WHAT PRICE ARBITRATION?

The Scope of the Paper

We have been awarded the topic "What Price Arbitration?" with a view to discussing with you the advantages and disadvantages of arbitration as an appropriate method of resolving maritime disputes. The topic immediately raises the question of cost benefit to the parties of arbitration, compared with other dispute resolution procedures. This cost may be in terms of money, or it may be in non-monetary terms such as the penalty of unnecessary or untoward publicity or the loss of good will. A full-blooded dispute through the courts in the public eye may make it very difficult for the two commercial parties to continue to conduct business together as they would like. These non-financial costs of dispute resolution are sometimes difficult to identify, but they should never be ignored.

We have concentrated upon arbitration as an alternative to the conventional procedures for resolving disputes in the courts. It is necessary immediately to note the limitation of this choice. There are dispute resolution procedures other than arbitration or litigation. We instance mediation and conciliation procedures which have been adopted and promoted in recent years. These alternative procedures are directed not so much to the resolution of the dispute by the imposition on the parties of the decision of a third person, but rather to the task of bringing

the parties together so that they agree themselves an appropriate resolution for their dispute. It is so obvious as to go without saying that such a solution is preferable to a solution imposed by a third party. Lawyers know from long experience that commercial parties prefer and very often succeed to achieve a resolution of their disputes by settlement or compromise. If this paper were entitled "What Price Compromise?" there would be very little to be said against it. The difficulty is in devising a system for resolving disputes which have not and perhaps will not be compromised. It is in these circumstances that the parties have traditionally looked to the courts or to arbitration for a result. We are here concerned to consider what are the relative advantages of these two systems in the context of the resolution of maritime disputes. These disputes may arise from charterparties, disputes concerning marine towage, marine insurance, rescue and salvage and the consequences of collisions between ships and between ships and port installations, interference with fishing rights and damage to fishing installations. All of these matters might properly fall within the description of maritime disputes. As we shall see, each of them is capable of being determined either within the court framework or within the framework of arbitration.

International Arbitration

On 15 May 1989 the Commonwealth Parliament passed legislation[1] which substantially amended the Arbitration (Foreign Awards and

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1 International Arbitration Amendment Act 1989

Agreements) Act 1974. The function of the 1974 Act was to implement the provisions of the 1958 New York Convention[2]. The consequence of this 1974/1989 legislation is fourfold:

(a) The name of the 1974 Act as amended is now the International Arbitration Act 1974;

(b) It adopts for International Arbitrations the UNCITRAL Model Law;

(c) The New York Convention is now implemented in Australia solely through this Act. Its implementation in the various States and Territories by the uniform CAA and in Queensland by the Arbitration Act 1973 is now abrogated;

(d) It permits the parties to an international Arbitration to adopt a number of miscellaneous procedures:

- consolidation of Arbitrations;
- interest up to award
- interest on an award
- costs
- representation of parties

Some of these consequences are of little interest for present purposes. What is important is that there are now two independent arbitral regimes in force in Australia, one for

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2 The Convention on the Recognition and Enforcement of Foreigh Arbitral Awards

Commercial Arbitrations of whatever kind[3], and another for International Commercial Arbitrations[4]. In the context of typical maritime disputes it should be noted that the definition of "International" is extremely comprehensive. It is found in Article 1(3) of the Model Law:-

An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; of

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(iii) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

(4) For the purposes of paragraph (3) of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does ont have a place of business, reference is to be made to his habitual residence.

Despite this welter of legislation, we must not lose sight of the fundamental premise that arbitration is consensual. The parties must have agreed to refer the dispute to arbitration. If they have done so and if the dispute falls within the definition of the Model Law then the Model Law regime will apply <u>unless</u> they

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3 The uniform Commercial Arbitration Acts and Ordinances and the Queensland Act

4 The UNCITRAL Model Law, unless the parties opt out

opt out. The question then is whether the parties should so agree and, if so, how should they do so.

Jurisdictional Aspects of the Decision to Arbitrate or Litigate.

The arrest power: A procedure which has traditionally been seen as a peculiar[5] advantage of litigation in Admiralty is the power to arrest the ship as security for the satisfaction of the judgment. This power which is preserved in Part III of the Admiralty Act 1988 is available only where a claim is made under the Act and in the court. The power of arrest in support of arbitrations is available only in two cases:

(a) Where a proceeding has been brought in court which should be stayed because there is an available arbitration procedure[6] the court ordering the stay may do so on condition that the ship be retained by the court as security for the satisfaction of the award[7].

(b) Where the claim is for the enforcement of arbitral award made in respect of a maritime claim[8]

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5 With the development of Mareva Injunction procedures this however is not now as peculiar as previously.

6 Uniform Commercial Arbitration Acts s 53, Queensland: Arbitration Act 1973 s 10. Where the arbitration agreement is a foreign agreement to which International Arbitration Act 1974 (Cth) s 7 applies then the Court must grant a stay.

7 Admiralty Act 1988 s 29.

8 Except a claim for interest in respect of a general maritime claim. Admiralty Act s 4(3)(u).

It is true that article 17 of the Model Law empowers the arbitrator to order interim measures to protect the subject matter of the dispute. This article would not support the arrest power. Furthermore, how is such an order to be enforced? The Uniform Commercial Arbitration Acts do not contain a comparable provision in those terms. Under s 18 the parties may be compelled by the court to comply with the arbitrator's requirements[9] and the court may under s 47 make such interlocutory orders in the arbitration as it might in a court proceeding. This power has been exercised to require a claimant to give security for costs[10], but it is unlikely that it would support an order for arrest of the respondent's ship as security for an award.

Jurisdiction: Arbitration is to a very large extent free of the troublesome jurisdictional difficulties which the courts often encounter in maritime cases. The Arbitrator acting in accordance with the arbitration agreement can deal with events which occur on the high seas or in circumstances when the sovereign jurisdiction of a court is uncertain. Ultimately the only relevant question is whether the award will be enforceable in the place where the unsuccessful party has its assets.

Enforceability: The question of enforceability will present little difficulty when the arbitration has been conducted in Australia. The procedure prescribed under section 33 of the

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9 See too s 37.

10 Nasic v Dimovski [1988] VR 94

Uniform Commercial Arbitration Acts is readily available. The question may be more difficult where the award has been obtained under an Australian law but the assets of the respondent are overseas. In this case it is necessary to have regard to the local law of the property to determine whether the award is recognised, or more appropriately for present purposes, whether there is more or less difficulty in enforcing in that country an arbitral award rather than an Australian court judgment.

Procedural Aspects of the Decision to Arbitrate or Litigate.

Parties to an arbitration enjoy the advantage of selecting the tribunal, or if this right is not available, they have every expectation that the nominating body will appoint an Arbitrator whose expertise particularly suits the dispute. Assuming the parties have the choice, this may create difficulties especially where each is manoeuvering to appoint a person thought to be sympathetic to his position. A compromise frequently adopted is to agree to the appointment of an Arbitrator by an independent organisation such as the Institute of Arbitrators Australia or some organisation representing the technical expertise required. Where the arbitration has an international flavour the Australian Centre for International Commercial Arbitration (ACICA) has a panel of distinguished arbitrators from all the commercial entities from which the parties or ACICA will nominate a suitable person. In this way the parties can be confident at least that the nominee will have expertise to understand and resolve the

dispute. The procedure for appointment will depend upon the arbitration agreement or, where there is no procedure laid down, the appropriate court will fill any vacancy[11].

Within an arbitration the parties, if they are able to agree, can choose the procedure which they consider appropriate to resolve their dispute. There are not to my knowledge any special procedures which are presumed to apply in Australia to arbitration, arising out of maritime disputes. The parties therefore must agree the procedure or entrust it to the arbitrator. He is given very wide power to conduct the proceeding as he sees fit[12], subject only to the requirements of natural justice[13]. For the present purposes these requirements probably demand no more than he give each party the right to be heard and to adduce material for his consideration[14], that each party have the opportunity to know what material is before the arbitrator[15] and, finally, that the arbitrator have and appear to have an unbiased attitude to the dispute[16]. It is even possible for parties to agree, provided that they do so in clear terms, to exclude all or any of these requirements.

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11 Model Law art 10(3), Uniform Commercial Arbitration Act s 10.

12 International Arbitration Act s 19; Model Law art 19(3) UCAA s 14.

13 Uniform Commercial Arbitration Act s 4(1)

14 Model Law art 18

15 Model Law art 24(2), (3)

16 Model Law art 12; Uniform Commercial Arbitration Act s 4(2)

Furthermore, the parties may even by agreement affect the statutory or juridical procedures which would otherwise be applicable. Let us suppose that they wish to eliminate as far as possible the possibility of appeal from the award. It is a notorious fact that the Supreme Court of Victoria adopts a very strict approach to the grant of leave to appeal under s 38 of the Uniform Commercial Arbitration Act[17] - probably more strict than in the UK. In New South Wales on the other hand, the judges have been ready to permit an appeal to be brought where it appears that the arbitrator is in error on an important point[18]. The parties, being resident in New South Wales, may choose to appoint a Victorian arbitrator or even agree that their arbitration should be subject to Victorian Law. Or if they have no liking for the appeal procedure under the Uniform Commercial Arbitration Act however it be interpreted, why should they not agree to conduct their dispute under Queensland law where the old case stated or prerogative writ procedures are still available?

Similar choices are, of course, available in the international sphere[19].

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17 Karen Lee Nominees Pty Ltd v Rob & Salzer Constructions Pty Ltd [1988] VR 614

18 Qantas Airways Ltd v Joseland & Gilling (1986) 6 NSWLR 326 at 333

19 Apparently for some years the ICC court in Paris obtained business from disputants who were unhappy with the pre-1979 case-stated and appeal procedure sin the UK.

A further advantage of the arbitral process is the possibility that the arbitrator will exercise his powers under s 27 Uniform Commercial Arbitration Acts to achieve a negotiated settlement. It is of course trite to say that parties will in most cases be better off settling their disputes rather than fighting. This truism is as valid for litigation as it is for arbitration. Section 27 of the Uniform Commercial Arbitration Act empowers the arbitrator to order the parties to take steps towards settlement including attendance at a conference to be conducted by the arbitrator. In my experience any arbitrator worth his salt will encourage the parties to settle, even push them a little in that direction, but I have never seen an arbitrator order the parties to negotiate or otherwise move towards settlement, and I could not imagine any arbitrator exercising the power conferred by this section to preside over a compulsory settlement conference and then, when no settlement has been achieved, to continue to hear the arbitration.

The major procedural disadvantage of arbitration compared with litigation is cost. On the one hand arbitration being more flexible and in the hands of an expert is or should be quicker than proceedings before a judge who has to be re-educated on the mysteries of marine architecture, pilotage etc. each time a new case starts. Nor is there much of a learning curve because judges tend to move from one factual area to another, with every new case. But the cost per day of arbitration is greater than that of litigation where the court room, the judge, the judge's staff are all free - or at least not specially charged. As the

case becomes longer or if the arbitral tribunal becomes more numerous this financial difference is more apparent.

Arbitrations are very often quick. In Victoria where court delays are a problem it is a great advantage to the parties where the arbitrator's timetable is quickly established and adhered to. So often, however, this does not happen. In Court where the judge orders that a document be filed or some other act be done on a certain date, this tends to be done. Doubtless this is a response as much to his moral authority as it is to the power that he has to punish the disobedient or to dismiss summarily the claim or strike out the defence. So often the arbitrator does not enjoy that authority and he certainly does not have that power, except by enlisting the aid of the court under s 18. This means that a dilatory party has great scope to exercise his craft.

Furthermore, it is in the hearing that costs really accrue. A skillful arbitrator can by shortcoming the heavy time more than justify his charges. In the hands of an unskilled Arbitrator, the process can become merely a court hearing conducted before a non-judge. This means that all the disadvantages of court proceedings are present - rules of evidence, endless pleadings and particulars, long oral hearings. The consequence is a lengthy and expensive hearing, but without the great benefit of the court - highly trained tribunal, ample coercive power, an understanding of the court rules and, above all the moral authority to bend the parties to his will. If the arbitral

proceeding is to be formally a clone of the curial proceeding, there is little reason to conduct it otherwise than in court.

Conclusion

The topic of this paper is built around the price of arbitration as opposed to litigation. We assume that each possesses the basic ingredients of any civilised dispute resolution procedure - impartiality, fairness, careful and accurate fact finding, and a proper application of the law. In the courts these ingredients are taken for granted. In arbitration, they require careful selection from panels of trained arbitrators expert in the field with which the arbitration is concerned. Arbitration becomes an attractive alternative to the courts when it is able to offer advantages which the courts do not possess. These are confidentiality, the short lead time between commencement of the proceeding and the hearing date, speedy hearing before an expert tribunal, and an absence of jurisdictional difficulty. Provided that the parties are co-operative and the arbitrator is skilled an enormous saving can be achieved to the parties by resorting to arbitration. The difficulty is that when the choice is available, at the time of the making of the agreement containing the arbitration clause, or, at the time that the dispute has arisen, the parties must be able to look ahead and decide whether the particular dispute which is to be the subject of the dispute resolution procedure is more appropriate for one course rather than the other.