Maritime Arbitration

Topic 10

The Continued Development of Shipping Law: the Role of Arbitration

Is dispute resolution the only function of arbitration?

- Much of shipping law derives from industry-developed norms rather than state activity.
- State law-making appears confined to (a) agreeing mandatory rules to apply to situations where vulnerable contract parties require protection and (b) receiving into national law certain industry-developed norms.
- These industry-developed norms are of two types:
  i. articulated or expressed rules that are enforceable directly as a result of the formation of a valid and binding contract,
  ii. unexpressed (or implicit) understandings (or tacit assumptions) that form part of the contractual context and that supplement the expressed rules (gap fillers; interpretative norms).
- A feature of (ii) is that they become articulated in the process of resolving disputes.

Is dispute resolution the only function of arbitration?

The strong preference of the shipping community for arbitration thus raises the following questions:

- To what extent should it be the duty of an arbitrator to perform the articulation function?
  - It is argued that there is little incentive to perform any function beyond the resolution of the dispute: Landes & Posner (1979)
  - Can this duty co-exist with the parties' right to dispense with reasons?
- Should arbitral awards (or at least that portion of the award where a tacit rule is articulated) be viewed as a public good? Can this view co-exist with the confidentiality of awards?
- Even if (redacted) awards were published is this sufficient? Is there a further need for (i) a judicial precedent or (ii) codification in national law?

Shipping cases before the English courts

- First Era – Arbitration Act 1950, s 21: virtually unlimited right to appeal to court on points of law by making a Special Case to the Commercial Court on any issue of law.
- Second Era – Arbitration Act 1979, s 1(3)(b): judicial review discretionary and only available with leave of the court.
- Third Era – Arbitration Act 1996, s 69: "obviously wrong" – considerable threshold to overcome, courts tend to uphold awards and the principle of finality of arbitration. BUT note alternative route based on "general public importance" and "open to serious doubt" – lower threshold.
- The number of shipping cases reaching the courts has dwindled.

Shipping cases before the English courts

… in 1978, the last year of the first era, 300 Special Cases were set down for hearing in the Commercial Court. The Committee estimated that probably about 175 of them were from maritime awards, although there were no reliable statistics. In the ten-year period between 1968 and 1978, 107 Special Cases from maritime awards were reported in Lloyd's Law Reports. Fifty-seven of the reported Special Cases went up to the Court of Appeal and 10 to the House of Lords. In other words, the old system produced a healthy flow of precedent-creating judicial review. In contrast, in 1990, during the second era, there were 39 applications for judicial review of maritime awards, which amounted to 58% of the total of 67 applications for review of arbitral awards under s 69. In 2008, in the third era, there were 41 applications for judicial review of maritime awards, which amounted to 72% of the total of 57 applications for review of arbitral awards under s 69. Significantly, leave to appeal was granted in only 14 of them. Only six challenges were successful.

Davies, 2010

“Arbitral Precedent”: rule-articulation

- Assuming it is the role of the arbitral tribunal to articulate a rule that is in existence, albeit tacit, they first have to “find” the rule.
- How do arbitrators do this?
  - Reliance on own knowledge and experience of the industry BUT note increase in the number of arbitrators from a legal rather than an industry background in London noted by Davies (2010). What meaning do lawyers ascribe to the expression “market understanding”? (Goldby, 2016)
  - Barristers and solicitors involved as counsel in arbitrations will adopt practices that prevail in court: expert witnesses. What is problematic about the evidence of expert witnesses?
- Arbitrators appear unconstrained by the need to prove a custom (certain, notorious, reasonable; *opinio juris*), but it is unclear:
  - What level of proof is required for a market understanding or tacit assumption to be found to exist (question of fact) and
  - What is required for such market understanding or tacit assumption to constitute an implied term of the contract (mixed question of fact and law).

The Astra [2013] EWHC 865 (Comm), [14]

'… the tribunal stated (at [59] of their reasons) that, whilst their instinct as commercial arbitrators would be to treat it as a condition, they were not persuaded that was the current state of English law. Rather they considered that the generally accepted position under English law is that failure to pay charterparty hire is not a breach of condition.'

Basis: *The "Brimnes"* [1973] 1 W.L.R. 386, 409, per Brandon J. Decision upheld on appeal [1975] Q.B. 929 but this point was not discussed.

After *The Astra*: NYPE 2015 cl. 11 (b) and (c)

(b) Grace Period

Where there is failure to make punctual payment of hire due, the Charterers shall be given by the Owners three (3) Banking Days (as recognized at the agreed place of payment) written notice to rectify the failure, and when so rectified within those three (3) Banking Days (as recognized at the agreed place of payment and the place of currency of the Charter Party) following the Owners' notice, the payment shall stand as punctual.

(c) Withdrawal

Failure by the Charterers to pay hire due in full within three (3) Banking Days of their receiving a notice from Owners under Subclause 11(b) above shall entitle the Owners, without prejudice to any other rights or claims the Owners may have against the Charterers:

(i) to withdraw the Vessel from the service of the Charterers;

(ii) to damages, if they withdraw the Vessel, for the loss of the remainder of the Charter Party.

The Achilleas [2008] UKHL 48, [6]

[6] The dissenting arbitrator did not deny that a charterer would have known that the owners would very likely enter into a following fixture during the course of the charter and that late delivery might cause them to lose it. But he said that a reasonable man in the position of the charterers would not have understood that he was assuming liability for the risk of the type of loss in question. The general understanding in the shipping market was that liability was restricted to the difference between the market rate and the charter rate for the overrun period and "any departure from this rule [is] likely to give rise to a real risk of serious commercial uncertainty which the industry as a whole would regard as undesirable".

[7] The majority arbitrators, in their turn, did not deny that the general understanding in the industry was that liability was so limited….

“Arbitral Precedent”: nature

- Arbitration generates precedent if “awards have some observable relevance to the future conduct of system participants.” (Weidemaier, 2010) – an example of this would be where an award articulates a tacit rule.
- The awards have precedential value if the system participants invest those awards with a normative authority.
- Evidence of this would be e.g.
  - System participants cite awards in the course of resolution of subsequent disputes
  - System participants change the wording of standard terms in response to awards
- Investing an award with normative authority does not necessarily mean that precedent is “binding”: sufficient for it to be persuasive.
- In the maritime field there is value in achieving the consistent interpretation of widely-used standard terms.

Weidemaier, 2010, 1926-7

Whether or not awards constrain future arbitrators, we can plausibly refer to a system of arbitral precedent if awards shape the manner in which lawyers frame their arguments, the language in which arbitrators justify their decisions, and the behavior of system users…. [E]ven without a doctrine of stare decisis, the mere existence of a relevant past award might provide an independent reason to reach a similar result now…. [P]ast awards offer parties and their lawyers a language in which to frame their arguments. Past awards may provoke deliberation and debate among arbitrators. And past awards invite arguments couched in normative terms like the need to ensure equality of treatment-that enjoy widespread support among system users notwithstanding their divergent preferences on matters of substance.

“Arbitral Precedent” in the courts

- If the award articulating the rule never makes it to court, what is the value of that articulation? This raises questions as to arbitrators’ legitimacy as producers of law.
- Even where the courts are considering a point of law on appeal from an arbitral award, they may not interfere with the arbitrators’ findings of fact (such as a finding relating to the existence or otherwise of a “market understanding” or a tacit norm): is this problematic?

The Aconcagua Bay [2018] EWHC 654 (Comm)

- The question of law was whether the warranty in a voyage charterparty that a berth is "always accessible" means that the vessel is always able not only to enter but also to leave the berth.
- Whilst the Vessel was loading, a bridge and lock were damaged. As a result the Vessel was unable to use a channel so as to be able to leave the berth until 14 days after she had completed loading. The Owners claimed damages for detention from the Charterers for the period of delay.
- The applicable principles of interpretation were not in issue.
- There were judgments and awards which have examined the term "always accessible" in relation to a vessel's arrival, but have not needed to address the position on departure.
- Obiter dictum in London Arbitration 11/97 (1997) LMLN 463 where "always accessible" requirement was found not to extend to leaving the berth (at [7]).

The Aconcagua Bay [2018] EWHC 654 (Comm)

- This decision however was taken before the promulgation of the Baltic Code 2003 in which the expression was specified as including departure. The same definition as in the Baltic Code 2003 is adopted by the Laytime Definitions for Charterparties 2013 (BIMCO special circular no. 8 dated 10 September 2013) (at [8]).
- The Baltic Code and BIMCO meaning contrasted with the Oxford English Dictionary definition of “accessibility”, namely, “capable of being approached” but not with the definition in other dictionaries which referred to “usability”.
- “always afloat, always accessible” suggests continuity (at [13]).
- The parties advanced arguments as to the appropriate risk allocation in voyage charterparties.
- The court noted “Where commercial parties have addressed the question of the accessibility of a berth, I can see no basis for a conclusion that they should be taken to have addressed entry alone.” (at [16]).

The Aconcagua Bay [2018] EWHC 654 (Comm)

- At [17] Knowles J held: “I accept that London Arbitration 11/97 may have informed some commercial decisions in the 20 years since that award. I should be cautious to disturb a meaning if it had become settled. As the Charterers submit, business people can be taken to choose words carefully when risk allocation is at stake. However London Arbitration 11/97 has not always been free from question when commentaries refer to it. The issue remains whether, as here, the Umpire was correct in law. In my respectful view he was not.”
- He noted that other commonly used wordings, such as “reachable on arrival”, were available to contracting parties if they wished to refer exclusively to arrival [18] and [19].

“Arbitral Precedent” in the courts

- As the courts may not make findings of fact, it is insufficient for the arbitrators to refer vaguely to a tacit rule: they need to articulate it effectively in a form that permits its application – see *The Mozart* [1985] 1 Lloyd’s Rep 239, 242.
- The *Achilleas* provides examples both of effective (dissenting award) and ineffective articulation (majority award)

The Mozart
[1985] 1 Lloyd's Rep 239, 242

… although I accept that the clause should be construed against the charterers … this approach cannot be adopted unless there is a credible alternative construction, narrower than the one relied upon. The arbitrators evidently considered that there was one for they referred to the market understanding of the clause (an understanding which, it may be noted, was not shared by their co-arbitrator, Mr. Besman), but they nowhere give expression to that narrower meaning. For my part, I cannot think what it could be.

The Achilleas [2007] 2 CLC 400, [70] and [71], per Rix LJ

[70]: Majority award
"The arbitrators agreed that if a lawyer had been asked for what damages the owners would be liable if the vessel was redelivered late, he would have referred to the overrun period measure of damages; however, if a broker had been asked the same question, he would have referred to the dangers of loss of fixture acknowledged in the award (para 17)."

[71]: Dissenting award
"3. …. Without ever having had the point argued previously, I shared what I regarded at the outset in this arbitration as the well-established view in the industry, namely, that if a vessel is redelivered late, the measure of damages which the charterer must pay to the shipowner (if the market has risen in the meantime) is the difference between the market rate for the period of the overrun and the charter rate."

Industry view of “Arbitral Precedent”

It is party autonomy that legitimises the arbitrators as dispute resolvers, but can it ever legitimise their role as law-makers? This legitimisation must stem more broadly from the industry that makes use of maritime arbitration: participants and observers need ‘actively [to shape] system norms that treat arbitrators as legitimate producers of law.’ (Weidemaier)

- Do parties’ submissions include citations of past awards”?
- Do arbitrators themselves promote consistency and predictability and accept responsibility for promoting them?
- Do maritime arbitrators bear the primary responsibility for lending certainty and predictability to maritime transactions?

Commercial Court Users' Group Meeting Report 13.03.2018

Claims under section 69 (appeal on a point of law):

Year	No. of Claims	Permission for appeal granted	Successful appeals
2015	60	20	4
2016	46	0	0
2017 - March 2018	56	10	1

Claims under section 68 (serious irregularity):

Year	No. of Claims	Successful challenges
2015	34	1
2016	31	0
2017 - March 2018	47	0

Reading

- M Davies, ‘More Lawyers but Less Law: Maritime Arbitration in the 21st c.’ (2010) 24 Austl. & N.Z. Mar. L.J. 13
- M Goldby ‘Enforceability of Spontaneous Law in England: Some Evidence from Recent Shipping Cases’ Chapter 3 in M Goldby and L Mistelis (eds), *The Role of Arbitration in Shipping Law* (forthcoming: OUP, 2016)
- W M Landes & R A Posner ‘Adjudication as a Private Good’ (1979) 8 J. LEGAL STUD. 235
- WMC Weidemaier, ‘Toward a Theory of Precedent in Arbitration’ (2009-2010) 51 Wm. & Mary L. Rev. 1895