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Maritime Lawyers: the last resort or part of the client's business strategy?

The title to this paper is in all respects presumptuous. For someone who has not "practised" law - in any sense of the word - since the mid 1970s to purport to put forward views on the practitioner's role to a gathering such as this smacks at best of hubris, and seems at worst to place me, like Daniel, firmly in the lion's den. My only justification for this act of full-frontal brazenness is that I suspect that, like Oscar Wilde, the lawyers amongst you subscribe to the view that there is only one thing worse than being talked about in public, and that is not being talked about in public.

Be that as it may, I am foolhardy enough to want to explore with you today and over the next few days of this conference some ideas about the changing perception, from a consumer's point of view, of the role of maritime lawyers in our current commercial and financial environment. I want to revisit briefly - and by way of reassurance I mean only "briefly" - the fashionable subject of alternative dispute resolution, a subject which so exercised this conference in Adelaide two years ago. And I want, lastly, to leave you with a number of challenges which I hope George Fryberg, who has kindly agreed to come into the lion's den with me as commentator on this paper, will pick up on and toss around with you a little later on in the proceedings.

I do not delude myself that anything I may offer you here could sensibly be described as original thought, free thinkers that you all no doubt are, but if the perspective at least is a new one for many of you, I for one will be content.

So first, I should set out my stall for you. I am currently involved in the management of a business which insures the legal costs and expenses incurred by my clients in commercial ship-operating disputes about uninsured sums of money. My clients are the owners and charterers of about 2,000 owned and, at any one time, about 1500 chartered vessels. We preside at any particular moment over about 20,000 problems of one sort or another, and of all sizes and degrees of complexity. Rather less than half of that number merit expert assistance from elsewhere, and the bulk of that assistance is, not surprisingly, obtained from law firms around the world. In these circumstances it is inevitable that over time we should begin to adopt a "horses for courses" approach; to form views on which lawyers are appropriate for different types of problem; which procedures, customs and practices assist the process of dispute resolution and which do not; and which lawyers tailor the provision of their expertise to the commercial aims and requirements of their and our ship-operating clients. In other words, while not claiming any facility with a crystal ball, my experience to date in this somewhat esoteric field has taught me to appreciate why it is that laymen tend instinctively to place lawyers in one of only two categories: constructive or destructive. And I want now to turn my attention to some of these areas in as provocative a fashion, if you will allow me, as I can.

These are hard times for businessmen and lawyers alike. In most sectors of industry and in most countries gone are the expansionist days of the 1980s. Retrenchment and cost-cutting is the order of the day, and maybe for us all the order of a number of days still to come. Budgetary restraints are paramount.

Lawyers practising in the maritime field, at least in the common law countries, seem to be equally hard hit. I personally have never before seen so many job applications from practitioners as have peppered my desk since the beginning of the year, nor have I previously seen law graduates struggling to find favour in such a limited marketplace as they face today. Whole departments are being wound down, and new recruitment for some is at a standstill. Talk of mergers between firms has been commonplace for some time.

But in my judgment there is another climatic change with which we are all now having to cope as part of the post-80s fall-out, and it bids fair to affecting the way in which we all do business much more radically and over a much longer period than the economic contraction and recessionary climate which we are all experiencing. I am referring to the demise of the "win at all costs" approach to business dealings, the aggression politics of dispute resolution, the "take every point that's going" approach to litigation. Marketing managers (a breed with whom I know all lawyers now claim great familiarity) would, I think, categorise this shift as design-led change, or a move from product image to product quality as the yardstick for measuring success.

I should note at this point my firm belief that aggressive methods certainly have their place in dispute resolution. In a recent book review published in the New York Times, former U.S. Chief Justice Warren Burger referred to a speech made to the American Bar Association in 1906 by the then Dean of Harvard Law School, Roscoe Pound, in which he criticised lawyers for turning litigation into a "sporting contest". The Association took umbrage at this attack and declined at first to publish the speech. That was 1906, and the unpopularity of some aggressive litigation practices has continued since that time so as to risk giving the art of litigation in general an increasingly bad name. In context, however, I accept that aggression serves as a legitimate means to a previously agreed commercial end; I merely object, like Roscoe Pound, when its use is seen as an end in itself. As Saddam Hussein would no doubt agree, there is nothing to be gained in deploying a supergun on the battlefield if it has no part to play in ensuring a satisfactory strategic outcome. More significantly, if one wants to retain the opportunity to do business with the other side, the battlefield is unlikely, win or lose, to be the forum giving one the best chance of doing so.

It is axiomatic that in a contracting marketplace every potential or actual business partner alienated is a business partner lost. I do not doubt that those responsible for the profitable operation of shipping around the world are as alert to that fact now as they have ever been. But I often question the extent to which their lawyers are also inclined to vary their methods, their manner or their tactics to take account of this commercial reality. How often have you heard a claimant's lawyer advise his client that he cannot initiate settlement discussions because to do so would be a sign of weakness? How often have you been served with a writ on the eve of a public holiday? Too many lawyers in my judgment are still content to press their client's claim, albeit to a successful legal result, without weighing in the balance the attendant commercial risk of doing so and considering other options. Too many overlook the fact that, in winning a victory in court or arbitration, they may also destroy at best a future trading venture and at worst a market, either of which might have been preserved if a way could have been found to trade the dispute away. In these circumstances the client might legitimately come to wonder whether the courtroom success was commercially justifiable.

I am, however, beginning to believe that instances of pointless aggression are on the wane. The change in approach is partly climatic, as I have indicated, but it is also partly a result of educational factors. Your lay client is now much more aware of the pitfalls he faces in allowing his dispute to become a football for professional litigators. And insurers, not least those of legal fees such as myself, are equally aware of the commercial risks to the client. I will come to the consequences of that awareness in a moment. Meanwhile, how is the legal community responding to this mood change? Amongst other initiatives the lawyer is putting forward alternative methods of dispute resolution: litigation, arbitration, short form arbitration, mediation and conciliation. For different types of dispute each method has its proponents, and each its disadvantages. But the emphasis is still on setting up a legalistic or quasi-legalistic framework to enable the lawyer to resolve his clients' disputes for him.

In the context of the most frequently used dispute resolution procedures, namely litigation and arbitration, lawyers will also point to those twin bedevillers of all legal systems, time and cost, as inescapable parts of the process. They advise that the client cannot have the benefits without the burdens. But to the commercial client time and cost translate into cashflow, and cashflow is something that at all costs he must protect. Accordingly, if cashflow is threatened either by the aggressive instincts of his lawyers or by inbuilt procedural intricacies or inadequacies, he needs to be aware of that fact, and he needs to remedy the situation quickly. It should cut no ice with him at all to be told simply that the process cannot be quickened up and cannot be completed any less expensively. No businessman of substance allows such factors to dictate his corporate strategy. He weighs them in the balance and if the game is not worth playing, he does not allow his lawyers to play it; he looks for more commercially acceptable ways of resolving the dispute. Increasingly, I see shipowners and charterers alike turning away from litigation, arbitration and other satellite forms of dispute resolution, and resolving instead to trade their claims away, often in subsequent commercial transactions. To these clients resorting to law through any of the dispute resolution procedures now on offer with their unacceptable components of time, cost, risk and potential market loss has already come to be seen as "the last resort". It is beyond the scope of this paper to delve into the pros and cons of arbitration, short form arbitration, mediation, conciliation or any other form of dispute resolution. The point I want to home in on is the unfortunate one that the move towards these alternatives is no more than a half-way house in an attempt to meet a market-driven need. And the reason for that, inescapably, is that the market is concerned at the threat to cashflow that the traditional adversarial methods of dispute resolution now pose, and in the main does not see the practitioner as willing or able to do anything about it.

If I am right in my suggestion that the marketplace now demands that we move away from the "win at all costs" approach to dispute resolution and that running parallel is the feeling that trading the dispute away is a better commercial option than allowing it to be resolved through any of the currently available procedures, we need to look at the likely consequences for the practitioner. It has been suggested that this trend will inevitably lead to a fall-off in contentious work. I agree with that view, but I do not agree with the complaining tone in which it is so often voiced. Merely to bemoan this type of sea change is to bury one's head, ostrich-like, and ignore an inevitable market shift. The true businessmen among you will spot here a commercial opportunity, not a fall-off in business overall. The proponents of mediation, for example, point to the fact that 90% of litigation settles before going to court and that nine out of the remaining ten per cent settle on the first day of the trial. They argue that if just one in a hundred cases is decided by the tribunal, the time and money expended in this adversarial process cannot be justified on any rational grounds, and some other method must be preferable. Whether this last conclusion militates in favour of mediation (as opposed to some other procedure) is, at the moment at least, in my submission a moot point, but the thrust of the argument, viewed purely as a toss up between product, i.e. result, on the one hand and time and cost, i.e. cashflow, on the other is undeniable.

So where, you ask yourselves, is the opportunity for the practitioner if I am correct in predicting that businessmen will shrink in ever increasing numbers from referring their disputes to the available and somewhat formalistic methods of dispute resolution? It does not lie, I venture to suggest, in more of the same, albeit sold to your clients through ever more expensive beauty parades, marketing brochures, mail shots, in-house magazines, and the like. Your clients are looking for a change of approach to problem-solving, and they know that change is not achieved by better sameness. More of the same will pull in a few of the uninitiated but, as I have suggested, your clients and their advisors and shareholders in the main know what it is you are able to provide and, although they like the quality of what you provide, by and large their objectives are frustrated by the means of production. In manufacturing industry, if the means of production mars the product, the product invariably fails. I am tempted to ask whether the very small number of disputes, comparatively speaking, which are allowed to go the distance is not evidence enough of the failure of your particular product. The inability to convince the lay client that it is available at a cost and in a time frame and in a commercial environment which meets his requirements may result, once again, in the market being forced to provide its own solution.

There is a further problem which I want to dwell on at this point, and that is in broad terms the counterpoint between the lawyer's view of what he is trying to achieve on behalf of his client and the client's own view. The product for the lawyer, in terms of dispute resolution, has in my view for too long been viewed in pure money terms, most frequently by reference to the recovery or protection of funds in dispute. For the lay client the product he looks to his lawyer to provide is the enhancement or protection of market position or advantage, often seen crudely in terms of profitability or margin. The two perceptions do not always coincide. Where they do, we rarely have a problem. Where they do not, in my submission the ability to realise the client's business objective is paramount. We are talking here not just of image or form, but of a realisation of what the client needs and an ability to provide a product which meets those needs in the relevant commercial time frame. And, I may add, that commercial time frame is invariably shorter than you, and sometimes the clients, believe. I would venture to suggest that consumer needs have to be the starting point of the lawyers' business, as in any other. It is not sufficient merely to invite the client to distinguish between individual lawyer "producers" in ultimately superficial ways if the product itself is flawed through being available from all of them only at great cost and considerable delay, so as to defeat the commercial purpose of the venture.

My own belief is that resort to litigation or arbitration, conducted as it now is, is the last resort. The lawyer's first task, it seems to me, is to assist the client to an understanding of what the law provides. His second task in my view is to help the client make rational strategic business decisions so as to minimise commercial risks, including the risk of disputes arising. The third task is to assist the client to resolve any disputes that do arise. Whatever the forum to which those disputes are then formally referred, two further points need to be noted: first, the forum should enable the problem to be resolved with minimum aggravation and time loss; and second, if the lawyer has been involved throughout he may well have failed in his second task if he has to worry about his third. My concern is that the emphasis today in the maritime field seems overwhelmingly to be on the third of the lawyer's tasks, namely dispute resolution, to the detriment of the first two, and indeed that very often the first two only come into play in the context of the third.

Against this background, I come to what I perceive to be a business opportunity available to the lawyers to move from being the last resort at the end of an unhappy commercial venture to being an essential cog in the machinery that formulates the client's business strategy. Before doing so, I propose to put to you a number of questions, no one of which will, I am sure, cause any lawyer present today the slightest concern. What they may do, I hope, is to give you a jumping-off point at least from which to tackle my tentative conclusions.

- First, in any particular matter what is the purpose of the tactics you are adopting on your client's behalf? Are they pointlessly aggressive? Does the client understand and approve of the potential legal and commercial fall-out from the tactics adopted? Does he fully understand the alternatives?

- Is a result in money terms the only way to resolve the dispute?

- What priority is given to understanding the commercial aims and priorities of the client who refers a matter to you? How relevant is his business strategy from the outset to your conduct of the case? For how long have you been involved, alongside your client, with the development of this particular business venture?

- What strategic business information do you have at your disposal about your opponents? What continuing business relationship does your client have with them or hope to develop with them in the future?

- What budgetary constraints are you and your client working under? How much can your client afford to lose?

- Can you sell your "product" by marketing your ability to deliver the result desired by the client within the strategic time frame required? If not, why not, and what can you do about it?

- In addition to asking yourself, "how can I get the client out of this mess?", do you also ask: "how did he get into it in the first place?". How far do you see it as your role to ensure that the same problem does not arise for your client in the future?

- Are lawyers born negotiators? How much time does your firm devote to the study of negotiating techniques? In any event, are good negotiators born or can they be trained? Is it almost invariably better for the client to conduct negotiations on his own behalf?

- Do you see your conduct of a contentious matter from start to finish as one continuous negotiation, or is negotiation a self-contained optional phase at some point during the dispute resolution process?

- How is it possible for a claimant to open settlement negotiations without his doing so being viewed as a sign of weakness?

So where does that all take us? It takes us, I believe, to this: if I am right to suggest that businessmen and their companies are now looking increasingly to avoid seeing their disputes ending up in the traditional dispute resolution procedures, it is a short step for the practitioner to move from placing the emphasis on dispute resolution to placing it on dispute prevention. And just as the move to alternative forms of dispute resolution was market-driven and coincided with a shift in commercial climate, so also in my judgment is a shift towards dispute prevention now in tune with the times. You do not need me to tell you that most sectors of the insurance market, for example, are groaning under the weight of litigation-primed claims of some years ago. Nor do you need reminding of the increasing demands of environmental pressures in particular and of regulatory bodies in general to force ever higher standards of risk management, training, and building and maintenance requirements on our shipowners. The underlying trend in these areas is in my view all in one direction: prevention, not resolution. For the lawyer, if the dispute never occurs, it is never there to be resolved.

By way of an aside, I would ask you this: how often have you won a case for a client who, notwithstanding your and his success, appears somewhat less than ecstatic at the final outcome? I suspect myself that he is thinking at that point of the cost of his victory, not just in relation to his unrecoverable costs, but also in relation to market opportunity, and a potentially unmendable relationship with a previous trading partner. In other words, grateful to you though he is for your not inconsiderable and indeed successful efforts on his behalf, what he really wishes is that you had been there to stop him getting into this dispute in the first place.

In a parochial context, I have analysed the number of disputes referred to us at the U.K. Defence Club by our shipowner or charterer clients which simply raise questions of construction, drafting or interpretation. And I wonder how many matters referred to you are the results of poor or inexpert drafting? My researches tell me that, of the 20,000 problems referred to me by my clients, conservatively speaking, about 40% fall into this category. But where is the input from the professionals in these formative stages? In other areas of practice, for example in industrial relations or collective bargaining situations, in trusts or tax work, neither side seems content to move without the approval of their lawyers. What deters lawyers from proffering their services at this point in the transaction? Is it perhaps that lawyers are not really interested in this type of work? Is it more in their interest, fee scales for contentious work being what they are, and employment and accommodation costs being what they are, to ensure that the emphasis is on lucrative dispute resolution work? If the emphasis were on loss prevention would they be killing the goose that laid the golden egg? Or is the successful litigator still regarded as the non-pareil of the legal world? Are we back, in other words, to status concern again? By analogy, why do car manufacturers produce vehicles today which have a lifespan of less than half that of the 1920s models? Is it perhaps that built-in obsolescence is an invaluable element of their profitability?

Or is the question misdirected altogether? Is the onus on the shipowner or charterer? Well then, what constrains shipowners and charterers from seeking advice at this early pre-contract stage? Few of them, after all, these days retain in-house counsel. I have put this question to many of my clients in the past, usually, it has to be said, when the dice are loaded in my favour and the inadequacy of the client's own efforts has been laid bare by a judge or an arbitrator for all to see. The answers I have received, touched up in some cases for reproduction in polite society, are predominately along these lines:

(a) "We are fixing on the spot market and have no time to bring in lawyers."

(b) "We don't want to incur the additional unbudgeted cost of legal fees at this stage."

(c) "Lawyers will only complicate things."

(d) "Lawyers will make the other side suspicious."

(e) "Lawyers don't understand the business we're in."

If we analyse those reactions for a moment, and I assure you (should you need assurance) that they are representative, we arrive at some uncomfortable conclusions. Firstly, we unearth the unspoken but almost tangible fear that, if lawyers are brought in to assist when the deal is being struck, the businessmen concerned will in some way be shown to be inadequate. This status concern was most graphically illustrated by Sir John Harvey Jones, the former chairman of ICI, in his assertion of a few years ago that any manager who needed to bring in outside management consultants was not doing his job properly. I understand that since those days Sir John has turned his hand quite happily to advising others how to manage their businesses, a case, if ever I saw one, of gamekeeper turned poacher. But Sir John was of course talking of managers consulting other managers; what I am advocating is non-lawyers consulting lawyers.

Secondly, the long term benefits appear completely submerged by short-termism. To argue that outlay on legal fees at this stage is not affordable overlooks the fact that, when a dispute arises, the fees then incurred will inescapably be considerably higher and inevitably unbudgeted. In addition, what of the benefit in the marketplace derived from the knowledge that one's position is invariably carefully considered and, as far as possible, protected against later misunderstandings?

Thirdly, the spectre of the commercial timescale raises its ugly head again, in other words the fast and furious pace at which most shipping business is transacted, together with the belief that lawyers cannot contribute within that timescale. I will merely say that only you know whether this is the case or not. If the business opportunity is attractive to you, you will no doubt make it your business to meet the client's time frame.

But, fourthly, and most worrying of all in my view is the concern expressed that the lawyers do not understand the marketplace in which they are operating. There may be here something of the status concern referred to earlier, but if we discount that, what we appear to be left with is the assumption that reference to a lawyer means that the lawyer will take over and indeed handle the negotiation himself. The idea of the lawyer as a support mechanism bringing a trained, experienced, fresh and informed view to the proposed deal is entirely missing. And if, by the way, it really is the case that the lawyer does not understand the client's marketplace, he is either the wrong lawyer or there is an opportunity here for him to develop that understanding very speedily indeed.

Again, the worries about the other side's suspicions presuppose that the lawyer is to become a part of the negotiating team. In my judgement he should not become part of the team; he is a counsellor, a reference point operating unannounced behind the scenes. He will not dictate policy; he will merely comment on the options and parameters within which policy is being rapidly formulated.

In summary, if by bringing in his lawyer at the initial phase of a negotiation, the shipowner is able, at some initial cost, to avoid up to 40% of the subsequent disputes with which he is currently faced with all their attendant much greater cost factors, will he not have proved my point?

I have taken as an example of the opportunity for greater involvement in dispute prevention work the supposedly mundane area of formulation of contracts. It is said to be unexciting; that depends in my view on the context and the team approach to the task. And if you change the terminology, and describe yourself as an entrepreneur or 'high roller' cutting a deal, perhaps that meets the image requirement a little better! Again, the work is said to be unremunerative by comparison to litigation; that is perhaps the case, as things now stand, but it is, as I have attempted to show, infinitely more valuable in the long term to the client. But to meet this concern head-on, could we perhaps envisage in the future so rearranging matters that the lawyer who effectively assists his client to avoid disputes arising is more highly remunerated than the lawyer who merely assists in the resolution of a dispute? An alternative definition, if you like, of the old concept of "importance to client", and an approach, it will not surprise you to learn, that would certainly find favour with the insurance community.

In addition, this closer involvement in the formulation of business strategy seems to me to give the lawyer every opportunity to know the client's business so intimately that in certain circumstances referring subsequent business elsewhere would be unthinkable, or even risky. We all know that if one has been instrumental in advising on and drawing up, for example, a newbuilding contract, it is odds on that one would be best placed to deal with any subsequent problems that may arise in relation to that contract. As they say in the Catholic church, if you catch them young, you've got them for life.

I want to conclude now by drawing some of these disparate threads together. First, for a variety of reasons I believe that we are witnessing the demise of the "win at all costs" mentality towards dispute resolution. Secondly, aggression for its own sake can be shown to lead to unnecessary and unwarranted expense without in many instances compensatory benefit to the client. I believe, thirdly, that formal methods of dispute resolution are in any event under close scrutiny by the market they aim to serve. In my view they are not regarded as necessarily meeting the commercial needs of the client. Trading the dispute away may be a preferable commercial option. Against this background, and for a whole variety of reasons the commercial emphasis is now shifting from dispute resolution to dispute prevention. My thesis is that in these circumstances the lawyer needs to develop new skills and new awareness of his client's business to make the transition successfully. It may be that the transition results in a reduction in profitable contentious work, but the interests of the client will be more expertly served. I invite all lawyers to involve themselves as actively as possible in shifting the focus of their attention from dispute resolution to dispute prevention.

I leave you with the graphic image drawn by Professor Charles Handy in his book, The Age of Unreason. In advising his readers not to be afraid of change but to see in market-driven change new scope for business opportunities, he reminds us of the frog sitting in a bowl of cold water while the water is gradually heated from below. The frog has two options. So too, if you accept the provocative picture that I have painted here, do maritime lawyers.

I am grateful to you for you indulgence in allowing me to set out my stall for you in this way. I am greatly honoured to have been asked to address your 1991 Conference. As my fellow speaker, Guy Cassar, has reminded me, one is entitled to make a spectacle of oneself once in one's lifetime. Thank you for your indulgence in allowing me to do so on the first morning here in Perth.

PEREGRINE MASSEY