WaveLength

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CURRENT JAPANESE CASE LAW ON CARRIER'S LIABILITY FOR CARGO LOSS

*Takao Tateishi**

INTRODUCTION

Even when a dispute arises between, for example, the owner of the goods carried by sea and the carrier in relation to damage to/loss of the goods, the parties to the dispute do not necessarily have to bring suit/arbitration to resolve it. If the injured party can negotiate and successfully persuade the reluctant party to accept whatever appropriate remedy might otherwise be granted by the court/arbitral tribunal, it must be the best solution to the dispute because it is the cheapest and the quickest. In this context, the gist of risk management lies in the systematic analysis of leading cases and good arbitration awards so as to better arm the claiming party with the knowledge to talk the other into settlement.

However, despite the fact that Japan is one of the major trading and shipping countries, it is rare that the Japanese courts decide disputes relating to cargo transport, whether it is international or domestic. The paucity of case law may be attributable to the Japanese parties' preference to settle their disputes before and during litigation. Further, Japanese shipping people normally agree to TOMAC arbitration rather than jurisdiction of the Japanese court if they choose Japan at all as a forum of dispute resolution. It would therefore be useful for the parties inclined to sue in Japan as well as for the Japan researchers, to show how the Japanese courts have recently considered the issue of carrier's liability for cargo loss. In this paper, I will discuss the latest four cases determined by the Tokyo District Court (and its Appellate Courts) in relation to loss of/damage to cargo carried by sea.

1. CARRIER'S LIABILITY FOR DELIVERY OF CARGO WITHOUT B/L

The practice to deliver a cargo to a *lawful cargo owner* without delayed bills of lading has been recognized and accepted by the Supreme Court.[1] The Court held there:

> "In view of the practicality of commercial trade utilizing shipping, which has recently been very much developed, it should not be an illegal act to deliver the

* Administrator, Tokyo Maritime Arbitration Commission (TOMAC) of The Japan Shipping Exchange, Inc.

1 Decision on 14 June 1930; Docket: Showa 4 (o) No 1006.

> cargo without production of the bill of lading but in exchange for a bank guarantee on pain of damages in case the misdelivery infringed upon the rights of the bill holder..."

Therefore, a problem in delivery of cargo without bills could only arise where the cargo was delivered to a person who was *not* a lawful owner of the cargo. In the latest case of such kind where the plaintiff B/L holder sued the defendant carrier to recover damages for wrongful delivery of a cargo without production of the original bill, the Tokyo District Court granted judgment in favour of the plaintiff on 28 May 2001.[2] There, the defendant carrier issued bills of lading for the carriage of a cargo of electronic components from a port of Hong Kong or Mainland China to a port in Brazil. The carrier delivered the cargo at the discharge port to the super terminal, which subsequently delivered the cargo to the consignee without production of the original bills. As the consignee was already insolvent and failed to pay the contractual price, the shipper had retained the original bills.

The Court granted damages holding *inter alia*:

> "(1) A bill of lading is evidence of the contract of carriage and also a document of title. The plaintiff is the lawful holder of the bill. (2) The carrier should be held liable in contract if, due to failure to exercise due diligence, the cargo sustained damage, as provided for in the Carriage of Goods by Sea Act 1992. (3) On the evidence, the super terminal delivered the cargo to the consignee in exchange for the certificate of loss of original bills issued by the carrier's agents. Thus the cause of loss of the cargo should lie in the act of the carrier's agents. (4) The agents committed a breach of duty in that they issued a certificate of loss of original bills to a person other than a lawful holder of the bill without conducting reasonable investigations. The carrier should be liable for its agents' breach. (5) The plaintiff also proved that it incurred loss."

It should be noted here that the Court followed the universal law of damages - i.e. grant damages only when the plaintiff proves (1) a contractual relationship between the plaintiff and defendant; (2) a duty owed by the defendant; (3) a breach of that duty by the defendant; (4) a causal connection between the breach and the loss; and (5) the amount of loss.[3]

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[2] Docket: Heisei 10 (wa) 16546; *Kaiji Ho Kenkyu Kaishi* (Maritime Law Review) No 163 at 86.

[3] It is worthwhile to note, however, that the new Code of Civil Procedure now provides for the court's discretion in the assessment of the quantum of damages. Article 248 of the Code <Assessment of Damages> provides: "Where it is recognised that a loss was incurred, but it is extremely difficult to prove the amount

2. WHERE LIABILITY IS EXTINCT FOR DELIVERY WITHOUT B/L

As seen in 1. above, it is the general rule that the carrier should be liable for *wrongful* delivery of cargo without bills ("wrongful" in the sense that the cargo was delivered to a wrong person). However, if the bill has a limitation clause which can relieve the carrier of all liability as per cargo loss after a lapse of a certain period, the lawful holder should be wary. The Supreme Court affirmed on 14 October 1997 the lower court's decision that the right of the plaintiff-appellant bank to sue for damages against the carrier for misdelivery of the cargo without production of original bills, had become extinct when the one year limitation as stipulated in the bill expired.[4] The facts of the case were as follows:

The cargo was shipped on board the vessel from Hong Kong on 28 March 1991. The carrier issued original bills of lading which provided at clause 25(2): "In any event the carrier shall be discharged from all liability in respect of non-arrival, misdelivery, delay, loss of or damage to the goods unless a legal suit is brought within one year from the date of delivery of the goods or the date when the goods should have been delivered."

The cargo was discharged at Kobe, Japan on 8 April 1991. The agent of the carrier delivered the cargo to an importer on 18 April 1991 without production of original bills of lading but in exchange for a letter of guarantee issued by the importer. On 20 May 1992 the plaintiff bank, a legitimate holder of the bills, sued the carrier for damages arising in breach of contract and in tort. The plaintiff additionally sued the agent of the carrier for tort on 11 August 1993.

The Tokyo District Court dismissed the suit on 24 May 1994 holding:[5]

> "Clause 25(2) of the bill should apply (as the clause provides that the carrier shall be discharged from *all* liability in respect of loss of cargo, etc) both to a claim in contract and a claim in tort. Therefore the Court would dismiss the instant suits against the carrier and also against the agent by way of clause 25(1) ("Himalaya Clause") on the grounds that the one year limitation period had already passed on 9 April 1992 before the pending suits were brought in this Court." (Emphasis added)

The Court further dismissed the contention by the plaintiff that the clause should be null

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of the loss due to the nature of such loss, the court may assess a reasonable amount on the basis of all the oral pleadings and the results of evidential examination."

4 Docket: Heisei 8 (o) No. 273; *Kaiji Ho Kenkyu Kaishi* (Maritime Law Review) No 145 at 59.

5 Docket: Heisei 5 (wa) No. 1748/15203; *Kaiji Ho Kenkyu Kaishi* (Maritime Law Review) No 132 at 59.

and void because of Article 15(1) of the Carriage of Goods by Sea Act (Cogsa),[6] holding:

> "The plaintiff maintains that the clause should be null and void as it extends coverage to an intentional act of the carrier in violation of Article 15(1) of Cogsa, which, they assert, prohibits an insertion of a clause lessening carrier's liability otherwise than provided for in the law. However, the Court decides that by way of Article 15(3), Article 15(1) should not be applicable to a loss of cargo occurring after its discharge as in the pending case."

The Appellate Tokyo High Court affirmed on 16 October 1995 the District Court's decision, holding:[7]

> "This Court recognizes that the defendant-appellees should be liable arising in contract or tort because the delivery of the cargo without production of the bills was illegal in that the cargo was handed over to a wrong person, thereby infringing upon the rights of the lawful holder of the bills. However, by operation of clause 25(2) of the bill, the liability of the defendants became extinct. Clause 25(2) may be in disfavour of the consignees in that the clause covers tort claims. However, in view of the fact that the loss occurred after discharge of the cargo, to hold that the clause should also apply to the instant claim in tort would not fall foul of public policy of Japan. Furthermore, the new Cogsa 1992 extends cover to liability in tort and drops liability for intentional act. Of course, the clause should not be applicable where a cargo was lost due to a grave and malicious act of the carrier, i.e. theft of the cargo, which is not the case for the instant suit."

It should be noted that the Tokyo High Court did not depart from the Supreme Court's earlier decision which recognized the legitimacy of delivery of cargo without production of original bills.[8] The Tokyo High Court here held that "... the defendant-appellees should be liable ... because the delivery of the cargo ... was illegal in that the cargo was handed over to a *wrong person*..." (Emphasis added)

To sum up, to deliver a cargo without production of original bills but in exchange for a letter of guarantee is a universal commercial practice and the Japanese court appears to be

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6 Article 15 (Prohibition of special agreement) provides:
"(1) Any special agreement which is contrary to the provisions of Articles 3 to 5, Article 8, Article 9 or Articles 12 to 14 and is not in favor of the shipper, receiver or holder of the bill of lading, shall be null and void. A benefit of insurance in favor of the carrier or similar agreement shall also be null and void. (2)..."

7 Docket: Heisei 6 (ne) No. 2472; *Kaiji Ho Kenkyu Kaishi* (Maritime Law Review) No 132 at 59.

8 As in note 1 above.

lenient to the carrier as far as the cargo was delivered to a lawful cargo owner. Accordingly, the delivery of cargo without original bills does not *per se* give rise to a cause of action under Japanese law.

3. EFFECT OF "UNKNOWN WORDING" ON FACE OF B/L

I turn next to a common problem in today's containerized age. That is, the shipper stuffs and seals the container and the carrier has no practical measure to check the contents; however, if loss of the cargo occurs, the issue who should bear responsibility arises. In order to evade responsibility in this context the carrier normally inserts a so-called "unknown clause" in their contract, i.e. bills of lading. There are many cases around the world especially in UK and US in which the courts decided this particular problem.

Japan joined too. The Tokyo District Court had to consider this issue in a circumstance where the carrier delivered the cargo to a third party without production of original bills of lading.[9] The issue for decision was whether in the circumstances the carrier could set up the "unknown wording" on the face of the bill against the lawful B/L holder who claimed damages for misdelivery calculated on the basis of the face value as stipulated on the bill. The Court granted effect to the wording "said to contain" and dismissed the assertion of the plaintiff on 13 July 1998. The facts of the case were as follows:

On 26 July 1995 the carrier issued to the shipper two sets (three each) of original bills of lading for the carriage of used motorcycles (the cargo) stuffed in containers. Each bill bore "Shipper's Load and Count" and "Said to Contain" in the column of kind of package/cargo particulars on its face ("unknown wording"). The shipper brought those bills and other documents in an L/C scheme to the plaintiff Japanese bank (negotiating bank), who bought the documents and became the legitimate holder of the bills. The carrier delivered the cargo in Singapore to a third party-intervener without production of original bills.

The plaintiff contended that the "unknown wording" on the bill should be null and void and claimed damages on the basis of the face value of the cargo stipulated on the bills. The defendant carrier relied on the "unknown wording" and asserted that the bills in effect described no numbers or types of packages as existing in the containers so that the burden of proof as to actual numbers/types should shift to the B/L holder.

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9 Docket: Heisei 8 (wa) No. 19818; *Kaiji Ho Kenkyu Kaishi* (Maritime Law Review) No 146 at 47.

The Court affirmed the effect of the "unknown wording" holding:

> "It has been a trade practice to insert the "unknown wording" where the carrier cannot inspect and confirm the contents of a container but nevertheless has to issue bills of lading bearing relevant descriptions of the cargo for the purpose of transferability of the bills. It has been submitted and supported by most commentators that in such cases the carriers should be exempt from liability for the description. The Carriage of Goods by Sea Act 1992 (which incorporated the Hague-Visby Rules) provides at Article 8 (Shipper's notice):
>
> > (1) The items 1) and 2) of paragraph (1) of the preceding Article shall be inserted into the bill of lading in accordance with the shipper's notice if such notice is available in writing.
> > (2) The provisions of the preceding paragraph shall not be applicable where the carrier has reasonable grounds to believe that the notice under the preceding paragraph is not accurate, or where the carrier has no suitable means to confirm the accuracy of such notice.
> > (3) The shipper shall guarantee to the carrier the accuracy of the notice under paragraph (1).
>
> "Article 8(2) has been construed to have the effect that where such exception is applicable the carrier may, by inserting "unknown wording" on the face of the bill, be exempt from liability as to descriptions. As there are no special circumstances in the instant case which direct the court to construe this differently, the Court decides that the "unknown wording" has effect so that the carrier should not *automatically* be liable for the loss of cargo just as though the stipulated cargo existed in the container. Accordingly, the plaintiff is only entitled to damages for the actual loss of the cargo. It is now common grounds that the actual shipments were 89 motorbikes and that the third party sent a commercial invoice for the cargo in the amount of US$12,935 to the end buyers. It should therefore reasonably be held that the cargo had the market value in that amount. In the end, the claim of the plaintiff should be permitted to that extent plus interest." (Emphasis added)

4. IS OWNER OR TIMECHARTERER LIABLE FOR LOSS OF CARGO?

Another is a very recent case in which the Tokyo District Court considered who should be responsible for loss of a cargo carried onboard the vessel under a time-charter. In that case, the subrogated insurer, who had paid to the cargo interests in respect of damage to the cargo, sued the head owner in tort who had time-chartered their vessel on an amended NYPE form to the charterer, who had in turn undertook the carriage of the cargo. The

Court dismissed the claim on 18 April 2001, holding that only the time-charterer should be liable.[10] Further facts of the case were as follows:

The shipper, a manufacturer of steel wire rod, entered into a contract of affreightment of 11,420.48 tons of steel wire rods in coil with the carrier (time-charterer of the vessel) on 29 October 1996. The cargo was shipped from Suez Port on the same day and the carrier issued an original bill of lading for the carriage to Chiba Port, Japan. The bill was to the order of the shipper and the notify party was the cargo owner, who was at any material time the legitimate holder of the bill. It was common ground that part of the cargo was either contaminated by asphalt/oil or lax/entangled during the course of the navigation before arriving the discharge port on 17 December 1996. The insurer paid in the amount of Yen 15,546,629 to the cargo owner.

The only issue for the Court was whether the head owner of the vessel should be held liable *in tort* for the damage incurred by the cargo owner. The plaintiff insurer accepted that the time charterer was the carrier of the cargo but asserted that the defendant owner should be held liable for lack of duty of care imposed by Clause 8 of the NYPE charterparty. Clause 8 provided "... The Captain (although appointed by the Owners) shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow, trim ... and discharge the cargo at their expense *under the supervision of the Captain*...") (Emphasis added).

The Court dismissed the claim holding:

> "In the proper construction of the provision, the part of the Clause 8 which reads 'Charterers are to load, stow, trim ... and discharge the cargo at their expense under the supervision of the Captain' expressly imposes the primary responsibility for loading and stowing upon the charterers and the master owes no duty to intervene and supervise the loading and stowage of the cargo other than where he must do so for the sake of seaworthiness of the vessel. Thus, the master shall only be held liable if the failure to exercise this duty to maintain safe navigation of the vessel, or, if he actually intervened, that act of intervention in loading and stowing, gave rise to damage to the cargo.
>
> "On the evidence, it is recognized that the cargo was contaminated by a leakage from drum cargoes of asphalt, which were damaged by forklifts used by the stevedores during the loading of those drums onto the upper layer of the vessel.

[10] Docket: Heisei 10 (wa) No. 13473; *Kaiji Ho Kenkyu Kaishi* (Maritime Law Review) No 162 at 55.

Another source of contamination, i.e. oil, came from the fuel tanks of the forklifts. The laxness and entanglement of the cargo were caused by pitches and rolls during the navigation.

"As to the first cause, a fault should be recognized in the fact that the drums were damaged by the forklifts. It should also be a fault of improper stowage in that a cargo of fluid which was susceptible to leakage was stowed on the upper deck. However, none of the faults comes within the breach of the above duty owed by the master under the circumstances. Nor is it proven that the master actually intervened in the loading and stowing process. Accordingly, it is the carrier who should only be held liable. On the evidence, the same reasoning should apply also to the second cause. Finally, it is judged on the evidence that the relaxation and entanglement of the cargo occurred due to poor stowage/lashing and the liability for this should rest with the carrier-charterers as well."

CONCLUSION

As far as has been discussed above, the approaches taken by the Japanese courts to resolve cargo disputes are in substance the same as in most other legal systems in the world.

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LAYTIME AND DEMURRAGE*

*John Alan Schofield***

Clauses Accelerating the Commencement of Laytime

In this section, I intend to deal with two of the most common clauses which accelerate the commencement of laytime in a berth charter. These are:

Reachable on arrival/Always Accessible
Whether in berth or not

Reachable on Arrival/Always Accessible

In *The Kyzikos* [1987] 1 Lloyd's Rep. 48, these phrases were said to mean the same, at least in as far as getting into berth is concerned. Strictly speaking, they have no effect as to when laytime commences and therefore in a charter containing such a clause, laytime will commence on arrival at the specified destination after the lapse of any prescribed period. What it may do however, is give rise to a claim for detention for any delay preventing the vessel reaching its specified destination and may also alter the effect of a clause such as Clause 6 of Part II of the Asbatankvoy form by which the charterers are excused from responsibility for delay in the vessel getting into berth after notice of readiness has been given.

The meaning of "reachable" was defined by Mr Justice Roskill in *The President Brand* [1967] 2 Lloyd's Rep. 338 at P. 348 in this way:

> " 'Reachable' as a matter of grammar means 'able to be reached'. There may be many reasons why a particular berth or discharging place cannot be reached. It may be because there is an obstruction between where the ship is and where she wishes to go, it may be because there is not a sufficiency of water to enable her to get there. The existence of any of those obstacles can prevent a particular berth or dock being reachable and in my judgment a particular berth or dock is just as much not reachable if there is not enough water to enable the vessel to traverse the distance from where she is to that place as if there were a ship occupying the place

* This is part of the papers presented by Mr Schofield for JSE's members in Tokyo on 10 May 2002.

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> at the material time. Accordingly in my judgement, the charterers' obligation was to nominate a berth which the vessel could reach on arrival and they are in breach of that obligation if they are unable so to do."

The judge also pointed out that in some cases, of which that was one, a breach might arise without the fault of either party, but nevertheless even in those circumstances, as a matter of construction, the clause provided that the loss of time should fall on the charterers and not the owners.

If there is a breach of such a clause, i.e. a failure by the charterers to procure a berth reachable on arrival, the consequences will differ on whether the vessel has become an Arrived ship. If it has, then laytime will commence in the normal way, although as will be seen shortly, it may be that any exceptions in the charter relating to the delay will be ineffective. If on the other hand, the effect is that the vessel is unable to become an Arrived ship, then the owners will have a claim for damages for breach of the warranty. In such circumstances, of course no laytime exceptions will apply and it is usual for the parties to agree that the owners be recompensed for the period of delay at the demurrage rate, even though laytime may not have expired.

The interaction of a "reachable on arrival" provision and one excusing delays in berthing beyond the control of the Charterers (such as Clauses 6 and 9 of Part II of the Asbatankvoy charter) has been the subject of some controversy for over 20 years.

The story starts with *The Laura Prima* [1980] 1 Lloyd's Rep. 466, [1981] 2 Lloyd's Rep. 24; [1982] 1 Lloyd's Rep. 1. The vessel concerned was a tanker and unable to berth at Marsa El Hariga because of congestion. In arbitration and in the Court of Appeal, it was held that the charterers were protected by Clause 6 of the Asbatankvoy form excusing delay beyond the control of the charterers. However the High Court, and ultimately the House of Lords, held that such a provision was ineffective if the charterers had failed to procure a berth which was reachable on the vessel's arrival. Since the House of Lords gave its decision, its precise limits have been the subject of some speculation. The question has been "Does the decision apply whatever the cause of the vessel failing to berth?"

Traditionally there have been those who have categorised risks of delay as owners or charterers' risks. Thus congestion would come under the latter and lack of water or weather, under the former. *The Laura Prima* itself was a case involving congestion and there is nothing in any of the judgements or speeches that suggest that any of the judges gave any thought to limiting the type of risk to which such a provision applies.

The point arose indirectly in a number of cases in the years that followed the decision and was also the subject of conflicting decisions in various arbitrations. However it did not arise directly for judicial decision until three first instance decisions in 1987/88. These were in chronological order, *The Kyzikos* [1987] 2 Lloyd's Rep. 122, *The Fjordaas* [1988] 1 Lloyd's Rep. 336 and *The Sea Queen* [1988] 1 Lloyd's Rep. 500.

The "KYZIKOS" was in fact a dry cargo vessel and the phrase in that charter was "always accessible" but this was held to equate to a "reachable on arrival" provision. The other two cases involved tankers and the charters were on Asbatankvoy forms.

In *The Kyzikos*, the problem was fog. In *The Fjordaas*, it was a prohibition on night navigation coupled with a requirement for compulsory pilotage, and in *The Sea Queen*, it was the non-availability of tugs followed by bad weather.

In *The Kyzikos*, a berth was available but not accessible because of the weather. Accepting that he was bound by *The President Brand*, where the problem had been a lack of water, traditionally categorised as a shipowner's risk, Mr Justice Webster drew a distinction between physical and non-physical reasons for the delay, applying this type of clause only to the former, which he said included congestion and lack of water. Fog and other forms of adverse weather, he said came under the latter and owners were not protected.

The same distinction was put forward in the two later cases, although in those cases unsuccessfully. The present position is therefore that there are two High Court decisions holding that the owners are protected by a "reachable on arrival" provision whatever the impediment preventing the vessel from berthing and one involving a similar but not identical provision holding that the provision only applies where the vessel is physically unable to reach the berth due to congestion or lack of water. Interestingly enough, *The Kyzikos* case subsequently went to the House of Lords on the meaning of the phrase "whether in berth or not", which provision was also included in the charter and on that the House of Lords held that Mr. Justice Webster had been right to exclude weather. However the "reachable on arrival" argument did not proceed beyond the High Court. It therefore remains to be seen whether someone in the future will seek to argue in the higher courts that there is some limit on the protection offered by such a clause. At the moment however, the majority view is that summed by Mr Justice Saville in *The Sea Queen*, when he said:

> "... it seems to me that the charterers have warranted in clear and simple words that there will be a berth that the vessel will be able to reach on her arrival - so that, if

> there is not, for whatever reasons, then the charterers have failed to perform this part of their bargain."

Whether in Berth or Not

This is perhaps the most common of the special clauses which have the effect of advancing the commencement of laytime from when it would otherwise start.

The phrase has been in use for many years and was first judicially considered in 1911 in *Northfield Steamship Co v Compagnie L'Union des Gaz* (1911) 11 Com. Cas. 74, a decision of the Court of Appeal, where Lord Justice Farwell said:

> "Want of space to berth is of very frequent occurrence, and the parties appear to me to have expressly provided for it, and this also disposes of the contention that the ship was not ready to unload. She was ready as far as she was concerned, and the fact that she was not in a berth, is rendered immaterial by this clause."

In none of the earlier cases before *The Kyzikos* [1989] 1 Lloyd's Rep. 1 was a berth available. In that case however, as already mentioned, the berth was available, but she could not reach it because of bad weather. What happened was that the vessel arrived off Houston to discharge, but was forced to anchor because of fog. She made an abortive attempt to get into berth but was forced to re-anchor until the fog lifted. Apart from considering this phrase, the lower courts also considered whether in these circumstances, the vessel was at the immediate and effective disposition of the charterers and the meaning of the "always accessible" provision, which has already been discussed.

It was held in arbitration and in the Court of Appeal that the "whether in berth or not" provision applied whatever the reason the vessel could not berth, but in the High Court and the House of Lords, it was held that this provision did not accelerate the commencement of laytime where the delay in berthing was due to bad weather.

The principal speech in the House of Lords was that of Lord Brandon, who summarised the issues thus:

> "Two views have been advanced, at each stage of the proceedings with regard to the meaning of the phrase "whether in berth or not" in a berth charterparty. One view put forward and accepted by Mr Justice Webster is that the phrase covers cases where the reason for the ship not being in berth is that no berth is available but does not cover cases where a berth is available and the only reason why the ship cannot proceed to it is that she is prevented by bad weather such as fog. The

> other view put forward by the Owners and accepted by the Arbitrator and the Court of Appeal, is that the phrase covers cases where a ship is unable to proceed to berth either because none is available or because although a berth is available, the ship is prevented by bad weather, such as fog from proceeding to it."

Having reviewed the previous cases and pointed out that the effect of the phrase in the present circumstances had never been judicially considered, Lord Brandon concluded in favour of the charterers, saying:

> "I am of opinion, having regard to the authorities ... and the context in which the acronym 'wibon' is to be found in the charterparty concerned, that the phrase 'whether in berth or not' should be interpreted as applying only to cases where a berth is not available and not also to cases where a berth is available but is unreachable by reason of bad weather."

On this basis, the same conclusion would have been reached had the reason for non-accessibility been lack of water or possibly some prohibition on navigation. However an interesting question has arisen, at least in arbitration, as to what precisely is meant by a berth being available and in particular does it mean that the berth must be available to the ship in question.

In the case which I have in mind, the owners sought to argue (it was a berth charter with a wibon provision) that the wibon provision did not apply where the vessel was not given a berth because the charterers' cargo documentation was not in order. There was an empty berth which could have been allocated to the vessel but wasn't until the cargo documentation problem was resolved. The question was, was that berth available?

The reason why the owners wanted to claim it was available was because they thought they could argue if it was, the wibon provision would not apply and being a berth charter, they could put forward a detention claim on the basis that the cargo documentation problem (which arose from a problem between the charterers and the receivers) prevented the vessel from becoming an Arrived ship. In the particular charter, there was a detention rate which was higher than the demurrage rate.

In that particular case, the tribunal held that a berth being available meant being available to the ship in question, which it was not, so that the wibon provision did apply and the vessel was able to tender Notice of Readiness, thus shutting out the owners' potential detention problem.

It should be stressed however, that even in the case of congestion, the phrase will only

apply if the vessel has arrived at a point within the port limits, and as already mentioned, one of the lesser issues which did not get beyond the Court of Appeal was whether, irrespective of the wibon argument, the vessel could be said to be "at the immediate and effective disposition of the charterers" as required by the Reid test in *The Johanna Oldendorff* [1973] 2 Lloyd's Rep. 285, for determining eligibility to present a Notice of Readiness. In other words, what was being suggested was that the geographical position of the vessel by itself would not suffice to show availability for this purpose if the vessel was unable to get into berth because of the weather. However that argument was rejected by the lower courts.

Interruptions and Exceptions to Laytime

Interruptions and exceptions to laytime could of itself form the subject of a whole talk. Today I just want to mention some general principles and illustrate these with a specific case.

The term "interruptions to laytime" is used to cover those periods when laytime does not run because they are outside the definition of laytime as expressed in the laytime clause. Excepted periods, on the other hand, are those periods which are within the definition of laytime, but nevertheless excluded by an exceptions clause. The principal difference between the two is that with the latter it is necessary to show a causal connection between what is excepted and the failure to work cargo, whereas with the former, all that need be shown for causation is that the excluded state of affairs existed at the place where cargo would have been worked.

The same phenomenon may be either an interruption or an exception to laytime, which it is will depend on the terms of the charter. Thus adverse weather would be an interruption to laytime where this was defined in terms of weather working days because these are not words of exception but a definition of the only kind of time that may count. On the other hand, a clause providing that "any time lost through bad weather is not to count as laytime" is an exception, so a causal connection must be shown to prove that time was actually lost due to weather. Clearly time could only be lost if the vessel concerned was in a berth or position where loading could take place, whereas time may be interrupted whether the vessel is in berth or not, once adverse weather is shown to exist.

It must be remembered however that what might constitute adverse weather for one vessel, might not be adverse weather for another vessel with a different type of cargo. Thus periods of rain may well prevent the discharge of a cargo of bulk sugar but would

have no effect on the discharge of crude oil from a tanker. The effect on laytime may even be different in the case of two similar ships with the same type of cargo but different weather clauses in their charters. For example, if the charter of ship A is a port charter with laytime expressed in weather working days and ship B has a similar cargo but laytime measured in working days and an exceptions clause excluding time lost due to adverse weather and both are waiting at an anchorage for a berth, then in the case of ship A, rainy periods on working days will be excluded from laytime, but not in the case of ship B, assuming both have a cargo that would be affected by rain during cargo operations. This is because the causal element necessary is different for an interruption to laytime (i.e. where the periods concerned do not come within the definition of laytime) compared with that relation to an exception from laytime.

It should also be remembered that whether adverse weather be excluded because of the nature of the laytime provision or by an exceptions clause, it will not normally be excluded once laytime has expired and the vessel is on demurrage.

An exceptions clause will normally therefore be construed as only applying to the period covered by laytime. It will not protect the charterer after the vessel has come on demurrage, unless it explicitly so provides, although it may of course affect the time at which demurrage commences by suspending the laytime clock prior to this point in time.

Furthermore exceptions clauses will be limited to the loading and discharging operations and periods whilst these are going on, unless they clearly indicate that they are also to apply to the operation of bringing the cargo down to the loading place or removing it after discharge.

The charterer's duty to have the cargo at the loading place ready for shipment at the right time is an absolute one. No matter what difficulties there may be in procuring the cargo and getting it despatch to the loading place, the charterer will be liable if it is not ready in time, unless the exceptions clause covers not only the actual loading but also the preliminary operation. In *Grant v Coverdale* (1884) 9 App. Cas. 470, Lord Selborne said:

> "It would appear to be unreasonable to suppose that the shipowner has contracted that his ship may be detained for an unlimited time on accounts of impediments, whatever their nature may be, to those thing with which he has nothing whatever to do, which precede the operation of loading and which belong to that which is exclusively the charterer's business."

However the charterer fulfils his duty to have the cargo ready for shipment in time, if he

has sufficient at the loading point to allow loading to start when the ship arrives and is ready to load and suitable arrangements have been made for the rest to be available at such time and in such quantities as will enable loading to continue without interruption.

If however the charterer fails to meet his obligation to have the cargo to be loaded ready in time, the charterer loses his laytime and if that expires, must pay demurrage to the owner.

Most charters have an all-embracing general exceptions clause, as well as specific exceptions clauses. However general exceptions clauses will not normally apply to laytime and demurrage and, unless by express words or necessary implication to the contrary, they do not protect either party in respect of events which occur before the ship starts on her approach voyage to the port of loading.

In *Sametiet M/T Johs Stove v Istanbul Petrol Rafinerisi A/S (The Johs Stove)* [1984] 1 Lloyd's Rep. 38, Mr Justice Lloyd said at P. 41:

> "I agree with the arbitrator that a general exceptions clause such as cl 19 will not normally be read as applying to provisions for laytime and demurrage, unless the language is very precise and clear."

This will be so even where the general exceptions clause refers to delays in loading and discharging the vessel.

The specific case I wanted to mention, which illustrates this, is the case of *The Solon* [2000] 1 Lloyd's Rep. 292. The relevant charter was Sugar Charter-Party 1969 and the clause in question in that case, under the heading "Strike and Force Majeure" provided:

> "28. Strikes or lockouts of men ... or stoppages ... or any other force majeure causes ... occurring beyond the control of the Shippers, or consignees, which may prevent or delay the loading and discharging of the vessel always excepted."

The cause of the delay relied on by the charterers was a strike at the load port and they argued that the specific reference to delays in loading and discharging meant that it was intended to refer to laytime. In arbitration, the arbitrator agreed but on appeal this was reversed by Mr Justice Thomas. The court however agreed with the following general principles put forward by the arbitrator:

AA. Whether a clause applies to limit the running of laytime or excludes liability for demurrage is essentially a question of construction.

BB. An ambiguous clause provides no protection in either case but simply because it covers more than one case, does not necessarily make it ambiguous.

The Judge went on to hold that the clause in question operated as an exceptions clause excusing what would otherwise be a breach and not as a clause that provided for an extension of time for performance. As a matter of language, Clause 28 was wide enough to provide an exception but it was clear the clause covered other circumstances where loading or discharging was prevented and could protect owners as well as charterers. The Judge also referred to another exceptions clause in the charter, relating to gear breakdowns and pointed out that that specifically referred to laytime and demurrage. He therefore concluded that Clause 28 was not sufficiently unambiguous to make it clear that the parties intended it to refer to laytime.

It is also worth mentioning that printed Sugar Charter-Party form has itself been amended to now specifically refer to laytime and demurrage since the events which gave rise to the dispute in *The Solon*, although the old form of charter is still in frequent use.

The End of Laytime

The general principle is that if it has not already expired, laytime ends with the completion of cargo operations. The charterer cannot artificially extend this by delaying final loading or discharging, as the case may be. As an illustration of this, see *Margaronis Navigation Agency Ltd v Henry Peabody* 1965 QB 430.

Unlike dry cargo charters, most tanker charters contain specific provisions dealing with the end of laytime. Whilst individual charters differ slightly, nevertheless in most cases, they either provide that laytime runs until loading/discharging hoses are disconnected, or, in the case of loading, until the relevant cargo documentation has been placed on board.

Where the charter does not expressly provide for any delay beyond the disconnection of hoses, it is nevertheless usual to allow a short period for the necessary documentation relating to loading to be produced. In such circumstances, the time to be allowed is such time as is reasonable, if the documentation must be on board before sailing, it cannot be produced before completion of loading and the charter is silent as to the time to be allowed. Whilst each case must be considered on its own facts dependant on the actual documentation involved, a period of either one or two hours is frequently allowed by the parties by agreement. Such time is not however laytime and if the time allowed is exceeded, the owner's claim is one for detention for the excess.

One slightly unusual tanker charter with regard to the ending of laytime, which fortunately is not much in use these days, is the STB Voy form of charter. This provides at discharge for laytime or time on demurrage to continue until the hoses have been disconnected or until ballasting begins, whichever begins first.

In at least one arbitration, it has been held that where as is usual with segregated ballast tanks, ballasting commenced part way through discharge, this meant that this was the point at which laytime came to an end, notwithstanding that discharge of the cargo continued. It is suggested however that in such circumstances, although laytime or time on demurrage would cease, the owners would have a valid claim for detention thereafter, probably quantified at the demurrage rate.

Tanker Warranties

Many tanker charters provide for a total laytime of 72 running hours. However they usually also contain an additional clause whereby, in its simplest form, the vessel warrants that it can discharge its entire cargo in 24 hours or maintain 100 psi back pressure at the ship's manifold, "provided shore facilities permit". There may also be a further additional clause requiring that the cargo be maintained at loaded temperature or alternatively heated, usually to a maximum of 135 degrees F on discharge.

Alleged breaches of these two clauses probably account for most demurrage disputes arising from tanker charters. As well as giving rise to disputes over demurrage, such breaches may also result in substantial cargo claims, but that aspect is outside the scope of today's discussion.

The cost of heating, which may well be considerable, is usually included in the freight. If the cargo heating requirement is only to maintain loaded temperature, then little or no heating may be required initially if the vessel loaded in tropical waters, but as the vessel moves to colder climes then heating will become necessary. If the vessel delays heating too long, then there may be insufficient time to bring the cargo back to loaded temperature or it may have become so cold as to be no longer possible for it again to become pumpable.

In certain cargoes with a high fat content, what may happen if heating is delayed is that the cargo begins to solidify and when heat is applied, only the cargo in the immediate vicinity of the heating coils again liquefies. As heat continues to be applied to the small pools of liquid cargo, they overheat and eventually suffer heat damage.

With regard to the pumping warranty, disputes often arise because the charterers simply deduct all time in excess of 24 hours. Owners usually assert in reply that the extended discharge was the fault of the terminal, often it is said because they provided hoses which were insufficient in number or size. If a vessel is provided with one hose when there are four connections, it stands to reason that discharge will be at a lesser rate than if all four were used. The effect on pressure should however be the opposite. Many factors impact on back pressure – length of shore line, gradient between the jetty and the shore tank and diameter and smoothness of pipe to name a few of the more common. If however four pumps are being used to pump through one pipe the pressure should be greater than if one pump is used on each of four lines. It should also in theory be easier to maintain pressure pushing through an 8 inch diameter pipe than a 16 inch pipe. Records as to the back pressure maintained at the ship's manifold and the shore side are often missing or incomplete.

It has been said that since the standard pumping warranty does not refer to laytime or demurrage then as with general exceptions clauses, the pumping warranty cannot operate as an exception to either. At least one London arbitration tribunal has taken this view (see London Arbitration 4/98 – LMLN 481 14 April 1998). However the usual approach is to assess damages on the basis of ascertaining the excess time by comparing the time actually taken to discharge with the time allowed and disallowing demurrage to that extent.

In fact there are remarkably few reported cases on this aspect. In theory if discharge exceeds 24 hours, the vessel should maintain the warranted pressure until discharge is complete. However in practice that is impossible, since even if stripping out of some cargo tanks is carried out concurrently with main discharge from the others, there will invariably be the last two or three tanks to be stripped out when discharge pressure is bound to fall. Most charterers are prepared to recognise this and although few charters contain an express provision relating to stripping, provided the time taken is not excessive, the additional time will be allowed.

Whilst pumping warranties can themselves generate quite complex problems for which a knowledge of fluid dynamics would be more useful than law, the issues can be even more involved when combined with an allegation of a breach of the heating warranty, which may explain why so many cases settle and so few get reported.

Multiple Charters

Mention has already been made of multiple charters, that is where a vessel is under more than one voyage charter at the same time, carrying separate cargo under each charter. This form of chartering is at its most sophisticated in the parcel tanker trades.

Where multiple chartering is envisaged, it is usual for each charter to state that it is in respect of a specified quantity of cargo, that this is a part cargo and that the shipowner is entitled to enter into other charters concurrently. The provision agreeing that the shipowner may do so is sometimes referred to as a "liberty to complete" clause. An early example of such a provision is the Centrocon completion clause, the salient parts of which provide:

> "Owners have the liberty to complete with other ... merchandise from port or ports to port or ports en route for owners' risk and benefit, but ... same not to hinder the loading or discharging of this cargo."

A more sophisticated clause is that in the Bimchemvoy charterparty, Clause 24 of which states under the heading "Segregation/Commingling/Rotation":

> "If the Vessel is carrying different parcels, same always to be safely segregated but commingling of some commodities is permissible by written consent of all the Charterers concerned. If part cargo fixed, Owners shall have the option of loading and discharging other cargo(es) for account of other Charterers or Shippers from port or ports en route or not en route to port or ports en route or not en route.
> Rotation.
> Rotation of loading/discharging ports to be at Owners' option."

Similar principles apply where a voyage charter is supplemented by part cargoes carried pursuant to one or more booking notes or bills of lading with their own provisions covering demurrage and possibly laytime as well.

Commencement and Running of Laytime in Multiple Charters

In general, the normal rules apply to the commencement and running of laytime in respect of each charter where there is more than one charter. Thus where both charters are port charters and loading or discharging, as the case may be, is to take place at the same port then the vessel may in the usual way give Notice of Readiness under all charters on arrival within the port, provided that in the case of the discharge port, all cargoes are freely accessible. If one of the cargoes is overstowed in part or in whole then laytime cannot run in respect of that charter until all the cargo is accessible.

In most charters, it is for the charterers to choose at which berths the vessel should load and discharge. In the veg oil trade however, it is often the owners who are allowed to choose the berth and the shippers/receivers are invited to provide and take their cargoes from that berth.

If all the cargoes are accessible, then laytime will run concurrently in respect of each charter after arrival. Let us take an example where there are two charters but the same principles apply where there are more. If loading or discharging of each cargo is to take place at the same berth, then time, laytime or time on demurrage, will continue to run during this operation ending in respect of each charter when the cargo carried under it is loaded or discharged. However if there are periods when cargo operations in respect of one cargo have to be suspended whilst cargo operations take place in respect of a different cargo, then the periods lost to the first charterer will not count against his laytime, nor will demurrage accrue. If the cargoes are to be loaded/discharged at different berths, then if the second berth is unavailable whilst the vessel is at the first, the question arises, does laytime/demurrage still run?

This is the scenario recently considered in the High Court in an important case called *Stolt Tankers Inc v Landmark Chemicals S.A.* Judgement in the Commercial Court was given by Mr Justice Andrew Smith on 21st December 2001 (Folio 2001/515) where he upheld a decision by London Arbitrators that in those circumstances, time did not run. So far, the case has only been reported in Lloyd's Maritime Law Newsletter No. 579 dated 31st January 2002.***

The facts of the case were relatively straightforward. The vessel in question, the "STOLT SPUR" was a parcel tanker and under the charter in question she was fixed for the carriage of a parcel of paraxylene from Rotterdam to Mumbai. She was also carrying other parcels of chemicals for different charterers to the same discharge port.

Under this charter, Landmark were entitled to nominate the discharging berth but the berth they nominated could not be reached on the vessel's arrival because it was occupied by another vessel. The vessel however gave Notice of Readiness and laytime began to run. The day after her arrival, she shifted to another discharge berth and discharged cargo carried under other concurrent charters, proceeding out to sea for tank cleaning on completion of that operation but returning to the anchorage thereafter. On her return, the berth at which Landmark wished their cargo to be discharged was still occupied and some

*** Editor's note: The case has subsequently been reported in [2002] 1 Lloyd's Rep. 786.

days later, the "STOLT SPUR" proceeded to an inner anchorage and there loaded a cargo of rape acid oil for other charterers, returning to her original anchorage on completion. Some 17 days after her arrival at Mumbai, the Landmark berth became available to her and she was able to discharge that cargo.

The Owners however asserted that the whole of the period between her arrival and being able to discharge the Landmark cargo should count as laytime and thereafter time on demurrage, since at no time were Landmark in a position to say "You can now discharge my cargo". Landmark on the other hand said that the two periods when the vessel was not available to them whilst she discharged other parcels of cargo then tank cleaned and loaded a different parcel should be excluded because the owners were at fault in removing the vessel from the charterers' disposition for their own purposes. They relied on a passage in the current edition of Scrutton on Charterparties (20th edition) where it is stated:

> "However, in order to be entitled to claim demurrage, the shipowner is under an obligation to have the vessel ready and available to load or discharge."

rather than whether there was any causal connection between the delay and what the ship was doing.

It should be noted that during the first period when the "STOLT SPUR" discharged another cargo and cleaned tanks, laytime had not expired but by the time of the second period when she loaded another cargo, laytime had expired and the vessel was on demurrage.

The matter went to arbitration and a panel of three arbitrators decided that Landmark were right, a decision upheld on appeal in the High Court by Mr Justice Andrew Smith.

The case raises an important question as to what is meant by "fault of the shipowner" such as would prevent laytime from running and demurrage accruing. The question arises not just in relation to multiple charters but to any case where a vessel is delayed in berthing because of something for which the charterer is responsible e.g. congestion and the shipowner wishes to use that time when he is prevented from berthing for his own purposes e.g. for bunkering. The case proceeded on the basis that the same principles would apply whether the vessel was on laytime or on demurrage.

In the course of this case, a considerable number of authorities were considered but since time is limited, I will confine myself to a consideration of the key cases, the most

important of which was *Ropner Shipping Company Ltd v Cleeves Western Valleys Anthracite Collieries Ltd* (1927) 27 Lloyd's Law. Rep. 317.

Having reviewed the earlier cases, the Judge in *The Stolt Spur* accepted that they showed that in a fixed laytime charter, there is an absolute obligation on the charterer to load or discharge the vessel, as the case may be, within the time allowed and that he is not excused from doing that by any cause unless it is one which is covered by an exception in the charter or unless the failure to load arises from the shipowner's default. He also accepted that the earlier cases showed that it was not an implied condition of the right of the shipowner to demurrage that the ship should be ready and willing to load and that even the absence of the ship from the port in question would not prevent laytime running or demurrage accruing if the vessel's absence was through no fault of the owners. He continued:

> 22. This was the law when the Court of Appeal decided *Ropner Shipping Company Limited v Cleeves Western Valleys Anthracite Collieries Limited* [1927] 1 KB 879 (1927) 27 Lloyd's Law Rep. 317. The case was one in which, after the vessel had come on demurrage, the owners removed her from berth in order to bunker. Had bunkering been carried out during laytime, then the time taken would have been excluded under the terms of the charterparty. The owners argued that they were entitled to demurrage in respect of the time that she was shifting to bunker. At first instance (1926) 26 Lloyd's Rep. 58, Roche J had considered that the charterers were not liable for demurrage because it did not lie in the mouth of the owners to say that their act was not wrongful. He went on to refer (at p. 61) to the owners' argument that "the vessel was withdrawn from the actual place or position in which she was loading, but that had she not been so withdrawn she would not have been loaded any sooner or any better", and said that, "That contention would have been a formidable one had there been the necessary facts to support it".
>
> 23. The Court of Appeal did not decide the case on that basis. Instead Bankes LJ, having considered that the cases of *Budgett v Binnington, Houlder v Weir* and *Cantiere v Russian SNEA* said that the owners could not claim that their vessel was being detained by the charterers and therefore they were not entitled to demurrage during the time when for their own convenience they had removed the vessel for bunkering. Sargant LJ put it thus: "In order that demurrage may be claimed by the owners, they must at least do nothing to prevent the vessel from being available and at the disposal of the charterers for the purpose of completing the loading of the cargo" (at p. 888, p. 302).

24. Bankes LJ insisted that the case fell to be decided on the basis that the owners had simply bunkered for their own convenience. He held that it did not lie in the mouths of the owners to say that the vessel was detained by the charterers and claim demurrage. The charterers' counsel, Mr Jowitt QC and Mr Dickinson, had said in argument that they did "not question the proposition that if the charterers have no cargo ready, the owners can bunker during the demurrage period and make the charterers liable for the whole time" (p. 84). Nevertheless Bankes LJ was emphatic that he would not express an opinion about the position if bunkering had taken place "in order to trim the vessel, or for some equally good reason, or was done because no cargo was available for loading" (p. 887, p. 319). He left entirely open the question which arises in this case, whether the charterers are liable for demurrage in respect of time when the vessel used the time to bunker because, or when, the charterer could not have loaded cargo in any event.

25. Sargant LJ agreed with Bankes LJ on the point that arose for determination. However with regard to the position if cargo was not available, he said this (at p. 888): "We have had a very ingenious argument to the effect that the charterers must show not only that the vessel was rendered unavailable for them but must also show that they had cargo ready to load upon the vessel. On that point I agree with Roche J. It seems to me that when it is shown that, by the act of the owners, the vessel has been placed in the position which renders her unavailable for the charterers' purposes in loading the cargo, it is for the owners who claim demurrage to show that the charterers had not in fact cargo available for loading during the period the vessel used for bunkering".

26. The third member of the court, Avory J. simply indicated his agreement with the other members of the court. He cannot be regarded as endorsing Sargant LJ's obiter dictum.

27. Therefore, both Roche J and Sargant LJ apparently considered that if the owners had discharged the burden of proving the cargo was not available, then the charterers would have been liable for demurrage notwithstanding the vessel was "unavailable for the charterers' purposes". However, their views were expressed by way of obiter dicta.

It seems to me that strictly speaking, the comments of Roche J and Sargant LJ may have been obiter but they were apparently shared by counsel for the Charterers! Furthermore if Bankes LJ was emphatic that he would not express an opinion, that can hardly be taken as support for a contrary view.

Later in his judgement, Mr Justice Andrew Smith observed:

> 33. ...However, whenever a vessel is not available to the charterers to load or discharge cargo, that necessarily prevents the cargo operations taking place. The real question which is raised by this appeal is whether it matters that there is another cause which would in any event have delayed the cargo operations. In other words, the nature of Mr Houghton's submission (*Mr Houghton was the Solicitor representing the Owners*) is that the act of the owners, if it is to prevent laytime or time on demurrage running, must be *the* effective cause of the cargo operations not taking place (and this is indeed the view expressed in Cooke on Voyage Charters (cit sup)). It is not sufficient for him that the conduct of the owner was *a* reason that cargo operations were delayed.
>
> 34. Once this is recognised, the owners find little help in the authorities which are to the effect that laytime will run or demurrage accrue unless the failure to load or discharge results from the owners' default. Of the authorities which were cited by the owners and to which I have referred, only the views expressed obiter by Roche J and Sargant LJ in the *Ropner Shipping* case consider the position where there are concurrent causes of the vessel not loading or unloading. These do provide some support for the owners' argument, but especially in view of the reservation emphatically expressed by Bankes LJ, they are, in my judgment, far from conclusive.

Nevertheless earlier in his judgement, Mr Justice Andrew Smith purported to find a "wider principle" from two relatively modern cases, *The Union Amsterdam* [1982] 2 Lloyd's Rep. 432 and *The Lefthero* [1991] 2 Lloyd's Rep. 599, which he said applied in the case he was considering. This principle is that in order to claim demurrage, an owner must do nothing of his own choice which would result in his vessel not being available to the charterer. In *The Lefthero*, Mr Justice Evans said at P. 608:

> "The authorities show, therefore, that the charterer undertakes an absolute obligation to pay demurrage, subject to exceptions and to 'fault', but this depends in its turn, in my judgment, upon the shipowners' obligation to have the vessel ready and able to discharge in accordance with contract. This cannot be stated as an absolute obligation, for the reasons given in the *Cantiere Navale* judgment, but it is nevertheless a qualified obligation, non-performance of which will prevent the shipowner from recovering demurrage. Thus, no claim lies when the ship is proceeding from one loading or discharging port to another: not because the time on passage is an exception, but because the ship is proceeding on the voyage, not being detained by the charterers, during that period: *Breynton v Theodorou & Co*

> (1924) 19 Ll.L.Rep. 409. The wider principle underlying the authorities is like the larger theme which goes through the Enigma Variations, but which is never played."

With respect to Mr Justice Evans, the reason why no claim for demurrage lies during the voyage stages of the charter is indeed not because of an exception in the charter but because laytime and demurrage by their very nature only apply during the loading and discharging stages of the charter.

Lord Justice Atkin, a most respected judge, himself said in the *Cantiere Navale* case that *Budgett & Co v Binnington* [1891] 1 QB 35, the case normally taken as the start point for a consideration of the meaning of "default of the shipowner", was authority for the proposition that it is not an implied condition of the right of the shipowner to demurrage that the ship should be ready and willing to load (or presumably, discharge). He simply said there was no implied condition. He did not say there was a qualified condition, namely that the owner must do nothing to remove the vessel from being available to the charterer, even though to do so would not be causative of delay.

The Lefthero was subsequently considered by the Court of Appeal, where the decision was reversed but in his judgement in the higher court Lloyd L.J. simply recorded that the charterers in that case did not seek to rely upon any "wider principle" and the other members of the court did not comment.

On the basis of this wider principle however, Mr Justice Andrew Smith reached the conclusion that if a vessel is not available for the charterers' cargo operations but being used by the owners for their own purposes, there is no reason why they should pay compensation, as she was not being detained by the charterers. He also refused leave to appeal which unfortunately means that there will be no opportunity for the Court of Appeal to consider this important question.

With respect to the judge, I believe there is no wider principle or requirement that an owner must do nothing which would prevent his vessel being available to a charterer in circumstances where the charterer is unable to discharge the cargo because of berth congestion, nor is there any need for such a limitation. In my view, the only question that should arise is whether there was a default on the part of the owner. I would suggest that if there is no obligation on the part of the owner to ensure his vessel is ready and willing to discharge (or load), there can be no default if she is not. The only time there would be a default is if the berth became free and the vessel was not at that time available.

I of course accept that when Notice of Readiness is tendered, the vessel must be ready and available but I see no reason for in effect requiring an owner to keep his vessel ready and available if she is not at that time required by the charterer to be in that state.

There is however another consideration which I understand was not taken into account in the "STOLT SPUR" case and that is this.

I said a short while ago that the judge said there was no reason why the charterers should pay compensation when the vessel was not being detained. I would suggest however that she was in one sense being detained, because she was not free to go elsewhere and take on new business because the charterers' cargo was still on board. The charterers had entered into a charter for a part cargo and they were therefore using that part of the ship they had chartered as floating storage. To my mind therefore, it is right that the owners should be compensated for that use of their vessel either by the laytime allowed running against the charterers or by payment of demurrage.

Nevertheless the judgement in this case is binding on commercial arbitrators and given the facts, it is unlikely that they can be distinguished so as to reach a different conclusion. It is unlikely therefore that in the foreseeable future the point will again be considered by the High Court or the higher courts and therefore owners would be prudent to adjust their charterparties accordingly so as to provide that laytime should run and demurrage thereafter provided the proximate cause of any delay is congestion or some other matter within the charterers' control.

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DEVELOPING TRENDS IN DISPUTE RESOLUTION

*John Battersby**

1 Alternative Methods of Dispute Resolution – an Introduction

1.1 The objective of this paper is to consider the advantages and disadvantages of each of the alternative methods of dispute resolution as they are practiced and perceived in various business sectors and to see what one process could learn from another process to provide bespoke dispute resolution solutions to suit the varied nature and size of disputes with the object of saving time and costs.

1.2 In many jurisdictions a party to a contract who is in dispute with the other party can have that dispute resolved by a court of law through litigation unless it has entered into an agreement with the other party to have such dispute resolved by an alternative method of dispute resolution.

1.3 The reasons for seeking alternative methods of dispute resolution can be many and varied but normally include:

- privacy,
- time savings,
- cost savings,
- technical expertise in decision making,
- finality,
- preservation of business relationships.

1.4 Traditionally, these objectives have been sought in some business sectors, such as construction and shipping, through arbitration.

1.5 When we talk about "alternative dispute resolution", or "ADR" as it is often referred to, we are talking about methods of dispute resolution which are alternatives to litigation. However, many people often refer to the alternatives to both arbitration and litigation as ADR, probably because of arbitration's failure, in some business sectors, to achieve some of the objectives referred to earlier, particularly with regard to time and cost. In the context of this paper, arbitration will be treated as having a very important role to play among ADR processes as it is perhaps the only process which can achieve **all** of the aforesaid

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objectives.

1.6 ADR therefore comprises:

- arbitration;
- mediation and conciliation; and
- adjudication and expert determination.

1.7 Each of these processes has advantages and disadvantages when compared to the other processes. Although there are some similarities between one process and another, particularly in regard to their objectives, the processes themselves are significantly different one from another.

1.8 **Arbitration** is a judicial process involving the presentation of evidence by the parties before a tribunal and the tribunal reaching a decision on the parties' respective rights and obligations under the contract.

1.8.1 Although arbitration is consensual, in that the parties have agreed in their contract to refer disputes to arbitration, the arbitrator's power is not derived from the contract itself but rather the arbitration agreement and statute. By virtue of the relevant arbitration statute in some jurisdictions, the arbitration agreement has a separate existence and is not necessarily dependent upon the contract in which it was originally included.

1.8.2 In arbitration, there is often an absolute obligation that the arbitrator must give each party a reasonable opportunity of presenting his case and dealing with that of his opponent. There is also often a statutory obligation on the arbitrator to adopt procedures suitable to the circumstances of a particular case so as to provide a fair means for the resolution of the matters falling to be determined. In the case of complex disputes, this can lead to the utilization of procedures which can be as time consuming and costly as litigation or even more so if the process is not properly managed.

1.9 **Mediation** is a totally different process from arbitration in all respects save only for the parties' agreement to utilize the process as an alternative to litigation and the objective of privacy. The role of the mediator is to facilitate a settlement agreement between the parties by negotiation.

1.9.1 In some jurisdictions, conciliation is not considered as a process separate from mediation. In some other jurisdictions a conciliator is someone who makes recommendations at the end of the process. In some mediations, this often forms part of the process of mediation in appropriate circumstances.

1.9.2 The objectives of mediation are to achieve a quick, economic and amicable settlement of a dispute. Unlike arbitration, the process does not and cannot, within the time available, involve the consideration of all the parties' respective rights and obligations under the contract. Instead it concentrates on the key issues whose resolution is necessary to achieve a commercial settlement.

1.10 **Adjudication** is similar to arbitration in that it is a judicial process in which the adjudicator determines the parties' respective rights and obligations under the contract on the basis of evidence presented by the parties. The difference is in the procedures used. Pleadings, further and better particulars, discovery, evidence under oath etc. are not appropriate to adjudication which is intended to be a quick process like mediation.

1.10.1 The adjudicator may be prevented by time constraints imposed by the contract from giving each party a reasonable opportunity of presenting his case and dealing with that of his opponent. Such time constraints may also put the adjudicator in a position of having to do things in a manner which, if done by the arbitrator in an arbitration, might be considered to a breach of the requirement to provide a fair means of resolving the matters to be determined.

1.10.2 In some ways, adjudication is similar to expert determination. Both are contractual procedures involving an impartial third party reviewing the rights and obligations of the parties under the contract. The expert uses the results from his investigations and his own knowledge and experience in making his determination. The adjudicator is also permitted to ascertain the facts and the law for himself but there may not be any obligation upon him to do so and time may preclude him from being able to make any independent investigation. The expert's determination will be contractually binding on the parties whereas the adjudicator's decision may only be binding as an interim measure pending a more detailed review of the matters in dispute through arbitration.

2 Arbitration

2.1 Most practitioners in dispute resolution are familiar with arbitration so I do not intend to deal with the process itself save to say that the process can vary quite considerably from one jurisdiction to another. At one end of the spectrum, it can be an extremely quick and cost effective means of resolving disputes while at the other end of the spectrum, it can be an extremely costly and cumbersome process, particularly in common law jurisdictions which adopt an adversarial approach as opposed to an inquisitorial approach.

2.2 As I mentioned in my introduction, arbitration is perhaps the only process which can achieve all the objectives of ADR and often does in many areas of business.

2.3 Arbitration has been used for the resolution of disputes for many years. However, the parties are often dissatisfied with the result.

2.3.1 Although intended to be private, particular business sectors in many places are very much like villages and arbitrations are very often not kept as private as they ought to be. I have even seen lawyers distributing awards to their clients who are interested in how a particular arbitrator has dealt with a particular issue.

2.3.2 Although intended to save time when compared to litigation, construction arbitrations often last for many months and even years due to unnecessary requests for particulars, protracted discovery, unnecessary use of experts and the parties' representatives' failure to properly manage the process by identifying the issues and attempting to agree facts and figures where possible.

2.3.3 Although intended to save costs when compared to litigation, protracted arbitration proceedings often cost more than would have been spent on court proceedings, particularly when more than one arbitrator is appointed to the tribunal.

2.3.4 Although arbitration should be far more efficient than court proceedings for the resolution of disputes through the availability of technical expertise in decision making, lawyers are often appointed as arbitrator when a technical arbitrator would have been more appropriate. I recently sat through a 6 week hearing as an assessor in a construction arbitration assisting a non-construction lawyer as arbitrator. The arbitration was concerned wholly with the principles of valuation and quantum of variations. The only matters of law related to the interpretation of technical provisions in the contract which would have been far more appropriately dealt with by an engineer or quantity surveyor than a lawyer. To make matters worse, both parties appointed quantum experts who disagreed with one another on just about everything. In such circumstances a single tribunal expert may have been more appropriate than an assessor so that costs of party appointed experts could have been saved and issues narrowed considerably upon the conclusion of the expert's investigations and submission of his report.

2.3.5 Although arbitration brings finality to a dispute, this is not satisfactory when the arbitrator makes a wrong decision which cannot be appealed. Arbitrators can

come to the wrong conclusion like everyone else. Even judges make wrong decisions but at least there may be recourse to a higher court. There is a mistaken belief among the legal profession that businessmen want finality to the resolution of their disputes come what may. I know of no businessman who would not want to appeal a decision which he believed to be wrong if sufficient money was at stake and advice was in his favour.

2.3.6 Although protracted arbitration proceedings are likely to cause immense harm to business relationships, most businessmen I know would accept a quick well reasoned decision of an arbitrator considered to be an expert on the subject matter of a dispute, if such decision was unlikely to be overturned by appeal.

2.4 As observed in a recent report on the construction industry, the delivery of a construction project is a highly complex process, involving multi-disciplinary inputs provided by a vast number of participants from tradesmen, technicians, supervisors, professionals, consultants, contractors and sub-contractors to client organizations and regulatory authorities. Complex processes are likely to give rise to complex disputes. It does not therefore seem sensible to me to have an arbitration clause in a construction contract which can only be implemented upon completion of the project. Meanwhile, small disputes fester, compounding one upon another, and develop into large disputes which become more difficult to resolve as time moves on and memories fade (often conveniently) and both parties become firmly entrenched in their views.

2.5 Other business sectors may have similar problems.

2.6 As it is now widely recognized within many business sectors, disputes need to be avoided and those which cannot be avoided need to be resolved quickly, economically and in a non-confrontational manner soon after the dispute arises.

3 Mediation

3.1 Mediation is a confidential, voluntary, non-binding and private dispute resolution process in which a **neutral** person (the mediator) **helps** the parties to reach a **negotiated** settlement.

3.2 Mediation is an extension to the negotiation process when negotiations have broken down. It is really an assisted negotiation.

3.3 Mediation combines the flexibility of negotiation with the discipline of a formal dispute resolution process.

3.4 There are however fundamental differences between mediation and a normal negotiation process.

3.4.1 Negotiation is normally carried out between two parties whereas mediation requires a third party neutral to take a **proactive** role in the negotiation process. The mediator assists the parties by getting them to address the important issues so that they can build on the common ground rather than arguing about differences.

3.4.2 The mediator assists communications between the parties by acting as a messenger. He can package proposals in such a way that they are less likely to be rejected.

3.4.3 The mediator can act as a "sounding board". The parties can obtain unbiased advice from someone who, although involved in the negotiation, understands both sides point of view.

3.4.4 There are no rules in negotiations which is why they often break down. Mediation is normally conducted under rules. Why should rules be necessary?

3.4.4.1 If parties enter into a negotiation at their own free will to settle a dispute, they should not perhaps be bound by rules.

3.4.4.2 However, were it not for the existence of a set of rules referred to in the contract, many successful mediations would never have got off the ground in the first place.

3.4.4.3 I am an advocate of mandatory mediation for the construction industry. I do not believe that the decision to mediate as opposed to arbitrate should be left in the hands of individuals representing large corporations or government departments; in case they decide not to make the decision at all, perhaps for their own self interest. However, whether mediation should be mandatory in other business sectors is another matter. Each sector should consider what is best for its own particular business.

3.4.4.4 It is usually only when the parties get into a mediation that they realize the benefits of settlement, often considerably below their prior expectations.

3.4.4.5 Rules are important, firstly to protect a party from having its time wasted by another party who has no intention of settling.

3.4.4.6 They give the mediator important authority to get the parties together for meetings, to see them separately, and to generally conduct the process in an

orderly and efficient manner.

3.4.4.7 Rules are said to be important to protect the mediator and the appointing authority from claims by the parties. Personally, I can understand the need to protect the mediator otherwise his performance may be inhibited to the detriment of the settlement process. However, I do not agree with protecting the appointing body from the consequences of appointing a mediator who does not have the capability of mediating a particular dispute.

3.4.4.8 In my view the most important aspect of having rules is to ensure confidentiality and to ensure that all documents, communications, information disclosed, made or prepared for the mediation process remain privileged.

3.4.4.9 If both parties can openly discuss the issues without fear of having what they say used against them in any later arbitration or court proceedings, the chances of reaching a sensible, justifiable settlement are increased considerably.

3.4.4.10 I say justifiable settlement because I appreciate that any settlement involving a government has to be justified. The same is true for other parties in business. Both private and public companies all have auditors and shareholders who have to be satisfied with any settlement.

3.4.4.11 In many respects, I believe that mediation is often a process by which the parties reach agreement on what is likely to be the result of an arbitration on the issues in dispute. In so doing the "grey" areas are identified and quantified. Compromise should be limited to these areas on the basis of avoiding risk and saving costs. There is no reason why the "black and white" areas cannot be worked out during the mediation process and substantiated.

3.4.4.12 I was recently involved in a construction mediation where the parties agreed to provide the necessary information to the mediator to evaluate the claim so that a justified evaluation could be tabled to their respective boards for a decision to settle. The mediator was actively involved in assisting the parties to jointly prepare the necessary information such as baseline programmes, as-built programmes and so on. Such an evaluative role being undertaken by the mediator may be criticized by some of the purists who believe only in facilitative mediation. However, this development in the role of the mediator resulted in a settlement of the dispute.

3.5 There are also fundamental differences between mediation and normal dispute resolution processes such as arbitration.

3.5.1 Mediation is non-binding. The mediator is a third party neutral but does not make decisions.

3.5.2 Unlike an arbitrator, the mediator has the freedom to communicate with the parties in dispute alone or together. Within the rules of the mediation, there is complete flexibility.

3.5.3 The focus in a mediation is on the parties' interests rather than their contractual rights which are the focus in arbitration.

3.5.4 In many disputes, mediation can be a cost effective means for each party finding out:

- who's right?
- who's wrong?
- how much?
- where are the grey areas to compromise and avoid a gamble?

3.6 The advantages of mediation over arbitration are enormous.

3.6.1 Relative to arbitration, the cost of mediation is insignificant.

3.6.2 If successful, mediation is much quicker than arbitration.

3.6.3 Mediation avoids the risk of losing. In arbitration, both parties nearly always believe they are right. So do their advisors. At least one will be disappointed. Often both are disappointed when the winner does not receive as much as he thought he would. Judges often come to the wrong conclusion. Arbitrators who are not sufficiently knowledgeable in the law or in the technical matters which are the subject of the dispute are even more likely to come to a wrong decision.

3.6.4 The parties to a mediation retain control over their positions. If a party does not like the result, it can walk away. If a party is not sure of its position, it can take time to consider.

3.6.5 Mediation can bring flexibility to the dispute resolution process. There is not a right way or wrong way to conduct a mediation. The manner in which the issues are resolved should depend on the circumstances. Some points may not need to be resolved if the resolution of other key points result in a settlement which both parties can live with. On the other hand one fundamental point may be the key to the resolution of the whole dispute. For example a point of law could be resolved by a short arbitration on the basis of an agreed statement of background facts and written questions and then quantum resolved by

negotiation.

3.6.6 Mediation allows creativity to fulfill the needs of the parties. It provides the opportunity to promote commercial interests. For example, another claim may be settled in return for the withdrawal of the claim which is the subject of the dispute.

3.6.7 Mediation is non adversarial and can therefore achieve an amicable settlement and preserve business relationships.

3.6.8 Justification for settlement can also be provided through a mediator's **independent** report to governments or large corporations.

4 Adjudication

4.1 In my introduction, I said that adjudication is similar to arbitration in that it is a judicial process in which the adjudicator determines the parties' respective rights and obligations under the contract on the basis of evidence presented by the parties.

4.2 The advantage of adjudication over arbitration is that it is quick and relatively cheap. The advantage of adjudication over mediation is that it ensures a result. The adjudicator's decision is binding.

4.3 Anyone who is looking for disadvantages may say that the decision can be appealed. That is true but is not that also another advantage? No one likes a wrong decision. If the adjudicator gets it wrong then there is a safeguard; normally an opportunity to refer the matter to arbitration. The opposite is the case in arbitration. If the arbitrator makes a wrong decision (and many do!), there is often little chance of an appeal.

4.4 When preparing for this paper, I thought I would look in the Concise Oxford Dictionary to see how it defines adjudication. Adjudicate is defined as to: "act as a judge in a competition, court, tribunal, etc" or "decide judicially regarding a claim etc". Arbitration is defined as "the settlement of a dispute by an arbitrator". Very little difference in meaning one may say. However, arbitrators' awards are enforceable by the courts through legislation in many jurisdictions whereas adjudicator's decisions may not be so easily enforceable.

4.5 In my view, an effective adjudication process is one which:

- provides for the referral of a dispute arising under the contract at any time,
- to an adjudicator who,
- acting impartially,
- on the basis of such information as the parties to the dispute are able to provide him,
- or he is able to ascertain for himself,
- in a very limited timescale,
- reaches conclusions as to the parties' rights and obligations under their contract on the basis of that information,
- those conclusions being set out in a decision that is contractually binding on the parties unless and until such dispute is finally determined by legal proceedings or by arbitration (if the contract so provides or the parties so agree) or by agreement between the parties.

5 Combining ADR techniques

5.1 Arbitration, as it is often conducted these days, has few of the advantages which led to it becoming the traditional method of resolving construction disputes. In particular, it has become extremely costly and time consuming. That is not to say that efficient, cost effective procedures cannot be adopted; they can, but these require cooperation between the parties if they have not agreed appropriate rules when they entered into the contract. Mediation is based on cooperation between the parties, facilitated by the mediator, with the objective of finding a mutually acceptable solution for resolving the dispute by agreement. However, mediation on its own is often not appropriate to the resolution of construction disputes. Decisions may need to be made on key issues which neither party is able to compromise. Whilst adjudication is a judicial process in which the adjudicator determines the parties' respective rights and obligations, it may not bring about a final resolution of the dispute which, under the terms of the contract, may only be achievable through arbitration. In this respect, as in the case of a failed mediation, adjudication can add to the cost of resolving a dispute.

5.2 The use of arbitration for the resolution of disputes in various business sectors has been used in Asia for many years. Arbitration clauses are included in many contracts in use around the region. Mediation has been used extensively and successfully for the economic resolution of disputes in some countries. Although mediation is now a standard feature in many contracts, its use is not always mandatory. Private sector clients appear reluctant to adopt the mediation

process, preferring instead to use arbitration in its traditional form if disputes cannot be avoided. Adjudication has not been used extensively at all.

5.3 It should be noted that neither mediation nor adjudication is normally included in contracts as a replacement for arbitration but only as a means of avoiding arbitration. In this respect both processes can form a step along the way to an arbitration, thereby increasing costs and prolonging the resolution of the dispute as a result.

5.4 For example, some forms of contract in use in the construction industry contain a four stage dispute resolution procedure whereby:

1. the dispute is referred to the Engineer for his decision within 28 days of receipt of a Notice of Dispute;
2. if such decision is not accepted by either party or if no decision is given then either party can refer such dispute to mediation within 28 days of the date of such decision or the expiration of the time limit for the giving of such decision;
3. in the event that the dispute is not settled by agreement through mediation and provided the Works are not complete (in which case the dispute can only be referred to arbitration) then either party can refer such dispute to the decision of an adjudicator **acting as an independent expert but not as an arbitrator** within 28 days of the date of termination of the mediation and such decision will be final and binding unless and until such dispute is the subject of a settlement or an arbitral award;
4. either party can refer such dispute to arbitration within 90 days of the date of the adjudicator's decision but such arbitration can only commence after substantial completion of the Works.

5.5 More recently and in the wider context of international commerce, the International Chamber of Commerce introduced on 1st July 2001 the **ICC ADR Rules** whose purpose is to offer business partners a means of resolving disputes amicably in the way best suited to their needs.

5.5.1 A distinctive feature of the ICC ADR Rules is the freedom which the parties are given to choose the technique which they consider most conducive to settlement. Failing agreement on the method to be adopted, the fallback shall be mediation.

5.5.2 In its introduction to its ADR Rules, ICC distinguishes ICC ADR from ICC arbitration as an amicable method of dispute resolution. Although they are two

alternative means of resolving disputes, in certain circumstances they may be complementary. For instance, it is possible for parties to provide for arbitration in the event of failure to reach an amicable settlement. Similarly, parties engaged in an ICC arbitration may turn to ICC ADR if their dispute seems to warrant a different, more consensual approach.

5.5.3 In the ICC ADR procedure a Neutral is selected to facilitate the amicable resolution of the disputes by whatever method the parties agree to be appropriate. Such methods could include facilitative or evaluative mediation, adjudication or expert determination or even arbitration on some elements (such as points of law). Each of these methods has its advantages and disadvantages and should be considered carefully in the particular circumstances in which they are to be adopted. Mediation on its own is often not appropriate to the resolution of some disputes. Decisions may need to be made on key elements of a dispute which cannot be compromised by either party due to internal rules of interpretation. Similarly, decisions on other elements of a dispute may not be necessary as they can be agreed through negotiation.

6 **In conclusion**, each of the alternative methods of dispute resolution has advantages and disadvantages. Therefore, there is much to be learned by advocates of one process from the experiences of those involved in the other processes of ADR. For the economic well being of any business sector, the objective must be to develop a dispute resolution solution to suit the varied nature and size of the disputes which are likely to arise so that such disputes can be resolved within the minimum time possible and at minimal cost whilst, at the same time, ensuring that business confidence in the process is maintained.

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RESOLVING SHIPPING DISPUTES UNDER AN ADVERSARIAL SYSTEM - AN ENGLISH PERSPECTIVE

*William Marsh and James Marissen**

INTRODUCTION

In the previous edition of *WaveLength*,[1] Mr Takao Tateishi, in his article "Inquisitorial Approach in Dispute Resolution", examined the nature of the inquisitorial approach used in Japanese arbitration and the occurrence of mediation during the course of such arbitration. In a continuation of this theme and by way of comparison, we considered that it would be of some benefit to examine similar issues but in the context of the adversarial approach used to resolve shipping disputes in England.

This article will examine the primary dispute resolution methods used in England, namely Court and Arbitration proceedings, with a particular focus on the possible use of mediation during these proceedings.

ADVERSARIAL SYSTEM

The English legal system is based upon an adversarial approach to resolving disputes and, as such, it involves parties presenting their respective cases to a Judge or arbitration tribunal which, in turn, delivers a judgment or an award based upon the evidence and arguments presented. The Judge or arbitrators are not concerned with issues outside those advanced by the parties to the dispute and do not themselves obtain evidence or conduct any inquiries.

THE COURT

Background

The primary dispute resolution vehicle in England is the Court. It is not unusual for shipping contracts to be governed by English law (albeit that nowadays this is more often than not the result of an express choice of law clause in the contract rather than of any factual connection of the parities or the transaction with England). An English choice of

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1 The Bulletin of the Japan Shipping Exchange, Inc, No 44 March 2002 at 8.

law clause is usually coupled with an English jurisdiction (or arbitration) clause. Accordingly, Court proceedings are frequently used to resolve shipping disputes in England under English law.

In England, there is the High Court of Justice with its specialist Commercial Court Division in London and the Business List of the Central London County Court. These are the Courts in which shipping disputes are resolved. The basic infrastructure of these Courts has been in existence for a very long time. The Commercial Court, for example, was brought into existence as long ago as 1895 to provide a Court in which the Judges and practitioners had a greater familiarity with mercantile disputes and to provide procedures to enable those disputes to be determined "justly, expeditiously and efficiently and without unnecessary formality". These are still the objectives of the Commercial Court – although in the century since its creation some of the procedures became outdated and anachronisms began to creep in.

In recent years there has been a radical overhaul of the court system inspired and overseen by Lord Woolf – the Lord Chief Justice of England and Wales. The starting point was the publication in 1996 of Lord Woolf's "Access to Justice" report which was then followed in 1998 by the Government White Paper: "Modernising Justice". The principles enunciated in these are now enshrined in the Civil Procedure Rules (CPR) which came into force in April 1999.

The Civil Procedure Rules (CPR)

By means of a codified set of rules, which draw together the previously tangled and disparate strands of the rules of Court, accompanied by detailed written Practice Directions designed to evolve over time to cover just about every "litigation situation", the CPR govern all aspects of taking a claim to, through and out of the other end of the English legal system.

The overriding objective of the CPR is stated to be to enable the Courts to deal with cases "justly".[2] The CPR apply to cases in the Commercial List subject to the provisions of the Commercial Court Guide which contains the following glowing endorsement:-

> *" .....approached in a constructive spirit the introduction of the Rules presents a major opportunity to add to the strength and advantages of the English jurisdiction as a forum for commercial and international litigation and dispute resolution".*

[2] Rule 1.1(1) CPR.

A major part of the "overriding objective" – of dealing with cases justly – is the regulation of speed, cost and accessibility.[3] So far as cost is concerned the principle of "proportionality" is paramount. This means that a case should be dealt with at a cost which is proportional to the value and importance of the issues at stake.

In addition, the Court has the obligation to further the overriding objective by actively managing cases which includes:

> *"encouraging the parties to use an alternative dispute resolution procedure*[4] *if the court considers that appropriate and facilitating the use of such a procedure"*.[5]

Such encouragement may be given at various times throughout the court proceedings and may be given in two ways, either on the Court's own initiative or at the request of the parties, both of which are outlined below. However, it is to be remembered that the main reason why alternative dispute resolution, including mediation, works is because it is consensual and leads to outcomes which are agreed rather than imposed. Thus while the Court can encourage participation in a mediation and can give teeth to such encouragement in the form of stays of action and threats of adverse costs orders, it cannot actually force the parties to mediate. Still less can it *force* them actually to resolve their disputes in mediation.

Court Encouraged Mediation

Two of the most visible changes brought about by the Woolf Reforms and the CPR are the pre-action protocols and the Case Management Conference (CMC). With each, the emphasis is very much on early settlement and it is really these which have been the immediate cause of the recent expansion of the use of mediation.

Pre-Action Protocols

The pre-action protocols are designed to set standards and timetables for the conduct of a case even before Court proceedings are commenced. Their aim is both to encourage the parties to resolve disputes without the need for legal proceedings at all and then, if the protocols have been followed, but the dispute cannot be resolved, to ensure that

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3 Rule 1.1(2) (a) to (e) CPR.

4 An "alternative dispute resolution" procedure is defined in the CPR to mean the "collective description of methods of resolving disputes otherwise that through the normal trial process" and, as such, would include mediation.

5 Rule 1.4 (1) (e) CPR.

proceedings are simplified and streamlined if they come to Court. The pre-action protocols do this essentially by requiring full investigation of claims and the open exchange of information at the earliest possible stage. This is part of the "front-end loading" of the CPR. The pre-action protocols also make specific provision for the parties to agree to take the dispute to mediation at any stage.[6] Therefore, under the pre-action protocols, even before Court proceedings are commenced the parties may have already participated in a mediation to attempt to resolve their dispute, albeit unsuccessfully.

At present, the pre-action protocols have limited application to the majority of shipping disputes as there are only five approved pre-action protocols for specific causes of action, namely, clinical disputes, personal injury actions, defamation claims, construction and engineering disputes and professional negligence. However, it is anticipated that there will be further reforms made to the CPR which will include the introduction of a general pre-action protocol introduced for all matters before the Court.

Case Management Conferences (CMC)

The concept of the CMC is part of the new "hands on" approach taken by the Judges of the English Courts. It is born out of the underlying theme of the CPR that the Court system is a public resource which should be managed and, where necessary, rationed for the benefit of all.

A CMC is a formal Court hearing before a Judge. At the CMC the Judge will make formal directions for the future conduct of the case, but one of the first questions he will ask is whether the parties have considered alternative disputes resolution methods, including mediation. Indeed, there are some Judges who are pre-disposed to making alternative dispute resolution orders, including orders for mediation, almost as a matter of course upon the application of one of the parties to the dispute. Therefore, even those parties who "do not believe in mediation" may find themselves being directed to attempt mediation in any event and having the court proceedings stayed while they do.[7] Although if the mediation is unsuccessful, the Court will review the matter and make directions for its management.

Request for Mediation

A party may make a written request to the Court for the proceedings to be stayed while

6 See, for example, the Professional Negligence Pre-Action Protocol B6.1 [C7-010 CPR].

7 See *Kinstreet Ltd -v- Balmargo Corporation Ltd*, August 3, 1999, Unreported, Arden J.

the parties try to settle the case by alternative dispute resolution, including mediation.[8] Where both parties request a stay or where the Court, of its own initiative, considers that such a stay would be appropriate, the Court can make an order for the stay to allow the parties to try and settle the dispute without the need for further Court proceedings.

ARBITRATION

Background

Apart from litigation in the courts, Arbitration is the other primary vehicle used in England for the resolution of commercial disputes. Indeed, largely for historical reasons, arbitration is perhaps the preferred method of resolving shipping disputes and very many shipping contracts which are subject to English law, in particular charterparties and MoAs (but not so often bills of lading), contain express London arbitration clauses.

Over the past three or four years reform has actually been very much in the air as regards all dispute resolution vehicles available in England and arbitration has also been the subject of major overhaul. At the same time that Lord Woolf was thinking about the civil justice system the Government's Departmental Advisory Committee on Arbitration Law (the "DAC"), under the Chairmanship of Mr Justice Saville, was thinking about arbitration.

The DAC report was published in February 1996. It resulted in the Arbitration Act 1996 which came into force at the beginning of 1997 and applies to all arbitrations commenced on or after 31st January 1997. The Arbitration Act 1996 consolidates and streamlines a system which, over the previous half century, had become so fractured that in order to work out what could and could not be done in arbitration, it was necessary to look at a number of different statutes. It was conventional to refer to it all globally as "The Arbitration Acts 1950-1979".

The thinking behind the Arbitration Act 1996 is exactly the same as the thinking behind the CPR. Section 1 (a) of the Act states expressly that:-

> *"The object of arbitration is to obtain the fair resolution of disputes by an impartial Tribunal without undue delay or expense".*

Further, and no doubt reflecting the desire to avoid costly and time consuming applications to Court, Section 1 goes on to re-emphasise the freedom of the parties and

[8] Rule 26.4 CPR.

the autonomy of the chosen arbitration Tribunal. Thus Section 1(b) states that "*The parties should be free to agree how their disputes are resolved*" and Section 1(c) states unequivocally that the Court should not intervene except as expressly provided for in the Act.

In those rare circumstances where applications to the Court regarding arbitrations are permissible, they are made by way of an "arbitration application" and, to complete the tie-in with the CPR, there is a specific Arbitration Practice Direction.

Procedure in Arbitration

Subject only to the overriding duty of the Tribunal, as set out in Section 33 of the Arbitration Act 1996, to act "fairly and impartially" and to adopt procedures suitable to the circumstances of the case and avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters in dispute, the Act is silent as to the precise procedure for an arbitration. However, the wording of Section 33 is reminiscent of the "overriding objective" in the CPR and the principle of "proportionality".

All of the established arbitration bodies in London – for example the LMAA (London Maritime Arbitrators Association), LCIA (London Court of International Arbitration) and the ICC (International Chamber of Commerce) have detailed written procedures which have always tracked, more or less, procedures in Court and so have obviously evolved and changed along with the evolution of and changes in the Court system.

Most shipping arbitrations are conducted on LMAA terms, the latest version of which was published in January of this year. There are a number of categories of LMAA arbitration which include those on:

- full LMAA terms;
- LMAA Small Claims terms;
- LMAA FALCA (Fast And Low Cost Arbitration); and
- documents alone.

LMAA Small Claims, LMAA FALCA and documents alone are all similar in the sense that there is no hearing and everything is done on paper alone. Full LMAA terms provides for a more rigorous procedure whereby the parties:

- exchange submissions of claim, defence, counterclaim and reply, together with all supporting documents;

- request further relevant documents, in addition to those documents already disclosed, from the opposing party;
- exchange factual witness statements; and
- proceed to hearing.

Accordingly, although the CPR do not apply to arbitrations, it is evident that the procedural steps in arbitrations are very similar to the procedural steps in Court, and submissions, and orders, are often made "by analogy with" rules of Court.

For obvious reasons there is no role for a formal pre-action protocol with a contractual arbitration. However, an Arbitration on the LMAA Terms does have an equivalent to the case management conference under the CPR in what is called the "preliminary meeting". At this meeting the Tribunal is expressly authorised to give "*such directions as it thinks fit*". Given the basic similarities between Court and arbitration proceedings and the apparent overlap of Sections 1 and 33 of the 1996 Act with the "overriding objective" of the CPR and the principle of "proportionality" a question arises as to whether such directions (whether given at the preliminary meeting or at any other stage of the reference) may include a direction, similar to that which might be given in Court, that the parties attempt to resolve their dispute by mediation.

Arbitration and Mediation

Certainly, once a reference has started there is nothing to prevent the parties to the arbitration from subsequently agreeing between themselves to try mediation. They would then ask the Tribunal simply to endorse that agreement and the reference would be put on hold to allow the mediation to take place. This is not an uncommon occurrence in LMAA arbitrations. If the mediation fails the reference simply resumes where it left off, but if it is successful the settlement agreement reached at the mediation will deal with the discontinuance of the reference. Obviously, in order to maintain confidentiality and uphold the fundamental principle of the adversarial system in the event that the mediation fails and the arbitration is resumed, the mediator and the arbitrators must not be the same people.

However the possibility of one party making a unilateral application to the Tribunal that it stays the reference to enable the parties to attempt mediation – whether of the whole dispute or a particular aspect of it – raises a rather different and potentially more complex legal issue. There is nothing in the LMAA terms which specifically entitles one party to make such a unilateral application or which specifically empowers the Tribunal to grant it. Similarly there is no express provision in the 1996 Act and, moreover, there would

seem to be cogent reasons why there should not be. Firstly, and on a very general level, unlike the services rendered by the Court, the services rendered by a commercial arbitration Tribunal constituted pursuant to a contract between the parties for the specific purpose of resolving disputes between those particular parties, are not a public resource. There can therefore be no question of those services (which the arbitrators are paid by the parties to provide) being "rationed" by siphoning the dispute off to an alternative dispute resolution process. On the contrary, the very fact that the Tribunal owes its existence to the agreement of the parties that their disputes should be resolved by that Tribunal would seem to provide a complete answer and, indeed, make it unlikely that either party would actually want to participate in a mediation. Nevertheless, and notwithstanding the foregoing, it is not impossible to envisage a situation where one party to an arbitration might wish to have the reference stayed in favour of mediation. This might be the case, for example, where the reference has become bogged down with technicalities and/or *behind the scenes* negotiations have reached impasse. In such circumstances mediation might well provide an ideal "kick start".

One argument which might be made to support the application is that the parties' original contractual agreement to have their disputes resolved by arbitration in England was in fact an agreement that their disputes might, in appropriate circumstances, be referred to mediation. Arbitration in England necessarily means arbitration in accordance with the Arbitration Act 1996 and, as set out above, Section 33 of that Act requires the arbitrators to resolve the dispute in such a way as avoids unnecessary delay and expense. Mediation is intended to avoid unnecessary delay and expense and so, even if the application is contested, the arbitrators are bound to consider (and therefore must have jurisdiction to order) a stay pending mediation.

It remains to be seen whether such an argument would be accepted by an LMAA Tribunal. However, there would seem to be no reason in principle why it should not be. After all there is conceptually no difference between two parties with no connection with England agreeing to have their dispute (in relation to a transaction which similarly has no connection with England) resolved by arbitration in England and those same parties agreeing to have the same dispute resolved by the English Court. In the same way that an agreement to the exclusive jurisdiction of the English Court cannot be read as an agreement to the exclusive jurisdiction of the Court minus large parts of the CPR, an agreement to arbitrate in England cannot be read as an agreement to arbitrate minus a legitimate interpretation of large parts of the Arbitration Act 1996.

CONCLUSION

English law and the various dispute resolution processes available in England are among the country's most significant exports. This is particularly so in the area of shipping. The legal system has always been based upon an adversarial approach to resolving disputes. This remains the case despite the recent radical overhaul of the whole dispute resolution landscape which started in 1996 and culminated first with the coming into force in 1997 of the Arbitration Act 1996 and then of the CPR in 1999. One of the processes which has come to the fore as a result of this overhaul, but which can be described as neither adversarial nor inquisitorial, is mediation. How mediation should fit in with other dispute resolution processes is something which has yet to be worked out in full. In particular how it will fit in with commercial arbitration is wholly uncharted territory. However, the arguments set out in this article are at least "food for thought".

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CIArb Entry Course to Open in Tokyo

The Chartered Institute of Arbitrators has announced its plans to put on a two day "Entry Course" in Tokyo November 21 and 22, 2002. The course is a first step in the Institute's program to become more active in Japan and contribute to greater knowledge and availability of arbitration for the resolution of private disputes involving Japanese and others doing business in Japan.

The Chartered Institute of Arbitrators (CIArb) was founded in 1915 in the United Kingdom to provide a member organisation for practicing arbitrators. A not-for-profit organisation, the Institute has become a global body, approaching 10,000 members in 86 countries, with headquarters in London and branches worldwide, including its very large, active East Asia Branch headquartered in Hong Kong. The CIArb not only promotes and facilitates the determination of disputes by arbitration, but also by alternative means of dispute resolution (ADR) including mediation.

The Entry Course in Tokyo will be taught by a faculty of several experienced arbitrators led by Peter Caldwell, FCIArb, Chartered Arbitrator, and former Secretary General of the Hong Kong International Arbitration Centre, and will also include other noted Hong Kong arbitration specialists. One or more eminent Japanese arbitration scholars are also expected to speak during the Course. The syllabus will be based on the UNCITRAL Model Arbitration Law, which it is anticipated will form the basis of a new arbitration law in Japan to be enacted in the near future. The course will be given entirely in English and is open to all professionals and business people, Japanese or otherwise, with an interest in arbitration.

Passage of the CIArb Entry Course qualifies one to join the Institute as an Associate Member. For those interested in becoming a trained arbitrator, it also lays the groundwork for further training leading to higher qualifications recognized by the CIArb, including MCIArb, Fellow, and Chartered Arbitrator.

More details of the Entry Course will be made available in the weeks to come. For those interested in further information, contact can be made with Dick Eastman at reastman@hklaw.com or Toshihiko Omoto at omoto-t@aa.cyberhome.ne.jp.

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