INTERNATIONAL COMMERCIAL CONTRACTS: PRACTICES, EXPECTATIONS AND PITFALLS

by

Justice Andrew Rogers*

> "I am afraid I remain quite impenitent. I think I was right and that nine out of ten businessmen would agree with me. But of course I recognise that I am bound as a judge to follow the principles laid down by the House of Lords. But I regret that in many commercial matters the English law and practice of commercial men are getting wider apart ..."
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> Scrutton, L.J. in Hillas & Co Ltd v Arcos Ltd (1932) 147 LT 503, 506

Are lawyers and is the law meeting the legitimate expectations of the commercial community? The business community seems to reply with a resounding negative. It is not easy to obtain proper particulars of causes of dissatisfaction. Nonetheless, in this day of export drives, international trade links and other calls for smoothing the path of trade, it is important that the effort be made. One of the prime causes of complaint is the length and cost of hearings. Changes in procedure have wrought great improvements but it is the substantive law that it is intended to address.

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Delivered to the First Canada-Australasia Law Conference
Canberra, 6 April 1988

One reason for long and costly hearings in Australia is the continuing and unresolved tension, between, on the one hand, the recognition that some aspects of business practice and business purpose should be recognised without further proof and the traditional requirement that matters in dispute should be proved by evidence. Let me illustrate.

In an otherwise quite unremarkable dispute, I held that the Re-insurers' construction of the policy would have produced a commercial situation which the parties could not have intended. The insured's construction avoided that difficulty. The task set for the court in such circumstances is clear enough.

As Lord Diplock accepted in Antaios Compania Naviera SA v Salen Rederierna AB (1985) AC 191 (p 200):

> "We always return to the point that the owners' construction is wholly unreasonable, totally uncommercial and in total contradiction to the whole purpose of the NYPE time charter form. The owners relied on what they said was 'the literal meaning of the words in the clause'. We would say that if necessary, in the situation such as this, a purposive construction should be given to a clause so as not to defeat the commercial purpose of the contract."

Granted that Lord Diplock lifted this passage from the arbitrators' award which was the subject of the challenge. Against a possible argument that this fact made a difference, let me continue the citation (p 201):

> "This passage in the award anticipates the approach to questions of construction of commercial documents that was voiced by this House in the very recent case, Miramar Maritime Corporation v Holborn Oil Trading Ltd (1984) AC 676, which dealt with a bill of lading issued under a charterparty in Exxonvoy 1969 form. There,

after referring to various situations which might arise if the construction for which the shipowners in that case contended were correct, I added, at p 682, in a speech concurred in by my fellow Law Lords:

> "There must be ascribed to the words a meaning that would make good commercial sense if the Exxonvoy bill of lading were issued in any of these situations, and not some meaning that imposed upon a transferee to whom the bill of lading for goods afloat was negotiated, a financial liability of unknown extent that no business man in his senses would be willing to incur."

While deprecating the extension of the use of the expression "purposive construction" from the interpretation of statutes to the interpretation of private contracts, I agree with the passage I have cited from the arbitrators' award and I take this opportunity of re-stating that if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

Again, in more recent times, the English Court of Appeal in Pagnan SpA v Tradax Ocean Transportation S.A. (1987) 3 AER 565 required that the interpretation given to a contract should accord with commercial commonsense. The leading judgment was that of Bingham LJ who said (p 575):

> "Having reached that conclusion as a matter of construction, it is necessary to test it against the touchstone of commercial common sense: is this an apportionment of risk which the parties could reasonably be supposed to have intended? I think it is. It is one thing to accept responsibility for the possibility of oversight, error, mishap, bureaucratic inefficiency or delay or mere failure to issue, but it is quite another to accept responsibility where an export certificate cannot be provided for because the licensing system has for the relevant period been entirely abrogated or suspended by governmental decree. I have no doubt that the judge's conclusion on this matter was right, and I agree with it. I am again fortified in that conclusion by the fact that it commended itself to the board of appeal, who saw nothing uncommercial in the result."

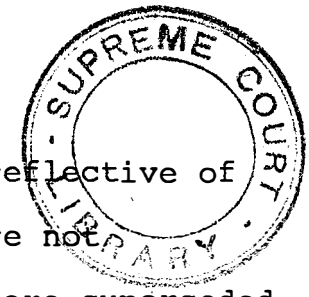
The end is, therefore, clear. Apparently I fell into error on the way to it. On appeal, the President agreed with my decision and expressed the view that the conclusion that the the result called for by the Re-insurers' construction was non-commercial was well within the experience of the specialist judges administering the Commercial List. In his view, by insisting upon the strict proof of matters of commercial practicality and limiting the matters of which judicial notice may be taken, the utility of the Commercial List as an efficient mechanism for the resolution of business disputes "according to law but in a way that practical business people would themselves appraise the resolution of such disputes" would be damaged. The majority took a different view. As one judge expressed it, what importance the insurance industry attached to various matters was a subject upon which he had no judicial knowledge. He said:

> "For all that I know, the parties may give scant attention to the possibility that the Re-insurer may change having in mind the likelihood that renewal will occur at the end of the year and in the worst case on the basis of an adjustment to premium. If they are contemplating a steady association of insurer and Re-insurer, there is no evidence to suggest that the selection of notified claims as opposed to notified occurrences might not be a wholly convenient criterion of liability."

There are two initial comments that I should wish to offer. First, as a matter of history when the matter came back before another commercial judge, evidence was led in support of a claim of rectification which fully established the view initially embraced as to the approach the Re-insurer would take to the problems thrown up by the construction contended for by it. In other words, the conclusion initially deduced proved correct. Contrary to appearances, this is not a plea of self

justification. Contrast the situation that would have arisen before the Commercial Court in Paris or any other French city. The Tribunal is composed of businessmen appointed for a fixed and short period. As I would apprehend it, the problem which arose in the case in our court could not have surfaced in the form it did. I ask whether we are approaching the problems of commercial disputes correctly?

Second, I offer a comparison with the allegation of an implied term. The underlying problem is universal. It is practically impossible to draw an agreement which will cover every occurrence that may eventuate. Every legal system recognises that an agreement may need to be fleshed out. The law in Australia confronts the problem of a broadly drafted agreement which neglects to attend to a particular matter which then becomes the basis of the dispute in the same way as English law. Does "business efficacy" require that a term should be implied dealing with the particular matter? In order to determine the dictates of business efficacy, a number of tests have been accepted. One of the requirements for an implied term is that it must be necessary to give business efficacy to contracts and no term will be implied if the contract is effective without it. One may ask, effective to achieve what? The answer is not necessarily what the parties have discussed and intended but rather what the court, excluding all evidence of the parties' subjective intentions, concludes they intended. Prior negotiations are admissible to establish the objective background facts known to both parties, and the subject matter of the contract. In so far as they consist of



statements and actions of the parties which are reflective of their actual intentions and expectations, they are not receivable. The theory of the law is that they are superseded by and merged in the contract itself. In other words, business efficacy will be determined without evidence of the actual intention of the parties, except in so far as the court may extract it from the words of the contract, which ex hypothesi are incomplete in their expression so far as one party is concerned, otherwise there would not be the contention of an implied term.

Of course, even the illusory assistance of evidence of the negotiations is unavailable in the case of contracts of adhesion. In these circumstances, it is not surprising that in the leading case on implied terms in Australia (Codelfa Constructions Pty Limited v State Rail Authority of New South Wales [1982] 149 CLR 337) the trial judge found one implied term, the Court of Appeal found another, the majority of the High Court found it unnecessary to come to a final conclusion as to whether there was an implied term. One member of the High Court concluded that the contract revealed no lacuna which needed to be filled to make it work. It worked perfectly well. His Honour came to that conclusion notwithstanding his finding that the parties shared the mistaken belief that Codelfa would be able to work three shifts a day without restraint by injunctions. As it happened, an injunction was granted and only two shifts could be worked. The judge said in part (p 405):

> "If, at the time when the parties were signing the contract, the officious bystander had asked what did they intend in the event of the issue of an injunction restraining work during the night shift they would have replied 'we have thought of that. It cannot happen' they cannot be presumed to have agreed upon a term inconsistent with their common belief."

That may have been the correct conclusion. However, it might be thought a trifle difficult to prove, if that had been required, that an injunction having been granted and the contractor unable to work three shifts a day, the contract was working perfectly well. In other words, that in those circumstances business efficacy did not demand an implied term.

In the result courts are required to draw commercial conclusions, in circumstances such as the ones I have referred to, in determining what is required by "business efficacy". They deny to themselves the opportunity to make commercial evaluations by denying the right to take judicial notice in some circumstances but consider themselves free to do so in others.

The English decisions I have earlier cited sound good but they do not truly confront the problem. This is apparent from the words of comfort that their Lordships wrap themselves in mentioning that their conclusion as to the commercial realities was the view taken by the arbitration or trade dispute body initially entertaining the dispute. The view of the majority of the NSW Court of Appeal would call for a deal of evidence to be adduced which in the particular case was subsequently seen to be unnecessary. Which is the right way to go? Can we presently say that a businessman will leave a court satisfied that there has been satisfactory resolution of the problem?

There is another area which, in an international context, serves as a good illustration of the difficulties the common law faces in grappling with the realities of marketplace. It is a fundamental doctrine of commercial law that whilst, in the event of breach, a sum of money fixed by the contract as liquidated damages may be recovered so long as it represents a genuine pre-estimate of the damage, it is irrecoverable if it is a penalty. This, of course, stands in vivid contrast to the widespread acceptance in commercial transactions in other countries of the enforceability of penalties. UNCITRAL has now produced a set of rules detailing the circumstances in which a penalty is to be deemed lawful in international contracts. What will Australian courts do in determining whether public policy should permit the enforceability of penalties in international contracts but not in domestic contracts? The commercial community really wants enforceability of penalties. Are the courts more appropriate guardian of the market place than those who participate in it? Should the unenforceability of penalties be restricted to consumer contracts?

With the evolution of the new Lex Mercatoria, Australian courts will increasingly be forced into taking a more international and non-parochial approach to disputes arising from international trade. We do not have an entirely unblemished record in this regard. The New South Wales Court of Appeal has declined to follow the House of Lords in adopting the doctrine of forum non conveniens as explained in the Spiliada

Maritime Corporation v Consulex Ltd (1987) A.C. 460. Throwing overboard the accumulated baggage the centuries have tied to English law the House of Lords by this decision cleared the slate in the approach to be made to forum selection for the resolution of international trade disputes. In Oceanic Sun Line Special Shipping Co Inc v Fay (1987) 8 NSWLR 242 although the major elements of the dispute, appeared to stamp the litigation with Greece as being the forum conveniens, and a forum selection clause designated Athens, the New South Wales Court of Appeal by majority refused to grant a stay of proceedings. Substantially the decision was based on the fact that a local statute provided the plaintiff with an argument not to be found in Greek law. The majority allowed itself a comment which, if correct, will achieve a considerable set back to notions of internationalising dispute resolution. Service of process on the Greek shipping company was achieved in reliance upon the provisions of Pt 10 R 1(e) of the Rules. McHugh JA, speaking for the majority said (p 268):

> "Principles of forum non conveniens worked out in other jurisdictions are not necessarily applicable, at all events in their entirety, to an action brought in reliance on that rule. In particular, it is not easy to reconcile the object of Pt 10, r 1(1)(e) with a principle that an action should be stayed if there exists another jurisdiction more appropriate for the hearing of the action: cf Spiliada Maritime Corporation v Cansulex Ltd (1986) 3 WLR 972. A rule which permits service out of the jurisdiction when the proceedings are founded on the suffering of some damage within the jurisdiction would be greatly reduced in scope, if proceedings should prima facie be stayed whenever another jurisdiction was more appropriate for the hearing of the action."

That decision is now being reviewed by the High Court.

Legislatively, Australia has been adopting a more far sighted international outlook. The 1980 United Nations Convention on the International Sale of Goods (Vienna Convention) has been adopted by statute in all the Australian States in 1986/1987. The UNCITRAL Model Law on International Arbitration looks like being adopted by domestic legislation in the near future as will the Geneva Convention on Agency in the International Sale of Goods. Reverting then to the point with which I commenced, how will Australian courts cope with Article 9(2) of the Vienna Convention? That provides:

> "The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties of the contract of the type involved in the particular trade concerned." (emphasis added)

Will it be necessary for a judge to have the same sort of evidence as is presently required in relation to trade customs in order to find an established trade usage? Has our thinking marched in step with the legislatively endorsed and commercially sponsored international regime for the sale of goods? It is not just the problems of proof which will produce interesting difficulties. Professor Goldstajn takes the view that commercial usages applicable in international trade are not merely for the benefit of parties but satisfy the higher interests of the international community. On the other hand, (as Professor Goldstajn mentions in "Usages of Trade and Other Autonomous Rules of International Trade according to the

UN (1980) Sales Convention") the delegate from Ghana to the UNCITRAL conference said that:

> "In some developing countries some large scale traders whose business may include international trade are illiterate."

Now how is an Australian or a Canadian judge to approach a contract for the purchase of cocoa from Ghana from a person of the category described and deal with an argument that the contract includes amongst its terms the challenged usage of which this person ought to have known?

The foregoing gives rise to an other interesting question. There seems to be a developing tendency around the world to make different provisions for international contracts and disputes from those applicable to domestic contracts and disputes. For example, in France there is a different regime for international arbitrations. The Sale of Goods Convention is applicable only to international contracts (Art 1[1]). Will there be a developing divergence between international and domestic rules for commercial transactions or will the international rules gradually acquire a dominant role even in domestic transactions?

There is no reason why, subject to mandatory provisions of the local law, the parties should not specify the provisions of the Vienna Convention as the applicable regime to their domestic contract for the sale of goods. The alternative to different regimes for international and domestic commercial contracts may be to have the same for both perhaps with different rules for domestic consumer contracts.