International Congress of Maritime Arbitrators XI
Hong Kong, 18 May 1994

Maritime Arbitration — The American Experience

by The Hon Judge Charles S Haight, Jr

Before I could accept the Congress's generous invitation to journey to Hong Kong and deliver the second Cedric Barclay Memorial Lecture, I had to obtain the permission of 15 federal judges. Those judges form the Committee on Codes of Conduct of the Judicial Conference of the United States — a title suggestive of the dreaded Committee of Public Safety in revolutionary France.

I doubt that my Cedric Barclay Lecture predecessor, Lord Mustill, had to ask anyone's permission to address the Congress in Vancouver. But America has a Puritan heritage, which manifests itself from time to time in odd ways. One manifestation is the Codes of Conduct for United States judges. Canon 5C(4) prohibits a judge from accepting reimbursement of expenses in attending an activity unless that activity is "devoted to the improvement of the law, the legal system, or the administration of justice." The Committee on the Code of Conduct must approve such adventures in advance.

Immediately upon receipt of your invitation, I telephoned the Chairman of the Committee, a Court of Appeals judge, to ask his blessing. I expected to receive it then and there. But the judge said I must submit a written presentation. I did so, including, as you will imagine, a litany of the good works performed by this Congress. Three anxious weeks passed. I then received a letter formally reciting the Committee's conclusion that the

International Congress of Maritime Arbitrators ("ICMA") satisfies the Canon.

I brought that certification to Hong Kong. It is next to my passport, which is next to my heart. And if I say nothing to you this morning of substance, style, or wit, at least I have persuaded 15 federal judges to attest that this Congress has something to do with the improvement of the law, the legal system, or the administration of justice.

They could reach no other sensible conclusion. Arbitration plays a vital role in the administration of commercial justice. Cedric Barclay explained why in a characteristically concise way. He said to the Fifth Congress in 1981 : "To be told expeditiously that you are right or wrong, is of value in commercial dealings." That single sentence sums up what arbitrators are supposed to do and how they are supposed to do it: say who is right, and say it quickly.

I understand that, in accepting your invitation, I do not come to praise Cedric Barclay. He needs no praise from a judge of a former colony. But in these remarks, I will on occasion quote from Cedric Barclay's reflections on arbitration. I do so because his words capture the ideals embraced by American arbitration, and also suggest ways in which those ideals may be compromised as we approach the end of the century.

My title is "Maritime Arbitration — The American Experience."

I am acutely aware that this meeting of the ICMA is the first to be convened in an Asian city; that in consequence there is a powerful and quite wonderful coming together of many traditions forged over the centuries; and that my country, in the 219th year of its independence, is a new nation, as eternity measures time.

My hope is that, at a period when the maritime nations are engaging in commercial cooperation to a degree perhaps not previously known in history, reflections on the past, present, and future of maritime arbitration in this young country of America may be of some interest and utility.

One gets the impression from Cedric Barclay's writings that, for him, the ideal arbitration takes place before a single arbitrator, with no lawyers

in sight, and ends with the briefest possible award. Discussing the arbitration of shipbuilding contracts, Cedric Barclay said: "It is imperative in order to reduce the cost and the duration of the Arbitration that the parties should agree on a single Arbitrator. To have three Arbitrators only leads to haggling arising from the divergence of opinions." In the same address, he said: "Lengthy exchanges between the lawyers for the parties only lead to a waste of time, of paper, of typewriter ribbons." That was before word processors, but the principle remains the same. Cedric Barclay has also said: "The length of an award is not the criterion of its excellence." We hear his main goal restated: administer commercial justice promptly, inexpensively, and without excessive verbiage, from lawyers or arbitrators.

That is the fundamental purpose of all arbitral systems. The American experience in maritime arbitration, and in arbitration generally, reflects the goal of a just and efficient alternative to the courts. But the American experience also reflects, and is shaped by, certain particularly American forces: a populist tradition deriving from the frontier days; the legal interaction between the 50 sovereign states and the Federal Government; the public policy concerning arbitration expressed in the governing statutes; and the current construction given to those statutes by the courts, at a time in American history when the courts themselves are facing unprecedented demands.

One of my purposes will be to identify the effect of these forces upon maritime arbitration in the US. I begin, however, with one of the earliest American experiences in maritime arbitration.

On 3 May 1768, the New York Chamber of Commerce held its first meeting. At that time, of course, New York was a colony of Great Britain. King George III was on the throne. William Pitt the Elder was the most forceful member of the government, although he was about to give way to Lord North, a negative development for the English colonial experience in America. I drop these historical footnotes not to depart from my text, but to emphasize the early date at which America became interested in maritime

arbitration.

At its first meeting, the Chamber established a committee of six gentlemen for the purpose of "adjusting any differences between parties agreeing to leave such disputes to this Chamber." The Committee of Arbitration was busy from its inception, but it was thought no records had survived until some years ago, when a manuscript volume of minutes covering the period July 1779 to November 1792 was found in a remote corner of the Public Library. New York City, containing about 50, 000 inhabitants at the time, was a leading world port. Most of the disputes recorded in the minutes related to ships. Others had to do with commercial paper. The minutes reflect, without explaining the procedure, that many of the disputes were referred to the Committee by the police of the City. Thus a report dated in 1780 reads: "Upon this matter the Police desired to know if the Committee were of Opinion that there were sufficient grounds for a reference in respect of a Bill of Exchange drawn by Mr. Campbell on London in favor of Mr. Kempe which was protested and Mr. Campbell refused paying, alleging the amount of the Bill was for a larger sum than it ought to have been."

I pause to note that, in my experience as a trial judge in criminal cases, the New York City police do not speak in such polished, parliamentary tones anymore. I wonder if they ever did. These colonial minutes may simply reflect the Mother Country's manners of speech. When I was a schoolboy during World War II, I became a devoted reader of *"The Illustrated London News"*. Frequently that famous publication, then a weekly, covered English crime. A typical photograph would show a dangerous-looking individual struggling in the grasp of three uniformed policemen, his teeth bared, arms pinned behind his back and hair falling over his eyes, with this caption: "Mr. T. F. G. Arbuthnot is pictured above assisting the police in their inquiries."

In any event, the Committee dealt with the dispute in a one-sentence award whose pointed brevity would have pleased Cedric Barclay: "The Bill was clear and the protest regular and Mr. Campbell should immediately

pay to Mr. Kempe the amount of the Bill with 20 per cent damages according to the established Custom of this Province." Another one-sentence award during the same year dealt with the claim of William Brander, mate of the Brig Betsy, against the shipowner for one month's wages on account of "his disappointment in not returning in said Brig to England." "Mr. Brander has no right to this demand," the award reads, "because the Shipping Articles declare positively that her voyage was from England to New York only." No submissions by counsel. No summaries of positions or quotations from documents in the award. Commercial justice done. Next case.

But this early American experiment in maritime arbitration suffered, as did all comparable efforts, from the hostility of the common law judges. Arbitration, as the Chamber of Commerce noted in a 1910 report, saves "much expenditure of money and many tedious delays and vexations incident to trials in Courts of Law," but was weakened because parties could withdraw after arbitration had begun, and before an award had been made; executory agreements to arbitrate future disputes could not be specifically enforced; and judgments could not be entered on awards. A New York statute in 1861 allowed arbitration awards to be made the basis of a judgment in a Court of Record, but the other defects remained, and the Legislature was not receptive to remedying them. That reduced the Chamber, in its 1910 report, to professing its belief that the disputants' submission to arbitration in good faith "makes it likely that neither will withdraw after arbitration has begun and before the award is made and that both will be satisfied with the result; and that it is not probable that a merchant would be willing to blemish his fair name by repudiating a written agreement with a reputable body of public-spirited men" (the last phrase being a reference by the Chamber to itself).

Whatever the truth of such pious beliefs in those gentler, Edwardian days, it seems clear enough that arbitration would not have flourished in America without the action of state legislatures and the Federal Congress. I want to refer briefly to the statutes most important to maritime arbitration. I

know you are familiar with them. But they set the stage for what I want to say about the present state of the American experience.

The New York Arbitration Act of 1920 was the first statute in the US to give effective support to institutional arbitration and individual agreements. [1] The United States Arbitration Act, often called the Federal Arbitration Act, followed in 1925. [2] In 1970, a second chapter was added to the federal statute in order to implement the 1958 United Nations Convention, also known as the New York Convention, on the recognition and enforcement of foreign arbitral awards. [3] The US Supreme Court has repeatedly characterized the federal statutes as expressions of national public policy favoring arbitration of commercial disputes.

Stated more precisely, American public policy expressed in the Federal Arbitration Act favors the enforcement of private arbitration contracts. To that end, arbitration agreements have routinely been given the broadest possible interpretation. The Supreme Court has said: "The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." [4] The statute's purpose, the Court has explained, "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." [5]

But until recently, the public policy favoring arbitration yielded, like the burdened vessel in a crossing situation, to other enactments of public policy. An example is found in the American laws regarding securities.

Following the stock market crash in 1929, Congress enacted the

---

1 NY CPLR § 7501–7514.

2 9 USC § 1–14.

3 *Id* § 201–208.

4 *Moses H Cone Memorial Hospital v Mercury Construction Corp,* 460 US 1, 24– 25 (1983).

5 *Gilmer v Interstatel Johnson Lane Corp,* 111 S Ct 1647, 1651 (1991) ("*Gilmer*").

Securities Act of 1933 ("1933 Act") and the Securities Exchange Act of 1934 ("1934 Act") to protect investors against fraud in the purchase and sale of securities. Investors disappointed by market losses frequently sued their brokers, alleging violations of these statutes. The brokerage firms placed in their customers' agreements clauses providing for arbitration of disputes. In a 1953 decision, Wilko v Swan, [6] the Supreme Court exalted the public policy expressed in the 1933 Act giving investors the right to sue in court over the policy favoring arbitration expressed in the Federal Arbitration Act. The arbitration agreements were held unenforceable. The lower courts applied the same reasoning to fraud claims under the 1934 Act. They could not be arbitrated either.

The consequence was that when I became a District Court judge in 1976, all the judges had considerable numbers of cases in which investors had lost money in the stock market and sued their brokers to get it back. Those cases were often complex and time-consuming.

But we are not troubled by them anymore because in 1987 the Supreme Court decided the McMahon case, which enforced an arbitration clause in a brokerage customers' agreement and required arbitration of claims under the 1934 Act. [7] The Court labored mightily to distinguish Wilko, which dealt only with the 1933 Act, but in 1989 gave up and explicitly overruled Wilko, [8] so that today all securities fraud claims covered by arbitration agreements are arbitrated. This 180-degree course change in favor of arbitration was presaged by a 1974 Supreme Court decision upholding enforcement of a pre-dispute agreement to arbitrate securities fraud claims by parties to an international contract, [9] and a 1985 opinion compelling arbitration in Japan of claims arising under the American

---

6 346 US 427 (1953) ("*Wilko*").

7 *Shearson/American Express, Inc v McMahon,* 482 US 220 (1987) ("*McMahon*").

8 *Rodriguez de Ouijas v Shearson/Arnerican Express, Inc,* 490 US 477 (1989) ("*Rodriguez de Ouijas*").

9 *Scherk v Alberto-Culver Co,* 417 US 506 (1974).

antitrust laws. [10] Reversing Wilko in Rodriquez de Ouijas, the Court said: "To the extent Wiiko rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." [11]

You may be wondering what all this securities law has to do with maritime arbitration. There are two answers. The first is that the degree of judicial approval of arbitration creates the ambiance in which future issues concerning arbitration practice will be decided. The second and more specific answer arises out of the second point of decision in the McMahon case.

The investors in McMahon also wished to assert against their brokers a claim under the Racketeer Influenced and Corrupt Organizations Act, popularly — or not so popularly — known as "RICO." [12] The name of that statute, enacted in 1970, would suggest that Congress aimed it at organized crime, and indeed that was its genesis. However, at the last moment in the legislative process, with almost no discussion, Congress added a section allowing private parties to allege RICO violations in commercial cases and collect triple damages if they proved them. [13] The investors in the McMahon case argued that the public policy embodied in the civil RICO remedy precluded arbitration of RICO claims. The Supreme Court disagreed and held civil RICO claims arbitrable. [14] And we, now see RICO claims for triple damages being asserted in maritime arbitrations in New York.

I will say more about RICO claims in arbitration later. But I will conclude this review of the Supreme Court's hospitable view of arbitration with its most recent pertinent decision. Federal statutes prohibit in the

---

10 *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc,* 473 US 614 (1985) ("*Mitsubishi*").

11 *Supra* n 8 at p 481.

12 18USC ~1961et *seq.*

13 Id § 1964(c).

14 *Supra* n 7 at pp 238–242.

workplace discrimination of one kind or another: based on race, national origin, sex, religious belief, or age. The anti-discrimination laws were thought for a long time to be declarative of such strong public policy that arbitration clauses in employment contracts would not be enforced to require arbitration of discrimination claims. Those claims were tried in the federal courts. But in 1991 the Court made it plain that discrimination claims were arbitrable, [15] explicitly rejecting any "suspicion of arbitration as a method of weakening the protections afforded in the substantive law." [16]

If we examine, then, the present state of the arbitration experience in America from the perspective of the courts, we find the broadest conceivable judicial approbation of arbitration as a form of dispute resolution. That approbation is not limited to a reversal of the common law judges' distaste for arbitration. It goes much farther than that. As a result of these decisions, the whole broad spectrum of civil remedies created by federal statutes as manifestations of public policy are now subject to and available in arbitration.

In addition to the analyses expressed in the Court's opinions, there is, I believe, an unstated legal reason for this development. The resources of federal courts are increasingly expended on criminal and civil rights cases. The US District Courts have criminal and civil jurisdiction, so long as there is something "federal" about the case. The boundaries of those jurisdictions are constantly being expanded by the Congress. The current fashion in Congress is to, "federalize" all sorts of criminal conduct which had previously been prosecuted only under state law. These new federal crime bills allow the legislators to return to their constituencies and say they are "tough on crime", a posture regarded as helpful in securing re-election.

---

15 *Supra* n 5 (age discrimination). The rationale of *Gilmer* has been followed by the Court of Appeals in different contexts. See *Dean Witter Reynolds Inc v Alford,* 111 S Ct 2050 (1991), on remand, 939 F 2d 229 (5th Cir 1991) (sex discrimination); *Fletcher v Kidder, Peabody & Co,* 81 NY 2d 623 (Ct App 1993) (race discrimination).

16 *Id* at 1654, quoting Rodriguez *de Ouijas, supra* n 8.

The expansion of federal criminal jurisdiction reduces the court resources available to conduct civil litigation.

In that broad area of law known as "civil rights", Congress has built upon statutes enacted immediately following the Civil War with additional laws forbidding discrimination and creating private remedies in federal courts. Moreover, the American experience over the last half century has been an erosion of the citizens' confidence in the executive and legislative branches of government, and an increasing reliance on the judiciary to satisfy social and economic grievances. Federal district judges have found themselves administering state prison systems, running city school systems, drawing the boundaries of local voting districts: a variety of responsibilities that would have amazed and, I believe, appalled federal judges of a simpler time, who in relative leisure would produce polished opinions on charterparties and collisions at sea. Given these burgeoning demands in other areas of the law, if there is a way to get disputes out of the courts and into arbitration, the courts will do it.

And so, to use the jargon of current political expression, American arbitrators are "empowered" by the courts. I see a number of leading American maritime arbitrators in the audience. You are empowered by federal law to decide any issue that could conceivably fall within an arbitration agreement. You are empowered to grant any remedy, legal or equitable, not explicitly excluded by the arbitration agreement. You are empowered to award treble damages under RICO, and to award punitive damages for outrageous commercial conduct (although arbitrators do not yet have that power under New York state law).[17] You are empowered to issue awards without much concern for judicial review, because judicial

17 Federal law permits arbitrators to award punitive damages in appropriate circumstances. *Kerr-McGee Refining Corp v M/T Triumph*, 924 F 2d 467, 470 (2d Cir 1991). New York law does not. *Garrity v Lyle Stuart, Inc*, 40 NY 2d 354, 353 (1976).

review of American arbitration awards is severely limited by statute. [18]To be sure, the Supreme Court said in Wilko that an award could also be vacated for "manifest disregard of law"; but the language was not necessary to the decision, and today "manifest disregard of law" remains an elusive bird of paradise, whose bright plumage is sometimes discerned flitting though the dark jungle of rejected claims, ardently pursued by disappointed claimants, but never captured. "Manifest disregard of law" means more, the Second Circuit Court of Appeals has said, "than mere error or misunderstanding with respect to the law. The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it." [19]

And you are free to exercise these broad powers without fear of being sued for doing so, because arbitrators enjoy the same immunity from suit by losing litigants as judges do. [20]

It is important to note that in these areas, federal arbitration law has recently established supremacy over the law of several states.

One cannot fully understand the American experience in maritime arbitration without appreciating that each of the 50 states has its own statutes and courts.

Thus in New York state, federal and New York statutes both apply to maritime arbitration, and New York and Federal Courts have concurrent

---

18 See 9 USC § § 10, 11. Section 10 authorizes vacation of an award in the case of corruption, 'fraud, undue means, or evident partiality, specified misconduct or misbehavior on the part of arbitrators, or "[w] here the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." Section 11 provides for modification or correction of an award in the case of an "evident" and "material" miscalculation of a figure or misdescription of a person, thing or property and where the arbitrators have awarded upon a matter not submitted to them, or where there is an error in form not affecting the merits of the controversy.

19 *Carte Blanche (Singapore) Pte Ltd v Carte Blanche International, Ltd,* 888 F 2d 260, 265 (2d Cir 1989).

20 *Austern v Chicago Board of Options Exchange Inc,* 898 F 2d 882 (2d Cir 1990).

jurisdiction over actions to compel arbitration or vacate awards.

Some years ago, a motion in the state court to confirm an arbitration award was frequently countered by a petition in the Federal Court to vacate it. Counsel for the parties perceived different advantages in one forum or another.

Now, however, the state courts recognize that in maritime matters, federal law controls in questions of substantive, as opposed to procedural, law — a distinction that is not always easy to draw. And the New York Court of Appeals has recently extended the supremacy of federal arbitration law to non-maritime matters. It had previously been the public policy of New York state, as declared by its courts, that claims for employment discrimination were not subject to arbitration. However, following the US Supreme Court decision in Gilmer, to which I referred earlier, the New York courts have reversed that position, holding that the Federal Arbitration Act, under which discrimination claims are arbitrable, takes precedence over the law of the state.

A question arises, of common concern to the shipping industry, maritime lawyers, maritime arbitrators, and the courts. How will American maritime arbitrators exercise those broad powers as the 20th century ends and the 21st begins?

I approach that question by contrasting the first arbitration case I presented as a lawyer with the last. I know that when one tells personal war stories he runs the risk of causing his listeners' eyes to glaze over. But the contrast makes a point.

My first arbitration was in the 1950's, shortly after I was admitted to the Bar. I presented a shipowner's demurrage claim for just under $16,000 to a panel of three distinguished commercial arbitrators. Ships were smaller then. So were the claims they generated. A young lawyer could present such a claim alone and at minimal legal cost to the client. The hearing took place after business hours and took about an hour. I produced from my briefcase a modest collection of exhibits and made a little speech about them. My opponent did the same. There had been no pre-hearing

skirmishing, discovery or exchange of briefs. We were not overly concerned about the rules of evidence. I sometimes thought, in those earlier days, that I could have offered a photograph of my infant daughter among the exhibits. My opponent would, I suppose, have objected on the ground of relevance, but I would not have been surprised if the panel chairman had smiled indulgently and ruled that the arbitrators would consider it for what it was worth.

The arbitrators awarded my shipowner client its demurrage claim. I suppose that the owner found the $16,000 useful, although it could not have revitalized its fortunes. I regarded the award as a huge personal and professional triumph. I still do. It gave me a respect for the wisdom and perception of maritime arbitrators that I have never lost, although it has been strained on occasion.

Contrast that modest matter with my last arbitration before coming to the Bench. Immense vessels were by then plying the seas. One of these, my client's supertanker of hundreds of thousands of deadweight tons, was time chartered for ten years at the height of the market. She burned and sank en route to her first loading port. The charter market had plummeted between the fixture and the casualty. The shipowner, invoking a substitution clause of less than perfect clarity, tendered an unemployed sister ship to perform the charter. The charterer did not think that was a very good idea and refused the substitute. Mind-boggling amounts of money were involved. The arbitration generated extensive discovery of documents, many days of hearings, elaborate preliminary, main, reply, and sur-reply briefs, and passionate arguments of counsel.

Eventually a divided panel of arbitrators, maritime lawyers in this case, held 2–1 that the charterer had to accept the substitute. If the result had been different I would not have mentioned the case. But the point is that, as the result of enormously larger vessels and enormously more complex commercial transactions, maritime arbitrators today often deal with claims in amounts that were undreamt of only a few years ago. Even in the relatively pedestrian context of a lay time dispute, demurrage on a

500,000 ton vessel is more economically meaningful than demurrage on a vintage 1950 dry cargo vessel or T-2 tanker.

These changed circumstances will determine the future of the maritime arbitration experience in America. That future will depend upon the lawyers' reaction; and the responses of arbitrators, courts, and the industry itself.

Lawyers react to large, complex arbitration cases by seeking to invoke the full panoply of procedures more traditionally associated with court cases. They demand full discovery. They try to attach property to secure an award. They assert RICO claims or claims for punitive damages. They present vast amounts of evidence during the course of protracted hearings. They ask for the award of attorneys' fees. We cannot blame them for this zeal. It is their job. "Lawyers are Hessians", one of my law professors said; "they are mercenaries paid to go out and fight."

But the more arbitration comes to resemble litigation, the less it resembles Cedric Barclay's ideal arbitration: quick, inexpensive, uncluttered by lawyers. And the risk arises that arbitration may come to be disfavored for the same reasons litigation was disfavored as a means of resolving commercial disputes.

Indeed, the Maritime Law Association ("MLA") of the United States has recently formed a Committee on Alternative Dispute Resolution ("ADR Committee") which co-exists, in some degree of discomfort, with that Association's long-standing Committee on Maritime Arbitration. The discomfort arises from the fact that "alternative dispute resolution" means alternative to litigation and arbitration. On 22 June 1993, the MLA's ADR Committee promulgated Rules for Conciliation. At the MLA's October 1993 meeting, my former partner Glenn Bauer, Chairman of the Maritime Arbitration Committee, sounded what seemed to me almost a wistful note. He said: "Now we come to ADR... We consider arbitration to be the original alternative dispute resolution but, I must say, after listening to some of the speakers at the ADR seminar, some of the preachers of this new gospel, they seem to think we are sinners outside the church, along

with litigation in the courts. We feel, however, we can contribute to the process and have a lot to give."[21]

I admire conciliators and mediators. "Blessed are the peacemakers," we have on high authority, "for they shall be called the children of God."[22] My court has installed a panel of mediators and the parties must attempt mediation if the judge tells them to. Mediation has disposed of a number of cases. In 1988, the Society of Maritime Arbitrators ("SMA") drafted Rules for Conciliation, described as a "prelude or alternative to litigation or arbitration."[23]Cedric Barclay, in an address to the Third Congress in 1976, recommended conciliation in certain disputes. A good conciliator, in Cedric Barclay's view, should "act in every respect as would a 'Dutch Uncle' offering advice, listening and enumerating pitfalls, indicating the expenditure likely to be incurred in the course of a full scale legal action, and keeping down the temperature by avoiding acrimonious exchanges." Lawyers were to be avoided; in the same address Cedric Barclay said: "One needs hardly add that in numerous cases it is the legal representatives who fuel the dispute in attempts at justifying their worth by rearguard actions based on clutching at straws, delaying resolution and raising the costs."

But Cedric Barclay acknowledged in that address, as we all know, that many cases cannot be resolved by conciliation. His evocation of a "Dutch Uncle" implicitly assumes the presence of compliant Dutch nephews, prepared to accept avuncular guidance. Not every commercial sword can be beaten into a ploughshare. There will always be intransigent parties whose intractable disputes must be litigated or submitted to binding arbitration. The disadvantages of litigation are familiar. Even for those who prefer it in a given case, the current condition of the courts imposes obstacles to timely trials. It is clear that in many important shipping industry

---

21 Maritime Law Association of the United States, Doc No 706, 29 October 1993, at p 10387.

22 Matthew 5:9.

23 *Maritime Arbitration in New York,* published by SMA in 1991, at p 7.

disputes, arbitration is the only form of ADR.

So it is important to make maritime arbitration in America as effective as possible. That general goal, to which all would presumably subscribe, leads one into potentially controversial areas when we consider certain characteristics of American maritime arbitration of current concern or discussion: the availability of such exotic claims as RICO treble damages and punitive damages; the scope of discovery; the limited scope of judicial review; the traditional American rule against awarding attorney's fees to the winning party; and the ability, at least until very recently, to consolidate arbitration of disputes arising out of back-to-back agreements before a single panel.

That last-mentioned feature, to which the SMA pointed with satisfaction in its 1991 handbook, has now been called into question by the Second Circuit Court of Appeals' decision in The Government of the United Kingdom v The Boeing Company, decided in June 1993.[24] Boeing effectively overrules that court's prior decision in the Compania Espanola de Petroleus SS v Nereus Shipping SA case,[25] which held that, the Federal Arbitration Act gave the District Court authority to compel arbitration involving three parties, including a guarantor of a charterer's performance, before a restructured single panel of five arbitrators, rather than the three-arbitrator panel called for by the agreement. The Boeing case involved damage during ground testing to a helicopter. The UK had separate contracts with the builder of the helicopter and the builder of its engine. Each contract contained an arbitration clause. The UK asked the two manufacturers to agree to a consolidated arbitration. One refused. The U K then persuaded the District Court to order consolidated arbitration. The District Court did so, on the authority of Nereus. The Court of Appeals reversed this, holding that "the district court cannot consolidate arbitration proceedings arising from separate agreements to arbitrate, absent the

---

24 998 F 2d 68 (2d 1993) ("*Boeing*").

25 527 F 2d 966 (2d Cir 1975) ("*Nereus*"), *cert denied,* 426 US 936 (1976).

parties' agreement to allow such consolidation."[26] Boeing specifically disapproves Nereus to the extent that Nereus was "based on . . . the 'liberal purposes' of the Federal Arbitration Act."[27] Boeing declares that the Federal Arbitration Act "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms."[28] The American courts construe arbitration agreements broadly, as we have seen; but the Nereus case, now substantially discredited, must be regarded as a high water mark in judicial enthusiasm for the concept of arbitration.

The Arbitration Committee of the MLA, in its most recent utterances, has reported industry desire for awards of attorney's fees to the winning party and some right of appeal from the merits of an arbitration award.[29] Lawyers wish to expand discovery in arbitration. To that end, in 1990 the MLA adopted and sent to the SMA proposed guidelines regarding discovery in arbitration which, if utilized by the SMA, would make available in arbitration the full panoply of discovery used (and frequently abused) in civil litigation, including pre-hearing depositions of witnesses. The MLA accompanied those guidelines with a brief arguing that arbitrators had the legal authority to order broad discovery. I am told that the MLA is also working on guidelines to send to the SMA about awarding attorney's fees.

These are the areas of current dissatisfaction, or at least concern, with the present state of maritime arbitration in America. If changes are to be made, there are two vehicles for achieving it: amending the Federal Arbitration Act, or tailoring arbitration agreements to better reflect the present desires of the industry.

The first vehicle, in my view, is not a practical one. Amending the Federal Arbitration Act would require the perception of Congress that the

---

26 *Supra* n 24 at p 74.

27 *Ibid.*

28 *Supra* n 24 at p 70 (citing and quoting *Volt Info Sciences v Board of Trustees,* 489 US 468, 478 (1989)).

29 See, eg, Report of the Maritime Arbitration Committee at the MLA Spring Meeting, 1 May 1992, Doc No 695 at 10053.

statute needs to be fixed and the expenditure of legislative effort to do so. The US Congress will be concentrating for the foreseeable future on such tasks as reforming the American health care system, the welfare system, and the criminal law. Reforming arbitration does not generate headlines back in the constituencies. A groundswell of opinion for changing the Arbitration Act is not likely.

But parties to commercial contracts may shape all these matters by the manner in which they draft their arbitration agreements. The Boeing case reminds us that the Arbitration Act makes arbitration agreements enforceable, but leaves the contents of the agreements up to the parties. Courts will not alter the agreements. A recent example involves punitive damages. As noted, courts have held that under federal substantive law arbitrators can award punitive damages but under New York law they cannot do so. The provision that a contract is governed by New York law precludes arbitrators from awarding punitive damages, even under a broad arbitration clause. [30]This reflects the principle that "the parties are generally free to structure their arbitration agreements as they see fit." [31] Under that principle, I think that parties may validly provide in their arbitration agreements that the arbitrators cannot award punitive damages or entertain a claim for trebled RICO damages. An award disregarding those prohibitions would, in my view, be vacated by the court on the ground that the arbitrators exceeded their powers. [32]The arbitration agreement may provide for the awarding of attorney's fees. Even where the arbitration clause is silent on the point, if both parties request attorney's fees, recent arbitration panels have concluded that the joint request modifies the arbitration agreement and vests arbitrators with the discretion to award

---

30 *Barbier v Shearson Lehman Hutton Inc,* 948 F 2d 117, 122 (2d Cir 1991) ("Barbier").

31 *Volt Information Sciences Inc v Board of Trustees of the Leland Stanford Jr University,* 489 US 468, 478–79 (1989).

32 That is the holding of Barbier, *supra* n 30, at 948 F 2d 122.

fees. [33]It is even arguable that the parties could provide in their arbitration agreement for judicial review of the merits of the award. Courts would not welcome that development because they would have more work to do. But if the court's function under the statute is to enforce the parties' agreement, why should the parties not be entitled to contract for judicial review? Parties cannot by agreement confer upon a court subject matter jurisdiction which would not otherwise exist; but that problem would not arise in the case of an arbitration agreement contained in a maritime contract, which falls within the admiralty jurisdiction of the Federal Courts.

Another means of achieving desired changes in arbitration procedure is to revise the rules of a body like the SMA, and then provide in the contract that arbitration will take place in accordance with those rules. The courts would regard the Society's rules as having been incorporated by reference into the arbitration agreement, and binding upon the parties. There is in my view no limitation upon the rule-making authority in this regard. RICO claims could be excluded; so could claims for punitive damages; pre-hearing discovery could be made available; attorney's fees could be provided for; so could judicial review, at least in maritime contracts. It might even be possible to revive consolidated arbitrations for back-to-back contracts, if the rule drafting is clever enough. Of course, the underlying questions are whether the society would conclude that such rule revisions were a good idea; [31] and if it did, whether the industry would accept the new rules by incorporating them in arbitration clauses.

But these are questions for others to ponder. Let me conclude with some personal reflections on how the American maritime arbitration experience may be bettered in our time, to the furtherance of Cedric Barclay's purpose: the prompt dispensation, at reasonable cost, of commercial justice.

---

33 See eg, *Arbitration between Tweendeck II KS, as Owner of the m/v NORTHERN VILJA, and Brazilian Overseas Shipper Services,* SMA No 3058 (24 March 1994).

31 In fact, the most recently revised rules of the SMA contain provisions for the awarding of attorney's fees and for consolidated arbitrations. The effectiveness of the latter, in the event of an objection to consolidation by one of the parties, would pose a question for a court to decide.

To echo a Cedric Barclay theme, let lawyers act a little less like lawyers. Let them refrain from oppressive discovery, excessive motion practice, ad hominem attacks, and other miseries of the scorched earth warfare that characterizes much of civil litigation in America today. In fairness, maritime lawyers are not known for these tactics as much as warriors on the legal battlefields of, say, hostile corporate takeovers. But the greatly enlarged stakes in modern maritime commercial disputes may tempt them.

Let arbitrators conduct themselves so that arbitration remains a form of dispute resolution truly alternative to litigation, and not litigation under another name. Arbitrators may do this by efficient case management. I stress two areas that give judges difficulties. Arbitrators should keep discovery within bounds; and prevent awards of attorney's fees from metastasizing into satellite areas of dispute. These are problems that plague litigation. The Federal Rules of Civil Procedure are repeatedly and ineffectually amended to control excessive demands for discovery by deposition, written interrogatory, or document production, with resulting cries of anguish from the parties sought to be discovered. My sense is that arbitrators presently limit discovery for the most part to documents. I think they should continue to do so.

In litigation, awards of attorney's fees are traditionally barred by the "American rule", a populist concept of the new and expanding nation, intended to ensure access to the courts to citizens of all degrees of economic resources. But attorney's fees are becoming increasingly available by statute or rule of practice, in particular situations. In litigation, claims for attorney's fees and expenses must be supported by contemporaneous time records and receipts, and the opposing party is free to contest the necessity of the amount of lawyers' time spent; the reasonableness of each attorney's hourly billing rate; and the amount of the claimed cash expenses. I remember my former firm's claim for fees and expenses being challenged on the ground that my partners, taking depositions in another city, did not have to drink Heineken's beer at dinner; a more modestly priced domestic brand would have sufficed.

Judges constantly confront such disputes. Arbitrators, in cases where they are empowered to award attorney's fees and are inclined to do so, may avoid this quagmire by making a lump sum award of fees on account, which will probably be less than the total fees and costs incurred; or, if arbitrators wish to compensate the prevailing party fully, they may require that the claim be supported by receipted bills paid by the client. I read a recent award which did just that. It seems to me a stroke of genius. The responsibility for evaluating the reasonableness of counsel's charges was cast upon counsel's client, which had its own interest in doing so.

My general point is that arbitrators should exercise their powers to keep arbitration as streamlined as the circumstances will permit.

Let the courts support arbitration and the finality of awards when appropriate, but also be prepared to give the arbitral process a second look when justice requires.

There is growing judicial recognition that a broad arbitration clause empowers arbitrators to give provisional remedies, such as the attachment of funds to secure an award; and to include in their awards equitable remedies in addition to money damages.

Thus, my court has held that arbitrators have the equitable power to remove a notice of lien against a vessel.[35] The case arose out of a time charterer's refusal to accept redelivery of the vessel. As a tactical move, the charterer placed a $2 million notice of lien on the vessel's Liberian Registry. The owner asked the arbitrators to remove the lien, contending that the claims supporting the lien were baseless, and the lien itself was blocking a desired sale of the vessel to a third party.

The arbitrators ultimately removed the lien, but only after much soul searching. The interim award stated:

"This panel has anguished over the wisdom of granting interim

---

35 *Southern Seas Navigation Limited of Monrovia v Petroteos Mexicanos of Mexico City,* 606 F Supp 692 (SDNY 1985) ("*Southern Seas*").

> relief. Judicial tribunals are more accustomed to segmented proceedings and the creation of flexible remedies. Caselaw, however, supports our authority as arbitrators to engage in equitable type relief."

The District Court, confirming the interim award directing the lifting of the lien, had no such qualms. Citing and quoting a Second Circuit Court of Appeals case, Judge Edward Weinfeld (one of our most revered and influential district judges) observed that "not only do arbitrators have traditional powers of equity, under New York law they have power to fashion relief that a court may not properly grant."[36]

Arbitrators as super-Chancellors in Equity! It is a heady thought; but entirely consistent with the favorable view that American courts take of arbitration. The extension of equitable remedies to arbitrators is intended as a means to make arbitration effective.

That purpose is reflected by another case in my court, in which District Judge Walker (as he then was) upheld an arbitrator's order requiring a party to post bond of $123,000 to fund any future arbitration awards against it.[37] Rejecting the argument that ordering a party to a broad arbitration agreement to post a bond exceeded the arbitration panel's legal authority, Judge Walker (as did Judge Weinfeld) cited the Court of Appeals' decision in Sperry for the proposition that an arbitration panel may grant equitable relief that a court could not.

Concern has been expressed as to how arbitrators' equitable rulings maybe enforced. I entertain no uncertainty on that score. If the arbitrators grant provisional or equitable relief in the form of an award which finally resolves the issue at hand, rather than being an intermediate step towards a further or final result, that award, even though designated "preliminary" or

---

36 *Id* at p 694 (citing and quoting *Sperry International Trade, Inc v Govemment of Israel,* 689 F 2d 301, 306 (2d Cir 1982) ("Sperry")).

37 *Compania Chilena de Navegacion Interoceanica, SAv Norton, Lilly & Co, Inc* 652 F Supp 1512, 1516–17 (SDNY 1987) ("*Compania Chitena*").

"interim," is sufficiently discrete and final to allow confirmation by the District Court. That is the procedural lesson of cases like Southern Seas and Compania Chilena. If the award is confirmed, it becomes an order of the District Court. Failure to obey a court order may constitute contempt of court, punishable by fines or imprisonment. Of course, the one-ship, off-shore shell corporation, with no discoverable assets in the US and no corporate officers to send to prison, may escape the court's contempt power, but that is an ancient imperfection of the law. The present point is that courts can, and should, enforce arbitrators' provisional or equitable orders with the full power of their own jurisdiction.

As for judicial review of arbitration awards, it should remain as limited as it is under American law in cases where the disputes fall within the arbitrators' commercial expertise. There is no point asking judges who do not know what "demurrage" means and have never seen a laytime statement to review an arbitration award in a demurrage case. But less traditional claims, which as we have seen are arbitrable under a broad arbitration clause, are different.

It is worth recalling that in the Mitsubishi case, where the Supreme Court enforced an arbitration clause requiring the resolution of American antitrust law claims by Japanese arbitrators, the Supreme Court cautioned in the text that "[w] here the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim."[38] At that point the Court cited Wilko, which coined the phrase "manifest disregard of law". The Court sounded an additional warning signal in a footnote it dropped from the text, observing that it had no occasion "to speculate on this matter at this stage in the proceedings, when Mitsubishi seeks to enforce the agreement to arbitrate, not to enforce an award. Nor need we consider now the effect of an arbitral

---

[38] *Supra* n 10 at pp 636–37.

tribunal's failure to take cognizance of the statutory cause of action on the claimant's capacity to reinitiate suit in federal court."[39] I read that language as a promise or threat, depending upon one's point of view, to vacate an award and permit litigation if arbitrators fail to enforce a statutory claim in accordance with the statutory terms.

This possibility of enlarged judicial review resonates particularly in the RICO treble-damage claim context.

The Supreme Court has said that a RICO claim requires proof of (i) conduct (ii) of an enterprise (iii) through a pattern (iv) of racketeering activity.[40] These words and phrases are expressions of art that Congress for the most part did not define. They have driven courts almost frantic. Consider the requisite element of a "pattern". It is generally recognized that this requires a "continuity" of conduct, but no one really knows what "continuity" means. In 1989, the Supreme Court tried to define the concept in a decision that split the Court 5 to 4.[41] Justice Brennan labored mightily to produce a bare majority opinion speaking in terms of "closed" and "open-ended" continuity. Justice Scalia, who wrote the dissent, said he could not understand any of those notions but added, with an uncharacteristic note of apology: "It is, however, unfair to be so critical of the Court's effort, because I would be unable to provide an interpretation of RICO that gives significantly more guidance concerning its application."[42]

Less exalted judges, as well as the ablest arbitrators, are left to sail these largely uncharted seas as best they can. Over time, a body of case law will supply some definitions. But a RICO claim depends upon gradually evolving legal concepts, rather than facts established by commercial practice. Accordingly, in my view, courts should not shrink from taking a second look at arbitration awards upholding or rejecting RICO

---

39 *Id* at 637 footnote 19.

40 *Sedima, SP RL v Imrex Co,* 473 US 479, 496 (1985).

41 *HJ Inc v Northwestern Bell Telephone Co,* 492 US 299 (1989).

42 *Id* at pp 254–55.

claims. If a basis for their doing so is needed, we may revive the "manifest disregard of law" rationale of Wilko.

I would apply the same analysis to punitive damages claims. The concept of punitive damages causes concern in certain quarters. Punitive damages are recoverable under American maritime law. The MLA of the United States, in an effort to limit the concept, is considering asking Congress to provide by statute that "punitive damages under the general maritime law may be awarded only where it is proven by clear and convincing evidence that a party consciously and deliberately engaged in conduct which that party knew would result and which proximately resulted in injury to a claimant and which was reprehensible, outrageous, intentional, reckless or of a criminal nature, or was aggravated by an evil motive, actual malice, actual fraud or deliberate violence. Mere inadvertence or even gross negligence will not suffice to support an award of punitive damages under the general maritime law."[43] These definitions are derived in large part from prior caselaw. They measure human conduct in terms of both law and morality. In the hope that a judge's moral sensitivity may on occasion approach that of an arbitrator, I would argue that there should be broad judicial review of an award granting or rejecting a claim for punitive damages.

Lastly, let the maritime industry, the consumers of the American arbitration process, for whose betterment all in this vineyard of commercial justice labor, reflect upon the power of the contracting parties, in the arbitration clause, to define the scope and nature of arbitration. At the time commercial contracts are negotiated, the parties are presumably anticipating commercial prosperity and peace, rather than division and warfare. But cases like Boeing remind us that the parties in their contract significantly affect what arbitrators may or may not do in making an award.

Then, let members of the industry, having made their bargain, submit disputes that may arise to that form of arbitration upon which they have

---

43 Excerpt from draft legislation proposed by the Maritime Legislation Committee of the MLA.

agreed, with confidence in the integrity of the process. The fact is that over time there has grown up in the US a group of arbitrators of great skill, integrity and experience. The more recent awards demonstrate American arbitrators' ability to understand and apply the RICO claim elements as well as anyone; to exercise restraint in limiting awards of punitive damages to appropriate circumstances and reasonable amounts; and to deal with claims of attorney's fees in a sensible manner. The maritime bar and the maritime arbitrators in the City of New York regard each other, for the most part, with well-deserved mutual respect. They work together in many ways for the common good. You may have confidence in the present process, to which the American experience in maritime arbitration has brought us.

If lawyers, arbitrators and courts play their proper parts, the industry will find that arbitration remains the first and best alternative to litigation, capable of achieving in the 21th century, as in the 20th, Cedric Barclay's purpose of serving maritime commerce by telling shipowners and charterers if they are right or wrong, expeditiously and at reasonable cost.

I conclude these remarks with a final quotation from Cedric Barclay. I have no idea what it means, but the metaphor is so colorful that I cannot resist it. In 1985, Cedric Barclay read a paper at the ICMA Casablanca Congress on the subject of "Oil Shortages — Allowances and Tolerances". You would not think it possible to infuse so prosaic a topic with elements of poetry and mystery. But Cedric Barclay could. He concluded an informative talk on oil shortages by saying:

> "For as the fox said when he ate the bag-pipes, here's meat and music too, and no one can really know which is which."

I do not know if this morning I have been the fox, or the bag pipes, or neither of the above. But I do hope that in what I have said, you have found at least some meat, and heard at least some music, and have been able to tell the difference between the two.

If I have achieved those objectives, then I have paid a suitable tribute to this good man. Thank you for letting me make the effort.

The Rt Hon Sir Anthony Clarke
Master of the Rolls

Anthony Clarke was appointed as a High Court judge in 1993 (sitting mainly as Admiralty judge), was elevated to the Court of Appeal in 1998 and became Master of the Rolls — the senior judge in the civil division of the Court of Appeal — in 1995. His appointment to the bench followed a very successful career at the English Commercial and Admiralty Bars, based in chambers at 2 Essex Court (now Quadrant Chambers) where he succeeded Barry Sheen QC on his appointment as Admiralty judge.