

Speaker Requirement Form

Event Name: 2009 Conference - Resolution and Resilience: ADR in the Global Recession

Date: 29 - 31 May

Location: Sofitel Melbourne on Collins

Speaker Details

Speaker Name	RON SALTER
Organisation	
Title	
Presentation Date	30 - 5 - 09
Presentation Time	1145

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Your mobile phone number:	0411 236 394
Contact person in case of delay:	CYNTHIA SALTER
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Please email or fax the completed form to Gianna Totaro by 17/4/2009
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Speaker Requirements Form Notes

Maritime Arbitration in Australia at a time of recession - threat or opportunity?

Ron Salter

1 Introduction

For the better part of a century - or perhaps even longer - arbitration has been the preferred method of dispute resolution in the maritime industry. Just as the concept of "look and sniff" arbitration developed in relation to commodity quality disputes, arbitration was presumably seen as the ideal means of dispute resolution, involving arbitrators appointed from within the industry seeking to resolve disputes expeditiously and inexpensively without the need for legal intervention.

In a paper delivered at a Chartered Institute of Arbitrators International Dispute Resolution Conference in Kuala Lumpur last year, and published in (2009) 75 Arbitration 231, Bruce Harris, a leading London maritime arbitrator, reflecting upon his 45 years experience in maritime arbitration in London stated the position thus:

"45 years ago, most arbitrations were conducted by the parties themselves, their brokers or agents, but not by lawyers. Each would appoint an arbitrator. The claimant would send its nominee a short letter setting out its claim accompanied by the documents it relied on. The claimant's appointed arbitrator would send that on to his counterpart who, in turn, would pass it to the respondent asking for comments by way of defence and any documents the respondent relied on, and those would then be sent back via the arbitrators to the claimant who would have a right of reply; and the arbitrators would then proceed to their award.

In this very quick and simple (and cheap) procedure there were no, or at least very few, requests for further information and no real question of any type of discovery. Procedural questions were happily ignored, as very often were the subtleties of legal argument. Whilst the

arbitrators were bound to apply English law as best they could, they normally reached a commercially sensible decision which, happily, would usually be in line with the law.

In the absence of something going seriously wrong, no one would challenge the arbitrators or their proceedings; and there would be no question of arbitrators' conclusions being reviewed by the judiciary unless one party thought there was a real question of law involved and asked the arbitrators to state their award in the form of what was called a "special case" for the opinion of the court.

This meant that the arbitrators did not generally need any legal expertise either to run these informal proceedings or to reach their conclusions. If they found themselves in difficulty on the law, they would often consult a solicitor or appoint a lawyer as third arbitrator or umpire."

On the back of the process described by Bruce, maritime arbitration flourished in London. In turn, other European and North American countries followed suit, with significant maritime arbitration centres developing in places such as New York, Paris, and Stockholm.

Of course, as Bruce Harris himself pointed out in his paper, much has changed in the 45 years since he commenced his involvement with maritime arbitration. In particular, he observed that today's cases were often far more complicated, both on the facts and on the law than they had been in times gone by, and that conduct of arbitration had become far more elaborate and legalistic. Nevertheless, it is fair to say that arbitration remains the dispute resolution mechanism of choice in the maritime industry, particularly for disputes arising under charter parties and contracts of affreightment, for disputes arising under ship building contracts, and for salvage disputes.

2 The position in Australia

Notwithstanding its very considerable reliance on shipping, Australia has never been a significant power in the shipping industry. Much has been said, and is continuing to be said on this subject, with particular reference to the ongoing absence of a viable shipping policy. That is of no direct concern for present purposes, but it is significant to note that despite this country's reliance on shipping for most international trade, maritime arbitration has never really flourished here. Now why is this so?

Let me take the example of the charter party which is simply a contract between the owner of a ship and another party who wishes to employ the ship for a particular period of time or on a particular voyage. The owner of the ship will invariably be a foreign party, while the charterer will be an Australian party. The owner basically sets the terms of the charter party, which, in most cases, follows a standard format. By reason of history and tradition, the charter party will contain an arbitration clause, and by reason of further history and tradition, that clause will specify London or New York as the place of arbitration. Nine times out of ten, or perhaps ninety nine times out of one hundred, the charterer will not be much bothered by this, as amongst other things, dispute resolution will be the last thing on his or her mind at the time when the contract is being negotiated. In the past, even if the charterer raised the issue and suggested that it might be appropriate that any dispute be arbitrated in Australia, that suggestion might be treated with ridicule by the owner on the basis that London, New York, or wherever else arbitration was proposed was far more appropriate, the arbitrators in those places having the skill set necessary to determine the dispute, whilst no such expertise existed in the antipodes. Even today, there is often no challenge by local charterers to this assertion. London maritime arbitration benefits considerably from the "IBM" principle.

Notwithstanding this frustrating approach, arbitration of maritime disputes in Australia has existed for a considerable period of time:

- Firstly, not every ship trading to and from or within Australian waters is owned by a foreign party, so that there might be a charter party where both the owner and the charterer are Australian. Mind you, difficult as it might be to believe, I have actually seen charter parties of this type in the past where despite the fact that the two parties were based in Australia, the contract contained a London arbitration clause! Fortunately, common sense usually prevails, so that arbitration in Sydney, Melbourne, Perth or elsewhere is specified.
- Secondly, some of the major charterers in Australia have over the years exercised their commercial power to influence the seat of arbitration. Thus, for example, AWB (formerly the Australian Wheat Board) has long adopted its own form of charter party, which while nominating London as the place of arbitration for disputes relating to

events happening outside Australia, has at least specified arbitration in Australia in relation any dispute about events happening in Australia.

Over the last decade or so, there have been more concerted efforts made to encourage maritime arbitration in Australia. In 1997, the Maritime Law Association of Australia and New Zealand (MLAANZ) developed a tailored set of arbitration rules designed specifically for maritime disputes, and at the same time, established a panel of suitably qualified arbitrators. A review in 2006/2007 produced a revised and very user-friendly set of rules effective from 1 July 2007 which state in their introduction that the object is to "*provide a dispute resolution procedure which is expeditious, flexible and cost effective.*" Information about the MLAANZ rules, information about the panel of arbitrators, and other information can be found at www.mlaanz.org.

A further significant development occurred in 2007 when the Australian Centre for International Commercial Arbitration (ACICA), with support of then Attorney General Philip Ruddock, created the Australian Maritime and Transport Arbitration Commission (AMTAC) as a special purpose committee of ACICA. The objects of AMTAC are stated in its constitution as being "*to support and facilitate both international and domestic arbitration and mediation in respect of maritime and transport disputes, and to promote Australia and the region as a recognised leader in maritime transport scholarship, maritime affairs and commercial and maritime dispute resolution.*" Up to date information about AMTAC can be found at www.amtac.org.au.

Despite the good intentions of both MLAANZ and AMTAC, progress has been slow. That is not to say that no progress has been made, for in the recent years - anecdotally at least - there seems to have been an increase in the number of disputes in the maritime area being referred to arbitration. On searching through my personal arbitration records, I am reminded that in recent years, I have published Awards in -

- a dispute between the owner and charterer of a coastal vessel concerning issues of deadfreight and unsafe port;
- a dispute arising from the accidental mingling of a consignment of barley with a consignment of wheat during loading of a ship;
- (as part of a three-member tribunal) in a dispute in relation to alleged shortage on

discharge of consignments of bulk sugar;

- (with a co-arbitrator) in a laytime/demurrage dispute;
- (as a member of a three-member tribunal) in a dispute under a shipping services agreement;
- (again, as a member of a three-member tribunal) a significant dispute concerning alleged contamination of consignments of wheat exported to Pakistan.

I have listed the above matters by way of examples only. They do not include cases which have resolved before a final Award is made, and of course, they do not include cases which have been handled by other arbitrators. My purpose in setting out details of these cases is simply to illustrate that maritime arbitration in Australia is alive, if not necessarily thriving.

What is often ignored in the debates about arbitration in Australia is the fact that it is never easy to convince a non-Australian party to any type of contract that the dispute resolution process should take place in Australia. This is not unique to our situation but applies generally, where parties to international contracts prefer to have a neutral seat of dispute resolution if not powerful enough to insist upon dispute resolution in their home territory. London has thrived over a long period of time handling dispute resolution for parties all over the world, and indeed, it seems to me to be a rare case that a London maritime arbitration involves a United Kingdom based party. The reports one reads regularly concern disputes between say a Greek ship owner and a Chinese charterer, a Japanese ship owner and an Indian charterer, etc.

The best piece of news I have heard on this subject for a long time occurred quite recently when we learnt that the parties to a shipping service agreement involving a number of Pacific island countries and a foreign shipowner have negotiated arbitration under the MLAANZ rules into that agreement. To the best of my knowledge, this is the very first occasion which contracting parties, neither of whom is Australian, have chosen Australian law and arbitration. While a very small step forward, I regard it as an extremely significant one, which bodes well for the future of maritime arbitration in this country.

3 The recession

It is trite to say that a financial downturn presents opportunities for dispute resolution lawyers, and the same must be true for commercial arbitrators. In the shipping world, which has seen the

bottom fall out of the charter markets with the consequent refusal by many charterers to honour their contractual commitments, there are going to be many disputes played out before arbitral tribunals over the next few years, such that maritime arbitrators are very likely to encounter something of a purple patch in terms of work. Whether much, if any, of that work will flow to Australia, is a different matter, for one suspects that those charter parties now the subject of dispute, are mainly subject to London or New York arbitration. Indeed, I must confess that so far, I have only received one appointment which I can sense as being recession-related, while one reads about major recession-related disputes involving Australian parties being determined by arbitration in London and New York.

4 The way forward

While it is extremely unlikely that Australia will ever become a major centre for maritime arbitration, I believe that there is cause for optimism that considerable progress can be made in the future, so that maritime industry participants in Australia and indeed elsewhere in the Asia Pacific region accept that the option of Australian arbitration is the best option for their needs. Obviously, no one wants to become involved in a dispute, and particularly in an expensive and time-consuming one, but the industry needs to be aware that in the unfortunate case where a dispute arises, the infrastructure exists to have that dispute expertly, professionally, impartially and inexpensively resolved. In these circumstances, it seems to me that the key to further development is marketing and education.

As is often remarked in cases of arbitration generally, both Singapore and Hong Kong have shown the way over the last decade or so, and the same is true with maritime arbitration where these centres are having some success in displacing London and (perhaps to a lesser extent) New York. London maritime arbitration, while remaining prominent by reason of its long history, coupled with innate conservatism by industry participants, has nevertheless lost some ground to Singapore and Hong Kong, as it becomes more expensive and more time-consuming. Singapore in particular seems to be marketing itself very ably as a well placed neutral venue for dispute resolution in the maritime area, and while we do not have the advantage of Singapore's geographical position as the financial hub of Southeast Asia, we are able to offer a cheaper

environment, so far as both legal fees and arbitrator's fees are concerned and we are certainly able to offer a very considerable expertise operating within a widely respected legal structure.

I do not pretend to be a marketing expert, but it seems to me that those of us with an interest in encouraging maritime arbitration should be speaking regularly at fora such as this, writing articles for publication, and making direct approaches to importers, exporters, ship owners, charterers, ship brokers, freight forwarders, and lawyers, and in particular, to large commodity exporters. Relationships should be established with peak industry bodies such as the Institute of Chartered Shipbrokers, the Australian Ship Owners Association, and Shipping Australia Limited. Although funding might be problematical, I even believe that a marketing campaign directed at countries in the South-West Pacific such as Papua New Guinea, Fiji, Vanuatu, and Solomon Islands would pay dividends in due course.

I can recall that many years ago, a public relations consultant advising the firm of which I was a partner, insisted that the first 'public' that needed to be persuaded on a particular issue was the internal 'public', which in the case of our firm, was the staff. The second 'public' in the case of the firm was the client base, and the third 'public' was the world at large.

By analogy, I would reckon that the Australian shipping industry participants are the first 'public', the industry participants in the South-West Pacific are the second 'public', and that industry participants in Asia are the third 'public'. On that basis, the focus should be on convincing the major 'players' in this country that the best dispute resolution mechanism for them to employ is arbitration in Australia.

I will conclude this presentation by saying that education in this context also involves having the drafters of contracts understand the implications of their work. As an illustration of both our failure to persuade parties that there is real expertise in Australia, and of our failure to fully comprehend the effects of our contract preparation, I set out below an arbitration clause taken very recently from a shipping contract, which at least provides for Sydney arbitration:

All disputes from time to time arising out of this Contract shall, unless the Parties agree forthwith on a single Arbitrator, be referred to the final arbitratment of two Arbitrators carrying on business in Australia who shall be Members of the Baltic and engaged in Shipping trade, one to

be appointed by each of the Parties, with power of such Arbitrators to appoint an Umpire, with legal qualifications and commercial experience in the shipping industry. The arbitration is to be conducted in accordance with the rules of the Institute of Arbitrators and Mediators Australia, the arbitration to be in Sydney, NSW or other such place in Australia as the parties agree, the law of arbitration to be the law of New South Wales. Each party to bear its own costs. No award shall be questioned or invalidated on the ground that any of the Arbitrators is not qualified as above, unless objection to his acting be taken before the award is made.

I am told that the handful of members of the Baltic in Australia does not include anyone with prior experience of arbitration. Without trying to disparage them in any way, can we say that a better process for the benefit of the parties will be achieved simply because the arbitrators are members of the Baltic, or might it be that a better outcome would be achieved by having a sole arbitrator nominated (in the absence of agreement between the parties) by the president of this Institute, or, for that matter, the president of CIArb, MLAANZ, ACICA, or AMTAC?