales, Victoria, South Australia, Western Australia, Tasmania and the Northern Territory have enacted the uniform CAAs.

16 CAA s 34A.

17 Richard Garnett and Luke Nottage, "What Law (If Any) Now Applies to International Arbitration in Australia?" (Legal Studies Research Paper No 12/36, Sydney Law School, May 2012).

18 Ibid 12-13. Murphy J held in *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* [2012] FCA 21 at [67] that s 21 of the Model Law does not affect the rights and liabilities of the parties to an arbitration and therefore could apply retrospectively on the principle established in *Maxwell v Murphy* (1957) 96 CLR 261 that legislation may operate retrospectively where it has procedural and not substantive effect.

19 Richard Garnett and Luke Nottage, "What Law (If Any) Now Applies to International Arbitration in Australia?" (Legal Studies Research Paper No 12/36, Sydney Law School, May 2012).

20 Ibid; Albert Monichino, Luke Nottage and Diana Hu, "International Arbitration in Australia: Selected Case Notes and Trends" (Legal Studies Research Paper No 12/53, Sydney Law School, August 2012).

21 See Richard Garnett and Luke Nottage, "The 2010 Amendments to the International Arbitration Act: A New Dawn for Australia?" (2011) 7 *Asian International Arbitration Journal* 33-35.

22 The Hon. Justice Clyde Croft, "Recent Developments in Arbitration in Australia" (2011) 28 Journal of International Arbitration 599, 604.

23 Albert Monichino, Luke Nottage and Diana Hu, "International Arbitration in Australia: Selected Case Notes and Trends" (Legal Studies Research Paper No 12/53, Sydney Law School, August 2012) 12.

24 This is the most recent survey released by the School of International Arbitration at Queen Mary, University of London. The School is currently conducting its 2012 International Arbitration Survey entitled *Current and Best Practices in the Arbitral Process*.

25 This empirical study was based on "136 lengthy questionnaires" and "67 in-depth interviews": School of International Arbitration, Queen Mary, University of London, *2010 International Arbitration Survey: Choices in International Arbitration* (2010) <http://www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf> Introduction (Queen Mary College Survey).

26 Queen Mary College Survey 17.

27 Roger N Traves SC, *Singapore Trade Mission Report* (Queensland Bar Association) 4.

28 Ibid 5.

29 Ow Kim Kit, Director, ICC Arbitration & ADR, Asia "ICC International Court of Arbitration/ADR" (Presentation delivered at the ICC Australia Arbitration Roadshow, Brisbane, 25 July 2012).

30 Ibid.

31 Roger N Traves SC, *Singapore Trade Mission Report* (Queensland Bar Association) 5.

32 «中华人民共和国涉外民事关系法律适用法» [Law on the Application of Law to Foreign-Related Civil Relations of the People's Republic of China] (People's Republic of China) National People's Congress, 28 October 2010 (Foreign-Related Civil Relations Law).

33 Brooke Adele Marshall, "Reconsidering the Proper Law of the Contract" (2012) 13 *Melbourne Journal of International Law* 505, 507.

34 Law Reform Commission, *Choice of Law*, Report No 58 (1992) 81. From 1996, the Law Reform Commission has been called the 'Australian Law Reform Commission'.

35 Law Reform Commission, *Choice of Law*, Report No 58 (1992) 40.

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AMTAC Annual Address 2013

The Elusive Panacea of Uniformity: Is it Worth Pursuing?

18 September 2013

Stuart Hetherington, President, Comite Maritime International

ABSTRACT

This paper refers to the history of the Comite Maritime International (CMI), its raison d'etre being to seek to bring uniformity to maritime law internationally; the long history of attempts to achieve uniformity; and the reasons identified by others as to what has stood in the path of greater uniformity in the past. It examines the history of the carriage of goods liability regimes over the last 120 years, makes a recommendation as to how commercial parties could achieve greater uniformity and move the reform agenda more speedily in relation to the carriage liability regime describes the current work of the CMI, looks at CMI's limited role in relation to arbitration and recent disparate cases in the law on recognition of international arbitration awards; commits the CMI to continue its role of seeking to achieve uniformity, whatever obstacles it encounters .

COMITE MARITIME INTERNATIONAL

The CMI was established in 1897 and is the oldest international organisation in the maritime field. It was founded several years after the International Law Association (ILA) and was perhaps in one sense, as Frank Wiswall says in his Centenary publication: "A Brief Structural History of the First Century" (of the CMI), a descendant of the ILA. It was, however, the first international organisation concerned exclusively with maritime law and related commercial practices. Its origins lie in the efforts of a commercial and political group led by Belgians who came together in the early 1880s to discuss and to put before the ILA a proposal to codify the whole body of maritime international law.

Wiswall goes on to describe the two failed diplomatic conferences of 1885 and 1888 and the establishment of the CMI as a direct result. Agreement was reached with the ILA for a separate specialist organisation to continue to pursue the goal of unifying maritime law.

Amongst those involved were the acknowledged founding fathers of the CMI, Louis Franck, an Antwerp barrister, Charles Lejeune, a Belgian marine underwriter, and Auguste Beernaert, the President of the Belgian Chamber of Deputies, who later became Prime Minister. The same people were involved in setting up the Belgian Association in the CMI.

A meeting was held in Brussels in June 1897 to formally establish the CMI as the parent international organisation to carry on the effort to unify the world's maritime laws and to adopt a constitution for the CMI. In attendance were representatives of eight nations, including Belgium, Denmark, France,Germany, Italy, Netherlands, Norway and the United Kingdom.[1]

As Wiswall points out, the failed diplomatic conferences of the 1880s laid the foundation for the partnership between the Belgian government and the CMI that resulted in the famous series of Brussels Diplomatic Conferences on Maritime Law, which adopted the many conventions and protocols drafted by the CMI over more than 80 years and which were held between 1910 (Collision and Salvage) and 1979 (Hague-Visby/ SDR)[2].

With the formation of the Legal Committee of the International Maritime Organisation in 1968, following the "Torrey Canyon" wreck off the Scilly Isles, resulting in pollution, the IMO began to take over from the government of Belgium the role of organising diplomatic conferences in the field of maritime law. It may not be appreciated by this audience that the International Sub-Committees of the CMI and subsequent CMI conferences have done the initial drafting of every convention considered by the IMO Legal Committee (up to 1997) (except the 1969 Intervention Convention and 1973 Protocol and 1996 HNS Convention).

The CMI was one of the first NGOs to be granted consultative status by the IMO and has observer status at IOPC Funds meetings.

When I visited Antwerp earlier this year I also had a meeting in Brussels with a senior Belgian diplomat who expressed confidence that while the present government is in power it would be prepared to host a diplomatic conference, if the CMI produced work that did not sit comfortably within IMO's responsibility. This discussion took place in the context of "Judicial Sales", a draft instrument of which is currently being worked upon by the CMI and likely to be concluded in Germany next year.

One of my predecessors as President of the CMI (1947-1976)[3], Albert Lilar, said the following:

> *The history of maritime law bears the stamp of a constant search for stability and security in the relations between the men who commit themselves and their belongings to the capricious and indominatable sea. Since time immemorial the postulate which has inspired all the approaches to the problem has been the establishment of a uniform law.*

That is still the primary object of CMI today.

It is also important to remind ourselves that Louis Franck and his co-founders of the CMI said, when explaining their concept:

> *It is with the object of overcoming multiple opposition, national particularism, of resolving difficulties not by means of abstract and theoretical solutions but from the needs of practice, of obtaining the ear of the Parliaments, that we had the idea of appealing, not only to the jurists who are interested in maritime law, but to the very people who, in their interests, in their problems of every day, have to submit to the consequence of good and bad laws. We have taken into consideration that the shipowner, the merchant, the underwriter, the average adjuster, the banker, the person who is directly interested, all take a preponderant part in our work; that the task of the jurist is to discern that which, in this maritime community, is the general purpose, that which, among these divergent interests, is common to all; to discern what, among the diverse solutions, is the best, to contribute one's learning and one's experience; but that in the final analysis, the jurist must hold the pen and that it is the man with the experience who must dictate the solution.*[4]

EARLY ATTEMPTS AT UNIFORMITY

Albert Lilar referred also to the fact that:

> *...methods have differed and still vie these days with one another. Certain nations, with various fortunes, have endeavoured to impose their law on all those who use the marine spaces which are under their domination. "Mare nostrum'; "Mare clausum, sive de dominio maris" are typical expressions of a method opposed to that of "Mare liberum" vindicated by Hugo Grotius...*

We know that Rhodian Sea Law (the Lex Rhodia) based on the Code of Justinian, had a role to play in the Mediterranean from the 7th to the 12th centuries AD, particularly in the area of liability for lost or damaged cargo,[5] and The Rolls of Oleron[6] and their successors, were also widely adopted, at least in the Atlantic trades around the coasts of France, Spain, Belgium, Holland and Britain, from the 13th Century. They dealt with topics that we would today describe as salvage, general average, the rights and obligations of masters and crew, shippers pilots and demurrage - in admittedly simplistic terms. Whatever their reach and effectiveness, it is of interest, is it not, that in the 13th Century both traders, carriers and rulers saw benefits in seeking to have commonality in the laws as they applied to shipping. Interestingly, apart from in a general average situation those rules did not seek to lay down how cargo claims would be dealt with.

It is suggested by Valentin Vermeersch and his collaborators in their paper[7] that numerous copies of the Laws of Oleron are to be found in different parts of Europe, and were clearly extended when in 1407 twenty two Hanseatic cities met in Lubeck and produced a codification of maritime law. That codification, the Laws of Wisby (on Gotland in the Baltic Sea) was actually nothing more than a compilation of the articles of Lubeck, of the Amsterdam ordinance, and of the Laws of Oleron, which thus were taken up virtually integrally into a broader whole. The Laws of Wisby became the leading sea law on the Atlantic coastal route and were disseminated by the trading activities of the Hansa. "Only in England, where the original and pure laws

of Oleron were registered in the Black Book of the Admiralty did they find little acceptance."

I mention that history because it does show a desire of traders, shipowners and rulers to seek to have a codified version of the law to govern many aspects of their endeavours from the 6th to 14th Centuries.

EMPIRE

You will be pleased to know that I do not intend to discuss the intervening centuries between the 13th and 14th Centuries and the late 19th Century, except to refer, as did Albert Lilar to the Ordonnance de la Marine of 1681, which made liberal use of laws and customs of the past and to Mancini (I am assuming the reference was to Pasquale Stanislao Mancini of the University of Turin at the time of the Risorgimento), quoted by Lilar who, in his inaugural address at the University of Turin stated:

> *The sea with its winds, storms, dangers, does not change; it calls for a necessary uniformity of juridical regimes*[8]

Perhaps the single most unifying feature of the latter part of that period is of course the effect of the British empire. For example, those of us that were in practice prior to 1988 know that as shipping lawyers, a large part of our practice, was at one with those other countries in the empire that inherited the *Admiralty Court Act 1840, the Admiralty Court Act 1861*, and the *Colonial Courts of Admiralty Act 1890*, and that our admiralty jurisdiction had remained static since the beginning of the 20th Century. In 1924 we gave effect to the Hague Rules, as so many other Commonwealth countries were also to do.

By way of further example, let us not forget the work, at the end of the 19th Century in the legislative sphere, of Sir Mackenzie Chalmers. I commend to you the paper by Chief Justice Allsop and Michael Wells on the occasion of the Centenary of the *Marine Insurance Act* 1909[9] where the amazing achievements of that man were identified in relation to three key pieces of commercial legislation in the UK: the *Sale of Goods Act* 1894, the *Bills of Exchange Act* 1902, and the *Marine Insurance Act* 1906 and which were replicated throughout the Empire.

At paragraphs 28 and 29 of their paper, the authors made the following comments which are relevant to my topic:

> 28 *Chalmers' intention in writing his digest and in drafting the Bill is disclosed in the Memorandum attached to the 1894 Bill, in which he said:*
>
> *"In dealing with rules of law, which may be modified by stipulations of the parties, it is to be borne in mind that the certainty of the rule laid down is of more importance than its theoretical perfection. What mercantile men require is a clear rule to provide for cases where the parties have either formed no intention or have failed to express it clearly. Where the rule is certain, the parties know when to stipulate and what to stipulate for.*
>
> 29 *These ideas rest on the potency of the idea that commerce requires clarity and simplicity. They reveal a healthy scepticism of any ''genius" in the organic development of unstructured principle.*

The search for uniformity has therefore existed for hundreds of years.

WHY?

Why did the medieval traders, carriers and rulers think that codification or uniformity was so important and to what extent have trading nations achieved it today are the questions that I want to look at. In seeking to answer the first part of the question I can do no better than what Charles Haight Jnr, (Justice Charles Haight, United States Senior District Court, Southern District of New York), had to say in his paper "Babel Afloat: Some Reflections on Uniformity in Maritime Law" being the third Nicholas J Healy Lecture at New York University School of Law in 1996[10]. He explained his title with reference to Genesis Chapter 11 verses 1 through 9. I will not give you all of the text but simply quote a part which reads:

> *And the whole earth was of one language and of one speech. And they said to one another, Go to, let us build us a city and*

> *a tower, whose top may reach unto heaven; and let us make us a name, lest we be scattered abroad upon the face of the whole earth... so the Lord scattered them abroad from thence upon the face of all the earth; and they left off to build the city. Therefore is the name of it called Babel; because the Lord did there confound the language of all the earth; and from thence did the Lord scatter them abroad upon the face of all the earth.*

Justice Haight then posed the question as to what "that bleak old Testament passage" (as he described it) had to do with uniformity in the maritime law and answered his question as follows:

> *Those who strive to achieve a uniform maritime law, nationally and internationally, seek to have the people of the maritime community - shipowners, cargo owners, insurers, lenders, furnishers of supplies, salvors - "be of one language and of one speech". so that rights and obligations may be certain and predictable. I believe that to be a desirable goal and hope that, before this audience, I am in large measure preaching to the choir.*
>
> *And progress in achieving uniformity has been made from time to time throughout history. But it seems that whenever the maritime world begins to achieve one legal language, so that the tower of a uniform maritime law starts to arise, some force confounds that language, and scatters the maritime community upon the face of all the earth, so that uniformity, having taken two steps forward, then takes one step back.*

MEASURING SUCCESS

How does one measure success in relation to uniformity? Patrick Griggs in the 6th Nicholas J Healy lecture at New York University of Law in 2002[11] pointed out that "traditionally uniformity is achieved by means of international Conventions or other forms of agreement negotiated between government and enforced domestically by those same governments". He said it was "tempting to measure success on a strictly numerical basis", then analysed the track records of some of the major Conven-

tions - Collisions Convention 1910 (88 ratifications); Salvage Conventions 1910 (86 ratifications) and 1989 (40 ratifications); the Carriage of Goods Convention 1924 (89 ratifications); Hague-Visby (32 ratifications); Hamburg Rules (28 ratifications) (to which I will return); Limitation Conventions 1924 (15 ratifications), 1957 (51 ratifications) and 1976 (37 ratifications); Oil Pollution Conventions: CLC 1969 (103 ratifications); Fund Convention 1971 (75 ratifications); Maritime Liens and Mortgages Conventions 1926 (28 ratifications); 1967 (5 ratifications) and 1993 (6 ratifications)[12].

Patrick Griggs then identified a number of obstacles to uniformity:

Absence of need: There is much to be said for the IMO Assembly direction to the effect that Conventions or other instruments should only be produced "where a compelling need is established". This is something that I had to be mindful of when chairing the CMI International Working Groups on "Places of Refuge" and the "Review of the Salvage Convention", since to submit any draft instrument to the IMO without having satisfied ourselves of that requirement would have been a waste of time. Patrick Griggs quoted Hobhouse J (as he then was) in a paper where his Lordship had said:

> *What should no longer be tolerated is the unthinking acceptance of a goal of uniformity and its doctrinaire imposition on the commercial community. Only Conventions which demonstrably satisfy the well proven needs of the commercial community should be ratified and legislation should only be agreed to if it is demonstrably fit to be enacted as part of the municipal law of this country.*[13]

Time scale: This is a reference to the long delay between conception, finalisation and coming into force, especially where limitation amounts (a good example is the Athens Convention) may be out of date by the time states give effect to a Convention);

Differences in assessment of claims: He referenced The Athens Convention as a good example of the difficulties of establishing appropriate limitation amounts;

Drafting in a void: The Wreck Removal Convention is an example cited by Patrick Griggs. The initial draft was prepared by the three sponsoring countries without the usual preparatory work to ascertain domestic law in a large number of states, which would have been carried out by the CMI at the commencement of any such work program;

Over elaboration: Patrick Griggs compared the 1910 Salvage Convention with 16 articles (which occupy 4 pages of the CMI Handbook of Maritime Conventions) and the 1989 Salvage Convention (which consists of 34 articles, a "Common Understanding", and two resolutions which occupy 10 pages in the CMI Handbook);

Have we got the right instrument: Patrick Griggs identified the various alternatives: codes, model laws, guidelines and rules as opposed to a convention. Eg UNCITRAL Model Law on Arbitration;

Politics: Patrick Griggs cites the CLC Convention because it offered a clear liability regime, compensation for the consequences of oil spills and a direct cause of action against liability insurers as reasons for its success;

Expense of application: Patrick Griggs queried whether this might be the reason that the HNS Convention has not thus far been successful in gathering support;

High thresholds: Patrick Griggs compared the Athens Convention with a threshold of 10 states before coming into force with the Bunker Convention, requiring 18 states;

Failure to denounce superseded conventions: As an example Patrick Griggs noted Poland has ratified and implemented the 1924, 1957 and 1976 Limitation Conventions and not denounced the earlier two.

Implementation and interpretation: As the work done by Professor Francesco Berlingieri has pointed out, states give effect to conventions in many varied ways, such as by cherry picking and incorporat ing into domestic law only parts of the conventions. Although Australia did not ratify the 1952 Arrest Convention, we have largely accepted it within our *Admiralty Act 1988*. A review of the 1999 Arrest Convention by the NSW Committee of the MLAANZ identified a few provisions within it that might

be beneficial for our law, but not a sufficient number to warrant amendment to the legislation, or ratification of the Convention. Should we cherry pick some of those provisions?

Failing to set a good example: The United States is a significant maritime nation that generally does not give effect to international conventions. A good example is the United Nations Law of the Sea Convention which the US Coast Guard is very keen for the US to give effect to but which mining interests appear to oppose.

Finally, Patrick Griggs asked: ***are we just conventioned out?*** There is no doubt that all of those suggestions play a part in the success or otherwise of a convention. I would like to concentrate on implementation and interpretation and to consider whether there is a better way.

IMPLEMENTATION AND INTERPRETATION

This is an area to which Francesco Berlingieri has devoted considerable attention. In an article co-authored by him with the late Professor Anthony Antapassis, they drew attention to the following:

> *The methods of national implementation of international Conventions differ from country to country and, sometimes, various methods are used on different occasions in the same country. In some countries treaties, if self-executing, have the force of law as a consequence of their ratification, and they are therefore automatically incorporated in the national legal system. In most countries, however, some sort of implementing legislation is required. This is so in the United Kingdom and in the countries of the Commonwealth. This is a/so the case in many other countries, such as, for example, most of the civil Jaw countries. The implementing legislation may vary from the promulgation or publication to the enactment of a Convention to the translation of substantive provisions of the Convention into terms of national law, and to the application of a Convention within the framework of a more general law.*

CARRIAGE OF GOODS LIABILITY REGIMES

Another method of seeking to evaluate the success or otherwise of the international community in achieving uniformity in the maritime area might be to look at the history of the carriage of goods liability regimes since the 19th Century. There are presently four easily identifiable variants: the Hague Rules the Hague-Visby Rules the Hamburg Rules and now the Rotterdam Rules as well as many states, like our own, that have aspects of the Hague/ Hague-Visby and Hamburg Rules in their regimes.

In the late 19th century, the ILA became involved in early attempts at unification. Professor Michael Sturley describes this in an article in the Journal of Maritime Law and Commerce[14] where he refers to the ILA's early attempts to achieve uniformity to prepare a "Code of International Law". As Sturley says:

> *The founders believed that such a code was a pre-requisite to the judicial settlement of international disputes, and would therefore be a major contribution to world peace. The Association, however, quickly turned its attention to private law subjects with a heavy emphasis on maritime topics.*

In 1890 for example, it achieved its first great success: the York-Antwerp Rules, which have (with various revisions) effectively unified the law of general average for over a century. It is interesting that the Rolls of Oleron had also directed so much attention to that topic, namely how carriers and merchants should share the costs and expenses of a common adventure when disaster strikes.

(i) Model bill of lading

Sturley continues his history of the Hague Rules in his work on the Travaux Preparatoire of the Hague Rules[15] and the article in the Journal of Maritime Law and Commerce *to* which reference has already been made. He notes that the ILA turned *to* bills of lading at its Liverpool Conference in 1882, but the model bill of lading adopted at that Conference, which was designed for voluntary adoption by carriers and shippers, did not achieve general acceptance.

(ii) Set of rules

A few years later, the ILA temporarily abandoned the conference form of bill of lading in favour of a set of rules, known as the Hamburg Rules of Affreightment, for the parties to incorporate voluntarily by reference into their bills of lading. (I will suggest below that the consolidation of liner shipping into a few mega carriers may provide an opportunity for that failed 19th century model to be revived in favour of the more tortuous path of international conventions.) Although they were adopted by a few German companies, they had little immediate impact, according to Sturley. They were abandoned by the ILA a couple of years later in 1887 when it reaffirmed the principles of the "conference form" of bill of lading.

(iii) Domestic legislation

The next development, as Sturley points out, is that several countries unilaterally enacted domestic legislation governing exoneration clauses in bills of lading[16]. This was in frustration at the failures of the international community *to* develop a unified system. There was clearly frustration that carriers were able to exclude themselves from having any liability. The first country to introduce unilateral legislation was the United States with its *Harter Act*[17] which was signed into law by President Harrison in 1893. Other countries (including Australia) followed suit.[18]

(iv) Convention

It was not until the end of World War I that steps were taken to achieve an international convention. Countries such as Australia, New Zealand and Canada lobbied Britain because consignees in those countries were unable to obtain the benefits of their own *Harter Act* style of legislation and carriers were able to benefit from the wide exclusion clauses which were still permissible. This led to a number of meetings[19]. An early version of the Hague Rules of 1921 was designed, as Sturley points out, "for voluntary incorporation by reference into bills of lading" (ie another attempt to circumvent the convention model).

Australia gave effect to the Hague Rules in its *Sea Carriage of Goods Act 1924*. It was not until 1936 that the United States passed its *Carriage of Goods by Sea Act*.

Professor Sturley has also pointed out that it was only after US adoption that Canada passed its new *Water Carriage of Goods Act* (two months after the US COGSA); within two years of the US ratification of the Brussels Convention (France, Italy, Germany, Poland, Finland and the three Scandinavian countries all followed suit). That is not to say that there had not been a number of countries that had come on board earlier. They included a large number of Commonwealth countries in the 1930s.

The ***Hague-Visby Rules***, which were agreed in Brussels on 23 February 1968, did not enter into force until 23 June 1977.

The ***Hamburg Rules of 1978*** entered into force in November 1992. The last ratification was that of Albania in 2006. It is fair to say that none of the major trading nations such as the United States, China or Japan have ratified the Hamburg Rules.

Quite apart from the *Hague-Visby Rules* there are of course many countries (China, Australia and Scandinavian countries in particular amongst them) who have now given effect to, essentially, a hybrid regime that straddles Hague, Hague-Visby and Hamburg Rules.

By 1990 it hadbecome apparent to the CMI that the Hamburg Rules were not proving attractive to trading nations and the then President Francesco Berlingieri formed an International Working Group to consider what the CMI could do. The US MLA started work in the 1990s on the drafting of a Bill to replace the US COGSA of 1936.

As Professor Sturley recounts in an article in 1995[20] an ad hoe Liability Rules Study Group had been established by the US MLA earlier that year. It had proposed a number of amendments to the US COGSA. He concluded his article on the work done by that Study Group by saying:

> *The merits of the Study Group's proposal are open to debate. ... But the effect of the proposal on international uniformity has been a major part of that debate, and an area where there have been many misconceptions and ill-informed arguments.*
>
> *On careful analysis it can be seen that any international uniformity in this field is rapidly breaking down. In any event, US law has been out of step from the rest of the world for many*

years, and under current political conditions, there is no realistic prospect of bringing the United States into either of the international regimes. The Study Group's proposal may damage apparent uniformity, but this damage is merely cosmetic. Taken as a whole, the proposal does far more in bringing the United States into substantive uniformity with its trading partners than any other option available and most encouraging of all, if Congress adopts the proposal it may provide some of the impetus to help restore some of the international uniformity that has followed Congress' previous efforts in this field.

In his 1995 article Sturley said the following about uniformity:

If the law is uniform, everyone involved in the transaction will know that its liability (or recovery) will be the same wherever a dispute is resolved. Results will be more predictable, litigation will be less necessary, and the parties will be able to make their underlying business decisions with confidence, knowing what law will be applied if loss or damage occurs.

A lack of uniformity imposes real costs on the commercial shipping system that the Hague Rules govern. Every covered transaction involves at least two countries: the shipper's and the consignee's. The carrier may be from yet a third country. The carrier's indemnity insurer, the cargo underwriter, and the bank that finances the transaction may increase the total number of countries involved to six and each of these parties may participate in a number of other transactions, each involving a different group of countries. Any one of the transactions could be subject to litigation in any of the countries involved - or even in an unrelated country where a claimant obtains jurisdiction over a ship. Only a uniform international code can provide the certainty and predictability that they all require to make rational and efficient decisions.

ROTTERDAM RULES

In 2001 a draft CMI instrument was concluded at the Singapore Conference which was then forwarded to UNCITRAL. Work then proceeded over seven years until the Rotterdam Rules of 2008 were

finalised. They have been signed by 22 countries, including the United States, but since ratified by only two countries: Spain and Togo. A number of countries seem to be moving to wards ratification but are awaiting developments in the US or EU states.[21]

In April, together with Chet Hooper of the US MLA (who was President of the US MLA between 1994 and 1996), I met with two employees of the State Department. We were told that what is described as the "transmittal package" was nearing completion. That is the document which we would understand to be similar to, but I suspect more extensive than, an explanatory memorandum, as well as the text of the Convention.

On completion of the package, it is then sent to other government agencies such as the Federal Maritime Commission, Maritime Administration and the Justice Department. I was informed by Chet Hooper on 13 June 2013 that the package was on its way to the other agencies. (We like to think that our visit had something to do with that). Those departments have been involved in the process previously and it is not thought likely that there will be much delay in obtaining their sign-off on the package. Once that has taken place, the Secretary of State sends the transmittal package to the President for his approval. The President then sends it to the Senate for its approval. No estimate is given as to how long those processes may take. There is no certainty that they will be completed.

A SOLUTION?

International liner shipping has changed significantly since the late 19th Century. The consolidation of carriers, the conference system (where it still exists) as it applies to liner shipping, the recent coming together by Maersk, MSC and CMA CGM (the P3 Alliance), the similarity in the forms of bills of lading, the influence of the International Chamber of Shipping and BIMCO on documentary matters, all suggest to me that at least in relation to containerised carriage of cargo, it should be possible for carriers with the support of their P&I Clubs to incorporate the Rotterdam Rules into their bills of lading. Whilst local laws may give effect to regimes that predate the Rotterdam Rules, it is hard to see why parties would seek to rely on those other regimes, when by private contract they have

agreed to another regime, especially when there would be provisions which are beneficial to them. For shippers and consignees there are clearly benefits in having higher package limitations, the ability to sue for delay and an absence of nautical fault being a defence to a carrier. For carriers, the benefits include a clearer responsibility on shippers and certainty insofar as regime is concerned. It might be thought unlikely that carriers would seek to take advantage of more beneficial limitations in the country in which proceedings take place, if they have taken the step of incorporating the less beneficial regime into their contract.

If carriers were to take such a step, it would, in my view, impress governments and accelerate the process of ratification. Certainly in a visit (to which I will also refer later) which I made with the President of the Maritime Law Association of Australia and New Zealand (MLAANZ) to the Department of Infrastructure and Transport in May, it was said that that would influence the Australian government.

Overall, whilst the period after 1924 saw some measure of uniformity (particularly after 1936), the history of the Hague Rules since the 1970s does not supply very much evidence that the Convention system (if I can refer to it in that way) has greatly assisted commercial parties. As we have seen, there are presently four sets of Rules to choose from.

RECENT WORK OF THE CMI:

Review of the Salvage Convention and Recognition of Foreign Judicial Sales of Ships

The two principal topics which were discussed at the Beijing Conference in October last year were a Review of the Salvage Convention and Recognition of the Foreign Judicial Sales of Ships. The former had been carried out as a result of a request made to CMI by the International Salvage Union, who have been very unhappy with the convention for many years. Sadly for the Salvage Union, the CMI was not convinced that there was a "compelling need for reform".

Judicial Sales started on the initiative of Chinese lawyer Henry Li, who was concerned that the absence of a Convention in this

area meant that sales of ships by order of the Courts in one jurisdiction were not always being recognised in other jurisdictions. There are to be further discussions on this topic in Dublin in late September and the project will, hopefully, be concluded in Germany next year. Both those topics were classic CMI projects, that is, IWG's working on wordings for an international instrument before a Conference and then for it to be debated over a number of days at a Conference in sessions that have much in common with a diplomatic conference.

THE PRESENT WORK OF THE CMI

Review of the Rules of General Average

The CMI is the custodian of the York Antwerp Rules and initiated in October 2012 a major review of those Rules by appointing a new International Working Group (IWG) under the chairmanship of Bent Neilsen. Amendments made in 2004 to the York Antwerp Rules at the CMI Vancouver Conference have not received widespread support. The main reasons the 2004 Rules were unacceptable to the shipping community were that salvage (Rule VI) was excluded from General Average and crew wages in ports of refuge (Rule XI) were abolished. There were additional provisions but those appear to be the primary concerns. The questionnaire which was sent out to Maritime Law Associations on 15 March 2013 raises those issues, but also seeks to know whether General Average should be abolished, whether the Rules need amendment in the light of the Rotterdam Rules, whether the Rules should attempt to define terms used, whether they should incorporate provisions relating to arbitration or mediation of disputes, whether they should incorporate key documents such as average guarantees and average bonds, whether changes are needed to assist further in relation to absorption clauses (where hull insurers pay general average in full up to a certain limit) whether express wording is needed in the Rules to deal with the payment of ransoms, whether there are any steps which can be taken to minimise costs, as well as detailed questions posed in relation to particular rules. Some of the problems named in the answers to date include the large container ship cases, the administrative

difficulties of obtaining security, low value cargoes and currency of adjustment. The current Rules, which are most in use, are the 1994 rules drafted in Sydney at the CMI Conference.

OFFSHORE ACTIVITIES - POLLUTION LIABILITY AND RELATED ISSUES

Another topic which was debated at Beijing was "Offshore Activities". CMI sent a draft instrument to the IMO after the Rio de Janeiro Conference in 1977. At the 1994 CMI Conference in Sydney a revised version of the 1977 Rio draft Convention was adopted (Draft International Convention Off-shore Mobile Craft). At the same time it established a working group to "further consider and if thought appropriate draft an International Convention on offshore units and related matters". The Sydney draft was considered by the IMO Legal Committee in 1995 but it became apparent that it did not commend itself to the Legal Committee and the CMI was encouraged to pursue its efforts to draft a comprehensive treaty[22]. That history was brought up to date by Richard Shaw in a report he prepared for the Beijing Conference last year[23]. He noted that the CMI had submitted a report to the IMO Legal Committee in 1998 containing a review of the subject, with a survey of the principal legal issues which should, in the view of the CMI International Sub-Committee, be covered by such a Convention. In 2001 the Canadian Maritime Law Association produced a draft framework document for an International Convention on Offshore Activities[24]. As Richard Shaw noted in his Beijing report:

> *The need for an international Convention to clarify the application of legal principles relating to subjects such as registration, mortgages, salvage, limitation of liability and liability for oil pollution appears to be widely recognised, although it would not be right to overlook the view expressed in certain quarters, notably by the International Association of Drilling Contractors and the E&P forum (Exploration and Production)[25], that there is no need for such a Convention.*

Since the Deepwater Horizon and Montara disasters, some states, especially Indonesia, have argued that something needs to be done in this area Justice Steven Rares of the Federal Court of

Australia has written eloquently on the subject and believes that an international Convention modelled on the CLC (dealing with oil pollution) should be prepared. A new IWG (Offshore Activities - Pollution Liability and related issues) has been set up by the CMI under the Chairmanship of Richard Shaw and Patrick Griggs. A Questionnaire was sent out to National Maritime Law Associations in July 2013.

Tabetha Kurtz-Shefford has pointed out in a paper published last year[26]:

> *...It is obvious that there is little appetite for a global regime. The probability of one arising within the near future is very low, especially without the support of some of the more influential nations and organisations. Although it will never be explicitly cited as a reason for failure, it is almost certain that such a regime faces strong resistance from the main oil and gas entities within the industry ...The subject has now turned from the establishment of a global regime to the shape regional guidelines might take.*

OTHER TOPICS

Other topics discussed at Beijing and which have CMI IWGs working on them between conferences include Fair Treatment of Seafarers, Piracy and Maritime Violence, Marine Insurance, Cross Border Insolvency, and the Arctic and Antarctic Legal Regimes. All are extremely topical and require CMI to utilise the services of its worldwide network of maritime law experts.

PROMOTION OF RATIFICATION OF MARITIME CONVENTIONS

A new initiative launched at the Beijing Conference was the setting up of a Standing Committee to investigate the possibility of joining with the International Chamber of Shipping (ICS) and IMO to seek to have more conventions ratified. This has now occurred. It is believed that National Maritime Law Associations could do much (in conjunction with the ICS worldwide membership) to educate states about the conventions that they have not ratified. A brochu re has been published listing the conventions upon which a major focus is sought to be addressed[27].

On 20 June 2013 I visited Canberra with Matthew Harvey, the President of MLAANZ and we met with officers of the Department of Infrastructure and Transport. As a result of that meeting, I am hopeful that MLAANZ will be in a position to provide assistance to the department when it is putting together ministerial submissions for Australia to put in train steps to ratify some of these Conventions, such as Rotterdam Rules, HNS, Wreck Removal and Athens. Dr Sarah Derrington has initiated steps to produce working papers. I have posed the question to MLAANZ whether Australia should revisit the Arrest Convention 1999, the Maritime Liens & Mortgages Convention (1993) and debate whether there is anything in these Conventions which would benefit Australia (and New Zealand).

A Convention that I knew nothing about until recently was the Cape Town Convention 2007 on International Interests in Mobile Equipment 2001 and its three protocols relating to aircraft railways rolling stock and space assets. It seems that UNIDROIT is giving consideration to incorporating ships within that Convention. This was opposed by the CMI and the IMO, when it was first raised in the 1990s and it looks as if we are going to have to re-debate that issue over the coming months. The IMO was concerned that there would be a conflict with the Convention on Maritime Liens and Mortgages 1993 and the exclusion of the application of the treaty to registered ships would "preserve the features of international maritime law as a distinctive *corpus Juris*". The CMI was concerned as to whether states would be prepared to abandon their own ship registries and if not how any protocol to the convention could deal with a dual registry situation, and how conflicts would be resolved.

HANDBOOK OF MARITIME CONVENTIONS AND WEBSITE

CMI has in the past worked with a publisher to produce a handbook containing the most signif icant Maritime Conventions. With the assistance of Frank Wiswa ll and IMLI in Malta, work is being done to produce a new edition. At the same time consideration is being given to having that material posted on the CMI website. In recent years the CMI website (www.comitemaritime.org) has been considerably upgraded.

A further initiative of the CMI is to employ a French lawyer to gather together important decisions worldwide on international conventions, which would be available on the CMI website. Francesco Berlingieri has already worked on this for some years voluntarily but has been reliant on volunteers around the world sending him decisions, and it is thought that someone working full time on such a project for a six month period could assemble very much more material and establish a more committed network of volunteers around the world to gather such material in future. We will be looking for a volunteer in this country to assist her.

ARBITRATION

Given the role of AMTAC, it would be remiss of me not to say something about arbitration. This is a subject that has not exercised the minds of the CMI much. In fact, until recently, I was unaware of the fact that it had been on the CMI agenda at all. Albert Lilar noted in 1972 that one of the subjects on CMI's agenda of future work at that time was "International Arbitration in maritime matters". It appears from the records that following upon the Conference of the CMI in Rio de Janeiro in 1977 there were discussions concerning a joint initiative with the ICC in the field of maritime arbitration. There was the thought that the CMI could assist in ensuring that maritime disputes could be solved with expediency and certainty and, accordingly, the Assembly at the Rio de Janeiro Conference empowered the Executive Council to finalise a set of arbitration rules for subsequent implementation by the 1978 Assembly. It was however stressed at that time that the contemplated ICC/CMI arbitration would not seek to infringe upon the present practices to refer disputes to arbitration in London, New York, Moscow, Tokyo etc, but the parties should be left free to determine the place for arbitration procedure. It was recognised however that parties might agree upon arbitration in a particular place outside their home country if they could be reassured that the umpire or sole arbitrator would be chosen with due consideration to the nature of the dispute and the nationalities of the contracting parties.

The CMI Newsletter of October 1978 reproduced the Arbitration Rules of the CMHCC and its model clause. The Rules (known

as the IMAO Rules) were approved by the CMI Assembly in March 1978 and by the ICC Council in June 1978. At that time they established the International Maritime Arbitration Organisation (IMAO), which seems to have been referred to as the Commission on International Arbitration. A Working Party was set up in February 1997 to determine whether the IMAO Rules needed to be revised, relaunched or allowed to go to sleep. Its report of that year noted that the Rules were set up to follow, generally, the system of the ICC Arbitration Rules. The arbitration tribunal and the parties would interact with the IMAO Secretariat which was effectively the ICC Secretariat. The report does however notice differences between the ICC Rules and the ICC/CMI Rules. Over the 20 years since its creation at the time of the Working Party report, there had only been nine cases brought, of which only two had proceeded to a final award. However, as the report noted, 56 cases which had come before the ICC Court of Arbitration would have fallen under the scope of the IMAO. It was noted that a relatively high proportion of those cases involved African countries.

The responses to the questionnaire which had been sent to MLAs by the Working Party noted that the favourite centres for arbitration were London and New York, there was generally a lack of familiarity with the IMAO Rules, the maritime community is very traditional and not keen to change, non-institutional arbitration is preferred in maritime matters, the link between the IMAO Rules and the ICC was seen by some as a negative, the ICC being perceived as bureaucratic and expensive, some thought that a renewed IMAO system could constitute a supranational counterweight to the traditional London and New York arbitrations and should therefore be geared towards ad hoe arbitrations.

The Working Party therefore concluded as follows:

> *(i) Part of the shipping world desires an alternative to the present London and New York maritime arbitration systems. This group wants the alternative for reasons of lower legal fees, another language than English and a different culture and environment.*

(ii) An alternative system must be non-bureaucratic, flexible and of an ad hoe type. The arbitrator's fees should be transparent and fixed by the IMAO.

A revised set of IMAO Rules might in the extreme case be limited to the function of an appointing authority and the supply of a list of arbitrators.

(iii) The "market" for the IMAO rules is difficult to define

(iv) An alternative set of rules should not detract present users of the traditional ICC arbitration system.

(v) If the IMAO Rules are to be relaunched in one form or another, not only marketing will be necessary, but also lobbying of shipowners ' organisations, underwriters, brokers, charter associations and other drafters of forms. The CMI as such is unable to lobby, it will be the task of its individual members. An important role must be played by the ICC.

(vi) No real support for a relaunch of the IMAO Rules can be found in the answers given by the CMI and the ICC members.

The concluding recommendation of the Working Party was that:

Unless CMI and ICC intend to spend resources to promote the IMAO Rules the Rules should be allowed to continue to exist as at present and the standing committee be kept in place so that requests for arbitration can be dealt with if and when they come.

Since that report of 1999 the position has not changed significantly, although of course there has been a continuing development of alternative arbitration centres to London and New York, especially Singapore and China. As a result of a conversation which I had in New York earlier this year with a maritime lawyer, I have again put this matter on the agenda for the Executive Council of CMI to consider and have been instructed to set up an ad hoe working group to consider whether there is a role for the CMI to play in international arbitration.

THE NEW YORK CONVENTION

As has already been pointed out, if one measures success in achieving uniformity by the number of ratifications then the fact that the New York Convention has 148 member States would suggest that it scores highly in terms of uniformity. However, as the Court of Appeal's decision in Victoria in the case of *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*[28] demonstrates, the manner in which the Convention has been implemented has given rise to differences in procedures to register awards in different parts of the world. I referred to this in a CBP case note in November 2011 entitled "The Lack of Uniformity in Enforcement of International Arbitral Awards".

The divergence of judicial opinion arises out of essentially the same factual matrix, namely when a party against whom an award made in one jurisdiction is sought to be enforced in another was not the named party to the original arbitration agreement.

In a commendably short judgment Chief Justice Warren in the Victorian Court of Appeal said the following:

> *Both parties made extensive reference to international authorities. In so far as the Act implements an international treaty, Australian courts will as far as they are able, construe the Act consistently with the international understanding of that treaty. Uniformity also accords with the Acts stated purpose to facilitate the use of arbitration as an effective dispute resolution process.*
>
> *No Australian court and few foreign courts have considered the present issues. Most of those foreign courts have held that whether an award debtor is a party to the relevant arbitration agreement falls to be considered as a defence under their equivalent section 8(5)(b), rather than as a threshold issue.*

Her Honour did not accept that the foreign decisions were determinative of the approach that the Court should take. The first reason for coming to that decision was that construction contended for on the basis of those foreign decisions would render section 8(1) of the *International Arbitration Act 1974* (Cth) superfluous. Section 8(1) reads as follows:

> *Subject to this Part, a foreign award is binding by virtue of this Act for all purposes on the parties to the arbitration agreement in pursuance of which it was made.*

As her Honour also pointed out, sections 8(5) and (7), which identify circumstances in which a court may refuse to enforce the award, do not identify as one such circumstance one where the party against whom the award is sought to be enforced is not a party to the arbitration agreement.

Her Honour distinguished the two United Kingdom decisions in *Dardana Ltd v Yukos Oil Co*[29] and *Dallah Real Estate & Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan*[30] where reliance on the equivalent provision in the *Arbitration Act 1996* (UK), section 103(2)(b), was accepted, and in doing so she placed emphasis on the difference in wording of that comparable provision to section 8(1). The UK Act provides in that provision that "an award shall be recognised as binding", as her Honour explained: not on the parties to the applicable arbitration agreement but "on the persons as between whom it (the award) was made".

The point made by Francesco Berlingieri concerning how uniformity can be adversely affected by the variety of ways countries implement international conventions is well exemplified in this decision.

CONCLUSION

What I have sought to demonstrate in this paper is that throughout known history attempts have been made to make the law of the sea, as it applied to trade, uniform and that there have been many different ways used to seek to achieve uniformity. Since the end of the 19th century, great efforts have been made in the area of international conventions. Some would say there has been a surfeit of work in that area and governments have failed to rise to the challenge of giving effect to them, either when they were originally agreed or in later years when amendments or new conventions were prepared to deal with problems that had not been considered originally.

What I have also tried to show, at least in relation to private international law topics such as the carriage of goods liability regime, is that there might be another way, that is the way which

was attempted at the end of the 19th century: reliance on a standard form of contract to be entered into between carriers and merchants. The two processes are not mutually exclusive. It may be that the dilatoriness of governments requires carriers to take the lead and incorporate into their bills of lading via the clause paramount the Rotterdam Rules, which will send a strong message to governments that they need to renounce the Hague, Hague-Visby and Hamburg Rules at the very least and, further, ratify the Rotterdam Rules. If BI MCO and the P&I Clubs, together with the International Chamber of Shipping, decided that giving effect to the Rotterdam Rules is an urgent need in order to bring greater certainty to the carriage of goods and reduce legal costs substantially where disputes occur, then it is my belief that we could achieve a situation which is even better than that which was achieved during the lifetime of the Hague Rules, effectively between 1924 and 1968.

I have also, I hope, demonstrated that even in the area of international arbitration the way in which states have implemented the New York Convention has given rise to litigation around the world. There is much work to be done in educating states to try and achieve greater uniformity in the way in which they give effect to conventions they ratify (and the procedures they utilise to give effect to them under their national laws).

As so many others more learned than me have said, the goal of uniformity, or at least greater uniformity, is a noble one and it should be pursued. The panacea, as we have seen is indeed elusive, but we should not give up our pursuit. Like the Black Knight in the film "Monty Python and the Holy Grail" we should not be dismayed when, in the words of Justice Haight, having taken two steps forward we take one step back, and with the Black Knight we can perhaps shout:

> *Running away eh? Come back here and take what's coming to you! I'll bite your legs off!*

The CMI will continue to seek greater uniformity in the area of maritime law, whatever hurdles we have to overcome.

BIOGRAPHICAL DETAILS

Stuart Hetherington is the President of the Comité Maritime International and a partner at Colin Biggers & Paisley. Stuart was awarded the Lloyd's List DCN Maritime Service Award in 2010. He has also served on the boards of the Sydney Port Authority and the Sydney Ports Corporation.

In 2013 and 2014-15, Stuart was listed in Best Lawyers in Australia for shipping and maritime, transportation and insurance. In its 2016 and 2017 editions, he was once again recognised in these categories, as well as in alternative dispute resolution and litigation. Best Lawyers also named Stuart the Shipping and Maritime Lawyer of the Year in Australia in 2014-15. In 2015 and 2016, Doyle's Guide listed Stuart as a recommended Australian shipping lawyer, and named him as a leading shipping and maritime lawyer in Australia. In 2017, Doyle's Guide listed Stuart as a preeminent shipping and maritime lawyer.

In addition, Stuart was listed as a recommended lawyer in transport in the Legal 500 Asia Pacific 2015 and 2016 editions. He has also been recognised as a leading lawyer in shipping in Chambers and Partners (2013, 2014, 2015 and 2016) and Who's Who Legal Transport 2015, 2016 and 2017.

Stuart is an accomplished author, having published Annotated Admiralty Legislation in 1988 and numerous articles. He has also presented papers at seminars for clients, the legal profession and the insurance and shipping industries.

Stuart was called to the Bar of England and Wales in 1973 and admitted as a solicitor in NSW in 1978. He is admitted to practice in the Supreme Courts of NSW and Victoria, the Federal Court and the High Court of Australia.

NOTES TO CHAPTER

1 Following the formation of the CMI in 1897 France formed its association in the same year, Ger many in 1898 Norway, Sweden, Denmark, Italy and the US in 1899 Japan in 1901 Argentina and the Netherlands in 1905 Britain in 1908 Greece in 1911 and many others in the 1950s and 60s including Canada, Chile, Dominican Republic, Ireland Israel and Morocco; with our own Association being formed in 1974 (New Zealand joining us in 1977), China in 1988 and the most recent being Indonesia and Ukraine in 2012. There are now over 50 maritime law associations around the world.

2 Collision Convention (1910); Salvage Convention (1910) Limitation Conventions (1924 and 1957); Arrest Convention (1952 and 1999) Maritime Liens and Mortgages (1924 and 1967); Hague and Hague-Visby (1924 and 1968)

3 Albert Lilar and Carlo Van Den Bosch: "Le Comite Maritime International 1897-1972"

4 Albert Lilar and Carlo Van Den Bosch:"Le Comite Maritime International 1897-1972"

5 See Places of Refuge for Ships edited by Aldo Chircop, Olof Linden. Martinus N Johoff Publishes at pages 170-175 for a discussion of the "numerous efforts at codifying maritime trade practices including the Code of Hammrob; from around 1780 BC, the laws of Manu, 1500 BC-200AD Jus tinians Digest 529-565AD), Rhodian Sea Law and the Rolls of Oberon

6 It is said that the introduction into the laws of England of the Rolls of Oleron was due to that remarkable woman Eleanor of Aquitaine. She became the Queen Consort of both France and England (as a result of marriage to two different men, King Louis VII of France and then Henry II of England). She had eight children by Henr y, two sons of whom would become kings, Richard I and John. It is said that she went on the Second Crusade and whilst in the Eastern Mediterranean she learned about maritime Conventions and customs developing there and she introduced those Con ventions into her own lands on the Island of Oleron in 1160 and later in England as well, through her son Richard I.

7 Bruges and the Sea from Bryggia to Zeebrugge" edited by Valentin Vermeersch and others (Mercator fonds/ Ant werp).

8 Albert Lilar and Carlo Van Den Bosch: "Le Comite Maritime International 1897-1972"

9 Marine Insurance Act 1909 100th Anniversary" paper of the 11 th November 2009 (by Justice James Allsop and Michael Wells, researcher to Justice Allsop)

10 Journal of Maritime Law & Commerce Volume 28 No 2 April 1997.

11 Patrick Griggs "Obstacles to Uniformity of Maritime Law" - Journal of Maritime Law and Commerce Vol 34, No.2 April 2003)

12 CMI Yearbook 2001 (Singapore II)

13 JS Hobhouse, International Conventions and Commercial Law: The Pursuit of Uniformity 106. LO. Rev. 530 (1991)

14 Michael Sturley: "The History of COGSA and the Hague Rules", Journal of Maritime Law and Commerce, Volume 22 No. 1 January 1991

15 The Legislative History of the Carriage of Goods by Sea Act and the Travaux Preparatoire of the Hague Rules by Michael Sturley, Volume 1, 1990 published by Fred B Rothman & Co

16 1893 Harter Act (US); 1903 Shipping and Seamen Act (NZ); 1904 Sea-Carriage of Goods Act (Australia); 1910 Water Carriage of Goods Act (Canada).

17 The key features of the Harter Act were that it was deemed unlawful for carriers from or between ports of the United States and foreign ports to insert provisions in bills of lading relieving them "from liability for loss or damage arising from negligence, fault or favour in proper loading, stow age, custody, care or proper delivery of any and all lawful merchandise or property committed to its or their charge" and any such provisions were to be null and void and of no effect (section 1); and similarly it was unlawful for them to "insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence to properly equip, man, provision and outfit the said vessel, and to make said ves- sel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any ways be lessened, weakened or avoided (section 2); section 3 which was the precursor of the nautical fault defence and provided protection to carriers where damage or loss resulted from faults or errors in navigation or in the management of said vessel", as well as introducing an exclusion

in respect of "losses arising from damages of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process or from loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service; section 4 required bills of lading to be issued which stated, amongst other things, "the marks necessary for identification, number of packages, or quantity, stating whether it be carriers or shippers weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described".

18 New Zealand: Shipping and Seamen Act 1903; Australia: Sea-Carriage of Goods Act 1904; Canada: Water Carriage of Goods Act 1910

19 1917 Dominion's Royal Commission; 1918 Imperial War Conference; 1921 Imperial Shipping Com mittee Report; 1921 Imperial Conference; 1921 ILA Maritime Law Committee Meeting (London); 1921 ILA Maritime Law Committee Conference (Hague); 1922 CMI Conference (October 1922) (London); 1922, 1923 and 1924 further diplomatic conferences (Brussels).

20 Journal of Maritime Law & Commerce, Volume 26 No. 4553

21 The Maritime Law Commission of Norway recommended that "Norway should ratify the Rotterdam Rules in order to secure and promote a uniform legal regulation of carriage of goods internation ally when USA or larger EU States ratify". The Danish Maritime Law Committee has made a similar recommendation.

22 The work done by that IWG can be seen in the CMI Yearbooks 1996 and 1997

23 CMI Yearbook 2011-2012 Beijing 1

24 CMI Newsletter 2004

25 Now known as the International Association of Oil and Gas Producers

26 Liability for Offshore Facility Pollution Damage after the Deepwater Horizon? What happened to the Global Solution? The Journal of International Maritime Law (2012) 18 JIML 453

27 They include: Protocol of 1997 to MARPOL (Annex VI - Prevention of Air Pollution from Ships); International Convention for the Safe and Environmentall y Sound Recycling of Ships (Hong Kong), 2009; Convention on the Facilitation of International Maritime Traffic (FAL), 1965 Protocol of 1996 to the Convention on Limitation of Liability for Maritime Claims (LLMC), 1977; Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (PAL),1974; International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS), 1996, and Protocol of 2010; Nairobi International Convention on the Removal of Wrecks (Nairobi WRC), 2007; Maritime Labor Convention (MLC), 2006; Seafarers' Identity Documents Convention (Revised) (ILO 185), 2003; and United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules) 2009.

28 28 [2011] VCA 248 (22 August 2011)

29 [2002] 2 Lloyds Rep 326

30 [2010] UKSC 46

AMTAC Annual Address 2014

LNG: Driving Gas Globalisation, an Australian Perspective

4 September 2014

David Byers, APPEA Chief Executive

INTRODUCTION

I thank AMTAC for inviting me to offer an Australian perspective on the role that liquefied natural gas – or LNG – can play in driving gas globalisation.

I would like to particularly acknowledge the Chief Justice of the Federal Court of Australia, the Hon James Allsop AO, and the Chair of AMTAC, Mr Peter McQueen.

WHAT IS APPEA?

My address this evening will focus on Australia's role in the global gas story and how growing demand for LNG is driving gas globalisation.

I will outline:

- The global gas market's current state and future outlook.
- Australian LNG's rapid growth and its significance to the national economy.
- And what Australia must do to further grow its share of the global LNG market.

I also want to emphasise the important role of continuous technological innovation in the LNG industry.

Clearly finding, producing then transforming natural gas to a liquid and shipping it thousands of kilometres in specially built vessels demands advanced technology.

And the industry continues to evolve and enter new frontiers.

Innovations in drilling and gas extraction are now enabling gas production from coal seams and shale rocks and in deeper waters.

And another innovation now being developed – floating LNG – will enable the commercialisation of previously inaccessible gas resources offshore.

Can I say at the outset that when I talk about natural gas, there can be some confusion about terminology.

Natural gas from coal seams and from shales is the same as natural gas from traditional sandstone reservoirs.

It's all methane. Only the source rock differs.

Gas from coal seams and shales is used by businesses and households in just the same way as natural gas from other sources.

The coal seam gas flowing into Queensland's LNG plants will be used by our overseas customers just as they use any other delivery of gas.

Australia has been exporting LNG to Asian customers for 25 years.

In 1989, Australia had one operating liquefied natural gas project producing million tonnes of LNG per year.

Now we have three operating projects. Last year, they produced 23.3 million tonnes and an average of one tanker a day leaves our shores for Asia.

In that year, the oil and gas industry put more than $30 billion into the Australian economy and paid more than $8 billion in taxes.

Another seven LNG projects worth $200 billion are under construction, and four of these are due to start exporting in the next 12 months.

AUSTRALIAN LNG PROJECTS

By 2018, Australia will be the world's largest LNG exporter – a keystone energy supplier to several major Asian nations – an energy superpower.

By 2020, 10 Australian LNG projects will be collectively producing more than 85 million tonnes a year of LNG.

The industry will then be:

- putting almost $65 billion into the Australian economy;
- paying almost $13 billion in taxes; and
- accounting for 3.5% of GDP, nearing double its contribution at the start of the decade.

The remarkable growth of our LNG sector is one of Australia's greatest economic success stories.

And it is far from over, providing we can be as smart in the future as we have been in the past 25 years.

Australia has more than enough gas for its domestic needs and its export ambitions.

The latest Geoscience Australia data indicates this country has 392 trillion cubic feet – or TCF – of identified gas resources.

These include conventional resources in central Australia, Bass Strait and in waters off Western Australia and the Northern Territory, as well as coal seam gas, mostly in Queensland.

When shale gas resources – mainly in WA and the Northern Territory – are considered, the total potential resource is around 819 tcf. (As a rule of thumb, one TCF is enough to power a city of a million people for about 20 years. In 2013, the entire Australian economy consumed only 1.1 tcf of gas, with a further 1.1 tcf exported.)

So Australia has plenty of gas.

And it also has a strong track record as a reliable LNG supplier.

The market is there – no-one seriously doubts that there will be huge extra demand for gas over the next two or three decades.

The issue is whether new Australian-based projects can compete successfully with those proposed elsewhere around the world.

Let me explain a little more about the global gas market.

LNG in the global gas market

Natural gas currently accounts for around 25% of global energy consumption.

The International Energy Agency and others expect that gas will be the world's fastest-growing major energy source through to 2040.

According to ExxonMobil's 2014 Outlook for Energy report, global gas demand will rise by close to 65% between now and 2040.

During this period, gas will account for about 40% of the growth in global energy needs.

This demand is driven by the attractions of natural gas. It is a clean, reliable and versatile source of energy.

Its low emission qualities have become highly prized as urban air quality has become a big issue in many parts of Asia.

Globally, the share of gas demand met by LNG has been rising quickly. In 1990, LNG met just 4% of gas demand. Now it accounts for 10%.

Pipeline imports still account for 21% and domestic production for 69%, but LNG is catching up.

Use of LNG has risen by an average of 7.5% annually since 2000 – compared with 4% per annum for pipeline imports and 1.8% for domestic production.

For three of Australia's most important LNG markets – Japan, South Korea and Taiwan – LNG provides nearly 100% of gas supply as they have little to no domestic production or pipeline import capacity.

GLOBAL GAS TRADE

But Australia is not alone in striving to capture a higher share of this expanding global market.

The number and geographic spread of countries importing and exporting LNG continues to grow.

At the end of 2013, 17 countries were exporting LNG.

This year, Angola and PNG have joined the list of LNG exporters – new rivals for existing major exporters such as Qatar, Indonesia, Malaysia and Australia.

In the past six years, 11 countries have begun importing LNG.

There are now 29 LNG importing countries.

While this has been happening, interregional trade flows have shifted.

The most significant change over the past decade has been the rapid expansion of the Middle East to Pacific Basin LNG trade.

European LNG imports declined for the second consecutive year in 2013.

A tight supply market and weak European demand have seen cargoes redirected towards higher paying markets in Asia.

Europe's economic stagnation, and its continued call on coal and renewables for power generation, will likely limit its LNG demand through 2014 and beyond.

Asia will remain the largest source of demand – with 61% of total imports – though the potential restart of nuclear generation in

Japan – the world's largest LNG consumer – may affect its import requirements.

Despite these interconnections, there is still no "global" LNG market with a single price structure.

In this respect, LNG is unlike oil, which operates as a global market with slight regional variations.

LNG has strong regional supply and demand dynamics, with global flows that link regional markets.

How long that lasts remains to be seen.

The shipping story

Let me now canvass a subject dear to your hearts – shipping's essential role in the LNG story.

Shipping is crucial in connecting Australian gas with export markets.

It also epitomises the innovation and advanced technology that underpins the LNG industry.

Pipelines are best for short-distance trade, but they are not feasible at very long distances or through very deep water.

LNG SHIPPING

To cost-effectively move natural gas across oceans, the gas must be liquefied.

The gas is cooled to -162° C, changing it into a liquid that occupies 1/600th of its original volume.

This dramatic reduction enables safe and efficient transport via specially designed LNG vessels.

Once at its destination, the LNG is warmed to return it to its gaseous state and delivered to natural gas customers through local pipelines.

LNG carriers cost US$200 million to $250 million each to build. Their double hulls protect the cargo systems from damage or leaks.

They can operate on marine diesel, fuel oil or use gas vapour from the storage tanks on board to run steam turbines.

These high-tech vessels have an excellent safety record.

More than 80,000 LNG shipments have been completed around the world without a major accident or significant loss of cargo.

Today most new LNG carriers under construction carry 120,000–150,000 cubic metres of gas.

Based on Deloitte Access Economics analysis done for APPEA in 2012, each cargo in a tanker this size is worth about $33 million at current prices.

But many ships – mainly from Qatar – can carry up to 260,000 cubic metres of LNG.

Obviously, the bigger the ship, the fewer trips it need make to deliver given quantities of gas.

But if a ship is too large, it cannot dock at some receiving terminals.

At the end of 2013, there were 357 vessels in the global LNG fleet with a combined capacity of 54 million cubic metres.

Sixteen new vessels entered the global LNG trade in 2013. Another 31 LNG carriers are scheduled for delivery this year. And about 90 more ships are now on order.

Up to 40 LNG tankers – around 20% of the 225 LNG vessels expected to be added worldwide by the end of 2020 – are set to be built in China, according to American Bureau of Shipping estimates.

China has ambitious plans to restructure the country's ailing shipbuilding sector and secure China's energy supply chain.

This will boost China's capability in high-tech ships and challenge the South Korean and Japanese shipyards that have been the main suppliers of large gas tankers for 30 years.

LNG carriers can be owned by producers, customers or shipping companies – or producers or customers in partnership with shipping companies.

Globally, shipping interests are dominated by three companies tied to National Oil Company-led LNG projects in Qatar, Malaysia and Nigeria.

But other players have now entered the ranks of the largest LNG carrier owners.

Japanese and Chinese shipping concerns have equity stakes in a growing number of vessels, though they do not always exercise direct commercial control in their marketing.

At Western Australia's North West Shelf project, a subsidiary company – the North West Shelf Shipping Services Company – runs a fleet of seven carriers owned by the North West Shelf partners.

Four LNG carriers are used by Pluto Project – two managed by Woodside and two by customers who are equity partners in the project.

At Darwin LNG, the tankers are owned by customers. But two of those customers – Tokyo Gas and Tokyo Electric – are also project partners.

Similarly, at Queensland LNG projects now under construction, Chinese and Korean customers have taken equity in the projects as well as owning or part- owning the LNG carriers that will transport the production.[1]

Traditionally, the LNG market has been based on long-term supply contracts – 20 to 25 years has been the norm.

But in recent years, sales have risen in the spot market and in the so-called portfolio market. The volume of non long-term traded LNG reached a new high in 2013 – 77.3MT or about one-third of global trade (237MT). Most (74%) of that spot LNG was delivered to Asian markets.

This has driven more diversity in the LNG shipping market.

The spot market tends to cater to one-off cargoes. An LNG producer might buy a spot cargo to meet contractual obligations if there has been an unforeseen stoppage at one of its projects.

In the portfolio market, an LNG producer with stakes in numerous projects might make a deal with a customer, specifying a schedule or cargoes but not the origin of those cargoes.

This lets the producer juggle shipments from a range of projects. All that matters is that delivery commitments are met.

There has also been an entry of portfolio buyers who buy cargos on the spot market and on-sell these to customers. This trend has been driven partly by the collapse of some European economies.

Spain, for example, has several LNG terminals. Long-term contracts but depressed demand means it needs to accept the shipments but find new buyers for the gas.

Capturing further growth

As I have explained, in coming years LNG can contribute even more to Australia's prosperity.

But for this to happen, Australia must tackle some big challenges and address some major policy failings.

We must reverse the industry's recent productivity performance. Costs at Australian LNG projects have risen dramatically.

This now threatens to undermine our competitiveness against tough new players in the global market.

Companies in the US, Canada, Mozambique and Tanzania are now developing – or planning to develop – projects targeting our Asian markets.

Each of these nations has geological factors, cost structures and regulatory environments that mean we expect they will be able produce LNG 20% to 30% lower cost than we can.

I've noted that by 2018, Australia will be the world's largest LNG producer.

But if a number of the American and Canadian projects now under consideration proceed and we do not build more projects or add production units to existing ones, we could lose this standing by the middle of the next decade.[2]

Our rivals are lean and hungry.

Can Australia compete? Or have we become complacent?

There are a number of areas on which we need to focus our attention. Tonight, I want to focus on two that have something of a maritime flavour or linkage.

Firstly – by developing new labour relations arrangements we can address the cost of major construction projects so we can compete for expansions of existing – "brownfields" – LNG projects.

Secondly – by investing in new technologies such as floating LNG, we can compete for investment in new – "greenfields" – LNG projects.

Labour Market Reform

Industrial relations reform is well overdue in Australia.

Inefficient industrial relations and labour market systems have produced:

- Labour shortages;
- Poor productivity; and
- Repeated disruptions to projects.

High labour costs and low productivity are an unsustainable mix – particularly for major project construction.

The Fair Work Act facilitates continual ratcheting up of wages and allowances so that project owners cannot be confident about the cost of labour over the full life-span of construction.

Recent events in our industry have shown why labour relations reform must be central in the national productivity agenda.

In July and August of this year, the Construction, Forestry, Mining & Energy Union used its strategic position to threaten industrial action at the three LNG projects being built near Gladstone, Queensland.

After lengthy negotiations, an agreement was reached. But this required huge pay rises.

Tradesmen's wages jumped about $40,000 to reach $200,000 a year, according a report in the Courier Mail.

This dispute arose because an enterprise bargaining agreement had expired and a new one had to be negotiated – four months from project completion.

The stoppages were disruptive and the outcome has had a significant impact on projects that were already facing cost pressures.

Incidents like this make investors flinch.

If we want more major projects built in this country, we must change our ways.

The way we manage them must change. The Fair Work Act must be revised, especially in regard to major resource project construction.

APPEA has advocated a new form of enterprise agreement to specifically apply to construction of major capital projects, such as large mines and LNG plants.

These Major Project Agreements – or MPAs – would limit the time available to negotiate and would apply for the entire project construction period – rather than being renegotiated every four years.

MPAs would also require negotiations to be specific to individual major projects' circumstances.

This would prevent the most recent deal struck automatically becoming the minimum benchmark for the next.

APPEA is also urging the Federal Government to consider further reforms to protect major capital investments once an MPA has

been put in place – and therefore provide protection from disruption to service providers such as those in the maritime sector.

Unless we are prepared to see unemployment rise and living standards fall, we must improve productivity.

Unfortunately, the CFMEU is not the only union using the strong bargaining position it is granted under the FairWork Act to hold projects to ransom.

In July, the Maritime Union of Australia sought to undermine the use of Maritime Crew Visas for foreigners working on offshore platforms and construction.

This created great uncertainty and risked halting vital construction work. This issue is also being played out in parliament.

APPEA believes the *Migration Amendment (Offshore Resources Activity) Act* – or The ORA Act should be repealed.

This Act extends Australia's migration zone offshore to include offshore vessels – requiring relevant workers on those vessels to hold skilled migration visas.

Yet with or without the ORA Act, terms and conditions of employment will continue to be protected – both under domestic laws and the International Labour Organisation's Maritime Labour Convention.

Non-citizens working on resource installations, or coming to the Australian mainland to work, already must hold work visas.

They also need valid visas to be immigration-cleared at Australian airports when travelling to and from resource installations and vessels.

Even if they need not hold a visa for operations on the resource installation or vessel, they are subject to immigration controls.

The Australian Government has sought to introduce regulations allowing holders of the maritime crew visa, the 400 visa and 457 visa to work in, or support, offshore resources activities.

But the Senate disallowed these critical visa regulations.

This had the potential to shut down operations and harm Australia's international investment reputation.

The government responded by issuing a Legislative Instrument so foreign workers in offshore resource operations could still legally work in Australian waters.

But the MUA is now challenging this 'instrument' in the Federal Court.

Whatever, the ultimate legal position may be, we must recognise that the oil and gas industry is global.

Many of the services provided to it are undertaken by vessels with highly- specialised, highly-skilled crews that travel the world, from job to job.

Owners of these vessels should be able to use their own crews.

The same reasoning used to justify the ORA could be used to force British Airways to switch out its crews and use Australian pilots and cabin staff when in Australian airspace.

We need a new, more flexible class of visa with an extended duration – say, 6 to 12 months – and no labour market testing requirements for globally specialised services.

The Australian Government has introduced a Bill to repeal the ORA Act. But it has not yet been passed.

APPEA hopes senators consider what is at stake.

Visa and major project agreement reforms are critical reforms if the LNG sector is to increase investment and deliver more jobs.

Sadly, we are making it much harder to do business in Australia and must lift our game.

The promise of technology

Let me quickly canvass the key area of technological innovation.

Advanced technology is crucial to our future LNG prospects, just as it has underpinned all of the industry's past achievements.

I have already alluded to advances in drilling and hydraulic fracturing that have enabled the commercial production of gas from coal seams and shales.

Today, major new technologies include deepwater drilling and floating LNG – or FLNG.

These advances will let us produce oil and gas further from shore and in deeper waters from fields that were previously considered commercially unviable.

FLOATING LNG

In FLNG, a floating facility that will be moored over the gasfield for years or even decades will extract the gas from under the sea-

bed, and then liquefy it. This eliminates the need for a long pipeline and liquefaction facilities situated onshore as far as 900 km from the gasfield.

The LNG will then be offloaded from the floating facility to a tanker and taken directly to market.

I am speaking in the future tense because the world has not yet seen its first operating FLNG plant, although several are now under construction.

Shell's Prelude FLNG project – scheduled to start production in 2017 – will develop fields 200km off the coast of Western Australia.

Prelude is designed to withstand category five cyclones.

It will be the largest floating facility built in human history – larger even than an aircraft carrier – as long as a par five hole at Royal Sydney golf course.

Using FLNG to develop previously inaccessible fields is a development option that could transform the LNG industry – it has the potential to be a true game-changer.

It will create jobs, export income and tax revenue that Australia would not otherwise enjoy.

CONCLUSION

The world of LNG is changing and we can't stay in our comfort zones and hope to continue Australia's success story.

We must change how we operate.

We must do new things or do old things in better ways.

And we must innovate – both in business practices and in technology. We are at a critical juncture in which nothing can be taken for granted.

LNG is driving gas globalisation and Australia is truly at the forefront of these developments.

Natural gas is a major fuel – essential to Australia's energy security and to its balance of trade.

It is also essential to energy security and prosperity in several of our major trading partners.

LNG will certainly play a major role in Australia's economic future – the question is: "Just how large can we make that role?"

My thanks again to AMTAC.

I hope you have found this address interesting and informative. Thank you.

BIOGRAPHICAL DETAILS

David Byers joined the Minerals Council of Australia (MCA), the peak national body for the minerals industry, as Deputy CEO in July 2016. In this role, David has responsibility across the entire MCA policy portfolio with particular focus on economics, tax, productivity and energy-related matters.

Immediately prior to joining the MCA, David was Vice President Government Relations and Public Policy for BHP Billiton with responsibility for coordinating the company's global government relations and public policy interests.

From 2011 -2015, he was Chief Executive Officer of the Australian Petroleum Producers and Explorers Association (APPEA), the peak national body representing Australia's oil and gas exploration and production industry. During this period, the Australian oil and gas industry experienced its largest ever expansion with seven major LNG projects under construction and development of new onshore as well as offshore gas resources.

David's role at APPEA followed his earlier appointment from 2007-2010, as Chief Executive of the Committee for Economic Development of Australia (CEDA).

David has spent practically his entire career in the resources sector with over 17 years at ExxonMobil Corporation in a variety of senior corporate affairs, planning and human resources roles in Melbourne, Singapore and Dallas following an early career with Woodside, BHP and Brisbane law firm, Morris, Fletcher & Cross.

David is originally from Brisbane and has degrees in law and economics with postgraduate qualifications in energy and resources law.

References for statements in this speech

- At the end of 2013, there were 357 vessels in the global LNG fleet with a combined capacity of 54 million cubic metres. (International Gas Union World LNG Report – 2014 Edition, p6)

- Sixteen new vessels entered the global LNG trade in 2013. (International Gas Union World LNG Report – 2014 Edition, p6)
- Another 31 LNG carriers are scheduled for delivery this year. (International Gas Union World LNG Report – 2014 Edition, p6)
- And about 90 more ships are now on order. (GTT (Gaztransport & Technigaz) website: http://www.gtt.fr/references/vessels-on-order/)
- In China alone, shipyards are aiming to take some $10 billion in orders for new LNG tankers over the rest of the decade. (Reuters report August 5, http://uk.reuters.com/article/2014/08/05/china-lng-ships- idUKL3N0O838P20140805)
- The number of countries importing orexporting LNG continues to grow. At the end of 2013, 17 countries were exporting LNG. (International Gas Union World LNG Report – 2014 Edition, p7)
- In 2014, Angola and PNG have joined the list of LNG exporters – new rivals for existing major exporters such as Qatar, Indonesia, Malaysia and Australia. (See: www.tradewindsnews.com/weekly/336875/first-lng-ship-arrives-at- exxon-png-project)
- There are now 29 LNG importing countries.
- In the past six years, 11 countries have begun importing LNG.
- This includes three new importers in last year alone. (International Gas Union World LNG Report – 2014 Edition, p7)

NOTES TO CHAPTER

1 China's CNOOC owns 50% of the first LNG production unit at Queensland Curtis LNG; Sinopec – owns 25% of the Australia Pacific LNG project; and Malaysian national oil company, Petronas, owns of 27.5% of Gladstone LNG while South Korea's KOGAS owns 25%.

2 US has given conditional approval to 8 LNG projects, totalling production of about 95MT. Sabine Pass (Louisiana) will begin exporting in late 2015.

AMTAC Annual Address 2015

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

16 September 2015

Dr Kate Lewins, Murdoch University

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 as 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'.

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 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 certainty;*[11] *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 orig-

inated 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 the 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 circumstances[16] unless provided for in the contract.[17] But this was 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 frustration[20] 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 assumed[22] 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.

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 court[33] 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:

> *..(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 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 Ltd[42]

FA Tamplin Steamship Co v Anglo Mexican Petroleum Products Co Ltd 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).

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]

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 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 Sumner[65] 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, 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 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 char-

ter leaving no work for the arbitration clause.[75] The argument about a subsisting dispute that could be brought to arbitration[76] 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 accepted[77] 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 otherwise[78]:

> *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]

> *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 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] (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 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* injunction[115] 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 blades[117] 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 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 "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 Harris[131] 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 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 wrought in the almost 130 years since he wrote that preface. 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.

BIOGRAPHICAL DETAILS

Kate is a Professor at the School of Law, Murdoch University (Western Australia) and an Academic Fellow of the Centre for Maritime Law, National University of Singapore.

Kate is the author of the monograph International Carriage of Passengers by Sea (Sweet & Maxwell, London 2016). Kate has written numerous articles and delivered conference presentations on topics related to carriage of passengers by sea, insurance law, carriage of goods by sea, crimes at sea, and admiralty and marine insurance. A particular interest of hers is the interrelation between consumer law and commercial maritime law. In addition, Kate has been the Director of the International Maritime Law Arbitration Moot since 2005. Kate has taught maritime law, insurance law, admiralty law, contract, tort, civil procedure and legal writing. She teaches a master's unit on the carriage of passengers by sea at National University of Singapore.

Before joining academia, Kate was a senior associate in a national law firm practising in the area of transport and insurance litigation.

Kate's interest in maritime matters has deep family roots. Her father is a master mariner who joined the British merchant navy at 16 years of age. Her maternal grandfather, John Worrall, was the Australian Director of Union Steamship Line of New Zealand, which in its heyday was the largest shipping line in the southern hemisphere.

NOTES TO CHAPTER

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.

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.

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.

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.

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

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)

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.

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.

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.

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?

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.

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.

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 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…'

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 Treitel, 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).) L J 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.

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 Lloyds 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 239, 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.

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.

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.

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.

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'.

AMTAC Annual Address 2016

Maritime Arbitration: Old & New[1]

7 September 2016

Malcolm Holmes QC, Eleven Wentworth Chambers, Sydney

INTRODUCTION

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.

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).

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*.

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

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]

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.

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]

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]

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.

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

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.

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.

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]

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.

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.

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.

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.

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

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

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.

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.

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.

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]

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.

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]

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]

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]

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]

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.

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]

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*.

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.

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.

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.

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.

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.

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.

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.

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.

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 prelim-

inary conference to establish its jurisdiction and to set out a procedural timetable.

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

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.

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.

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

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.

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.

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.*"

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.

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.

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.

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.

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.

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

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 ship-

yards, or from being allowed to leave British waters. This idea of appointing such a partisan arbitrator is now an alien concept in international arbitration.

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]

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!

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

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]

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

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.

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.

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]

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.

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."

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]

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.

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]

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, …"*

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.

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.

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

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

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.

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.

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.

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.

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.

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]

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.

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."*

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]

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]

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.*"

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

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.

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]

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]

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.

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 par-

ties, which has no future purpose, or utility, other than to possibly undermine confidence in the majority award.

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

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.

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.

BIOGRAPHICAL DETAILS

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NOTES TO CHAPTER

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 9½ 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 vessel….*" 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.

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