International Congress of Maritime Arbitrators XX
Copenhagen, 25 September 2017

Forty Years On — Is This Progress?

by Bruce Harris

To be asked to give this lecture is, for me, an incredible honour and a correspondingly heavy burden, for I follow earlier lecturers each of whom had infinitely greater qualifications and, I feel, far, far more to offer than I. So it was a huge shock when, in the summer of 2016, Clive Aston, on behalf of the Steering and Topics & Agenda Committees, telephoned to ask if I would take on the task.

As I started writing it was almost New Year's Eve 2016. At that stage the lecture had to be ready by the end of February 2017 so that it could be included in a new bound volume containing all 10 of the lectures to date, to be made available at this Congress. At that point, December 2016, I really did not know what I was going to say — despite have worried about it on and off over the previous 4 months — and there had to be every likelihood that by the time of the Congress, 9 months away, I should want to say something quite different. If that is so, then what you hear will not correspond with this text and I hope you will understand and forgive me. The situation was not helped when, in mid-January, Philip Yang told me that I had even less time than I had hitherto thought: only until mid-February.

One early thought was to look back over the 40-odd years in which I have been arbitrating (of which some 37 have been full-time), to see what has changed and — just possibly — to speculate on what might happen to

maritime arbitration in the future, though prophesying is dangerous: as we who are involved in shipping know only too well, the unexpected always happens.

My provisional title, whilst this idea was in my head, was "Forty Years On — Is this Progress?" So I was momentarily peeved when, at the LMAA luncheon in November 2016, the speaker, Timothy Young QC, announced that his after-lunch speech was called "Forty Years On". That is, as Tim said, the title of a brilliant play by a brilliant man, Alan Bennett, which was also my inspiration when thinking of a title for this lecture. This coincidence just proves that great minds think alike, although Tim's mind is infinitely greater than mine, as I am sure he would readily agree. But as I got there first, I decided to stick with the title and see what happened.

One of the dangers of any personal review of the past is a tendency to bang on about how things are not what they were, meaning generally that they are not as good as they were. "Fings Ain't Wot They Used T'Be" was the title of a very successful musical show in London in 1960. This, of course, is a perennial cry which history shows us has echoed down the ages, probably ever since mankind became aware of itself socially. It is not easy to avoid this tendency, but I shall do my best. If, however, I end up sounding like a grumpy old man (some may say I have been like that for years) it is only because I speak as I find, and I would hope that you would not want me to do otherwise.

Context, as anyone who has to interpret a contract well knows, is very important; so let me indulge in a lightning review of some of the changes that have occurred in the wider world before turning to the particular sphere of maritime arbitration. This is, inevitably, a partial and very personal selection: you may well have your own memories and milestones.

The wider world

My first arbitration appointment was in 1974. Since then we have had the first Star Wars movie and a whole lot of sequels and prequels, the death of Elvis (or at least his alleged death!) (1977), the introduction of the first

mass-marketed PC and shortly after that the first laptops; the first test-tube baby (1978), the fall of the Shah of Iran and the rise of Britain's first woman prime minister (1979), the loss of Great Britain's last independent colony (Zimbabwe, 1980), AIDS, the introduction of the mobile telephone (1989) (and now, apparently, more people in the world own mobile phones than have toilets); the discovery of a hole in the ozone layer (1995); Denmark allowing same-sex partnerships (1988) — nowadays of course such partnerships and indeed marriages are commonplace in many countries; the fall of the Berlin Wall (1989), the dissolution of the Warsaw Pact and of the Soviet Union.

There have been various new kinds of disaster, some unquestionably to be so categorised — the Exxon Valdez (1989), the Deepwater Horizon (2010), 9/11 and all that followed, a devastating tsunami (2004), the financial crash of 2008 and the rise of Daesh (ISIS or ISIL) in 2014 — and some whose categorisation as disasters may be more debatable: the establishment of the European Monetary System (1989) and the EU (1993), the redefinition by President Clinton of the phrase "sexual relations" (1998), the invasion of Iraq (2003) and even the invitation to give this lecture. I deliberately avoid here mentioning certain events of the past year or so, in case I become victim of a Twitter campaign, whatever that may be ...

Other, perhaps more neutral, events have included the establishment of the Internet (1990), the opening of the tunnel under the English Channel (1994), the cloning of a sheep (1996) and the founding of Google, Wikipedia and Facebook (early 2000s) and now Instagram and the like.

It is clear that social media has substantial effects on communication — leading in my view, despite appearances to the contrary — to a lack of real communication, and to a great effect on our beliefs — what appears on Twitter or elsewhere is easily taken as truth, however unlikely or palpably inaccurate it may be. One English commentator has referred to "the collective dim-wittery, cliché-dependence and creative laziness of social media" and to an "online moronocracy with a collective reading age of 12

and a quarter".

And the modern, and dangerous, phenomenon is that of political correctness. This has gone so far that by the time this lecture is given it will probably be politically incorrect even to use the phrase " political correctness". Three short examples from the U. K. A school requires its pupils to sign a contract before they can play football. They must agree in this contract not to cheat, not to gloat when they win, not to be bad losers, and 14 other matters. Breach of a rule leads to a three-day football suspension.

In another school, teachers must not blow a whistle at the end of break because it is "too aggressive". Instead, they must raise a hand and wait for pupils to notice. One suspects that breaks in that school are now rather longer than the lessons ...

Thirdly, at Edinburgh University in Scotland, a student was threatened with expulsion from a student union meeting for raising her arms. This was in breach of a policy that bans head-shaking and hand gestures which denote disagreement!

Last year, of course, saw some changes on the international scene that may have very profound and long-term consequences. For instance, the decision of the UK to leave the EU and the election of President Trump. Both these events surprised the pundits whose job it is to forecast the outcomes of plebiscites. One imagines they may also have surprised some of those who were campaigning for such results. I suspect they will not be the only shocks that we shall be experiencing in the immediate future. Such occurrences reinforce my earlier point — that it is dangerous to prophesy — and make me even more hesitant when it comes to guessing what the future may hold for maritime arbitration.

Just as the Brexit and Trump votes were largely unforeseen, so is it impossible to know what they will lead to, not least because so many factors influence world events. Some feel that, as a result, the world has changed dramatically and will continue to do so. Others suggest that there is a parallel with 1848, when dissatisfaction with current leadership, a

desire for more say in government and an increase in nationalism led to effective insurrections in France, Germany, Italy and the Austrian Empire, led by a coalition of reformers, middle-class intellectuals and angry workers. One sees the similarities, but whether the outcome nowadays — which was then in fact little permanent change — will be the same is very much a moot question.

If there is one area where a fairly confident, if very general, prediction can be made, I suspect it is in that of work. Unless something changes in a wholly dramatic and equally unforeseeable way, automation is likely to reduce very substantially the number of jobs available. Most supermarkets now operate principally with self check-out points. My local one used to employ a dozen or so young people at cash desks at the three busy times of the day. Now they have only a handful because of all the self check-out machines. Amazon will be opening shops that check you out with sensors only as you leave with your goods under your arm. The British Retail Consortium estimates that by 2025 a third of all retail sector jobs will have gone. Driverless cars are increasingly with us. What will happen to taxi and similar drivers, of whom there are some 300, 000 in our small country alone, and to truck and HV drivers, of whom there are over 4 million in the United States?

The Bank of England reckons that half of the UK's 30 million jobs are at risk from automation. What will be the consequences for states, called upon as they will be, to support those made redundant — in addition to the increasing demands made upon state funds by constantly ageing populations? And what will be the psychological and social consequences for those who find themselves without work, and consequently for society at large? I venture no answers to these questions but I suggest they are matters that should be of great concern.

The world of shipping

Let me return closer to our maritime arbitration home, and consider what have been the significant changes in the shipping industry and how they

have affected what we do. Again, I propose a selection that is inevitably subjective and undoubtedly partial. But it strikes me that, at least in terms of effect on our business of arbitrating disputes, these have been some of the more important factors.

Regulation first. In the past forty years every aspect of life has become subject to more and more regulation, sometimes to the extent that it threatens to suffocate. But there is no doubt that many of the rules, regulations and laws introduced to govern shipping in the recent decades have served to reduce the number of undesirable physical incidents such as collisions, pollution, personal injuries and cargo damage: all matters that have more or less directly impinged on what we do. They have also created a number of arbitrable disputes.

Then we have seen a massive increase in the use of containerisation. Containers of course existed much earlier in the 20th century, but it was only after standards were introduced in the late 1960s and early 1970s, and double-stacking became acceptable, that the practice of carrying former break-bulk cargoes in containers and the consequent development, in large numbers, of specialised container ships really took off. Now we have container ships that are longer than the Eiffel Tower is high.

Containerisation has simplified many shipping practices (although it has given rise to new ones that are not always without their problems) and, I suspect, has led to proportionately more cargo being carried on liner services compared to tramp ships than was previously the case. That in itself has tended to reduce the number of disputes that arise in relation to tramp ships. In addition it has tended to reduce cargo damage — but it has in turn given rise to a few more or less spectacular or serious incidents with which we have had to deal. As a side-effect, surpluses of containers have been used to help reduce housing problems in various parts of the world.

On the other hand, the quantities of cargo moving around the world in ships have increased enormously, as have the numbers and sizes of ships. In 1975 something like 410 billion tonnes of cargo was shipped: in 1980 the figure was about 450 billion tonnes — but by 2013 that figure had

doubled to some 900 billion tonnes. The world's shipping fleet has more than kept pace — from about 580 million tonnes in 1975 to about 1,500 million tonnes in 2013, reflecting the surplus of tonnage that has so adversely affected the market in recent years.

Much of that increase came from ships built in the People's Republic of China where, from the late 1990s onward, shipbuilding burgeoned. It is perhaps worth noting in passing that it has been estimated that in 2010 China was responsible for some 44% of the world's shipbuilding activity, whereas in the 1970s Japan, Brazil, South Korea and Europe, in that order, were the leading shipbuilding areas.

As we all know, rises in the price of steel in the early 2000s led to numerous disputes because shipyards suddenly found that their contracts were proving unprofitable. But the situation quickly reversed itself when the crash came in 2008: shipowners who had entered into contracts to build sometimes large numbers of ships at what seemed low prices, in order to take advantage of a flourishing market, were suddenly anxious to find any way of getting out of their obligations. This situation has provided much employment for lawyers and arbitrators, at least in London: in my case a far larger part of my time has been spent on building disputes in the last 8 years or so than ever before.

I have mentioned the increase in size of container carriers, and of course a similar phenomenon has been observed in the tanker trade. In my experience this too has affected the number and type of disputes that come to arbitration. In the days of smaller tankers we saw many more laytime and demurrage disputes, often turning on questions of pumping performance, than we do now. Similarly there were many more issues concerning matters such as tank-cleaning than have come to arbitration in recent years.

As well as larger vessels, there are now many more purpose-built ships —and more in proportion to the total fleet — than ever before. Forty years ago, cargoes were often carried in ships that were quite unsuitable. So, for example, grain might be carried in a general cargo ship, with its limited-sized hatches and various obstructions in the holds, giving rise to

innumerable disputes about all kinds of things, with which arbitrators had to deal. This sort of situation of course still happens, but far less frequently.

Newer types of vessel have brought their own problems with which we have had to cope, not so much due to the nature of those vessels as to the new, specialised areas of employment and the contracts that have been developed to deal with them. I have in mind areas such as the off-shore industry: oil rigs and wind farms require particular vessels for servicing purposes. They create their own problems and disputes.

Sometimes such problems are formidable. I was involved in one case concerned with the conversion of a bulk-carrier hull into the world's then most sophisticated pipe-laying vessel, nowadays (after further work) capable of laying pipes of up to 60 inches in diameter at a depth of almost 3 kilometres, and of carrying 220,000 tonnes of pipe and a crew of 420. The design was, inevitably, complicated in the extreme. There were problems at the yard doing the conversion work which led to the owners taking the vessel away and having her completed on the other side of the world, at great cost and loss of time.

The resulting claims and counterclaims totalled, if memory serves me, more than $600 million — in 1998 a very large sum — as it still is for most of us. The arbitration was so complex and involved so many documents — there were many tens of thousands of them, many of which ran to hundreds of pages, that the case was "salami-sliced": i. e. we took different issues at different times and made awards on each slice — 9 awards in all, before finally there was a settlement. In total, there were almost 300 hearing days, spread over nearly 10 years. By the conclusion of the case I was the last man standing: one co-arbitrator had sadly died and two chairmen had resigned. Further, the legal teams were completely different from those at the start of the case. That was a truly exceptional matter, one that simply could not have arisen in the 1970s.

In those days, i. e. the 1970s, many of the disputes that went to arbitration concerned the calculation of laytime. I recall frequently having to pore over laytime statements, thinking about weather working days, time

lost waiting for berth, reachable on arrival, whether in berth or not, arrived ships and the like. Such questions — or some of them — still come up from time to time, but far less frequently than before, partly because many have been resolved by the courts and partly because of changes in the way business is conducted. Perhaps most significant is the shift away from voyage charters — which were the order of the day when I was young — to time charters: a shift reflected in the great increase in size of *Wilford & others on Time Charters*, and the markedly less frequent appearance of books on laytime. It is also reflected in the number of cases that have come before the English courts in recent years on off-hire and time charter indemnity questions.

Technology, of course, has affected not only the way things are done, but also to an extent the nature of disputes, even if only indirectly. Whereas until the early 1990s broking in London was principally conducted face-to-face on the floor of the Baltic Exchange and by telephone, now brokers spend much of their time staring at screens, finding out what business or what ships are available where, then negotiating through various message services: even email seems to be becoming redundant. All this, in my view, has changed the nature of broking and, perhaps more importantly, of brokers. I have the impression (but as so often I may be wrong) that speaking generally, today's brokers do not have the same broad, down-to-earth, experience of ships and shipping that they once had. If, as I suspect is the case, this leads to problems arising that have to go to arbitration, it is a good thing for us, but not for the industry.

Another of the developments that has been apparent is the rise of long-term charters, often tied to shipbuilding contracts, frequently themselves subject to sub-charters and not infrequently to further sub-charters down a lengthy chain. Even short-term time charters themselves often lead to such sub-chartering. These chains can create formidable problems: for example, how to handle disputes that in fact go up and down a chain of charters but where different arbitration tribunals are appointed at each stage, and there is no power (in English law at least) to consolidate proceedings. There have

also been some very substantial problems arising from insolvencies — usually of charterers but more recently of course of OW Bunker — those of charterers resulting in attempts to negotiate amicable terminations of fixtures, as well as liens on sub-hires and sub-freights: all problems rarely encountered 40 years ago. Linked are those cases — again new in type — which have involved insolvency coupled with performance guarantees and/or shipbuilding contracts. One in which I am presently involved concerns a long charter which the charterers were entitled to cancel in certain circumstances where the owners became entitled to terminate the shipbuilding contract. Issues have arisen as to what those circumstances are and whether the owners were in fact entitled to terminate the shipbuilding contract, these issues involving interpreting both the charter and that contract.

The "players"

Another great change that I have observed, which is no doubt partially a symptom of globalisation, is in the players: the owners, charterers, shippers etc. For one thing, there seem to be fewer small operators, at least in proportion to the total market. The owner with one or two ships seems now to be a rarity, as is the small trader. Huge shipping empires, sometimes consortia, play a proportionately much larger part, as do substantial shippers and charterers, than before. Consequently, they carry much more clout. One of the effects of that is that although disputes still occur in their transactions, they are often in a position to bring such commercial pressure on their contracting partners that matters never go to arbitration, or settle if they do.

Speaking of settlement, I know that a number of owners, no doubt helped by their Clubs, now look much more carefully than did their forefathers at the economics of fighting cases; not just balancing the legal costs against the sums in dispute, but also taking account of their internal management time and future relations with their fellow disputants. Again, this leads to cases that might otherwise have fought being settled, often

before they go to arbitration.

One reason for this is the education that many who are most active in the business receive, as well as their general background. When I was at a Club in the 1970s, many of the principals in owning companies were former masters or chief engineers, accustomed to keeping notes of deals done on small scraps of paper, or the back of a cigarette packet. Nowadays their successors, often their children, have been to university, studied economics, got their MBAs and spend as much time watching and playing the financial markets as they do running their ships.

Other changes

There have also been changes on other fronts relevant to shipping that could not have been imaginable 40 years ago: for example, the sale of the Baltic Exchange to Singapore, or the substantial financial interests that certain countries have taken in others' ports and infrastructure: to cite one instance, the majority shareholding taken by COSCO in the Piraeus Port Authority a year or so ago. Speaking of Greece, one Greek shipowner has estimated that if the EU Commission's proposals in respect of competition in shipping are implemented, half the European fleet would move to Asia. If that were to happen it would inevitably have, eventually, a huge effect on our business and its main locations, a subject to which I shall return.

One phenomenon that cannot go without mention here is the rise in piracy. This is a problem that has existed since ships first started sailing the world, but in the past decades its level has increased remarkably, latterly in south Asia particularly, but not long ago off the coast of Somalia. Cases have arisen concerning not only the direct effects — for example liability for hire and other expenses during the period a vessel is held by pirates — but also indirect issues such as liability for extra insurance premiums, the choice of route taken to reduce the risks, the cost of security measures and so on. Once more the issues with which lawyers and arbitrators have had to deal in these respects recently were not encountered, at least not to any appreciable extent, earlier.

The world of maritime arbitration

So much for a look at some of the changes in the world of shipping. What of the world of maritime arbitration? How has it changed in the past 40 years? Speaking from my own experience, primarily in London, I fear inevitably, the changes have been enormous. I have already, in reviewing some of the developments in shipping, touched on a selection of the changes, in particular in relation to the types of cases: the relative infrequency nowadays of laytime and demurrage disputes; the rise of problems about off-hire and shipbuilding disputes — sometimes involving complex technical issues but very often to do with termination of contracts and turning on responsibility for and the types of delays; disputes involving specialist vessels and new contract forms; issues arising from the resurgence of piracy.

I have also seen cases which I cannot imagine having occurred, at least with any frequency, in the 1970s, where ships are detained by port or even governmental authorities without any real justification. For example there is, at the time of writing this lecture, an ongoing case of a tanker detained in Venezuela since September 2014. Everyone — absolutely everyone — agrees that no one concerned with her had anything to do with a certain fraud that got close to being committed in relation to her. She was detained originally as potential evidence but both the prosecutor and the courts now agree that she is not needed in that regard. The problem is that neither is willing to take the initiative to authorise her release, for fear of losing their job — or worse.

There have also been cases of armed guards boarding ships in African ports, before even any arrest proceedings have begun, to ensure that the vessels in question do not sail because of cargo claims (which have often turned out to be grossly exaggerated if not wholly spurious), their presence being used to coerce the owners into paying, rather than simply securing, those claims.

Such problems arise most commonly in states where the rule of law is not as apparent as many of us are accustomed to, often because a

dictatorship, or a virtual dictatorship, is in place. Very recent history suggests that we may be moving into an era, even in the Western world, where authoritarianism, if not outright dictatorship, is once again the predominant rule. If that is the case it will no doubt give rise to other, perhaps new disputes that we have to resolve, though the consequences for society in general are unlikely to be desirable.

What has also changed enormously is the way in which arbitration is now handled, at least in London. My only other experience of any appreciable extent is in relation to maritime arbitration in Paris, where I have discerned some modest refinements but not, I think, any fundamental shift over the years. This is no doubt a tribute to the procedures adopted there, and to the Chambre Arbitrale Maritime de Paris in particular.

In London, as I have indicated, there have been great changes. By the time I started arbitrating in 1975 there were the first signs of a shift towards where we are now, but they were very much only first signs. Prior to that, in most cases, at least one and in all likelihood both parties would not have legal representation. Each would appoint an arbitrator and send its nominee a usually small clip of papers with a covering letter outlining the dispute and that party's point of view. The arbitrators would exchange those files and pass them to their respective appointors for comment. Those comments were then passed back, and there might be a further round of very short comments, following which the arbitrators would discuss the matter and if they could not agree, appoint an umpire to whom they would present the case as advocates. The umpire took over the case entirely and made an award.

All that has changed dramatically. For one thing, nowadays lawyers seem invariably to be involved on both sides. Detailed written submissions or statements of case are exchanged, with the lawyers battling for the last word, such that we not infrequently, although seldom necessarily, see demands for rejoinders, surrejoinders and even further rebuttal submissions. The slender file of documents provided by each side in the old days has now become a number, sometimes a large number, of near-

bursting ring-binders. Thanks to the 1979 and 1996 Arbitration Acts and the greatly increased use of the NYPE and Asbatankvoy charter forms, the umpire has all but disappeared: although clauses requiring an umpire rather than a third arbitrator are still found, when it comes to it parties are generally willing to agree that a third arbitrator rather than umpire should be appointed.

Until the early 1970s hearings were relatively rare and when they did occur they tended to be short. The increased use of lawyers changed that, though, so that once I started as a full-time arbitrator I quickly found my diary full with back-to-back hearing fixtures — a situation that Cedric Barclay himself had experienced for some time and which, as I have explained elsewhere, led to him becoming known as a respondents' arbitrator, because he could not offer early hearing dates. The pendulum has swung, however, and rather fewer oral hearings are taking place now, many of the cases being dealt with on documents alone.

What has brought about these changes? I believe there are a number of factors. In what I might call the early days, many owners and charterers maintained substantial offices in London — often described as mere agencies, but no one was fooled by that denomination — where there would be an in-house claims handler, often doubling as insurance manager. Many such people were old hands at the business. They knew their stuff and they and their principals saw no need for outside help, beyond perhaps that of their Club managers, at least for the average dispute.

Threats of taxation and other economic considerations drove many such offices overseas, or led to a reduction in their size and importance. The old-hand claims handlers were not replaced when they retired. Owners would more often turn to their Clubs and they in turn, because of pressure of work and other considerations, would more frequently involve solicitors who would often instruct barristers. It is a natural human tendency to do things in ways that are familiar to us, and lawyers are accustomed to court procedures. So similar procedures began to appear more frequently in

arbitration.

At the same time, many of the new guard of maritime arbitrators, i. e. those who started in the 1970s and 1980s and are now the London establishment, themselves came from legal backgrounds, at least in terms of training, so they were familiar with and found it easy to go along with more formal procedures.

Whilst originally the increased involvement of lawyers had effects that were relatively mild, over times other factors intervened that led to a rather different situation. For one thing, senior solicitors found themselves increasingly required to spend time and energy marketing and managing their businesses as practices grew and became more competitive, so work was delegated to less experienced lawyers who were not, in my view, given the supervision and instruction that had been provided to younger lawyers previously. That led, I believe, to a lowering of standards. Another factor is the blame culture, as a result of which lawyers have become increasingly concerned about being sued by their clients if they lose cases and therefore now tend to argue every point that might conceivably be open to them, however poor the merits.

In addition, the mid-1970s saw the introduction of time-sheets in solicitors' offices. Previously cases had been largely costed on a kind of "look-sniff" basis: how heavy was the file, how much work did the lawyers feel they had put in, how much was involved in the case and what was its importance to the client and, perhaps above all, what result had been achieved? With time-sheets, all that changed. Now it could be seen exactly how much time had been spent on a case, how much therefore the client could be charged, and how much could be claimed from the other side in the event of a success. Or rather, all that could be seen, provided that the time-sheets were filled in correctly, and provided also that the work so recorded was reasonably done. But there is what I call the "tyranny of time-sheets" because hand-in-hand with them came targets for the individual lawyers involved.

I challenge anyone accurately to account for every minute — or even

every 10-minute unit — of their working day, especially given the complexity and resultant distractions of modern life. Faced with a target of billable hours, often involving a high proportion of a working day, failing which you will lose your job, and faced with the fact that promotion will, to a large extent, depend on how many billable hours you can record, the temptation to be creative at least must be enormous. There is of course the old story of the lawyer arriving at the gates of heaven and protesting to St Peter that he was only 38 and thus too young to die. "But" said St Peter "we've checked your timesheets and according to them you're 108!"

Occasionally it falls to us London maritime arbitrators to assess the costs that a successful party is entitled to recover from the losing party. When I have to do this I am frequently dismayed by not only the hours said to have been spent on a case, but also the number of individuals involved in each firm, a matter which I feel is bound to lead to substantial duplication. Further, I believe the tyranny of the time-sheet, coupled with the blame culture and the fierce competition for places amongst lawyers currently in London (and for all I know elsewhere) has another effect: that of unnecessary argument at inappropriate length and in unpleasant ways, which inevitably leads to responses in kind, thus generating further costly work as well as ill-feeling. I am not for one moment suggesting that any of this is done consciously: I do not believe that more than a tiny handful of lawyers, if any, sit down consciously thinking "How can I maximise my chargeable hours?" or "How can I churn this case to the maximum?", but I cannot see any other reason for the extraordinary amount and length of vituperative and ultimately non-productive correspondence that now occurs in London arbitration (and, I believe, litigation).

The arbitrators

I shall come back to questions of costs in my conclusion, such as it is. In the meantime, let me say a few words about how arbitrators have changed. My experience of arbitration, when working at the Club, and prior to that for a firm of solicitors, involved the likes of John Chesterman, John

Selwyn, Ralph Kingsley, Dick Clyde, and latterly, Donald Davies and of course Cedric Barclay. Whilst some of them (excluding in particular, Cedric) had some legal training, they were all commercially very experienced and in particular mature men. Then along came John Potter and Michael Mabbs, both middle-aged men from broking backgrounds. There were, of course, others but they were less involved. Most, though, were in the strict sense of the phrase "commercial men".

Soon, however, young whipper-snappers (like me) came on the scene and, fairly rapidly, took up arbitrating as a full-time occupation. Four of the now more successful arbitrators in London, all of whom had some legal background, were on average only 32 years old when they were first appointed, and went full-time at an average age of only 42. This marked a sea-change, for until this time the accepted wisdom was that one could not possibly *start* arbitrating until one was at least 40 years old. To a large extent I believe this change came about because of the increasing involvement of lawyers in the process. They, who obviously have a great — though not final — say in the choice of arbitrators, tended to prefer those they might perceive as being of their own kind, and who could deal with the increasing procedural complexities that arose, largely because of the lawyers' involvement.

We are now, I believe, seeing a further change in the composition of maritime arbitration tribunals in London. In recent years a number of QCs have sought to act as arbitrators, perhaps because they have had enough of advocacy or perhaps because the work was not there for them, or some combination of such factors. At the same time some judges have retired from the bench and sought — mostly successfully — to develop practices as arbitrators. To an extent this has effects that are likely to perpetuate and indeed increase the role such individuals play. A claimant may appoint a QC or former judge as his appointed arbitrator. The respondent, wrongly thinking that this gives the claimant some kind of advantage, is likely to appoint a similar person as his nominee. If the case proceeds and a third person is needed, the chances are substantial that the party-appointed

arbitrators will appoint one of their own profession as chairman, rather than a typical LMAA arbitrator.

To an extent, I believe this is occurring because of a shortage of other, more commercial, candidates for appointment who are perceived as being suitable as arbitrators. I emphasise that qualification concerning perception because there are, as the LMAA's list of aspiring arbitrators shows, a good number of candidates around; but for whatever reasons it look as if those who have the gift of appointment do not view them as favourably as those candidates might hope. It is often thought that full membership of the LMAA is a pre-requisite to being appointed, but in my view this is not so. Many of today's most successful London arbitrators, including myself, received substantial numbers of appointments before becoming full members; in contrast we have seen some full members who have never had any great success, sometimes despite strenuous efforts to promote themselves. Another factor may be that it is now relatively difficult to obtain permission to appeal against awards in England, so perhaps it is therefore thought preferable to get a tribunal that is considered as more likely to reach the "right" legal answer. The potential downside, of course, is that such tribunals do not have the extent of commercial experience that others might have. Another disadvantage is the sheer increase in tribunal's fees that is involved: these colleagues charge hourly rates up to twice what a regular LMAA arbitrator may seek, and apply cancellation fee conditions that are, by LMAA standards, breathtaking.

I said a short while ago that a respondent faced with the appointment of a QC or ex-judge may wrongly think that the claimant thus has some advantage. It remains the case, although to a far lesser extent than some years ago, that parties occasionally believe the arbitrators they appoint are somehow going to fight their corner. In the 1960s and to an extent into the 1970s that may sometimes have been true, but it no longer is: we look at cases entirely impartially. It is no longer right for an appointing party to think of "my arbitrator". This is reflected in the fact that the vast majority of our decisions are unanimous. Dissents are rare, and in my experience

reflect a genuine difference of view when they do occur. Indeed, I recall in one case laughing out loud as chairman when my colleagues, discussing a case after a hearing, were having a heated disagreement. Indignantly they asked why I was laughing. I pointed out that the owners' appointee was arguing for the charterers' case whilst his colleague was arguing vigorously in favour of the owners' case. "So what?" they said, quite rightly.

"Conclusion" — Is This Progress? Where next?

And so to return to the second part of my title — "Forty Years On — Is This Progress?" Progress of course can mean different things. If it means simply going forward, as in going forward in time, then the answer to the question is obvious, indeed the question is pointless. But if progress is taken to mean improvement, or movement towards some ideal, then I am not persuaded that what we have seen meets those requirements, any more than I am persuaded that the world has, in this sense, progressed in the past 40 years. That may be because as someone has said: "Scratch any cynic and you will find a disappointed idealist". Or as the contemporary American historian Mark Lilla has it: "Where others see the river of time flowing as it always has, the reactionary sees the debris of paradise drifting past his eyes."

The world has certainly changed substantially in the past 40 years, and with it so have shipping and maritime arbitration. The latter, in London at least, has become substantially more formal and lawyer-controlled, and very considerably more expensive than ever it was. Given that arbitrators have to be paid, it may now be considerably more expensive than litigation, which these days it largely mimics. And we cannot expect that the increasing use of professional lawyers and ex-judges as arbitrators is going to reverse that tendency: indeed the opposite is more likely. For my part, I find it difficult to characterise what has happened in our work as "progress" in any positive way.

Looking more widely, it is right that a number of other centres have been established with a view to developing local maritime arbitration. So far

they do not seem to have been a real threat to London's pre-eminence; and it is possible, though far from certain, that until, if ever, they develop substantial maritime sectors of their own, such as London presently has, they will not be able to develop greatly. But nothing in this world remains static: fortunes rise and fall, as do dynasties, kingdoms and empires, and even dictators and presidents. It may be for example, that the effects of Brexit and EU regulation will drive much more of the shipping sector to the east than has so far migrated there. If that happens, if London arbitration continues to be as costly as it is (and if ex-judges and QCs are increasingly employed as arbitrators and charge their current rates it will become even more expensive!), and if overseas centres can develop cadres of competent arbitrators and lawyers and, preferably, economic and efficient procedures, London may be under some serious threat.

Having said that, I know that nine years ago in Tulane University, giving the William Tetley Lecture (which caused a certain amount of upset amongst some of my New York colleagues) I suggested that within 10 years London might see a substantial reduction in the number or arbitrations it had, and that mediation and early neutral evaluation might be in the ascendant. How wrong could I be? As I said at the beginning of this lecture, prophesying is dangerous. On the other hand, as President Kennedy said: "Change is the law of life. And those that look only to the past or present are certain to miss the future". Or as advertisements for financial services have to remind to us, past performance is no guide to the future.

So if I must venture a prophecy, it is the banal one that things will not stay the same. As to how, in our world of maritime arbitration, they may change, I can only guess. Assuming — and it is a huge and probably false assumption — that in the next 10 years or so there is no appreciable sea-change or step-change or quantum leap in circumstances generally, I might speculate that maritime arbitration will continue to prosper but will probably be more evenly spread than it is now between various centres across the world. However, I would also guess — on the same assumptions — that London will, despite its costliness, continue to dominate, though not to the

extent it does now.

Afterthought — Technology

Earlier I spoke briefly about the effects, as I saw them in one limited field, of modern technology. I think it not unlikely that we could in the years to come see some other effects in our daily arbitral work. One can conceive, for example, of the possibility that new arbitration software and hardware could transform things, reducing any need for physical presence during proceedings and possibly — who knows? — even enabling us to do away with arbitrators altogether. The idea of the robot arbitrator is one that conjures up all kinds of wonderful possibilities, as does the chance that contracts may be drawn up and concluded by robots. Even more speculatively, it is not beyond the bounds of possibility that many of the conventions we take for granted will be cast aside and that arbitration loses its ties to nationality, location, venue, form of proceedings, lawyers and arbitrators.

These and similar thoughts are, however, in my view best left to other, younger minds to develop, although were he here I am sure the great Cedric Barclay would enjoy toying with them, however fantastical they may be. But I am not Cedric. For my part, being inherently conservative and increasingly disinclined to learn new disciplines, I hope that any such drastic changes do not occur just yet. Things are certainly not what they used to be: I have coped so far, but now rather hope that they will stay more or less the same for a few years yet. Somehow, though, I doubt that my wish will be granted.

Post script: 13 February 2017

I realise that the deadline imposed for the finalisation of the printed lecture, mid-February, falls tomorrow, on Valentine's Day. I find the thought touching for, despite the cynicism and pessimism that some may discern in what I have written, the fact is I have always loved this work and the world in which we operate, and it is that which has motivated me rather than material considerations. I hope you too enjoy such great good fortune.