"DISPUTE RESOLUTION IN DIFFICULT TIMES – COURT, ARBITRATION, MEDIATION OR COIN TOSS?"

ADDRESS TO MLAANZ CONFERENCE QUEENSTOWN

4 SEPTEMBER 2009

Hon. Justice Hugh Williams
High Court of New Zealand

The Relationship Between the Courts Exercising Admiralty and Maritime Jurisdiction and Maritime Arbitrations:

It is a privilege and a pleasure to be invited by MLAANZ to participate in the 2009 Conference, though, having regard to the formal title of this Session "Dispute Resolution in Difficult Times – Court, Arbitration, Mediation or Coin Toss?", one might be forgiven for thinking one had lost the toss of the coin!

The papers to be presented at this session by Justice Steven Rares and myself were prepared independently but, perhaps

unsurprisingly, appear to be complementary – and, indeed, to be echoing a theme which has been part of MLAANZ conferences at least since Justice Brian Tamberlin and Justice David Steel presented their 2001 and 2003 Dethridge addresses.

In addressing the title to this Session, we all need to recognise -

- that dispute resolution by way of arbitration or mediation - whether as an adjunct to litigation or outside the Court system – is an integral part of assisting parties to the rapid and cost-efficient resolution of the disputes that inevitably arise between persons engaged in commerce;

- that those disputes arise as much in the shipping and maritime arena as in any other commercial context. Indeed, because those alternative forms of dispute resolution can be made to circumvent questions of jurisdiction arising out of sovereignty and national boundaries, it is precisely in the area of specific interest to those attending this conference that arbitration or mediation can and should play a significant role;

- a need to be unabashed about recognising that one of the aims of this Conference Session is to express astonishment that there seem to be so few maritime arbitrations or mediations in Australasia, and to try to persuade all facets of the shipping and maritime

industries that we, in our part of the world, can offer them an arbitration and mediation system for resolving their inevitable disputes which is at least the equal, when all factors are taken into account, of the systems offered by maritime arbitrators in other parts of the world - and is arguably better;

- that for those with interests in alternative dispute resolution in the maritime and shipping areas in Australasia there has been considerable delay in putting in place rules governing arbitrations and a mediation service.

MLAANZ has been as responsible as anyone else, although our Association has re-formed its Arbitration Rules, modernized its procedures, and is now in a position where it can offer industry such a service. But it has to be recognised that it has taken the best part of a decade for MLAANZ to reach that position.

It is of particular interest that Justice Rares has chosen to approach the topic with a scholarly and well-researched paper dealing with "The Front Comor" and anti-suit injunctions in the maritime area.

Those with lengthy memories may recall that the Dethridge Address to the MLAANZ conference in October 2005 dealt with the same topic: it was entitled "*Anti-Suit Injunctions: Damp Squib or Another Shot in the Maritime Locker? – Reflections on Turner v Grovit*". That paper set out to discuss the anti-suit injunction jurisdiction in Australasia (and the anti-anti-suit

injunction) and the trenchant rebuke administered by the European Court of Justice ("ECJ") of the House of Lords' decision in *Turner v Grovit* [2004] 2 Lloyds Rep. 169.

In *Turner v Grovit* the House of Lords over-stepped itself and, in essence, asserted the English Courts' jurisdiction to injunct parties and prevent them exercising their rights to issue Court proceedings in other countries, not just to compel adherence to London Maritime Arbitration clauses in their shipping documents.

Since the chastening decision of the ECJ in *Turner v Grovit*, the English Courts appear to have confined their use of the anti-suit injunction jurisdiction largely to compelling adherence by parties to London Maritime Arbitration clauses in their relevant documents (*Elektrim SA v Vivendi Universal SA (No.2)* [2007] 2 Lloyds Rep 8 is an example) but the use of wider injunction proscribing resort to the Courts still persists (see e.g. *Trafigura Beheer BV v Kookmin Bank (No.2)* [2007] 1 Lloyds Rep 669).

The 2005 Dethridge address made clear that the anti-suit injunction jurisdiction has well-established roots in Australia, stemming mainly from the decision of the High Court of Australia in *CSR Limited v Cigna Insurance Australia Limited* (1996) 189 CLR 345 and confirmed on many occasions since.

The jurisdiction is, however, much less securely established in New Zealand law: the only reported New Zealand case with which that address dealt was (*Jonner Inc v Maltexo Ltd* (1996)

10 PRNZ 119). *Jonner* was not a maritime case – indeed, many of the Australian decisions are not maritime cases - and although the 2005 Dethridge suggested New Zealand practitioners might usefully include the anti-suit injunction in their armoury, as far as is known, no further New Zealand cases have ensued. Despite that, however infrequently exercised, there is no doubt the anti-suit injunction jurisdiction exists in this country (Paul David *Laws New Zealand Maritime Law: Admiralty* paras 10 p10, 126-129 pp111-113).

The paucity of Australasian maritime cases employing the anti-suit injunction jurisdiction may be symptomatic of the relatively few Australasian maritime arbitration clauses in shipping and other maritime documents and the consequent fact that there have been relatively few Australasian maritime arbitrations. Aside from *forum non conveniens* and choice of law considerations, the anti-suit injunction is essentially a negative tool, and if there is no way contractually to compel parties to embark on Australasian maritime arbitration and not to exercise their rights to arbitrate or sue in other jurisdictions, the scope for the anti-suit injunction is much reduced.

We also need to recognise the effect of strong competition from other jurisdictions in our region. There are, at least, Maritime Arbitration Centres in Hong Kong, Singapore, the Pacific and, of course, China, Japan, the United States and Canada. A number of those are members of, or operate in association with, the Asia Pacific Regional Arbitration Group ("APRAG"). That organization is a grouping of at least

17 associations offering arbitration, mediation or commercial dispute resolution over, essentially, the whole of the Western Asia Pacific and, although many of their members may not operate a specific Maritime Arbitration section, they certainly offer skilled and experienced arbitrations and mediations generally and could no doubt adapt to provide a Maritime Arbitration Service if asked.

The existence of so many arbitration centres in our area of primary interest gives disputants – maritime or otherwise – a wide selection of venues for arbitration or mediation, and a choice between countries following the Common Law tradition and Civil Law systems.

Some counterbalance is, now, available in our region.

Although there are others present who are much more knowledgeable than I, there is, as I understand it, the setting up, with Commonwealth Government assistance, of the Australian Centre for International Commercial Arbitration ("ACICA") and its maritime off-shoot, the Australian Maritime and Transport Arbitration Commission ("AMTAC"). It is understood that ACICA and AMTAC are unlikely to be parochial in their membership and will admit New Zealanders of suitable qualifications and experience to their Maritime Arbitrators' lists.

More domestically, there are numerous arbitrations and mediations which occur in New Zealand. The arbitration and

mediation process is widely accepted, not least because of the usual benefits: speed, anonymity, interlocutory simplicity and, in the maritime area, the ability to involve participants from more than one country without disputes as to jurisdiction.

Thus New Zealand has a long-standing tradition of arbitration. Its dominant statute in the area is the Arbitration Act 1996 which follows the UNICITRAL model. The UNICITRAL Model Law appears as a schedule to the Arbitration Act 1996 and the substantive provisions in the statute support that Model Law.

In our suite of maritime legislation, we also have a conventional Admiralty Act 1973, an up-to-date Maritime Transport Act 1994 and a separate section of our recently re-promulgated High Court Rules, Part 25, dealing with Admiralty matters.

New Zealand offers those involved in maritime disputes a full range of available resources, whether arbitration or litigation, for the resolution of such disputes.

Dealing with arbitration and mediation outside the Courts, in New Zealand the pre-eminent body offering general arbitration and mediation is the Arbitrators and Mediators Institute of New Zealand ("AMINZ").

AMINZ maintains a number of Specialist Panels, the membership of which comprises members of AMINZ who are

generally experienced in mediation and arbitration but also have particular experience in specialist topics.

Some two years ago AMINZ agreed to institute a Specialist Panel of Maritime Arbitrators. For various reasons this has not occurred to date but the current President and council remain fully supportive and it is highly likely that such a Specialist Panel will be constituted by AMINZ in the near future.

This country, of course, has a number of skilled and experienced maritime arbitrators, many of whom may be members of AMINZ. To the benefit of both organisations there is obviously likely to be significant commonality between AMINZ's Specialist Panel of Maritime Arbitrators and MLAANZ members offering maritime arbitration in this country.

From the New Zealand Courts' viewpoint, the stance has moved to a degree from a negative view of Alternative Dispute Resolution, some years ago, to support for ADR, both as part of litigation and outside Courts' processes.

As far as the High Court of New Zealand is concerned, now encompassed within our litigious process are two major forms of dispute resolution short of Court adjudication.

In the first place, nearly every case in the High Court passes through a Judicial Settlement Conference which endeavours to resolve the dispute by agreement. For the most part, JSCs are presided over by Associate Judges who have particular

expertise in the area: JSCs settle about 70% of cases, leaving only the unresolveable for trial.

Further, the High Court is in the process of appointing mediators from the profession to engage in Court-appointed mediation, as part of High Court litigation, to endeavour to resolve disputes. Those mediators will be paid by our Ministry of Justice. The project is, at the moment, being instituted only on a pilot basis but this is an innovative move under the rubric of the High Court where members of the legal profession with particular expertise and interest in mediation can assist parties towards a resolution of their dispute.

This is another area where AMINZ/MLAANZ maritime mediators can assist because there is no reason why experienced maritime practitioners cannot be appointed.

The combination of these measures in New Zealand and what are understood to be moves in Australia, mean that Australasia will then be able to offer the shipping and maritime industries and all those involved in that area of our countries' common commercial life, an arbitration and Mediation Dispute Resolution Service which should be at least the equal to any such service anywhere in the world.

However, once that is achieved, what can the Australasian Maritime Arbitrators offer those in the industry which would be better, more convenient and more cost-efficient than similar services available in other countries, particularly when so

many of those involved in the Australasian shipping and freight businesses have their head offices in those countries?

We need to be able to offer a service which is seen by those in the industry as better than our competitors in other countries.

How can we do that?

In the first place, the services which we can offer should be less costly. Many of those present have personal experience of the cost of arbitrating in London or similar countries. The cost structure of arbitrating or mediating in Australasia should be lower. That particularly applies for shipping casualties, cargo disputes or disputes with ports and others when the dispute is factually centred in Australasia.

We need to be more cost-efficient than similar services offered in other countries. That involves not merely convenience for parties and witnesses but many other factors including speed of resolution.

And we need to offer a service, whether mediation or arbitration, the process of which commands acceptance on the part of industry participants that their dispute will be properly and promptly adjudicated upon.

It must be said that this is no new theme. As mentioned, it was a theme of the 2001 and 2003 Dethridge addresses. And the 2005 Dethridge address urged attendees to endeavour to

persuade those involved in the shipping and maritime industries to insert Australasian choice of law arbitration clauses in their shipping documents. The paper posed the rhetorical question:

> *"What logic or efficiency is there in disputes about the Far East trade, the Trans-Tasman trade or the Pacific trade being arbitrated in London?"*

If, as a result of this conference session, members of MLAANZ – lawyers and industry participants alike – can move forward to offering a first-class maritime mediation and arbitration service, the session will have been thoroughly worthwhile.

We will then face the task of proving ourselves to the shipping and maritime industries and persuading them to include Australasian dispute resolution as a regular part of their contractual documents.

4 September 2009