

THE IMPORTANCE OF CLARITY IN MARITIME LAW

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UDK 340.113.1:347.79
stručni rad

The author advocates clarity of the law either through statutory provisions, agreement or in a court decisions as important means for avoiding disputes resulting in subsequent litigation. The arguments for the importance of these result from analysis of three recent English decisions which the author elaborates in this article.

Different views of the law have been debated for many years. The Romans said that the law should be a light for the peoples. Other people disagree. William Shakespeare said that »the first thing we must do is kill all the lawyers«. There is an English cartoon which describes the legal system. It is picture of a cow: the claimant is pulling at the cow's ears, the defendant is pulling at the cow's tail. The lawyer is sat on a stool between them, taking all the milk. Another famous English writer, Charles Dickens, said that the law was »a ass«. More recently, the position of a person going into court was described as the same as the position of a man going blindfolded into a darkened room trying to catch a fly. His position is complicated by the fact that the room contains at least one other person, also blindfolded, and also trying to catch the fly. Outside the room are the lawyers, each of whom has convinced his client that he can succeed. Another view, far less complimentary, can be put in the form of a question: how do you describe a situation in which you have three lawyers up to their necks in manure? The answer — not enough manure!

It may be thought that the comments quoted above give evidence of bias on the part of the writer against the legal profession. This is not so: the comments are quoted as bases for the proposition that many nonlawyers have an unfavourable view of the law because, rightly or wrongly, they simply do not like lawyers. The main purpose of this paper is to argue that the real cause is not so much lawyers themselves, as confusion among non-lawyers regarding the roles which the law can play.

Law in itself is not mysterious. Indeed, it is a part of day to day business for anyone who is involved in shipping. During the course of any commercial activity, legal questions inevitably arise, and shipping is no exception. For the most part, these questions come to nothing. Occasionally, inevitably, disputes do occur and the parties involved, perhaps with the assistance of their Club or of legal advisers, will most frequently settle such disputes amicably, on the basis of commercial rather than legal considerations. A small minority of the disputes will, however, prove impossible to resolve amicably.

Against this background, there are two quite distinct roles which the law can play. Where amicable settlement is being discussed, the law serves to define the position of the parties. Once the parties know where they stand, they can then proceed to discuss the dispute, and to negotiate a settlement. The law gives a basis or starting point for negotiation and settlement. In some cases, the parties cannot — or will not — resolve the matter amicably. Then there is no alternative other than to follow the legal process, allowing an arbitrator or a court to decide who is right. Legal advisers will more often than not be involved. In these cases, the law acts as a tool, and is used by the legal adviser in an attempt to bring about a decision favourable to his client. It is important to stress that the law itself is neutral. The law exists to be used by the parties, rather than to force them into a particular course of action.

Before proceeding to examine in more detail the roles which the law does play, it is worthwhile to refer to one role which the law cannot play. It cannot be expected to rewrite the terms of a contract. As Lord Diplock stated in the »Maratha Envoy' »it is not part of the function of a court of justice to dictate to charterers and shipowners the terms of the contract into which they want to enter«. It is important to acknowledge that, by trying to use the law to rewrite a contract, shipowners simply create problems for themselves.

If the law is to define the obligations of the parties and be used as a tool in the legal process, it must be clear. If the law is not clear, it cannot play either role usefully. From a practical point of view, it could be argued that clarity may be more important than content. If the law is clear, then contracts can be concluded with each party having examined its own commercial requirements, and knowing its legal position. Both parties will then know the legal consequences of their contractual agreement. With luck, the contract could then be performed without problems.

The points made in the previous paragraph may lead to any number of questions regarding equity, justice or fairness. These concepts are certainly vital to any consideration of law, but are quite distinct from the question of clarity. In this context, it should be noted that clarity is not the same as certainty: there is a significant difference between the law being clear (and

* This article is based on a paper presented at a P & I Conference held by the UK P & I Club at Zagreb in June 1989.

¹ Federal Commerce & Navigation Co v Tradax Export SA [1978] A.C. 1

therefore understandable) and it being certain (and therefore predictable). The previous paragraph is concerned with clarity rather than certainty. Three recent decisions are referred to below in support of two propositions. Firstly, that clarity is a prerequisite for equity or justice. If the law is not clear, it cannot be equitable or just, since it is not possible to make any meaningful qualitative assessment of an object which is not well defined. Secondly, and conversely, only if the law is clear can judges — in their discretion — rely on principles of justice to correct the strict application of law in a given case. Whether a judge exercises his discretion will depend on his assessment of the circumstances of the case in question and the importance attached to other broader factors, including the need for certainty in law.

The importance of clarity can be illustrated by taking three examples from recent English decisions.

The »Kyzikos«² was a case concerned with the meaning of the phrase »whether in berth or not« (WIBON). The charter contained a WIBON provision and the ship was prevented by fog from berthing at her discharge port. The owners gave notice of readiness while the ship was still at anchorage, and argued that time started to count from tendering of the notice of readiness. The charterers argued that the WIBON provision did not apply, and that time started to count only from the moment when the ship reached the berth. The House of Lords decided that the phrase WIBON

»had over a very long period been treated as shorthand for what, if set out in longhand, would be »whether in berth (a berth being available) or not in berth (a berth not being available)«.

The House of Lords agreed with the charterers argument. It held that the phrase »whether in berth or not« applied only to cases where a berth was not available, and did not apply to cases where a berth was available but not reachable. By distinguishing between delays caused by congestion and delays caused by bad weather, the House of Lords has made the law unclear. Prior to »Kyzikos«, it was always accepted that the phrase »whether in berth or not« converted a berth charter into a port charter, so that notice of readiness could be given as soon as the ship arrived at the port. The situation is now open to question. For example, what would be the result if a delay were caused firstly by bad weather only (a berth being available) and then by congestion which did not initially exist? The effect of the decision is not clear. It is difficult for a solicitor to advise how to approach WIBON provisions in the light of the »Kyzikos«. In trying to clarify the meaning of the phrase »whether in berth or not«, the House of Lords has more than doubled its length, and succeeded only in confusing matters. The decision does not provide any basis for negotiation or settlement, because it is not clear, and it leaves the law in a state of confusion. In these circumstances, it is not possible to begin any discussion of justice because the law is not clear.

² Bulk Transport Group Shipping Ltd v Seacrystal Shipping Ltd [1989] 1 Lloyds LR 1.

A more helpful example was given by the House of Lords in the »Dominique«,³ a case which concerned an attempt by charterers to set off damages against freight. The circumstances of the case were unusual. »Dominique« was chartered for a voyage from India to Europe. The charter provided that the freight was to be pre-paid and deemed to be earned on signing bills of lading. The ship completed loading, bills of lading were issued and the ship set sail. She called for bunkers at Colombo, where she was arrested by creditors of the owners. The owners could not release the ship. The charterers gave notice that they were treating the charter as at an end. The charterers then arranged for the cargo to be on-carried by another ship, incurring costs which were greater than the advance freight. The charterers contested the owners claim for freight by arguing that they were entitled to set off against freight the damages they had suffered as a result of the owners repudiatory breach of the charter. The House of Lords rejected this argument. It referred to the long established rule of English law which prohibits deduction from freight in respect of cargo claims. Although it accepted that this »rule against deduction« differed from the rule in other countries, and had been criticised, the House of Lords felt that the rule against deduction was not open to challenge. The charterers were, therefore, liable to pay advance freight in full, without deduction. The decision makes the position under English law quite clear. Unless the charter otherwise provides, freight once earned must be paid in full without deductions, and without regard to any breach of charter, however serious, that the owners may have committed. As a result of the decision, the charterers having paid freight, were unable to recover their damages, since the owners were bankrupt. The situation and law was quite clear, and the House of Lords declined to exercise its equitable jurisdiction. In this respect, the decision may be open to criticism, as »Dominique« appears to be a case in which it would be proper to have recourse to the principals of justice in order to correct the harshness of the law. For example, in a similar situation under a time charter, the charterer would have the right to set off against hire the damages suffered as a result of the owners breach which deprived him of the use of the ship, the justification being that it would be equitable to allow set off. With considerable force, the question may be asked »why should voyage charters be different?«. It was open to the House of Lords to hold that, in circumstances where the charterer suffers damages as a result of repudiatory breach by the owner — and only in such circumstances — the charterer is entitled to set off the damages he suffers against freight which would otherwise fall due. The House of Lords presumably felt that it was more important to retain certainty so far as the right of set off against freight was concerned. This fact is likely to lead to considerable dissatisfaction with the decision. However, from a commercial point of view, the maritime community can be grateful that the situation is quite clear. In negotiating the provisions of a voyage charter, a specific freight deduction clause must be included, or otherwise the charterer will not be entitled to make deductions from freight.

³ Colonial Bank Ltd v European Grain & Shipping Ltd [1989] 1 Lloyd's LR 1

A third example, the »Freewave«,⁴ is a decision of the Court of Appeal on the meaning of the phrase »workable hatches«. In this case, the point at issue was a clause in a charter providing for discharge at a rate of 1,000 tons per day »basis five or more available working hatches or pro rata if less number of hatches«. The charterers argued that the phrase »available working hatches« meant that the parties intended the discharging rates decrease as cargo was discharged and holds became empty. They argued that, with five holds loaded, the discharge rate would be 200 times 5, that is 1,000 tons per day. The charterers argued that, once one hold had been emptied, it would no longer be workable, so that the discharging rate would fall to 200 times 4, that is 800 tons per day. Similarly, after two holds had been emptied, the rate would drop to 600 tons per day and so on. The effect of the charterers argument was that they would be allowed to discharge the ship more and more slowly as more cargo was discharged. Taken to its logical extreme, the charterers argument would have allowed the ship to continue discharging indefinitely, and prevented her from ever going on to demurrage. The charterers argument makes no commercial sense at all. It looks suspiciously like an attempt to re-write the terms of the charter. On the other hand, the owners argued that »available working hatches« referred to the characteristics of the ship and not to the distribution of the cargo. The Court of Appeal accepted the owners interpretation. It held that the clause referred to the ship's daily discharge rate, and not to the amount of cargo left on board. Therefore, the court decided that the average discharge rate per day should be based on the number of hatches available at the commencement of discharge. The decision is quite clear. It simplifies what would otherwise be a very complicated calculation and also provides fixed laytime, which both parties can take into account in voyage estimating. It has the effect of allowing the parties to know exactly where they stand, and also simplifies what would otherwise be very complicated legal arguments. There is no question of resorting to equity in this case. However, it is being taken to the House of Lords, and so the Court of Appeal's decision may not stand.

All three examples concern cases relating to voyage charters. Over the last few years there has been a relative decline in the number of cases concerning time charters which proceed to the courts in England. Many people feel that this fact is a reflection of the certainty which has been established regarding the rights and obligations of owners and charterers under time charter forms. In the 1960s and 1970s, there were relatively more cases concerning time charters, which have clarified the law. This is not to say that there are no disputes under time charter forms, but rather, that the law is sufficiently clear to allow the disputes to be resolved.

Two warnings may be given to shipowners by way of conclusion. Firstly, be very careful of concluding contracts which may include inconsistent or contradictory provisions. For example, a charterer will often propose to an

⁴ *President of India v Jebsens (UK) Ltd* [1987] 2 Lloyds LR 336. Court of Appeal not reported.

owner a fixture on the basis of a particular form of charter, with the charterers own standard rider clauses attached. In many cases, these clauses have not been drafted together, but have accumulated over a period of time. As a result, the clauses may not agree with one another, still less with the printed form. In such a situation, there are ready made disputes, simply waiting to occur. There can be no point in having ready made disputes, when commercial circumstances dictate that disputes inevitably arise. Secondly, having regard to the roles which the law can play, it is dangerous to rely too much on the law, and unrealistic to ask the law to perform roles it is not capable of performing. As has been pointed out above, the law cannot re-write a contract; in addition, it cannot, in itself, resolve a commercial dispute. If too much reliance is placed on the law, all that can be said with certainty is that lawyers will be richer, and that many more people will agree with Shakespeare that all the lawyers should be killed. The law reflects the people who use it, as well as the people who practise it.

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Acknowledgements: Chorley & Giles Shipping Law (8th revised edition 1987)
Thomas Miller & Co's Legal Decisions 1988

The writer wishes gratefully to acknowledge assistance given in the preparation of this paper by Messrs M. S. Furlong and J. R. Morris of Thomas Miller & Co.

Sažetak:

ZNAČAJ JASNOĆE PRAVNIH PROPISA U POMORSKOM PRAVU

Autor člankom ukazuje koliko je za nesmetano funkcioniranje svake, pa tako i pomorskopravne prakse, važno da su pravni propisi kojima se odnosi sudionika u pravnom prometu reguliraju jasni i nedvosmisleni.

Polazeći od toga da se pravom uređuju međusobni odnosi privrednih subjekata ponajprije da se utvrde određeni kriteriji prema kojima će se prosuđivati pozicija stranaka nekog posla i u okviru kojih će se moći tražiti bilo dobrovoljno ili sudsko rješenje nastalih nesuglasica i sporova, autor ističe da pravo ne može do kraja postići tu svrhu ako nije potpuno jasno i ako ne daje nedvosmisleni odgovor na pitanje u svakom konkretnom slučaju, čak i uz cijenu da ponekad zbog toga odstupi od načela pravednosti. S obzirom na načelo da ugovori obvezuju stranke pojedinih standardnih obrazaca brodarskih ugovora, one trebaju biti vrlo oprezne prilikom njihovih zaključivanja, jer im u slučaju nepreciznih ugovornih formulacija, kontradiktornih odredaba itd. pravo kasnije neće moći pomoći u razrješavanju sporova koji iz toga neminovno prijete da nastanu.

U potporu svojih naprijed navedenih uvjerenja i ocjena autor u nastavku članka iznosi i analizira tri sudske presude u tri različita spora nastala na osnovi primjene određenih standardnih obrazaca brodarskog ugovora na putovanje. Autor uz to napominje kako je u posljednje vrijeme zamijećen veći broj sporova oko značenja pojedinih klauzula u standardnim brodarskim ugovorima na putovanje za razliku od standardnih brodarskih ugovora na vrijeme koji su izazivali sporove u šezdesetim i sedamdesetim godinama, pa se može zaključiti da se u međuvremenu ustalila i terminologija takvih ugovora, a ujedno i izgradila prateća sudska praksa koja pomaže u tumačenju pojedinih standardnih odredaba.

U prvom slučaju broda »Kyzikos« brodarski ugovor na putovanje je u klauzuli o početku roka za iskrcaj sadržavao frazu »whether on berth or not«. Brod je zbog loših vremenskih prilika bio spriječen pristati na predviđeno pristanište u luci odredišta, mada su vlasnici broda dali pismo spremnosti čim je brod usidren. Engleska kuća lordova je zauzela stav da je prigovor naručitelja prijevoza opravdan i da frazu »whether on berth or not« treba tumačiti tako da se odnosi samo na slučajeve kad je pristanište slobodno (available), a ne i na slučajeve kad je pristanište dođuše bilo slobodno, ali iz nekog drugog razloga (kao i konkretnom slučaju zbog vremenskih prilika) nije bilo dostupno. Ovakvo tumačenje je, smatra autor, nedosljedno i unosi pravnu nesigurnost u značenje riječi »whether on berth or not« i pokazuje kako pravo može utjecati na izbijanje budućih sporova.

U drugom slučaju broda »Dominique« naručitelj prijevoza iz brodarskog ugovora na putovanje bio je prisiljen prekrcati teret vožen brodom »Dominique« na drugi brod i dopremiti ga u luku odredišta, jer je brod u čarteru tijekom putovanja bio zaplijenjen od vjerovnika brodovlasnika. Kako je u brodarskom ugovoru na putovanje bilo predviđeno da se vozarina plaća unaprijed i da se smatra zarađenom već prilikom izdavanja teretnice. Naručitelj prijevoza je smatrao da ima pravo svoje troškove prekrcaja tereta i završetka putovanja drugim brodom prebiti ugovorenom vozarinom, ali engleska Kuća lordova to nije prihvatila s obrazloženjem da je ugovorom između stranaka bilo jasno predviđeno kad se vozarina smatra zarađenom i da takva vozarina mora biti isplaćena bez odbitaka bez obzira na bilo kakvu povredu ugovora od strane vlasnika broda.

U trećem sporu u vezi s brodom »Freewave« engleski je apelacijski sud utvrdio točno značenje ugovorne klauzule predviđene u brodarskom ugovoru da će se iskrcaj tereta obaviti »po stopi od 1.000 tona dnevno na osnovi pet ili više grotla u upotrebi ili po ugovorenoj dnevnoj tonaži ako se radi o manje grotla. Naručitelji su tumačili da odredba o »grotlima u upotrebi« implicira da se postotak tereta za iskrcaj po danu smanjuje proporcionalno sve većoj količini iskrcanog tereta jer oslobađanjem svakog slijedećeg grotla ono prestaje biti u upotrebi. Na taj način

naručitelji bi imali pravo sve sporije iskrcevati teret s obzirom da bi se sve više grofľa praznilo. Kako je ovakovo tumačenje ugovorne odredbe ne samo protivno trgovačkoj logici nego i namjeri stranaka prilikom zaključenja ugovora, sud nije prihvatio tumačenje naručitelja, nego je zauzeo stav da se klauzulom utvrđuje količina tereta koju treba dnevno iskrcati, a ne količina tereta koja nakon dnevnog iskrcaja još ostaje na brodu. Ovom presudom sud je utvrdio pravično tumačenje ugovorne odredbe stranaka koja kad bi se tumačila kako su predlagali naručitelji ne samo da bi bila besmislena s poslovnog aspekta nego bi iziskivala vrlo komplikirana izračunavanja u svakom konkretnom slučaju.

Autor završava članak upozorenjem brodovlasnicima da obraćaju veću pažnju na klauzule koje unose u brodarske ugovore, a koje često mogu doći u suprotnost s tipskim klauzulama sadržanim u pojedinim formularima brodarskih ugovora. Takve situacije pogoduju kasnijem nastanku sporova, pa ih stoga treba izbjegavati. Osim toga autor naglašava da stranke trebaju uvijek biti vrlo oprezne prilikom sastavljanja brodarskih ugovora, jer ono što stranke ugovorom izričito predvide pravo ne može kasnije promijeniti ni kad je izričito na štetu jedne od stranaka.