3

ENFORCEABILITY OF 'SPONTANEOUS LAW' IN ENGLAND

Some Evidence from Recent Shipping Cases

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> ... the normative force of international trade usage depends not on what national law says about the usage but upon whether the power to decide on the existence and content of such usage has been exercised by a tribunal having competence under the *lex loci arbitri* and conforming with its procedural requirements.[1]
>
> Goode, 1995

A. Introduction

3.01 Historically the rules governing the relationships between merchants have been made largely by merchants. Indeed there are few areas of human interaction where there has been so little state-led intervention to impose mandatory rules governing private relationships between contractual parties.[2] Even today it is merchants themselves who develop the majority of the rules governing their relationships. Taking shipping law as a case study, this chapter explores how these privately-made rules come to be enforced by the English courts under the auspices of English law.

3.02 In this chapter the word 'rule' is being used in the sense of a normative standard governing a private commercial relationship. An example of such a rule would be a

[1] RM Goode, 'Usage and its Reception in Transnational Commercial Law' (1997) 46 *International and Comparative Law Quarterly*, 1, 34.

[2] A large majority of contracts governing relations in the maritime transport industry, in particular charterparty contracts, contracts of affreightment, and volume contracts remain largely unregulated. A notable exception are carriage of goods contracts which are regulated by international conventions, most commonly the International Convention for the Unification of Certain Rules Relating to Bills of Lading 1924 (Hague Rules) as amended by the Brussels Protocol in 1968 (Hague-Visby Rules or HVR).

contractual term. This chapter seeks first of all to analyse the process of rule-creation in the maritime transport industry. It argues that there are two features to the industry's rule-making activities. The first is the articulation in writing, usually using (adapted) standard terms drafted by international trade associations, of the main terms of their agreements, agreements which tend to assign positive performance obligations to participants. The second is the regular and repeated interaction between parties for the performance of the obligations undertaken, and, as a result, the establishment of common understandings (or 'tacit assumptions'[3]) within the industry of what performance entails, leading to the creation of reasonable expectations[4] in those responsible for effecting performance and those to whom performance is due. This is a manifestation of the phenomenon referred to as 'spontaneous law'.[5]

3.03 The rule-making activity thus results in a combination of (i) articulated or expressed rules that are enforceable directly as a result of the formation of a valid and binding contract, and (ii) unexpressed (or implicit) understandings that form part of the contractual context and that supplement the expressed rules.[6] The context within which these unarticulated rules come into existence is a commercial network of contractual relationships. Thus Lon Fuller in 1968 described custom as 'the inarticulate brother of contract'.[7] In this chapter a pluralistic theory of norm generation is being embraced[8] and I shall engage with the pragmatic question of

[3] RE Barnett, 'The Sound of Silence: Default Rules and Contractual Consent' (1992) 78 *Virginia Law Review*, 821, building on the work of Lon Fuller and Ian R MacNeil.

[4] See *First Energy v Hungarian International Bank* [1993] 2 Lloyd's Rep 194, 196, per Steyn LJ: 'A theme that runs through our law of contract is that the reasonable expectations of honest men must be protected. It is not a rule or a principle of law. It is the objective which has been and still is the principal moulding force of our law of contract.' For a detailed discussion see C Mitchell, *Contract Law and Contract Practice: Bridging the Gap Between Legal Reasoning and Commercial Expectation* (Hart, 2013).

[5] See generally N Barry, 'The Tradition of Spontaneous Order: a Bibliographical Essay' (1982) 5 *Literature of Liberty: A Review of Contemporary Liberal Thought*, 7.

[6] See R Cranston, 'Commercial Law and Commercial Lore', Chapter 4 in J Lowry and L Mistelis (eds), *Commercial Law: Perspectives and Practice* (LexisNexis Butterworths, 2006), 75–97: 'There is a commercial lore—a pattern of facts and beliefs—that guides the everyday behaviour of those engaged in commerce and commercial organisations.' (Ibid, [4.2]).

[7] LL Fuller, *Anatomy of the Law* (Pall Mall Press, 1968), 108. See also Goode (n 1), 7–8:

> There are two theories as to the nature of unwritten trade usage. One is that it is a particular form of international customary law. The other, adopted by (*inter alia*) English law and by Article 9(2) of the 1980 UN Convention on Contracts for the International Sale of Goods (the 'Vienna Sales Convention'), is that it takes effect as an implied term of a contract. Though the contract theory has been criticised as artificial, in that it ascribes to the parties a knowledge of the usage which they may not possess, this is entirely consistent with the objective theory of contract by which terms are interpreted not according to the subjective intention of the parties but as a reasonable person would interpret them. Usages depend for their efficacy on the settled practices of parties to contracts; they are essentially contractual in nature.

[8] See G Teubner, 'Global Bukowina: Legal Pluralism in the World Society', in G Teubner (ed), *Global Law Without a State* (Brookfield, 1997), 3–28; B de Sousa Santos, *Toward a New Legal Common Sense* (2nd edn, Cambridge University Press, 2002), esp. 85–98 and 208–214; R

how and to what extent these unarticulated rules will be enforced by the courts in the resolution of a dispute. The inquiry is focused on the courts of England and Wales.

3.04 One major consideration that needed to be taken into account in the writing of this chapter is that in recent decades fewer and fewer shipping law disputes have been resolved in the courts and an ever larger majority of them have been being resolved through arbitration, most frequently in London, in accordance with the Terms of the London Maritime Arbitrators Association (LMAA), and with the English Arbitration Act 1996. A resounding feature of all the recent court cases discussed under heading C.3 below is that they were initially the subject of arbitral proceedings and resulted in arbitral awards. Thus, this chapter argues that the way in which arbitration works is essential to an understanding of the process whereby English courts are able to enforce unarticulated rules made by the shipping industry. The chapter concludes with some recommendations on how the activity of arbitrators may assist this process.

B. A Classification of Privately-made Rules

3.05 In a study carried out for the International Chamber of Commerce in 1987,[9] Clive Schmitthoff classified trade usages as follows:[10]

1. Normative trade usages
   (a) *Statutory usages*: 'usages which have the force of law by virtue of a national enactment or a measure of delegated legislation',[11] including international conventions[12] (e.g. the Hague-Visby Rules, given the force of law in the UK by the Carriage of Goods by Sea Act 1971) and special trade usages (e.g. Incoterms).[13]
   (b) *Universal usages*: 'maxims universally accepted by all trading countries and derived from the *lex mercatoria*'.[14]

Michaels, 'The True Lex Mercatoria: Law Beyond the State' (2007) 14 *Indiana Journal of Global Legal Studies*, 447; R Wai, 'The Interlegality of Transnational Private Law' (2008) 71 *Law & Contemporary Problems*, 107; and GP Calliess and P Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart, 2010), 28–35 and 255–260. For a general overview see KP Berger, *The Creeping Codification of the New Lex Mercatoria* (2nd edn, Wolters Kluwer, 2010), 131–137.

[9] CM Schmitthoff, *International Trade Usages*, Institute of International Business Law and Practice Newsletter, Special Issue (International Chamber of Commerce, 1987).

[10] Ibid, [35].

[11] Ibid, [39].

[12] Ibid.

[13] Ibid.

[14] Ibid, [40]. Schmitthoff discusses these types of norms further, ibid, [64]–[74], and gives some examples of relevant maxims at [70].

2. Contractual trade usages
   (a) *Transnational formulations*: 'documents published by formulating agencies, such as the [International Chamber of Commerce] ICC or [United Nations Commission on International Trade Law] UNCITRAL, for the use of the international business community'.[15] An example relevant to maritime transport would be the United Nations Commission on Trade and Development (UNCTAD)/ICC Rules for Multimodal Transport Documents.[16]
   (b) *Other contractual usages*: 'documents issued by trade associations, professional organisations, interested trade circles or government bodies'.[17] These would include standard charterparty and bill of lading terms.
3. Factual trade usages

3.06 Schmitthoff explained categories 1 and 2 thus:

> The first category, normative trade usages, comprises usages which have the force of law in a national jurisdiction, like any other rule of law. The second category, contractual usages, are usages incorporated by the parties into their contract, by exercising their autonomy. They then become terms of the contract and are treated in the same manner as the other terms of the contract.[18]

3.07 About the third category of usages he explains that:

> ...they sometimes occur in international trading relations... [but] [t]hey are essentially local usages, limited to a particular locality or a particular trade.... The feature common to them is that they have to be proved by the party alleging them to the satisfaction of the judge or arbitrator in accordance with the rules of procedure of the forum. If they are so proved, they are binding on the parties.[19]

3.08 An interesting feature of the third category is the way in which a usage in this category is proved: its *existence* has to be proved as a matter of fact[20] while its *interpretation and application* are a matter of law.[21]

3.09 The second category of usages are those which equate to the first element in private rule-making activity, i.e. articulated or expressed rules that are enforceable directly as a result of their incorporation into a valid and binding contract. These rules tend to be enforceable because the parties have agreed, explicitly or implicitly (for example through a course of dealing),[22] to be bound by them.

[15] Ibid, [40].
[16] ICC Publication No. 481.
[17] Schmitthoff (n 9), [41]. See Lord Goff of Chiveley, 'Coming Together—the Future' in B Markesinis, *Clifford Chance Millenium Lectures: The Coming Together of the Common Law and the Civil Law* (Hart, 2000), 243–244, who argues that these standard form contracts are comparable to the codification of commercial law.
[18] Schmitthoff (n 9), [36]. See also Berger (n 8), 40–50.
[19] Schmitthoff (n 9), [37].
[20] Ibid, [25].
[21] Ibid, [22] and [23].
[22] See *British Crane Hire Corpn Ltd v Ipswich Plant Hire Ltd* [1975] QB 303. See also, with regard to the jurisdiction clause in a bill of lading, *Partenreederei M/S Tilly Russ v Haven & Vervoerbedrijf*

3.10 The question arises, which of Schmitthoff's categories encompasses within it unarticulated rules which have developed as a result of the market's understanding of how an international contract on standard terms is to be performed (i.e. the second element of private rule-making referred to under Heading A above)? These rules will have a normative quality (in that they require a certain standard of behaviour), but they cannot fall into Schmitthoff's category 1(a), not having yet been articulated. Neither are they likely to be in the nature of universal maxims (category 1(b)), their role being more akin to specific[23] 'gap-fillers' for widely-used written standard terms.[24] Therefore they would seem to fit more neatly into Schmitthoff's category 3: while they might relate to the way in which *internationally*-used standard terms are to be performed, therefore making them more than 'local', where they are found to exist, their effect may be said to be limited to a particular trade.

3.11 And what of Schmitthoff's first category of trade usages, which encompasses codified usages and uncodified general principles of commercial law? This type of rule may also prove important in interpreting contracts and filling contractual gaps. The main difference between a rule in the first category and a rule in the third is not merely that one tends to be general and the other specific, but that a rule in the first category tends to be long-standing and to have already been articulated in the past, so that its existence does not need to be proven by the parties to a dispute as a matter of fact. They will simply need to argue whether and if so how it applies to their particular contract, which is a question of law.

Nova (ECJ 71/83) [1985] QB 931, [18] where reference is made to 'the framework of a continuing business relationship'.

[23] See Goode (n 1), 12.
[24] See E Kadens, 'The Myth of the Customary Law Merchant' (2012) 90 *Texas Law Review*, 1153, 1174:

> Consider for instance the quintessential category of law merchant: bills of exchange. No other aspect of the historical commercial law seems to fit better the mythical law merchant image of universal, merchant-created rules. Bills of exchange grew out of commercial practice and eventually came to be employed (more or less) uniformly across Europe. Neither the Roman Law nor the existing customary law had anything similar. In addition bills of exchange fulfilled the criteria commonly associated with custom. The transactors interacted repeatedly and in the same fashion over a long period of time; the transactions were reciprocal because merchants would at different times have been debtors and creditors; the transactors were for quite a long time basically of a homogeneous social status; and they faced strong social sanctions against default given the importance of good faith and reputation for determining creditworthiness in this society.... [But] [h]ow could such a transaction have arisen without the transactors explicitly laying out the rules of their deal? They could not have achieved their end through repeat behavior to which they tacitly consented. In other words, the bill-of-exchange transaction grew out of contract, not custom.... Contracts inevitably had gaps and some of those gaps were filled by custom.

C. The Rule-making Activity of the Maritime Transport Industry: the Issues

3.12 Of the two elements that make up the rule-making activity of the maritime transport industry, the first raises questions of incorporation, the second of implication. The first element is rarely problematic: the parties will almost invariably indicate the set of standard terms which they are adopting for their contract and, should they wish to change or adapt any part of them, they will do so in writing.

3.13 The second element, being in the realm of unarticulated understandings and assumptions is where the issues tend to arise. In 1997 Roy Goode defined a trade usage as 'a practice or pattern of behaviour among merchants established by repetition which has in some degree acquired normative force'.[25] If one acknowledges that the pattern of behaviour in question becomes established as a result of repeated performance of broadly the same contractual terms among participants in a particular trade or market, one can infer that the pattern of behaviour is symptomatic of a common understanding among those participants that this is the way such terms should be performed. Another way of putting it is that there is an expectation that the pattern will be followed where those contractual obligations apply—hence an unarticulated rule. This highlights the usage's (or unarticulated rule's) role as a gap-filler.

3.14 There are two main questions which need to be addressed in relation to these unarticulated rules: first, how does one prove that they exist? And second, why and how are they enforced? These questions will be addressed in turn.

1. Proving the existence of unarticulated privately-made rules

3.15 An unarticulated rule that governs the relationship between two contractual parties must be proved to exist before the court can consider whether or not it applies to the dispute before it. The existence of the rule is a question of fact. There are traditionally two elements to proving the existence of the rule.[26] The first is to prove that things are as a matter of prevalent trade practice done in a certain way. Traditionally, this required the trade practice in question to be proven to be 'reasonable, certain and notorious'.[27] As aptly put by Ungoed-Thomas J,[28]

[25] Goode (n 1), 7.

[26] They are similar to the elements necessary for proving international custom. See International Court of Justice Judgment of 27 June 1986, *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* ICJ Reports 1986, p 14; General List No. 70, [183]–[186]. See also discussion in J Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP, 2012), Chapter 2. For a theoretical analysis see Calliess and Zumbansen (n 8), 261–274.

[27] See *Devonald v Rosser & Sons* [1906] 2 KB 728, 743.

[28] *Cunliffe-Owen v Teather & Greenwood* [1967] 1 WLR 1421, 1438–1439.

> For the practice to amount to such a recognised usage, it must be certain, in the sense that the practice is clearly established; it must be notorious, in the sense that it is so well known, in the market in which it is alleged to exist, that those who conduct business in that market contract with the usage as an implied term; and it must be reasonable.... A party to a contract is bound by usages applicable to it as certain, notorious and reasonable, although not known to him.

3.16 The second element is to prove what is known as *opinio iuris sive necessitatis*, i.e. the fact that the practice was followed out of a sense of obligation, because it was considered as being binding by those to whom it applied. The distinction was very well explained by Slade LJ in *General Reinsurance Corp v Forsakringsaktiebolaget Fennia Patria*:[29]

> There is... the world of difference between a course of conduct that is frequently, or even habitually, followed in a particular commercial community as a matter of grace and a course which is habitually followed, because it is considered that the parties concerned have a legally binding right to demand it. As Ungoed-Thomas J. pointed out in *Cunliffe-Owen v Teather & Greenwood* [1967] 1 WLR 1421, 1438: 'What is necessary is that for a practice to be a recognised usage it should be established as a practice having binding effect.'

3.17 One further thing to note is the nature of these unarticulated rules as *jus dispositivum*: they are in the sphere of optional law (or default rules). Parties have the autonomy to exclude them if they so wish, hence the need to show, after one has proved their existence, that they have indeed come to form part of the contract.[30]

3.18 Historically, in the case of commercial disputes, two principal methods have been employed to establish such existence in the English courts, each of which shall be discussed briefly below. This shall be followed by an analysis of the current approach as it emerges from recent shipping cases.

a. Merchant juries

3.19 From at least Tudor times until the eighteenth century unarticulated commercial rules tended to be established in the English jurisdiction through the use of merchant juries.[31] A prime example of a normative usage established in this way comes from the case *Lickbarrow v Mason*.[32] In this case, the House of Lords approved the judgment of the King's Bench where it had been held for the first time by an English court that property in the goods described in a bill of lading can be transferred by its endorsement and delivery. This notion was confirmed by a merchant jury when the case went back to the King's Bench, following a *venire de novo* ordered by the House of Lords because of a defect in the pleading. The jury held that the transfer or endorsement of the bill had this effect 'by the custom of merchants'.[33]

[29] [1983] QB 856, 874.

[30] See discussion under Heading C.2 below.

[31] See S Mentschikoff, 'Commercial Arbitration' (1961) 61 *Columbia Law Review*, 846, 854–855.

[32] (1787) 2 TR 63, 100 ER 35.

[33] (1794) 5 TR 683, at 685–686.

3.20 Indeed the concept of using a jury to make findings of fact is central to the historical development of the common law, and in commercial cases in particular the ability of a 'self-informing'[34] jury of experts to '[form] their judgment from their own notions and experience, without much assistance from anything that passed'[35] was highly prized by Lord Mansfield and his successors, Lords Ellenborough and Campbell.[36] As far as concerns the question as to the existence and applicability of customs, the jury had both an informative function, informing the court of the existence of relevant trade usages and customs and a decision-making function, invoking the customs in reaching their verdicts.[37] Several cases suggest that judges were reluctant in the extreme to disturb the factual findings by interfering with the verdicts of mercantile juries.[38]

3.21 As *Lickbarrow* suggests, the use of merchant juries in particular permitted the court to interpret the contract in the light of its context, a context with which the jurors would have been intimately familiar, being themselves actors within the same markets.[39] It is submitted that this same familiarity, and more specifically familiarity with standard contract terms and their operation,[40] particularly qualifies specialist arbitrators to decide disputes based on the facts of the case.[41] They are in other words uniquely placed to articulate previously unarticulated rules that have evolved spontaneously as a result of interaction of players within the relevant market.

b. Witness statements

3.22 Merchant juries fell into disuse in England in the second half of the nineteenth century, which meant that alternative ways had to be found of establishing custom or binding usage. The case of *Nelson v Dahl*,[42] which involved an allegation by the plaintiff that it was the custom in the Baltic timber trade in the port of London for

[34] J Oldham, *The Varied Life of the Self-Informing Jury* (Selden Society, 2005), 23.
[35] *Lewis v Rucker* (1761) 2 Burr 1167, 1168.
[36] Oldham (n 34), 25.
[37] Ibid, 24–31. Oldham, ibid, 27 and 29, notes that mercantile juries also participated actively in the examination of witnesses and volunteered observations about mercantile practices.
[38] See examples cited by Oldham, ibid, 27–29.
[39] R Davison, 'Arbitration—Its Future—Its Prospects' [1984] *Arbitration*, 147, 148 observes:

> The inadequacies of the common law rules regulating mercantile transactions, the technicalities of common law procedure and the ignorance and bias of juries created a general need for more efficient and more expert tribunals. Thus in the Tudor era, the Privy Council and Chancery would resolve its mercantile cases by reference to mercantile arbitrators, and common law courts used merchant juries.

[40] Mentschikoff (n 31), 853 observes that according to an empirical study that was carried out, arbitration appears to be perceived as a particularly suitable mechanism for the resolution of disputes between parties to commercial contracts on standard terms.
[41] 'Court actions are typified by the absence of expertise as to the particular business or trade involved, on the part of both the judge and the jury, but in the self-contained trade group arbitration mechanisms, the arbitrators all have this expertise.' Ibid, 859–860. See also ibid, 868: 'Fact-finding norms of an informed nature in commercial matters are more likely to reside in arbitrators than in a jury or even in a judge.'
[42] (1879) 12 Ch D 568.

the importers of timber to provide berths for the discharge of the cargo, is a particularly good example of the difficulties to which this gave rise.[43] Jessel MR[44] in the Court of Appeal observed:[45]

> No doubt the Plaintiffs called some witnesses who testified with more or less particularity as to the existence of this usage in their opinion. On the other hand, the Defendant called many, and would have called many more had I not suggested to the leading counsel for the Defendant that he had better stop because I had heard enough,—merchants, shipowners, ship-brokers, or agents of ships, none of whom had ever heard of such a usage. They not only denied the existence of it, but they never heard of it. Some of them engaged in the largest transactions, persons of unquestioned honour and veracity, stated that until this case they never heard that such usage existed. I cannot help thinking that after that evidence it is impossible for this Court to say there is a usage of trade so well known, so clearly established, that the Court is to insert it in this charterparty....
>
> It is a conditional term of the contract, and it must be as clearly established as the rest of the contract, although it must be established by oral evidence. In my opinion, the obligation thrown on the Plaintiffs of establishing the existence of the usage has not been discharged, the case fails, and the action must be dismissed.

3.23 Witnesses brought before the courts to prove a binding usage, were often expert witnesses depending on the nature of the usage that one was attempting to prove. Many interesting examples may be given, in particular from the field of marine insurance, though one will suffice for present purposes. Under the Marine Insurance Act 1906, s 50, marine insurance policies are assignable by indorsement or other customary manner, unless they contain words expressly prohibiting assignment. *The Angel Bell*[46] is an example of a case where the court was asked to find that the policy had been assigned by a 'customary manner' other than indorsement. Here, Donaldson J relied on the statement of one witness to the effect that 'unsigned and undated notices are accepted in the market as affecting [*sic*] an assignment',[47] and

[43] See also *Libyan Arab Foreign Bank v Bankers Trust* [1988] 1 Lloyd's Rep 259, 278 per Staughton J:

> With monotonous regularity parties on the summons for directions apply for leave to call expert evidence of the practice of bankers, or of underwriters, or of insurance brokers, or of others engaged in the market concerned. All too often the evidence shows merely that the expert called by one party believes the contract to mean one thing, and the expert for the other believes that it means something different.

[44] The same Jessel MR again commented upon the difficulties of proving custom, this time an agricultural custom in *Tucker v Linger* (1882) 21 Ch D 18, 33, 34, CA, affirmed (1883) 8 App Cas 508, HL, which concerned an alleged agricultural custom, where he held that

> Those who have had to deal with evidence upon these subjects know that you very seldom get even two witnesses to give exactly the same account of an agricultural custom, unless it is of the simplest kind.... The custom... must be collected not from what the witnesses say they think the custom is, but from what was publicly done throughout the district.

[45] *Nelson* (n 42), 576.
[46] *Iraqi Ministry of Defence v Arcepey Shipping Co SA (The Angel Bell)* [1979] 2 Lloyd's Rep 491.
[47] Ibid, 497.

indicated that, while 'it would not have required much to rebut this evidence',[48] the cargo interests had not done so. This suggests that provided the witness is reliable, it may be sufficient for one party to bring evidence that a certain manner of assignment is 'accepted in the market' to prove that it is customary, provided that the evidence is not successfully rebutted by the other party.[49]

2. Enforcement of privately-made rules

3.24 As suggested by the quote from *Nelson v Dahl*[50] above, once the existence of a trade usage was established, the court would proceed to consider the question of law whether on the true construction of the contract such usage formed part of the agreement. This entails the application of the objective 'reasonable person' test:[51] the court will ask what the reasonable person would have understood to be the substance of the exchanges between the parties, or, as it has been otherwise expressed, what the most 'plausible public understanding'[52] of the transaction would be.

3.25 It must be remembered that where a trade practice is proven to exist and to have achieved a normative value (in the sense that it obtains binding effect), as indicated by Ungoed-Thomas J,[53] a party will be bound by it whether s/he knows of it or not. Indeed the unarticulated rule will be deemed part of the general market understanding of how the particular contract is to be performed. This application of norms to individuals who might be unaware of their existence is justified on the basis of reasonableness.[54] Having chosen to interact in that particular market, using those particular standard terms, a party to a contract should be deemed to be bound by the meaning attributed by the market to (or, in other words, the market understanding of) those terms, unless the parties' interaction was such that by applying the objective test one would conclude that by their words or conduct they displaced the general market understanding with an alternative. Thus once a relevant unarticulated rule is 'found' as a matter of fact, it is presumed to apply to the contract unless that presumption is rebutted.

3.26 Therefore, so long as the custom in question were not inconsistent with the express wording of the contract, the contract would be interpreted in the light of the custom.[55] However this was not the case where there was inconsistency. In

[48] Ibid, 497.

[49] It would normally be the party alleging a custom who would have to prove it to the satisfaction of the court: *The Dean and Chapter of Ely v Caldecot* (1832) 8 Bingham 439, 447; *'Strathlorne' Steamship Co. v Baird & Sons* 1916 SC (HL) 134, 136.

[50] *Nelson* (n 42), 576.

[51] *Smith v Hughes* (1871) LR 6 QB 597.

[52] B Chapman, 'Rational Choice and Reasonable Interactions' (2006) 81 *Chicago-Kent Law Review*, 75, 79.

[53] *Cunliffe-Owen v Teather & Greenwood* [1967] 1 WLR 1421, 1438–1439.

[54] For a discussion of the objective standard and the meaning of 'reasonableness' see M Hevia, *Reasonableness and Responsibility: A Theory of Contract Law* (Springer, 2013), Chapter 7.

[55] See for example *Aktieselkab Helios v Ekman & Co* [1897] 2 QB 83 (CA).

Petrocochino v Bott,[56] the bill of lading covering the carriage of goods from Calcutta to London provided that 'the ship's responsibility shall cease' upon the goods being 'delivered... from the ship's deck'. The bill of lading was for sixty-nine bales of hides, however only sixty-eight reached the consignee. In the course of the hearings a custom was proved to apply to the discharging of goods in Victoria Docks in London whereby the goods would be transferred first onto the quay (at the shipowner's expense) and then from the quay to lighters sent by the consignee. If the lighters did not arrive to collect the goods within twenty-four hours the goods would be warehoused at the cargo-owners' expense. It appeared that all sixty-nine bales had been put onto the quay but that one had gone missing subsequently. The cargo-owners alleged that delivery was not complete while the goods were still on the quay. Brett J decided as follows:[57]

> ...the mode and manner of delivery of goods according to the usage of the port of London is, not an immediate delivery from the ship to the consignee, but from the ship to the quay, and from the quay to the consignee. Having regard to that usage this bill of lading is drawn. It seems to me that it could not more accurately describe the mode of delivery from the ship's deck to an intermediate place of delivery. That being so, according to the true construction of this bill of lading, I am of opinion that the moment the ship-owner has cleared the goods from the deck, he ceases to be responsible in any way for them; and that, whatever remedy the plaintiffs may have against the dock company, or any one else, they cannot under the circumstances charge the ship-owner with the loss of the bale in question.

3.27 Thus in spite of the fact that a usage was proved, the clear wording of the bill of lading ousted the usage in favour of an interpretation that was in line with the clear meaning of the words and that was inconsistent with the usage.

3. Current methods of establishing and enforcing unarticulated rules

3.28 There were two landmark 1980s cases where the parties argued on the basis of the existence or otherwise of a binding usage. The first was the abovementioned *Fennia Patria* case of 1983, where the question arose whether there was a custom to the effect that until such time as the risk had been fully subscribed the assured had the right to withdraw from an insurance contract made in the London market. Staughton J at first instance found that the evidence given by witnesses was sufficient to prove the alleged custom,[58] but he was reversed on appeal.[59] Lord Kerr held that the evidence brought showed how such situations tended to be resolved in practice, namely by allowing the assured to withdraw subject to premium for time spent on risk. However, it was insufficient to prove a binding usage, i.e. a right on the part of the assured to withdraw from what was a binding contract with each

[56] (1874) LR 9 CP 355.

[57] Ibid, 356.

[58] [1982] 1 Lloyd's Rep 87, 97.

[59] [1983] 2 Lloyd's Rep 287, 294–297.

individual subscriber who scratched the slip. Thus the argument based on the existence of a binding usage failed as the court was not persuaded that the practice in question was followed *opinio iuris*.

3.29 The second case was *Libyan Arab Foreign Bank v Bankers Trust Co*,[60] which was decided in 1988, and where once again it was held that though there was a practice whereby Eurodollar transactions were cleared in the United States, the evidence did not establish that this was because such methods of transfer were the only ones that a bank customer had the right to demand,[61] in other words, once again, *opinio iuris* had not been proven. Therefore, applying *Fennia Patria*, there was no binding usage.

3.30 The difficulty of proving *opinio iuris*, understandably, was having an effect on legal advisers' willingness to attempt proof of custom or binding usage before the English courts at this time. *South British Insurance v Mediterranean Insurance & Reinsurance*[62] is a very good illustration of this reluctance. The plaintiffs claimed to be entitled to cede under the re-insurance cover between the parties, at the rate of 32.5 or 35 per cent of original net premium, the risk of total loss and/or constructive total loss of vessels the original insurance of which was itself in respect of total loss and/or constructive total loss only. On the other hand counsel for defendants argued that the percentage figure applied to the original net premium in respect of vessels originally insured on an all-risks basis. Below are reproduced some extracts from the case where the court sometimes cites and sometimes summarizes the arguments and findings made:[63]

> In par. 7 [of the amended points of defence] there appear the words—
>
> ...35% of original net premium is the element in all risks rate which is generally recognised in the market as attributable to the risk of total loss [- and it was asked -] whether it is alleged that there exists a custom of the market to this effect.
>
> The answer was:
>
> *It is not alleged that there exists a custom* but it is alleged that the *principle* stated is *standard* and *well recognized*.... It is inconceivable that *any reasonable person* in the insurance market could have intended that the result contended for by the Plaintiffs should ensue.[64]

3.31 Such a result was observed by an expert witness to be 'contrary to all common sense and *market understanding*...'.[65] Subsequently, throughout the decision, the court appears to be perplexed by the question of what exactly the counsel for defendants is trying to do if he is not attempting to prove a custom.[66] There is a

[60] [1988] 1 Lloyd's Rep 259.
[61] Ibid, 277–278.
[62] [1986] 2 Lloyd's Rep 247.
[63] Ibid, at 248–249, per Neill LJ.
[64] Emphasis added.
[65] Ibid, 249, emphasis added.
[66] Indeed this perplexity continues to appear from time to time where a market understanding is alleged. See *Eitzen Bulk A/S v TTMI SARL (The Bonnie Smithwick)* [2012] EWHC 202, [27] where Eder J observed: 'Mr Saloman QC submitted that TTMI's construction is in effect one which

reference[67] to Bingham J's first instance decision where he stated: '[t]he First Defendants may or may not succeed in proving a custom of the market...', however counsel for defendants continued to insist that what he was arguing were 'questions of reasonableness and *the practice of the market*'.[68] He certainly appears to be alleging that there is a relevant market practice or market understanding, that it is a reasonable one, and that it applies to the contract before the court. Yet he insists that he is not trying to prove custom or binding usage. In view of the proximity in time of this litigation to the *Fennia Patria* decision, also on re-insurance, this evasiveness is not surprising.

3.32 In view of the decline of willingness to attempt to prove custom, the next step for this chapter is to explore whether and if so how unarticulated rules are still enforced in the English courts. As indicated above,[69] where binding trade usages were found to exist, they were applied as implied contractual terms. This approach to enforcement of trade usages was key to the transition away from having to prove a practice which was certain, notorious, and reasonable, and (most importantly) followed *opinio iuris*. Instead the question whether any unarticulated rules apply to the relationship between the parties is nowadays considered as part of the process of contractual construction.[70]

3.33 This transition was able to piggy-back onto an important evolution in the approach to the construction and interpretation of contracts that was taking place at the time, namely the courts' move towards interpreting a contract within its factual matrix. The expression 'matrix of facts' was introduced by Lord Wilberforce in *Prenn v Simmonds*[71] decided by the House of Lords in 1971 and the notion evolved into one of Lord Hoffmann's principles of contractual interpretation famously expounded in *West Bromwich Building Society*[72] in 1998. Of the five principles set out by Lord Hoffmann, the first two are particularly interesting for our purposes:

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the *background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*

would "reasonably be understood by the community of market users of the 2003 form". That may or may not be the case but there is nothing in the Award of Reasons to support such conclusion and, *short of a custom*, it seems to me that any such "market understanding" would, in any event, be inadmissible.' Emphasis added.

[67] Ibid, 250.
[68] Ibid. Emphasis added.
[69] See discussion under Headings C.1 and C.2.
[70] See Mitchell (n 4), 80: 'trade customs may be the source of commercial expectations, but these are accorded legal validity only by linking the custom to core contract notions of individual consent and agreement, usually through the mechanism of implied terms. The legal force of custom and usage must derive from incorporation into the contract, or else they operate as interpretative criteria. They are not independent sources of obligation'.
[71] [1971] 1 WLR 1381, 1384.
[72] *Investors Compensation Scheme Ltd v West Bromwich Building Society (No.1)* [1998] 1 WLR 896, 912–913.

(2) The background was famously referred to by Lord Wilberforce[73] as the 'matrix of fact', but this phrase is, if anything, *an understated description of what the background may include*. Subject to the requirement that *it should have been reasonably available to the parties* and to the exception to be mentioned next,[74] *it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.*[75]

3.34 Thus, instead of proving first that a trade practice was in existence and second that it was a binding usage to be enforced as part of the contract between the parties, counsel could argue simply that there was a market understanding (or tacit assumption) which formed part of the contract's factual matrix and which therefore should be taken into consideration when construing exactly what the parties had agreed to do under the contract. The need separately to prove *opinio iuris* was therefore avoided: it did not matter whether or not the practice in question was observed from a sense of legally binding obligation, only that it was reflected in an appropriate common understanding in the context of which the parties operated so that it became an implied term of their agreement.

3.35 The difficulty with this approach is as follows: the old approach to enforcing commercial custom established exactly what findings of fact had to be made before proceeding to the question whether on the true construction of the contract the proven usage formed part of the agreement, which was a question of law. In the process, the adjudicator would give voice to the unarticulated rule when setting out his/her findings of fact. But no similar clear and certain rules on proving the existence of the unarticulated rule within the process of contractual construction have (yet) become established. This is of limited impact where the same adjudicator has jurisdiction over both questions of fact and law. The real issues arise where the dispute starts life as an arbitration and is then the subject of appeal to the courts, which, as is well known, will be bound by the arbitrators' findings of fact as set out in the award.[76]

3.36 In the shipping field, the popularity of arbitration as a method of dispute resolution has reduced significantly the number of cases that start life as litigations before the English courts. Nowadays it appears that a preponderance of charterparty cases decided by the English courts come in the shape of appeals on points of law from arbitral awards. What this means of course, is that the court is called upon to determine only questions of law,[77] questions of fact (including the existence or otherwise of an unarticulated rule) being the sole remit of the arbitral tribunal.

[73] See *Prenn v Simmonds* [1971] 1 WLR 1381, 1384.
[74] See principle 3: 'The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent.' *West Bromwich Building Society* [1998] 1 WLR 896, 913.
[75] Emphasis added.
[76] See discussion under Heading D infra.
[77] See Arbitration Act 1996, s 69.

3.37 The process of contractual construction and interpretation has been reflected in a number of recent charterparty cases where the court had to consider and decide whether the contract was to be interpreted and the dispute decided in the light of the existence or otherwise of unarticulated rules. Three particularly noteworthy ones will be discussed below as illustrations.

a. The Achilleas

3.38 The first and most prominent example is *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)*,[78] where the question at issue was whether upon late re-delivery of a ship under a time charterparty, the charterer was liable for damages for breach of contract based either (a) on the loss of the follow-on charter as a whole, as argued by the shipowner or (b) only the difference between the market and charter rates of hire for the overrun period, as argued by the charterer. In the absence of agreement to the contrary, the extent of liability was to be determined by the tried and tested formula established in *Hadley v Baxendale*.[79] This formula was applied by the majority arbitrators, the High Court, to whom the charterers appealed, and the Court of Appeal. Reversing all of them, the House of Lords found for the charterers holding that liability for damages for breach of contract was founded upon the presumed intention of the parties and required the court to determine objectively what was the common basis on which the parties had contracted.

3.39 Lord Hoffmann held that the general market understanding of what the charterer was assuming responsibility for must be considered part of this common basis.[80] The general market understanding was stated to be that a charterer who returned a vessel late was liable in damages only for the period of late delivery and that therefore the charterers could not be considered to have assumed responsibility for the losses claimed by the shipowner, especially since such losses had been caused by volatile market conditions which amounted to an unusual occurrence outside the parties' contemplation. The end-result was that this alleged market understanding, in the manner of an implied term establishing how to calculate damages payable upon late re-delivery, displaced the rule in *Hadley*.

3.40 What is interesting to examine is how such 'general market understanding' was established: it was based on a pronouncement made by only one of the arbitrators, the dissenting one, that '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...',[81] although Lord Hoffmann noted that the other arbitrators 'did not deny that the general understanding in the industry was that

[78] [2008] UKHL 48.
[79] (1854) 9 Exch 341.
[80] Ibid, [11] and [23].
[81] Ibid, [6].

liability was so limited'.[82] The House of Lords did not enter into the question of whether this market understanding was certain, notorious, and reasonable and followed *opinio iuris*, and whether the view of one arbitrator unsupported by further witness statements was sufficient to establish the existence of this unarticulated rule. Indeed these were questions of fact which fell not within the remit of the court but within that of the arbitral tribunal.[83] The relevant extracts from both majority and dissenting awards were quoted by Rix LJ in the Court of Appeal judgment.[84] The majority arbitrators found as follows:

> 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).[85]

The dissenting arbitrator on the other hand made the following finding:

> 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.[86]

3.41 It is immediately noticeable that of the two pronouncements the second is clearly giving voice to what the arbitrator considers an unarticulated rule applicable to the contract between the parties. The pronouncement of the majority arbitrators is far less clear and decisive. It attempts to find some support in the market for the result achieved by the rule in *Hadley*, however it does so while admitting that the views of legal advisers would be in line with what the dissenting arbitrator had indicated was, in his view, the unarticulated rule.

3.42 In the absence of evidence of facts indicating that it was not the parties' intention at the time of entering into the contract that the party in breach should assume responsibility for some loss which 'arose naturally'[87] out of the breach (such as a general market understanding to that effect), *Achilleas* can have little effect. In

[82] *Achilleas* (n 78), [7].
[83] See discussion under Heading D.
[84] *The Achilleas* [2007] 2 CLC 400, [70] and [71], per Rix LJ.
[85] Ibid, [70].
[86] Ibid, [71]. Emphasis added.
[87] *Hadley v Baxendale* (1854) 9 Exch 341, 355, per Alderson B:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

support of this, one need look no further than *The Sylvia*,[88] another charterparty case decided shortly following *Achilleas*. The dispute arose when, as a result of the owners' failure to maintain the vessel in accordance with their contractual obligations, the vessel missed the laycan on a sub-fixture that had been entered into by the time-charterers. The essential issue which arose on appeal from an arbitration award was whether damages based on the loss of the sub-fixture were too remote in law. The owners sought to rely upon *Achilleas*, contending that the recoverable damages were limited to the difference between the charter and the market rate during the period of delay. In considering whether the owners could rely upon *Achilleas*, Hamblen J put it in a nutshell when he said:[89]

> The orthodox approach [laid down in *Hadley v Baxendale*[90]] remains the general test of remoteness applicable in the great majority of cases. However, there may be 'unusual' cases, such as The Achilleas itself, in which the context, surrounding circumstances or general understanding in the relevant market make it necessary specifically to consider whether there has been an assumption of responsibility. This is most likely to be in those relatively rare cases where the application of the general test leads or may lead to an unquantifiable, unpredictable, uncontrollable or disproportionate liability or where there is clear evidence that such a liability would be contrary to market understanding and expectations.

In *Sylvia*, unlike in *Achilleas*, there was no finding by the arbitrators of a general market understanding or expectation that justified a departure from the orthodox approach to assessing damages. **3.43**

One further point deserves to be made regarding *Achilleas*. This relates to how a relevant 'market understanding' is to be established. The case seems to provide some support for the proposition that if the dispute is decided through arbitration, arbitrators are viewed essentially as being in the position of experts on the particular market themselves, and can be considered authorities on the fact of the existence or otherwise of such an unarticulated rule, (as were the merchant juries). It does not appear from any of the judgments (First Instance, Appeal, or House of Lords) that the dissenting arbitrator's view of what constituted market understanding was based on any other evidence, expert or otherwise, brought before the panel.[91] **3.44**

[88] *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd (The Sylvia)* [2010] EWHC 542 (Comm). See also *ISPAT Industries v Western Bulk* [2011] EWHC 93 (Comm) [52]–[53].
[89] *The Sylvia* (n 88), [40].
[90] (1854) 9 Exch 341.
[91] There is a reference to 'expert evidence' in the Court of Appeal judgment [2007] 2 CLC 400, [75], however this does not appear to be a reference to evidence of the alleged market understanding:

> [The dissenting arbitrator] went on to make a distinction ('at least arguable') drawn from the expert evidence (which had been prepared by the parties but was not technically before the arbitrators and to which he therefore should not have referred) between a voyage charter or trip time charter on the one hand and a period time charter (such as the Cargill fixture) on the other. He said that period time charters represented only 15% of the relevant market and therefore said that contemplated losses arising from the loss of a period fixture could only be taken as 'a relatively unlikely possibility' (at para 12).

3.45 But where a dispute goes directly before the courts it is submitted that the general market understanding would have to be established as a fact in the usual way, using witnesses and other evidence of the existence of unarticulated rules. *Grimes v Gubbins*[92] is a case decided subsequently to *Achilleas* which was not an appeal from an arbitration. It involved a situation where a land developer's development scheme was delayed in its implementation by a breach of contract by a consulting engineer. The market value of the development fell during the period for which its completion was delayed due to the engineer's breach of contract, and the developer claimed damages for the loss he suffered as a result. The judge at first instance in resolving the issue asked the question posed in the *Achilleas*: 'whether the appellant could reasonably be considered to have assumed responsibility for such a type of loss, given the commercial background to the contract'.[93] In answering the question the judge noted that the *Achilleas* had not changed the rule in *Hadley*, and that unless the commercial background to the contract meant that the standard approach would not reflect the expectation or intention reasonably to be imputed to the parties, such standard approach to determining whether losses were recoverable should be applied. This view was upheld on appeal,[94] and in both instances the court found that the engineer was liable for the loss: no evidence had been brought before the court of any general understanding or expectation in the land development market as to assumption of responsibility for this type of loss.[95]

b. The Astra

3.46 Another recent controversial case concerning the interpretation of standard charterparty terms was *The Astra*.[96] The case concerned a withdrawal clause under a time charterparty on the NYPE 1946 form as amended (clause 5). The question which arose was: had the charterers, by their conduct in failing to pay hire within the time permitted, committed a repudiatory breach of the contract? The court concluded that they had, having regard to the totality of the evidence, which suggested that the charterers intended to perform the balance of the charterparty in a manner which was not consistent with it.[97]

3.47 In the course of the arguments before the court, the controversial issue was raised whether clause 5 of the contract made the obligation to pay hire punctually a condition of the contract. This issue was not required to be decided as part of the ratio

This factor combined with the 'utterly exceptional rate' featuring in this case led him to question whether it could fairly be said that a loss of this 'type' must have been within the contemplation of the parties (at para 13); the owners' claim therefore had 'the feel' of special damages (at para 14).

92 [2013] EWCA Civ 37.
93 Ibid, [11].
94 Ibid, [24].
95 Ibid, [26].
96 [2013] EWHC 865 (Comm).
97 Ibid, [28].

but at the parties' request, Flaux J pronounced himself upon it obiter.[98] The clause provided as follows:

> ...failing the punctual and regular payment of the hire...the Owners shall be at liberty to withdraw the vessel from the service of the Charterers, without prejudice to any claim the Owners may otherwise have on the Charterers.

3.48 As can be seen, the clause itself is ambiguous. It does not make clear whether the parties intended the inclusion of a right to withdraw to have the effect of making the obligation to pay hire punctually a condition of the contract, or whether they were merely asserting the availability of a self-help remedy (an option to cancel), were this obligation not to be fulfilled.[99] In this case one might think that evidence would be sought of general market understanding of the nature of the obligation, however it appears that very little was forthcoming in this regard:

> In relation to owners' argument that the obligation to pay hire under clause 5 of the charterparty was a condition, 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.[100]

3.49 This statement by the arbitrators suffers somewhat from the same ambivalence as the statement made by the majority arbitrators in *Achilleas*.[101] This ambivalence means that it cannot be viewed as an articulation of a previously unarticulated rule. It is interesting to note the use of the words 'generally accepted position' which begs the question: 'generally accepted by whom?' What the arbitrators appear to be attempting to communicate is that while from the perspective of commercial common sense, punctual payment of hire should be viewed as an essential part of the charterer's contractual obligations (therefore a condition), this would not be the legal advice that market participants would be given,[102] in that a contrary

98 Ibid, [33]. In the more recent case of *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd* [2015] EWHC 718 (Comm), Popplewell J declined to follow Flaux J on this point. At the time of writing *Spar Shipping* is under appeal.
99 In *Spar Shipping* (n 98), [92] et seq, Popplewell J considered this interpretation of the clause.
100 *Astra* (n 96), [14]. Emphasis added.
101 See sub-heading C.3.1 above.
102 This is supported in Flaux J's judgment where he indicates:

> It is clear from the previous two paragraphs of the Reasons that the tribunal were strongly influenced in reaching that conclusion by the view expressed at para 16.132 of the current (sixth) edition of Coughlin, Time Charters (and indeed in previous editions).

Astra (n 96), [34]. Cf. Popplewell J's interpretation of the matter:

> In the 40 years since [*The Brimnes*], owners and charterers have conducted business, and resolved disputes, on the footing that the payment of hire is not a condition, or at the very least may not be. The NYPE, Baltime and Shelltime forms of time charter have not been altered to make clear that payment of hire is a condition; nor so far as I am aware have any other standard time charterparty forms. Nor has there grown up any regular practice of including bespoke terms to that effect in time charters...

Spar Shipping (n 98), [201].

pronouncement had been made in *The Brimnes*[103] with respect to a similarly-worded clause. Counsel for the charterers attempted to argue, before Flaux J that 'the absence of any clear authority that clause 5 or provisions like it were conditions of the contract somehow reflected a "*market understanding*" that such provisions would not constitute conditions'.[104]

3.50 However, Flaux J found that the point had always been controversial at law and distinguished *The Brimnes* on the basis that the charterparty in that case did not contain an anti-technicality clause establishing the limits of any period of grace.[105] He cited several cases that included dicta which, he argued, indicated that the court considered the punctual payment of hire as being an essential term of the contract, synonymous with a condition.[106] He further argued that this conclusion was the correct one to reach on the basis that time is of the essence in mercantile contracts[107] and treating the clause as a condition rather than an intermediate term was conducive to commercial certainty.[108] The arbitrators' commercial instinct was therefore justified on the basis also of these basic notions applicable to the generality of commercial contracts.

[103] *Tenax Steamship Co v Reinante Transoceanica Navegacion SA (The 'Brimnes')* [1973] 1 WLR 386, 409, per Brandon J:

> I have reached the conclusion that there is nothing in clause 5 which shows clearly that the parties intended the obligation to pay hire punctually to be an essential term of the contract, as distinct from being a term for breach of which an express right to withdraw was given. It follows that I decide the first point of construction in favour of the charterers.

Brandon J's decision was upheld on Appeal, [1975] QB 929, but the Court of Appeal did not address the question as to whether the clause was a condition. In *Spar Shipping* (n 98), [128], Popplewell J commented thus:

> Even if one were to treat the condition point as conceded by owners in the Court of Appeal, I regard it as significant that no member of the Court expressed any reservation about that aspect of Brandon J's decision.... The decision involves at least implicit approval by a strong Court of Appeal of Brandon J's decision that payment of hire was not a condition.

[104] *Astra* (n 96), [74].

[105] Ibid, [111]. This did not persuade Popplewell J. See *Spar Shipping* (n 98), [181]–[186].

[106] See in particular, *The Petrofina* [1949] AC 76 (cited by Flaux J at [58]), *The Mihalios Xilas* [1978] 1 WLR 1257 (cited by Flaux J at [79]), *The Afovos* [1983] 1 Lloyd's Rep 355 (HL) (cited by Flaux J at [90]), *Stocznia Gdanska SA v Latvian Shipping Co* [2003] 1 CLC 282 (cited by Flaux J at [93]).

[107] Though Popplewell J disagreed with him in this respect in *Spar Shipping* (n 98), [203], saying:

> the presumption in commercial contracts is that stipulations as to time of payment are not of the essence in the absence of a clear indication to the contrary. The dicta in the cases about the owners' commercial interest in prompt and punctual advance payment provide good reason for approaching a contractual option to terminate with the stringency which its unqualified terms require, but no reason additionally to treat the term as a condition conferring a right to terminate at common law with its different financial consequences.

[108] *Astra* (n 96), [110], [115], and [117]. But see Popplewell J's assessment in *Spar Shipping* (n 98), [199]–[201].

It is hardly surprising that the attempts of counsel for the charterers to argue on the basis of a 'market understanding' failed to convince the court. They were nothing more than an attempt to conflate the legal advice that would have been given to market participants with the understanding of the market itself. Quite rightly, Flaux J remarked that 'there is simply no evidence to support an alleged market understanding...',[109] there being nothing in the material placed before the court to indicate its existence. One can only conclude that the 'market understanding' (or unarticulated rule) point had not been (properly) argued before the arbitral tribunal.[110] Being a question of fact it could not then be argued (and evidence to support it brought) before the court.[111] It is in any case a pity that the arbitral process did not shed light upon the question whether the tribunal's 'instinct as commercial arbitrators' was in line with the market's understanding of the clause. In the absence of proof of a specific unarticulated rule, it is interesting that Flaux J decided on the basis that time is of the essence in commercial relations.[112] **3.51**

c. *The Happy Day*

The Happy Day,[113] a second stage appeal from an arbitration award, concerned the validity of a Notice of Readiness (NOR) in a voyage charterparty. It was alleged by the charterers that the NOR, while valid in form,[114] was premature and thus invalid when given, so that laytime had never commenced and the charterers were not liable for demurrage and indeed claimed to be entitled to despatch. The court held that while technically the NOR was invalid, **3.52**

> ...in an appropriate commercial context, silence in response to the receipt of an invalid notice, in the sense of a failure to intimate rejection of it, might, at least in combination with some other step taken or assented to under the contract, amount to a waiver of the invalidity or, in other words, might amount to acceptance of the notice as complying with the contract pursuant to which it is given.[115]

In reaching its decision the court took into account various considerations, including an examination of the arbitrators' findings of fact. In particular, there is reference to the arbitrators' view 'that following receipt of an invalid NOR, the laytime regime might nonetheless be triggered by the commencement of loading'.[116] It was indicated in the decision that this view was based on concessions on this point made by charterers in two previous disputes on similar issues.[117] But were **3.53**

[109] *Astra* (n 96), [75].

[110] See similarly *The Bonnie Smithwick* [2012] EWHC 202 (Comm), [27] and [28].

[111] See discussion under Heading D.

[112] *Astra* (n 96), [110] and [117].

[113] *Flacker Shipping v Glencore Grain (The 'Happy Day')* [2002] EWCA Civ 1068.

[114] Ibid, [85].

[115] Ibid, [66], per Potter LJ.

[116] Ibid, [51].

[117] Ibid. See *TA Shipping v Comet Shipping (The 'Agamemnon')* [1998] CLC 106 and *Transgrain Shipping v Global Transporte Oceanico (The 'Mexico I')* [1990] 1 Lloyd's Rep 507.

the arbitrators attempting to give voice to an unarticulated rule to the effect that it was contrary to the parties' legitimate expectations for the charterers to profit from a technical defect in the NOR when they were perfectly aware of the fact that the ship was arrived and ready—so much so that they had actually commenced loading? The finding as expressed in the award appears not to have been entirely clear and to have required extended explanation by counsel in the appeal before the court.[118] While the court rightly found in favour of the owners, on the basis that the behaviour of the charterers and their agents constituted waiver of their right to a valid NOR, what would have been the benefits of a clear articulation of the rule are made evident by the subsequent case of *The Port Russel*.[119]

3.54 This is a very brief decision (only three pages long), on an appeal under s 69 of the Arbitration Act 1996 from a partial final arbitration award which decided a preliminary issue in favour of the defendant shipowners, the issue being whether email was a contractually permissible method of serving notice of readiness (NOR) under a voyage charterparty on BPVOY3 terms. Clause 19 (unamended) of the standard charter referred to the following methods of communicating NOR: letter, facsimile transmission, telegram, telex, radio or telephone (and if given by radio or telephone shall subsequently be confirmed in writing and if given by facsimile transmission confirmed by telex). Email was not there specified. The owner, however, gave NOR by email, and the arbitral tribunal found that this was permissible, as the reason why email was not indicated in the standard clause was probably simply that the standard clause was out of date.[120]

3.55 Popplewell J reversed the arbitral award, holding that the language of clause 19 was not permissive but obligatory and that the word 'may' merely connoted what was permissible: the list of methods was exclusive.[121] This, the court said, was the plain meaning of the words.[122]

3.56 Because the issue of invalidity of the NOR was decided as a preliminary issue in *Port Russel*, no analysis was undertaken in Popplewell J's decision of the further question whether this invalidity of form might have been waived by the charterer. There is no indication at all in *Port Russel* of (i) whether the NOR had actually been received by the charterers via email—i.e. whether the charterers were actually aware of the ship's readiness to load in spite of the NOR's invalidity; (ii) if

[118] *Happy Day* (n 113), [51].

[119] *Trafigura Beheer BV v Ravennavi Spa (The 'Port Russel')* [2013] EWHC 490 (Comm).

[120] *Port Russel* [2013] EWHC 490 (Comm), [9]. If there was any discussion in the award of what might be the market understanding regarding the permissible ways in which the obligation indicated in the clause might be fulfilled, this was not indicated in the subsequent court judgment.

[121] Ibid, [11].

[122] Ibid, [12]–[17]. Among other things, the court took into account the fact that clause 23 had been amended by the parties to allow the notification of demurrage claims by email and s 19 had not, and the fact that commercial certainty required that parties be aware of the methods that were acceptable for communicating the NOR.

so, whether the charterers had protested or made any reservation upon receipt of the emailed NOR at the time they proceeded with loading/discharging the ship. One wonders therefore whether the conclusion reached in *Happy Day* would apply equally where a NOR is invalid in form. If one accepts that there exists an unarticulated (but observed) rule to the effect indicated above, then there is no reason why this rule should not apply equally where the NOR is invalid because of its form rather than its timing.

D. The Role of the Arbitral Process in Establishing the Existence of Unarticulated Rules

3.57 What these court decisions have demonstrated is that unarticulated rules deriving from market understanding of how standard contracts are to be performed can be essential to the outcome of shipping disputes. In Chapter 14 of this book, Maurer demonstrates that a large majority of maritime disputes now go to arbitration,[123] as a result of which the majority of shipping cases before the English courts will be appeals on points of law under s 69 of the Arbitration Act 1996.[124] Cases such as *The Sylvia*[125] and *Dolphin Tanker v Westport Petroleum*,[126] confirmed most recently (at the time of writing) by *Cottonex v Patriot*,[127] show that where an arbitration goes to appeal on a point of law (one such point being the question of construction of a contract), 'aside from the award itself the only admissible documents are... documents which are referred to in the award and which the court needs to read to determine a question of law arising out of the award'.[128] In view of this it is submitted that it is essential that arbitrators set out clearly and carefully their findings of fact in their award, in particular any unarticulated rules or market understanding, which may form part of the factual matrix surrounding the contract, and whose existence is a question of fact.

3.58 What do the cases discussed under C.3 above tell us about the process whereby unarticulated rules are enforced under English law? As indicated above, the outcome of *Achilleas* in the House of Lords rested on the pronouncements of a dissenting arbitrator which, according to Hoffmann LJ were not contradicted by the majority. This was considered as constituting sufficient evidence of an existing market practice. There is no indication that witnesses with relevant experience and expertise

[123] See Maurer, 'Transnational Shipping Law: The Role of Private Legal Actors in International Shipping' Chapter 14 *infra*, at [4.10]–[4.11].

[124] Or indeed challenges under Arbitration Act 1996, ss 67 or 68 or applications to the court under Arbitration Act 1996, ss 42–45.

[125] [2010] 2 Lloyd's Rep 81, [86]–[88].

[126] [2011] 1 Lloyd's Rep 550, [23]–[30].

[127] [2013] EWHC 236 (Comm).

[128] Ibid, [27]. This is an application of the Civil Procedure Rules Part 62, Arbitration Claims, Practice Direction 62, Arbitration, para 12.15.

had attested to these views as facts in the course of the arbitral proceedings and it seems that the dissenting arbitrator had simply relied on his own expertise in making the finding. As explained, from a reading of the majority award the alleged market understanding appears to have been based on what a lawyer would have advised a market participant. Similarly, in *The Astra*, the counsel for charterers seems to have been attempting to conflate legal understanding and market understanding, an attempt which appears to have made an impression on the arbitrators (in that they also referred to 'the generally accepted position' without clarifying by whom this position was accepted: lawyers or market participants), but thankfully put to rest by Flaux J. In *Happy Day*, it appears that the existence and operation of the unarticulated rule in question was evinced from concessions made in previous disputes.[129]

3.59 It is therefore not really possible to deduce with finality from these cases what is required today in terms of evidence of market understanding or of the existence of an unarticulated rule. They do suggest that the approach whereby expert witnesses would be brought to give evidence on how the market understands a particular contractual term or obligation is not the exclusive method of proof, at least in charterparty cases,[130] and it is not unusual for the tribunal to take a decision based on its own expertise.[131] In other words the tribunal appears to be taking on the role not just of the judge but also of the erstwhile merchant jury discussed above, which, provided they have the relevant experience and expertise, may be quite appropriate.[132] The phenomenon of arbitrators relying on their own expertise

[129] *Happy Day* (n 113), [51].

[130] A noteworthy recent exception is *Trafigura Beheer v Navigazioni Montanari (The Valle Cordoba)* [2014] EWHC 129 (Comm), affirmed by [2015] EWCA Civ 91, where an expert witness gave evidence on the market understanding of the expression 'in-transit loss' within a voyage charterparty on BPVOY3 form (ibid, [16]–[17]). This was a determination of preliminary issues by Smith J and the dispute does not appear to have been the subject of an arbitration award prior to going to court. It is also worth noting that Smith J observed towards the end of his judgment (ibid, [27]): 'I do not question Mr Gretton's expertise or the reliability of his evidence, but I did not find it useful in determining the issues of interpretation.' The lack of resort to expert witnesses to evidence trade usages has been observed also in the United States. See L Bernstein, *Trade Usage in the Courts: The Flawed Conceptual and Evidentiary basis of Article 2's Incorporation Strategy* (Coase-Sandor Institute for Law & Economics Working Paper No. 669, 2014), 14–15.

[131] This is in line with an observation made by Goode (n 1), 15:

> There are three principal conditions in which a court or an arbitral tribunal can be led to accept the existence of a trade usage. The first is where the usage is so well known that the tribunal can take judicial notice of it; the second, where written or oral testimony is given by expert witnesses; and the third, where the usage can be inferred from international conventions, uniform rules prepared by international organisations, standard contracts, scholarly writings, and the like.... [I]nternational arbitrators appear much readier than courts to make confident statements about international trade usage and to take judicial notice of them.

[132] In this regard see JS Kraus and SD Walt, 'In Defense of the Incorporation Strategy', Chapter 6 in JS Kraus and SD Walt (eds), *The Jurisprudential Foundations of Corporate and Commercial Law* (Cambridge University Press, 2000), 193, 221–222.

in reaching a decision is not new, though it has been controversial at times, as demonstrated by *Fox v Wellfair*.[133] Thus, in *Sanghi Polyesters*,[134] the court held: 'the arbitrator has a task of some complexity and in discharging it he is not obliged to imitate the usual practice of an English Judge'.[135] It is submitted that to have the arbitrators decide on the basis of their expertise is not a problem *per se*. What is problematic is the drafting of awards in such a way that it remains unclear whether or not a rule is being articulated. In none of the three cases examined under C.3 above was there a clear articulation of the unspoken rule by the arbitrators. The only exception was in the *Achilleas*, and even then the articulation took place in the dissenting and not the majority award. In view of the fact that the courts are limited in their considerations to the award and any documents to which it refers, it is crucial that the arbitrators make an effort to be clear in this respect.[136] A good illustration of this is *The Mozart*,[137] where the following pronouncement by Mustill J (as he then was) neatly summarized the issue:

> ...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.[138]

3.60 With regard to the tendency to conflate what a lawyer would advise and what the market understands, it is submitted, with respect, that this is erroneous. While there may certainly be a relationship between the two, establishing what a lawyer would have advised does not prove either (a) that the advice ever actually reached the market or (b) that a market understanding actually evolved on the basis of that advice. There is no indication that participants in the market are in the habit of reading legal texts or that they listen carefully as a matter of course to explanations of what their legal adviser sees as being the legal position. The argument that unarticulated rules necessarily emerge on the basis of legal advice or that reasonable expectations are created in the market in this way is therefore unpersuasive. Consequently it is submitted that it is not correct to continue down the route of attempting to prove market understanding by referring to what a lawyer would have advised.

[133] [1981] 2 Lloyd's Rep. 514.

[134] *Sanghi Polyesters (India) v The International Investor (KCFC) (Kuwait)* [2000] 1 Lloyd's Rep 480.

[135] Ibid, [28].

[136] Regarding formulation of rules deriving from mercantile practice, and the importance of making intuitive judgments explicit see R Craswell, 'Do Trade Customs Exist?', Chapter 4 in JS Kraus and SD Walt (eds), *The Jurisprudential Foundations of Corporate and Commercial Law* (Cambridge University Press, 2000), 118, esp. 135–142.

[137] *The Mozart* [1985] 1 Lloyd's Rep 239.

[138] Ibid, 242.

E. Conclusion

3.61 This chapter has sought to explain, by means of illustrative case studies, the current process whereby unarticulated rules of so-called 'spontaneous law' that evolve organically as a result of repeated and frequent interactions on the basis of standard terms between commercial parties are recognized and applied by the English courts. As a result of the frequent use of arbitration, the process of articulation of these rules is informal and can be inconsistent. This chapter argues that increased consistency is desirable.

3.62 A more methodical approach to the articulation of emergent market understandings that inform the interpretation of standard contract terms is particularly important in view of the ever-changing commercial landscape. The development of new technologies will inevitably result in new ways of doing business. In turn, new rules underlying these new business processes, which may be partially or even almost wholly unarticulated, are bound to evolve and it appears that their articulation, particularly in the maritime field, will be in the hands of private arbitrators. The full and consistent engagement of the latter with the process of meaningful articulation is therefore essential to the continued development of the law in this field.