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STRIKES AFFECTING CHARTERPARTIES

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Shipping in Australia, as much as almost any other industry has been subject to disruption by widely varied forms of industrial action. Although such industrial action frequently causes delay in loading, discharging or moving vessels under charter, a charterer can only exclude time lost through such action from the computation of laytime, if an appropriate exception clause is present in the charterparty.

I propose for the purpose of this paper to examine the operation of two strike clauses in common use, and to consider the possible impact on those clauses, in an Australian context, of the Charter-Party (Laytime) Definitions submitted by the C.M.I. at its Rio De Janeiro Conference in September, 1977.

The "Centrocon" strike clause

The relevant part of the "Centrocon" strike clause is in the following terms:

> "If the Cargo cannot be loaded by reason of Riots, Civil Commotions or of a Strike or Lock-out of any class of workmen essential to the loading of the Cargo, or by reason of obstructions or stoppages beyond the control of the Charterers on the Railways, or in the Docks, or other loading places, or if the Cargo cannot be discharged by reason of Riots, Civil Commotions, or of a Strike or Lock-out of any class of workmen essential to the discharge, the time for loading or discharging as the case may be, shall not count during the continuance of such causes, provided that a Strike or Lock-out of the Shippers' and/or Receivers' men shall not prevent demurrage accruing if by the use of reasonable diligence they could have obtained other suitable labour at rates current before the Strike or Lock-out. In the case of any delay by reason of the before-mentioned causes, no claim for damages or demurrage, shall be made by the Charterers Receivers of the Cargo, or Owners of the Steamer".

The "Gencon" strike clause

The "Gencon" general strike clause differs in several respects from the one just quoted by providing:

> "Neither Charterers nor Owners shall be responsible for the consequences of any strikes or lockouts preventing or delaying the fulfilment of any obligations under his contract.
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> If there is a strike or lock-out affecting the loading or the cargo, or any part of it, when vessel is ready to proceed from her last port or at any time during the voyage to the port or ports of loading or after her arrival there, Captain or Owners may ask Charterers to declare, that they agree to reckon the laydays as if there were no strike or lock-out. Unless Charterers have given such declaration in writing (by telegram, if necessary) within 24 hours, Owners shall have the option of cancelling this contract. If part cargo has already been loaded, Owners must proceed with same (freight payable on loaded quantity only) having liberty to compete with other cargo on the way for their own account.
>
> If there is a strike or lock-out affecting the discharge of the cargo on or after vessel's arrival at or off port of discharge and same has not been settled within 48 hours, Receivers shall have the option of keeping vessel waiting until such strike or lock-out is at an end against paying half demurrage after expiration of the time provided for discharging, or of ordering the vessel to a safe port where she can safely discharge without risk of being detained by strike or lock-out. Such orders to be given within 48 hours after Captain or Owners have given notice to Charters of the strike or lock-out affecting the discharge. On delivery of the cargo at such port, all conditions of this Charter-party and of the Bill of Lading shall apply and vessel shall receive the same freight as if she had discharged at the original port of destination, except that if the distance of the substituted port exceeds 100 nautical miles, the freight on the cargo delivered at the substituted port to be increased in proportion".

What is a strike?

Whichever clause is found in a particular charterparty, the question of what is a "strike" arises at the outset of any consideration of the application of the clause. As long ago as 1915, Sankey J. entered a caveat against attempting an exhaustive definition of "strike" in a charterparty when he said:

> "The only matter I have to consider is the meaning of the word 'strike'. It is true that in the older cases the definition which has been given by various learned Judges as to what constitutes a strike has chiefly turned upon the

> question of wages. It has been said that workmen's demand for increase of wages, or refusal by workmen to accept diminution of wages, is itself a strike. I think those definitions rather show the danger, if I may be allowed to say so, of attempting to give an exhaustive definition of the word 'strike', because it is obvious that since those cases were decided many circumstances have arisen which would constitute, or might be held to constitute, a strike. A strike does not depend merely upon the question of wages. At the same time I do not think it would be possible to say that abstention of a workman from mere fear to do a particular thing or perform a particular contract would necessarily constitute a strike. I think the true definition of the word 'strike', which I do not say is exhaustive, is a general concerted refusal by workmen to work in consequence of an alleged grievance". Williams Brothers (Hull), Ltd. v. Naamlooze Vennootschap (W.H.) Berghuys Kolenhandel (1915), 86 L.J.K.B. 334, at p.335".

Many of the authorities in which a definition has been ventured, have tended to emphasise action in concert or combination as an essential element of a strike. See e.g. King v. Parker (1876) 34 L.T. 887 at 889; J. Lyons & Sons v. Wilkins (1896) 1Ch. 811 at 829; Metropolitan Gas Co. v. Federated Gas Employees Industrial Union (1925) 35 C.L.R. 449 at 453 and McKernan v. Fraser (1931) 46 C.L.R. 343 at 361. However, that concept may limit unduly the application of a strike clause particularly to situations in Australia, beset as this country is by a multiplicity of unions. For example, a vessel frequently carries only one radio officer, who is the sole member on board, of the Professional Radio and Electronics Institute, or a bulk loading installation may be manned by a single member of the Federated Storemen and Packers Union. Each such employee can stop work so as to inflict very expensive delays on a vessel under charter without acting in combination with any other employee. True it is that such a unionist usually has the express or tacit approval of officials of his union for the action which he takes, but that would not suffice to make his action one in concert with them so as to satisfy the test postulated in J. Lyons & Sons v. Williams, or the other authorities to which I have just referred.

As well as authorized one man strikes, the phenomena of "wild cat" or unauthorized stoppages of work, provide another type of industrial action where union officials or Committees of Management can in no sense be relied on as providing the element of action in combination or concert. Vaughan Williams L.J. recognized the possibility of one man strikes when, in the course of construing the expression "general strike", he said:

> "A strike is a general strike if it is not what I will call a particular strike. By a particular strike I understand a strike either by an individual workman or by a particular body of workmen working for a particular master. But if there is a strike against all the masters, and if that strike is taken part in by the workmen irrespective of the masters for whom they are working, that amounts to a general strike". (Aktieselskabet Shakespeare v. Ekman (1902) 18 T.L.R. 605 at 606).

The need to contemplate such one man strikes in drafting exception clauses in charterparties, was apparently not present to the minds of the framers of the C.M.I. Report on Charterparty Terms who defined "strikes" in clause 21 as meaning "a concerted refusal by workers to work normally for any reason whatsoever, which prevents or delays the loading/discharging of the cargo". In the annotation to that definition, it is explained that:

> "This definition seeks to do no more than define the word 'strike'. It was felt by the Conference that no attempt should be made to draft a definition which included a list of situations which amounted to a strike. It was at one stage suggested that the definition should include a reference to a minimum number of persons taking part in the refusal to work in order to constitute a 'strike'. However, it was felt that the words 'concerted refusal' were explicit enough and there was no need to establish a minimum number".

For the reasons indicated above, a reference to a minimum number of participants could well take outside the exception in a charterparty, conduct which in this country, one would unhesitatingly call a strike. Likewise, the necessity to establish a "concerted refusal" to work could, in certain circumstances,

impose an unrealistic qualification on the charterer's right to invoke an exception clause.

Another feature of modern industrial action which has to be borne in mind in drafting and applying exception clauses in charterparties is the prevalence of stoppages which are not directly related to the wages or working conditions of the strikers. The learned authors of Scrutton on Charterparties, 18th Edn. suggest at p.231 of that work that "the exception, 'strikes or lock-outs' covers refusals of men or masters to carry on work or business by reason of and incidental to labour disputes". It is perhaps not without significance that precisely the same proposition occurs in the text of the 7th (1914) Edition of the same work at p.215. It probably owes its narrowness to some dicta in Stevens v. Harris (1887) 57 L.T. 618 where it was suggested that men leaving work through fear of contracting disease were not on strike.

However, in more recent cases, action to demonstrate sympathy with other workers has been held to amount to a strike. For example, in Seeberg v. Russian Wood Agency (1934) 50 Ll.L. Rep. 146, the charterers of a Latvian ship were held entitled to rely on a strike by stevedores and other dock labourers in Leningrad to demonstrate their sympathy with seamen or other workers on or connected with Latvian ships in Latvian or other Ports. See also J. Vermaas Scheepvaartbedrijf N.V. v. Association Technique de l'Importation Charbonnierre (1966) 1 Lloyds Rep. 582 where McNair J. followed the Seeberg case and observed, at 591:

> "It seems to me that it is quite impossible for me in this case now to hold that the withdrawal of labour at Nantes arose because there was a grievance between the men refusing to work and their employers. Accordingly, it seems to me that the word 'strike' is a perfectly good, appropriate word to use to cover a sympathetic strike and a general strike and there is no need for it today to have any ingredient of grievance between those who are refusing to work and their employers".

Similar reasoning would, it is submitted, bring a "political" strike in Australia, within the operation of a widely drawn strike exception clause in a charterparty.

Such a consideration is far from being of purely academic interest. In a recent analysis of "political" strikes in this country, it has been estimated that 360,800 working days were lost through such strikes in Australia in the period from January to June 1976. In that time, waterside workers were involved on 10 occasions seamen on 6, storemen and packers on 5 and marine engineers and painters and dockers on 1 occasion each, amounting in all to 34.03% of the total union involvement in "political" strikes over that period. (P.R. Hay, Political Strikes: Three Burning Questions, Journal of Industrial Relations. Vol. 20, p.22 esp. at p.30).

Is the delay "by reason of" a strike?

A question which frequently arises under both the "Centrocon" and "Gencon" forms of strike clause, is whether the delay has occurred "by reason of", or is the "consequence" of a strike. It was held in the Leonis S.S. Co. v. Joseph Rank Ltd. (No. 2) 13 Com. Cas. 161, affirmed by the Court of Appeal ibid 295, that a delay affecting a vessel may occur by a reason of a strike, even though the strike impinges directly only on other vessels or on some port facility. In that case, the delay arose because berths which might otherwise have been available to the "Leonis" were occupied by other ships, so that she could not be loaded. By parity of reasoning, the benefit of such an exception seems open to a charterer where the port authorities meet a situation thrown up by a strike, by giving priority in loading or discharging to some other vessel, thereby delaying the chartered ship. That was what happened in Reardon Smith Line v. Ministry of Agriculture

(1960) 1 Q.B. 439 affirmed by the Court of Appeal, (1962) 1 Q.B. 42. In that case, there were seven grain elevators in operation at the port of Vancouver and the operators of five of them were on strike. The local manager for the Canadian Wheat Board exercised his discretion to limit the wheat available from the two working elevators to liners, and thus prevented the plaintiff owners' tramps from loading. Willmer L.J. in the Court of Appeal in upholding McNair J's findings in favour of the charterers said:

> "Was that delay then caused by one of the excepted clauses? The Judge, in approaching this question, directed himself correctly in my judgment, when he sought to apply the principles stated by Fletcher Moulton L.J. in Leonis v. Rank (No. 2), and by Lord Dunedin in Leyland Shipping Co. v. Norwich Union. Viewing the matter from a business point of view and as a matter of common sense he reached the conclusion that the cause of delay to these four ships was the strike. For my part, I am of the same opinion. It would, I think be difficult to reach any other conclusion on this point without saying that Leonis v. Rank (No. 2) was wrongly decided, which, so far as I know, has never been suggested. In that case the ship was delayed in reaching her loading berth because of a congestion of shipping following a strike which was all over before she reached the loading port. Yet Bigham J. and the Court of Appeal had no difficulty in arriving at the conclusion that the delay was due to the strike, so that the time lost came within the exceptions clause in that case". ((1962) 1 Q.B. at 102).

Of course, a party must take all reasonable steps to mitigate the effects of a strike, and cannot rely on it if his own act or omission causes the delay. (See Elswick S.S. Co. v. Montaldi (1907) 1 K.B. 626).

"Class of workmen essential.....

That issue is often bound up with the question of whether in terms of the "Centrocon" clause, a strike is of a class of workmen essential to the loading or discharge of the cargo. It can be very much a matter of evidence whether a charterer could have avoided the delay by using his own labour, or labour from

some other source not infected by the strike, or could have obviated a delay during a tug strike by berthing without tugs.

When does threatened industrial action amount to a strike?

A somewhat related question is whether a threatened strike or black ban, amounts to a "strike" within the relevant exception clause. Not infrequently, a union or group of workers indicates that a stoppage will occur in certain specified circumstances. For example a particular ship may be declared "black" in the sense that tug crews will not handle her, or if she berths, waterside labour will refuse to load or unload her. In those circumstances, the terms of the relevant strike clause and the surrounding facts have to be examined with care to determine whether it is necessary for the ship to attempt to berth, or go to the extent of tying up, so as to bring about an actual, instead of a merely threatened, withdrawal of labour. If a refusal to work is all that is necessary for the exception to operate, a statement by a duly authorized union official that a black ban will be imposed unconditionally on the happening of an event which is essential to the loading or discharging of the vessel will probably suffice. The main problem of proof in that case, is one of showing that the resolution to impose the ban was duly taken in accordance with the rules of the union, and was binding pursuant to those rules on the employees concerned.

With increasing sophistication of trade unions, has come a great number of variations on the original theme of a strike as an uncomplicated downing of tools or walking off the job. The action may take the form of a "floating" strike designed to descend at some unspecified time within a defined period. Action of that kind was recently considered by the Victorian Full Court

in Australian National Airlines Commission v. Robinson (1977) V.R. 87, where the Australian Federation of Airline Pilots resolved to continue industrial action in the form of stoppages of up to 24 hours each week until a particular dispute was resolved.

Moreover, industrial action may take a form such as "work to regulation", or a limitation on overtime which does not involve any breach by the participants of their individual contracts of employment. The Court of Appeal was recently prepared in Tramp Shipping Corporation v. Greenwich Marine Inc., (The "New Horizon") (1975) 2 Lloyds Rep. 314, to characterise such action as a "strike" within the meaning of a clause in the "Centrocon" form.

In that case a vessel under charter arrived at St. Nazaire, where it was customary for crane and sucker drivers to work shifts, if required, throughout a 24 hour day. While the "New Horizon" was in port, the crane and sucker drivers in support of a claim for improved conditions, restricted themselves at first to working only one, day, shift. It was held at first instance that such a restriction on normal work was a "strike" within the terms of the charterparty. That decision was upheld by the Court of Appeal. In the course of his judgement Lord Denning M.R. referred to the definition of "strike" propounded by Sankey J. in the Naamlooze case (supra) and said at 317;

> "He took that from the Concise Oxford Dictionary; and ever since Scrutton on Charterparties has quoted those words as authoritative. If I may amplify it a little, I think a strike is a concerted stoppage of work by men done with a view to improving their wages or conditions, or giving vent to a grievance or making a protest about or supporting or sympathising with other workmen in such endeavour. It is distinct from a stoppage which is brought about by an external event such as a bomb scare or by apprehension of danger.
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> Applying this test, I agree with the Judge that when these men refused to work 24 hours, but only eight hours, there

was a "strike". They did it so as to get an improvement in their terms and condition of work. They were not in breach of contract. But it is none the less a strike. Many a strike takes place after a lawful notice; but it is still a strike. It was discontinuous. At work during the day-time, off work at night. But a strike need not be continuous. It can be discontinuous and the periods may be added up. Mr. Diamond as a last resort said the employers had consented to the men not doing 24 hours, and therefore it was not a strike. But I do not read the award of the arbitrators in that sense. It seems to me that throughout the award the arbitrators and the umpire were saying that the men refused to work. The men refused to do the normal work: and they did so because of their desire to bring pressure to bear to have their terms and conditions of work improved. So it seems to me that it was a "strike" and the charterers were entitled to an extension of laytime".

To the same effect, Stephenson L.J., also at 317 observed:

"Forms of industrial action have developed beyond the contemplation of workmen in the last century; and the end is not yet. What was not then regarded as a strike may be commonly so regarded now. In my judgment it is a species of stoppage. There cannot be a strike without a cessation of work by a number of workmen agreeing to stop work; and the question is, what kind of concerted stoppages are properly called strikes today? It must be a stoppage intended to achieve something, to call attention to something, as my Lord has said; a rise in wages, improvement of conditions, support for other workers; for political changes; an expression of sympathy or protest. That does not seem to be disputed. But there are two disputed issues; (1) must it be long lived, and, if so, how long? (2) Must it also be complete, so that if work goes on, however slowly and obediently to rule; or if, as in Mr. Justice Greer's case of Tabb & Burletson v. Briton Ferry Works (1921) 6 Ll.L. Rep. 181, to which we were referred, it is resumed, there can be no strike? Mr. Diamond raised a third issue, that there cannot be a strike where the employers consent to the stoppage. I would not disagree. But I agree with my Lord that these employers cannot have agreed to this stoppage, because the arbitrators have found that the crane and sucker drivers refused to do shift work at the material time. In my view there can be a strike where the concerted stoppage lasts for some hours but work will be resumed when they have elapsed. I think Mr. Justice Greer would have regarded that as a strike situation in 1921; and I think the Judge was right in regarding it as one today. I too would dismiss the appeal."

"Once on demurrage, always on demurrage"

It is important to bear in mind as Mr. Gore indicates in his paper, that the "Centrocon" strike clause has been construed as not preventing demurrage from continuing to accrue if a vessel was already on demurrage before it was affected by the strike.

See Compania Naviera Aeolus v. Union of India (1964) A.C. 868. The "Gencon" strike clause, on the other hand, was construed in Salamis Shipping (Panama) S.A. v. Meerbeech & Co. (1971) 2 Q.B. 550 as giving the receivers the option of paying half-demurrage for the period both before laytime expired, and after the strike had ended.

Industrial Remedies, or what to do until the Arbitrators come

The considerations which I have just canvassed in the substantive part of this paper are those which come into sharp focus only when the Courts or Arbitrators are called on to apply a strike clause to the circumstances of a particular stoppage, usually two years or more after the event. However, advice is often sought during the period of the actual delay, as to what steps can be taken with a view to the lifting of a ban or limitation on the performance of work which is causing the delay.

If the offending workers as "seamen" as defined in the Navigation Act 1912, the Conciliation and Arbitration Commission is empowered by s.72 of the Conciliation and Arbitration Act 1904, to settle industrial matters affecting them insofar as such matters relate to international or inter-State trade and commerce, or trade and commerce within a Territory of the Commonwealth.

A similarly unrestricted jurisdiction is conferred by s.82 in respect of waterside workers.

The effect of those provisions is to enable an employer of the relevant class of employees to notify the industrial matter to the Conciliation and Arbitration Commission pursuant to s.25, for conciliation, and if necessary, arbitration, whether or not the

matter extends beyond the limits of any one State. Such recourse to the Commission is only available in respect of disputes concerning other classes of employees, if the issue provoking the strike has the necessary element of inter-Stateness, or is within the ambit of a wider foundational dispute which might have given rise to the making of a Federal Award. For example, if the employer, or the organization of which it is a member, had demanded the right to stand down employees in the event of any strike, that claim can be reviewed and ventilated before the Commission in the context of a strike causing delay to a vessel under charter.

If the jurisdiction of the Conciliation and Arbitration Commission, cannot be revived or invoked in any of the ways which I have just mentioned, recourse may be had to the appropriate State Industrial authority. The efficacy of each of those bodies in achieving a resumption of work usually varies in proportion to the extent to which it is a commission or tribunal staffed by a full-time arbitral personnel as distinct from the largely part-time wages boards which function in Victoria and Tasmania.

Persistent or long-continuing breaches of an award can expose an offending union to cancellation of its registration as an organization under the Conciliation and Arbitration Act, but de-registration proceedings are usually too drawn-out to be practical weapons for use at the instance of the owner or charterer of a particular vessel. Similar considerations apply to applications for the insertion of a bans clause into the relevant Award followed by an enquiry by a Presidential Member of the Conciliation and Arbitration Commission pursuant to s.33 of the Conciliation and Arbitration Act. If the Presidential Member grants the necessary certificate proceedings may be instituted in the Federal

Court for the imposition of a monetary penalty on the offending union or worker. (See s.119 of the Conciliation and Arbitration Act.

Section 45D of the Trade Practices Act 1974, provides a vehicle whereby a corporation owning or chartering a vessel can speedily obtain an interim or interlocutory injunction against the continuati of conduct which hinders or prevents the supply of goods or services by or to the ship owner or charterer, where the persons engaging in such conduct are not employees of the ship owner or charterer. Such an interlocutory injunction was granted on the application of Utah Mining Australia Limited against the Seamens Union as a result of a ban imposed by the union on a number of ships owned by Utah engaged in transporting coal mined by the company to Japan. Members of the union refused to man tug and line boats needed to bring Utah's ships into Hay Point because the company refused to man its ships with Australian crews. (See 20 A.I.L.R. par.13). The validity of that decision is still waiting determination by the High Court of an argument, amongst others, by the Seamens Union that s.45D is ultra vires. (See also Ascot Cartage Contractors Pty. Ltd. v. Transport Workers Union 20 A.I.L.R. par.183). However a very recent unreported decision of Northrop J. in Nauru Pacific Line v. Australian Shipping Officers Association (26th September 1978) refusing to grant an interlocutory injunction, has revealed a number of traps for unwary plaintiffs, particularly foreign ship owners.

The common law also affords remedies against individual employees in damages for non-performance of their contracts of employment, and against unions or their officials for the tort of procuring or inducing a breach of contract. The tort of intimidation has

been revived as a result of the decision of the House of Lords in Rookes v. Barnard (1964) A.C. 1129, and action in concert for the purpose of injuring the trade, custom or financial interests of another can give rise to a remedy in damages for civil conspiracy. However, the machinery which has to be set in motion to obtain interlocutory relief in such actions is often too cumbersome to meet the urgency of ending maritime delays. For the sake of completeness reference should also be made to s.31J of the Crimes Act (Cth) which requires a proclamation by the Governor-General to be in operation before its sanctions can be invoked.

It is not uncommon for shipowners, charterers, or freight handling companies to be the innocent third parties in conflict between a union and the consignor or consignee of goods. Such a situation can arise where crippling industrial action is threatened if goods of a particular company with which the union is in dispute are loaded or unloaded or handled. The recent controversy over the mining and export of uranium indicates another likely arena for such disputes. It requires little imagination to realise that the innocent third party in such circumstances may find himself threatened with an action by the owner or consignee of the goods, or the owner or charterer of a vessel, for very heavy damages for breach of contract notwithstanding that it has been the plaintiff, against whom the spleen of the union was actually directed. Some attention should be given to drafting suitable indemnity clauses for the protection of such third parties who bow, bona fide, to union pressure in order to avoid some more disastrous commercial consequence.