Case No: 2004 Folio 150

[2004] EWHC 1862 (Comm)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28th July 2004

Before :

THE HONOURABLE MR. JUSTICE MOORE-BICK

- -

Between :

TAME SHIPPING LTD	**Claimant**
- and -	
EASY NAVIGATION LTD	**Defendant**

'EASY RIDER'

- -
- -

Mr. Gavin Geary (instructed by **Richards Butler**) for the **claimant**
Mr. Chirag Karia (instructed by **Hill Taylor Dickinson**) for the **defendant**

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Judgment

Mr. Justice Moore-Bick :

1. This application under section 68 of the Arbitration Act 1996 raises once again the question whether, and if so in what circumstances, a party to arbitration proceedings who seeks to challenge the award may rely in support of his application on reasons published by the arbitrator separately from the award and expressly on terms that no use shall be made of them in any proceedings relating to it.

2. On 14th February 2003 the claimant (to whom I shall refer as "the Buyers") and the defendant ("the Sellers") entered into a contract for the sale and purchase of the vessel *Easy Rider*. The contract was contained in a Memorandum of Agreement on the Norwegian Saleform 1993 with certain additions and amendments. Only two of the clauses in the MOA are relevant for present purposes, namely clauses 11 and 19, which provided as follows:

> "11. Condition on delivery
>
> The vessel with everything belonging to her shall be at the Sellers' risk and expense until she is delivered to the Buyers, but subject to the terms and conditions of this Agreement she shall be delivered and taken over as she was at the time of inspection, fair wear and tear excepted.
>
> However, the Vessel shall be delivered with her class fully maintained and with all continuous surveys fully up to date, without conditions/recommendations, free of average damage affecting the Vessel's class . . . . . .
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> . . . . . .
>
> 19. No drydocking clause to apply, however prior to delivery the Buyers shall have the option to arrange with the assistance of the Sellers, and [sic] the Buyers' sole option and expense, for a class approved diver to carry out an underwater inspection at delivery port in the presence of the DNV Classification Society surveyor and Sellers' and Buyers' representatives, to ascertain the condition of the vessel's underwater parts below the Summer Loadline. For pre-arranging the presence of DNV surveyor, the Buyers shall declare within 48 hours whether they like to carry out diver's inspection or not from when the 7 days notice of delivery is received from Sellers.
>
> Should damage(s) and/or defect(s) be found to the underwater parts which affects vessel's clean certificates of class, but which, in the opinion of the class surveyor present, does not require drydocking prior to the next scheduled drydock of the vessel, then Sellers and Buyers to apply to two reputable shipyards at the port of delivery, but in case no shipyard at the port of delivery, then Sellers and Buyers to apply at the

> nearest port that shipyards exist, one to be selected by Buyers and one to be selected by Sellers, in order to obtain quotations for the direct cost of repairs to the said damage only, such quotations to cover the direct cost of repair to specified damages(s) and/or defect(s) only. Thereafter it shall be in the Sellers' option whether to repair said damage at Sellers' time and expense prior to delivery, or to deliver the vessel with the said damage against a reduction in price of the cost of repairs, which to be defined as the average of the two quotations obtained.
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> In the event that damage(s) and/or defect(s) is found to the vessel's underwater parts in respect of which the DNV Classification Society surveyor present requires the vessel to be drydocked for repair prior her next scheduled drydocking, the Buyers to declare immediately either to cancel the sale or take delivery of the vessel and put in a drydock by themselves at their own account with Sellers compensating the cost of repairs which to be defined as the average of the two quotations obtained from two reputable shipyards in delivery port or nearest port, one selected by Sellers and one selected by Buyers.
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> . . . . . "

3. On 28th April 2003 the Sellers tendered notice of readiness for delivery and the Buyers exercised their right under clause 19 to have the vessel's underwater parts inspected by a diver. That inspection was carried out the next day in the presence of a surveyor representing the vessel's Classification Society, DNV, who imposed the following condition of Class as a result:

> "During in water survey for sale purposes the lower rudder pintle clearance was found at 5.3 mm which is above the acceptable maximum limit. Prior to due date but not later than 2003-07-28 lower rudder pintle bearing to be re-examined and dealt with as necessary."

4. The Sellers informed the Buyers of this development. They indicated that they wished to proceed with the sale on the basis of a reduction in the price as provided for in clause 19, but they gave the Buyers the option of cancelling the contract if they wished to do so. At or about the same time they provided a quotation from a local shipyard for the repair of the rudder as contemplated by clause 19. The Buyers did not wish to cancel the contract, but they did not think that clause 19 applied to the situation because the Class surveyor had not at that stage decided one way or the other whether the vessel would need to be dry-docked before her next scheduled dry-docking in August 2004 and they did not therefore provide any alternative quotation for the cost of repairs. However, the parties were able to agree that the vessel would be delivered on 2nd May 2003 and that a sum of US$50,000 should be deposited in an escrow account to be released in accordance with any agreement between them or on the issue of an arbitration award.

5. The dispute between the parties was referred to arbitration under the Small Claims Procedure of the London Maritime Arbitrators' Association. This Procedure is described in the Commentary published in conjunction with it as "a simplified, quick and inexpensive procedure for the resolution of small claims" and was eminently suitable for the resolution of the dispute. Mr. Anthony Scott was appointed to act as sole arbitrator and the parties made extensive submissions to him in writing to which they appended the various documents on which they relied. The Sellers contended that clause 19 applied in the circumstances that had arisen and that their liability was limited to the estimated direct cost of repairs calculated in accordance with that clause by reference to the quotation which they had provided. The Buyers contended that clause 19 did not apply at all because the Class surveyor had not certified that the defect could be repaired without the need for an early drydocking. They made a counterclaim for damages in respect of the cost of repairs and the vessel's loss of earnings during the period of repairs said to be well in excess of the sum paid into the escrow account.

6. Neither party requested an oral hearing and on 4th February 2004 Mr. Scott published his award. He held that the Sellers were liable in damages to the Buyers in accordance with the provisions of clause 19, but that since the Buyers had failed to obtain a quotation in accordance with that clause, damages should be assessed by reference to the quotation obtained by the Sellers. Accordingly, he awarded the Buyers US$6,094 out of the escrow account and directed that the balance be returned to the Sellers. He dismissed the Buyers' counterclaim.

7. The award in this case does not contain the arbitrator's reasons for his decision. These were published separately in a document which contained the following rubric at its head:

> "These Reasons are issued subsequently to and separately from the Award and do not form part of the Award. They are given for the information of the parties only and on the understanding that no use whatsoever is made of them on or in connection with any proceedings on or related to the Award."

8. It cannot have come as any surprise to the parties that the arbitrator's reasons were published in that form. By agreeing to adopt the L.M.A.A. Small Claims Procedure the parties expressly agreed to waive all rights of appeal, thereby making reasons redundant as far as questions of law were concerned. Paragraph 4 of the Commentary expressly draws this feature of the Procedure to the attention of those contemplating making use of it. It also makes it clear that the arbitrator will not publish a reasoned award but will give brief, privileged reasons for his decision. There can be no doubt, therefore, that parties who choose to refer disputes to arbitration under this procedure agree to receive an unreasoned award with "privileged" reasons published separately. Although the Commentary does not state exactly what is meant by "privileged" reasons, the long-established practice among maritime arbitrators in the City of London of publishing reasons which state on their face that they are not to be referred to in any proceedings relating to the award is sufficiently well known not to require further explanation.

9. The Buyers now seek to have the award remitted to the arbitrator for reconsideration under section 68 of the Arbitration Act 1996. The application is made on two grounds: that the arbitrator based his conclusion on an argument of which they had no notice and to which they were given no proper chance to respond; and that in assessing damages the arbitrator wrongly disregarded an important item of evidence, namely, a quotation for the cost of carrying out the necessary repairs which had been obtained by the

Buyers from another shipyard. However, the only evidence of the way in which Mr. Scott came to his decision is contained in the reasons themselves and the Sellers argued that the Buyers could not rely on them for the purposes of the application because they had been provided on the express understanding that they would not be used for that purpose. Mr. Geary for the Buyers accepted that without access to the reasons the application was bound to fail, but he submitted that the court could and should allow them to be adduced in evidence. The first question that has to be decided, therefore, is whether the court can and should allow a party who seeks to challenge an award on the grounds of serious irregularity to rely on confidential reasons of this kind.

Can the Buyers rely on the arbitrator's confidential reasons?

10. This question has been considered in a number of previous cases but has not been re-visited since the Arbitration Act 1996 came into force. *Intermare Transport G.m.b.H. v International Copra Export Corporation (The 'Ross Isle' and 'Ariel')* [1982] 2 Lloyd's Rep. 589 concerned disputes arising from the carriage of two cargoes of copra from the Philippines to Europe in the vessels *Ross Isle* and *Ariel*. The two disputes were referred to the same arbitrator and heard together, although separate awards were published. In correspondence after the conclusion of the hearing the owners asked the arbitrator to state his award in relation to the charterers' counterclaim in each case in the form of a special case, but he declined to do so because he thought that the questions raised by the counterclaims were almost entirely of a factual nature. He therefore indicated that he intended to issue his awards in a non-speaking form, but gave the parties 14 days in which to apply to the court for an order directing him to publish them in the form of a special case. In the light of the arbitrator's observations the owners' solicitors mistakenly took the view that the question of law which they had intended to raise in relation to the counterclaims did not in fact arise and as a result they made no application to the court. The arbitrator duly published unreasoned awards, but provided the parties with separate confidential reasons for their information. Having realised their mistake, the owners applied to the court under section 22 of the Arbitration Act 1950 for an order remitting the awards to enable the arbitrator to state special cases. The application was made on the grounds that, as a result of a misunderstanding on the part of the owners' solicitors, there had been a procedural mishap giving rise to injustice. By that time what had come to be known as 'procedural mishap' had become a well-recognised ground of intervention.

11. In support of their applications the owners wished to refer to the arbitrator's confidential reasons, but they did not form part of the award in either case and indeed each one bore a rubric expressly stating that the reasons did not form part of the award and were issued on the understanding that no use should be made of them in any proceedings arising on or in connection with the award. The question therefore arose whether the court could properly look at them on an application of that kind. Staughton J. did not hear full argument on the question, but he did express the following views at pages 592-593:

> " Mr. Evans submits that in Court he is entitled to look at those documents and should do so for the purpose of these applications if the Court is not satisfied, merely from looking at the award, that the arbitrator has decided the case on matters of law, that is to say, the interpretation of cl. 35.

It is, I think, quite clear, and Mr. Evans does not dispute, that if the application were to set aside or remit the awards for error of law on their face then it would not be permissible to look at these reasons. They are not incorporated in the awards expressly or by reference to anything that is to be found in the awards. But that is not the application which is made here - it is an application to remit or set aside on other grounds. For that purpose Mr. Evans submits that all relevant evidence is admissible. I am disposed to agree with that (although again I have not heard Mr. Thomas on this point) subject to any special restriction that may attach to any particular category of evidence.

Is there some special restriction applying to the reasons given by the arbitrator, and if so what is the legal basis of it? Mr. Evans submits, or accepts, that the plaintiffs, by their acceptance of the reasons with that note upon them, agreed to some implied contract that they would not use the reasons, at any rate for some purposes. In my judgment Mr. Evans is right to accept that. It is extremely common practice in maritime arbitrations in London for such documents to be issued together with the award but separate from it. Sometimes the arbitrator will ask the parties before the conclusion of the hearing whether they wish him to issue separate reasons and whether they will accept them with such a note upon them. I, indeed, have known of one case where one party said that he would not accept reasons on those terms and the consequence was that no reasons were issued. But in the ordinary way if that is expressly said then there is clearly to my mind a contract that the reasons will be treated in confidence as the note requires. Even where nothing is said by the arbitrator before the conclusion of the hearing (and as far as the evidence goes, nothing was said by the arbitrator in this case) the practice is so commonplace in maritime arbitrations in London that I would regard it as implied by custom that an arbitrator may, if he wishes, issue reasons with such a note upon them and the parties agree to be bound by it.

That, as I say, was accepted by Mr. Evans; but he has a powerful point that there is a public interest which overrides any private contract as to the admissibility of evidence in certain cases. . . . . .

. . . . . I accept that there are circumstances in which the public interest requires that notwithstanding the private contract of the parties that they will treat such reasons confidentially, still they may be disclosed to the Court. On the other hand there is, as it seems to me, a strong public interest that arbitrators, if they choose, should be free to publish reasons of a confidential nature and the parties should be free, if they choose, to accept reasons on that basis. Whether, in any particular case, the public interest in favour

> of disclosure to the Court overrides the general public interest that confidential reasons may be published for the interest of the parties without endangering the rule that there must be an end to litigation, is a matter for decision in that case. If it had arisen in the present case I would have held that the public interest here did not require me to look at the reasons for the purposes of investigating a possible misunderstanding between the arbitrator and the legal advisers of the plaintiffs."

12. This approach was followed by Hobhouse J. in *Mutual Shipping Corp v Bayshore Shipping Co. (The 'Montan')* [1984] 1 Lloyd's Rep. 389. That case also concerned an application under section 22 of the Arbitration Act 1950 to remit the award, this time on the grounds that when dealing with one part of the case the arbitrator had accidentally transposed the identity of the parties and as a result had made an award in favour of the wrong party. The arbitrator had published confidential reasons from which the nature of the error and its effect on his final award were apparent. He had also subsequently accepted in correspondence with the parties that an error had been made.

13. Although the claimant relied on an exchange of correspondence with the arbitrator to establish the existence of the error, the question arose whether it was permissible to put in evidence the arbitrator's reasons. Hobhouse J. dealt with this in the following way at pages 392-393:

> " The status of confidential reasons was discussed by Mr. Justice Staughton in *The Ross Isle and Ariel*, [1982] 2 Lloyd's Rep. 589. I agree with him that as a matter of contract the parties have agreed with each other and the arbitrator or arbitrators to treat such confidential reasons as confidential. This, as a matter of contract, precludes any party, except by agreement, from referring to them on any application to the Court. The contract which imposes and accepts the obligation of confidence is a contract which comes into existence either when the parties concur in asking the arbitrator for such reasons or, when an arbitrator, where there has been no request for reasons, follows the usual practice of London Maritime Arbitrators and supplies the parties with confidential reasons and the parties accept such reasons from the arbitrator.
>
> Neither side disputed before me that such was the origin and nature of the obligations accepted by the parties to treat such reasons as confidential."

14. The judge then cited the passage in the judgment of Staughton J. in *The Ross Isle and The Ariel* to which I referred earlier and continued:

> " It was argued before me by Mr. Gruder that one should read "public interest" in this passage as if it meant the interests of justice. In this argument it was said that wherever a case of injustice to one party can be shown by referring to the confidential reasons a party should be entitled to breach the

> confidence. This, of course, is not what the phrase "public interest" means in this context. It means that the contract is to be treated as unenforceable on grounds of some overriding public policy. If the confidential reasons disclose fraud or criminal conduct then such considerations of public policy would begin to become relevant. But to treat an error of law or fact on the part of an arbitrator as giving rise to any such principle is wholly mistaken. To make an error of fact or law in the course of arriving at a decision is not even misconduct. If any principle of public interest is relevant, it is that identified by Mr. Justice Staughton that the parties should be held to their agreement to treat reasons such as these as confidential and should not be allowed, in breach of such an agreement, to attempt to destroy or undermine the finality of the arbitrator's award. If the parties want open reasons they are always entitled to ask for them under the 1979 Act. A party not having done so, there is no reason for treating confidential reasons as non-confidential, I therefore hold that on an application to remit, it is not open to a party in the absence of further agreement or of one of the wholly exceptional situations of overriding public policy to refer the Court to confidential reasons.
>
> If I was of the opinion that the charterers' case before me depended on their referring me to the arbitrator's reasons, I would have peremptorily dismissed the motion."

15. On appeal (reported at [1985] 1 Lloyd's Rep. 198) the members of the Court of Appeal expressed similar, though in some respects less forthright, views. Sir John Donaldson M.R. said at page 191:

> " I think that it is important to remember why the practice of giving "claused" or "restricted" reasons grew up. They are sometimes described as "confidential" reasons, but this is a misnomer since the only restriction is on using them "in connection with" the award. The reason for adopting this course was simple. Under the law as it existed before the Arbitration Act, 1979, came into force, it was possible to set aside an award on the grounds that it disclosed an error of fact or law "on its face", but it was not permissible to rely upon any such error, if its existence required evidence not appearing on the face of the award. There was much learning as to what constituted the face of the award and the first part of Mr. Clark's rubric is designed to prevent his reasons being in some way linked with and becoming part of the face of his award."

16. He then pointed out that the position had changed as a result of the passing of the Arbitration Act 1979 which removed the court's power to remit an award on the grounds of error of law on its face and substituted a limited right of appeal on questions of law. Sir John Donaldson said that he would not himself have felt able to say whether or not there had been an error by the arbitrator which affected the final award without referring to the reasons and it seems clear that he was himself willing to look at them in that case. However, at page 192 he said:

> " I agree with Mr. Justice Hobhouse that where restricted reasons are given and accepted by the parties, the parties must be deemed to have agreed that the reasons cannot be placed before the Court. Such an agreement purports to oust the jurisdiction of the Court and is void as being contrary to public policy (*Czarnikow v. Roth, Schmidt & Co.*, [1922] 2 K.B. 478). Were it otherwise the Court would be powerless in the face of misconduct or even fraud revealed by the restricted reasons. We can therefore look at Mr. Clark's reasons, although I hasten to add that no question of misconduct and still less of fraud arises or has ever been suggested.
>
> That said, it is important that there shall be no misunderstanding of the purposes for which reasons can be used. They are extremely limited. Few nations are prepared to lend the power of the state to enforcing arbitration awards, without retaining some right to review the awards themselves. This is reflected in the New York Convention, which has been incorporated into English domestic law by the Arbitration Act, 1975. Section 5 of that Act sets out circumstances which would justify the Courts of the Convention country in refusing to enforce an award. The reasons for an award can certainly be referred to in order to demonstrate that such circumstances exist. On the other hand, it cannot be over-emphasized that the parties, having chosen their tribunal, have to accept it "with all faults". Accordingly, even if the reasons show an error of fact or of law, the Court will take no action, unless, in the case of an error of law, the reasons are "open" or "unrestricted" and leave to appeal is obtained under s. 1 of the 1979 Act."

17. Sir John Donaldson clearly thought that the error made by the arbitrator in that case was one that would give rise to serious injustice since he later said

> " In the instant case, Mr. Clark has accidentally made a major error, which, if uncorrected, would lead to the charterers paying the owners, when it is the owners who should be paying the charterers. No Court could lend the power of the state to the enforcement of such an award."

18. Robert Goff L.J. considered that it was possible to discern the existence and general nature of the arbitrator's mistake without looking at his reasons and therefore found it unnecessary to consider whether and under what circumstances confidential reasons can be relied on as part of the evidence before the court.

19. Sir Roger Ormrod expressed himself in this way at page 198:

> " The exact status of these reasons may be a matter for discussion. To an inexperienced eye it looks difficult to derive their quality of confidentiality from contract, particularly where, as in this case, they were supplied on the initiative of the arbitrator himself, labelled, as they were, "confidential". Perhaps it would be safer to regard confidentiality as a matter

> of practice which is generally accepted by all concerned and recognized by the Court which will support it to the extent of usually in its discretion refusing to look at such reasons, in order to preserve the finality of awards.
>
> Whichever way of looking at this problem is correct it is clear to my mind that the parties themselves cannot blindfold the Court, only the Court itself can do that and in the vast majority of cases it will do so. But in those rare cases where an error occurs of the kind which we are considering in this case, the Court cannot decline to interfere without gravely prejudicing in the eyes of the lay world the machinery of justice."

20. The last of the reported cases dealing with this question to which it is necessary to refer is *Atlantic Lines and Navigation Co. Inc v Italmare S.p.A. (The 'Apollon')* [1985] 1 Lloyd's Rep. 597, another case in which an application to remit an award was made on the grounds that the arbitrators had made an accidental mistake. The applicant also alleged that the arbitrators were guilty of misconduct in making an award on the counterclaim on a basis that had not been raised in argument and on which they had not had a proper opportunity to make submissions. The arbitrators published confidential reasons which were expressed not to form part of the award, but the applicant sought to refer to them in support of its case. Webster J. considered the authorities to which I have referred and concluded that although the parties could not make use of the reasons without the court's permission, the court itself was entitled to look at them in order to satisfy itself that there had been no fraud or misconduct of the kind that would justify the court's intervention.

21. Mr. Geary submitted on behalf of the applicant in the present case that the various statements of principle to be found in these decisions had to be understood in the light of the issues before the court in each case. They were all made in the context of applications under the Arbitration Act 1950 at a time when the court's power to intervene in the arbitral process to correct irregularities of various kinds was much broader than it is now under the Arbitration Act 1996. He submitted that it is not possible as a matter of public policy for the parties and the arbitrator to prevent the court from considering any material that may have a bearing on the outcome of an application before it, including any reasons published by the arbitrator on a confidential basis. The court's power to intervene to correct a flaw in the arbitral process is now limited by section 68 of the Arbitration Act to cases where there has been a serious irregularity that has caused or will cause substantial injustice to the applicant. Accordingly, any application under section 68 must be based on an allegation that the arbitral process has been seriously distorted with unacceptable consequences. A procedural mishap of a modest nature will no longer do, nor, for that matter, will any irregularity that does not have really serious consequences. In view of the gravity of the issue, therefore, an applicant should always be able to rely on any reasons published by the arbitrator in support of an application under section 68, whether those reasons are confidential or not.

22. Mr. Karia accepted that the court could not be prevented from looking at the arbitrator's reasons, but he submitted that there was still a strong public interest in enabling arbitrators to publish confidential reasons which could not be deployed by a dissatisfied party in an attempt to challenge the award, save in exceptional cases. He submitted that

unless there are grounds for thinking that the reasons would disclose fraud or some other very grave misconduct on the part of the arbitrator, the court should refuse to allow them to be put in evidence.

23. It may seem surprising at first sight that any arbitrator who has carried out his functions conscientiously should be unwilling to provide the parties with open reasons for his decision. However, it is undoubtedly the case that by the time of the passing of the Arbitration Act 1979 there was a well-established practice among arbitrators of publishing their reasons in "confidential" form in those cases where the parties had not asked for the award to be stated in the form of a special case and that practice has lingered on. The reason for it, as Sir John Donaldson pointed out, was the willingness of English law, contrary to the practice of most jurisdictions, to intervene in cases where it was clear on the face of the award that the arbitrator had made a mistake in law. Publishing confidential reasons which did not form part of the award enabled the arbitrator to provide the parties with an explanation of his reasoning without at the same time providing an opportunity to challenge the award on that ground.

24. The power to remit an award on the grounds of error of law on its face was abolished by section 1(1) of the Arbitration Act 1979 which introduced for the first time the right of appeal now to be found in section 69 of the Arbitration Act 1996. It might appear that this development has done away with any justification for publishing confidential reasons, but that is not in fact the case. Now, whenever the arbitrator publishes a reasoned award there exists the possibility of an appeal on a question of law, but the parties are free to contract out of their right to appeal and if they have done so, the arbitrator may well prefer to publish any reasons for his decision in a separate document, as he did in this case, to discourage any thoughts of a challenge to the award and to promote finality. That appears to be the thinking underlying paragraph 4 of the Commentary on the L.M.A.A. Small Claims Procedure. Moreover, the court now has the power under section 70(4) of the Arbitration Act to require the arbitrator to give open reasons for his decision, if he has failed to include them in the award, if that is necessary in order for it to consider an appeal or an application to remit the award on the ground of serious irregularity. It is very unlikely to do so, of course, if the parties have agreed that the arbitrator should publish a non-speaking award, but it is more likely to do so, even under those circumstances, if it is satisfied that a question of serious irregularity is in issue. The principle of party autonomy in relation to arbitration proceedings is clearly recognised by the Act and it is both consistent with that principle and with the general public interest in securing finality in arbitration proceedings that arbitrators should be free to publish reasons that do not form part of the award if the parties to the proceedings so agree. On the other hand, it is difficult to see what public interest there could be in allowing either arbitrators or the parties themselves to suppress evidence of serious irregularities, whether that evidence is to be found in the arbitrator's reasons or elsewhere.

25. The authorities establish that if by agreement with the parties the arbitrator publishes his reasons in a separate document on terms, express or implied, that the parties are not to refer to them in connection with any proceedings relating to the award, the parties are bound by contract to each other and to the arbitrator not to make use of them in that way. They also establish, however, that an agreement of that kind cannot preclude the court from accepting the reasons in evidence if it considers it right to do so: see *The Montan*. In such a case the court, if it decides to admit the evidence, simply declines to hold the party seeking to adduce it to his contract. If there is extrinsic evidence of a serious irregularity, the court may not need to examine the arbitrator's reasons at all, in

which case there is no difficulty. That was the position, as Hobhouse J. saw it, in *The Montan*. Where the evidence of the alleged irregularity is entirely contained in confidential reasons, however, the court is faced with the difficulty that it cannot discover whether the allegation is well-founded without examining the reasons. It is clear that Webster J. was acutely conscious of this problem in *Atlantic Lines and Navigation Co. Inc v Italmare S.p.A. (The 'Apollon')* [1985] 1 Lloyd's Rep. 597. Taking as his guide the reference of Hobhouse J. in *The Montan* to "fraud or criminal conduct", he concluded that the court could look privately at the reasons to see whether they disclosed anything of that nature, but should disregard them entirely if they did not.

26. I have to say with respect that I do not find that approach entirely satisfactory. In the first place, I do not think that it is appropriate for the court to consider the reasons privately and without hearing submissions from the parties, if that is indeed what Webster J. had in mind. In my view, if the court is to look at the reasons for any purpose connected with the application, it ought to allow the parties to address it on the significance that is to be attached to them. In practical terms that amounts to admitting them in evidence. Secondly, I do not think that it is possible in the light of the decision of the Court of Appeal in *The Montan* to limit the scope of the enquiry to evidence of fraud or criminality. It was not suggested in that case that the arbitrator's reasons disclosed anything of that kind; the ground of complaint was simply that he had made an honest mistake. Nonetheless, it seems clear that Sir John Donaldson M.R., and probably Sir Roger Ormrod as well, was willing to look at the reasons in order to establish the existence and nature of the error. That suggests that the court can and should look at the arbitrator's reasons in any case in which they are alleged to disclose an irregularity of a kind that would cause serious injustice.

27. Under the Arbitration Act 1996 the court's jurisdiction to intervene in the arbitral process has been significantly reduced. It is no longer possible to remit the award to correct minor procedural deficiencies. As noted earlier, the court can now remit or set aside the award only if it is satisfied that there has been serious irregularity causing substantial injustice. In paragraph 280 of its Report on the Arbitration Bill published in February 1996 the Departmental Advisory Committee described the jurisdiction to intervene on these grounds as a 'long stop' which should only be invoked in extreme cases and there have been many judicial decisions since the Act came into force emphasising that the irregularity must indeed be serious and the injustice caused by it substantial before the court can properly intervene. It follows that no application should be made under section 68 of the Act unless there are substantial grounds for saying that these two requirements are both satisfied. It also follows, however, that whenever an application is made under section 68 the court is being asked to find that there has been an irregularity of a really serious nature that will cause substantial injustice if it does not intervene. In those circumstances I do not think the court has any alternative but to examine the relevant evidence. If the evidence is said to lie in the arbitrator's reasons it must look at them, whether or not they are confidential, unless there is evidence from other sources that makes it unnecessary to do so or it can see that the allegation is groundless or there is some other exceptional reason for refusing to do so. Failure to do so would risk allowing a substantial injustice to go unremedied which could not be justified by any general public interest in allowing arbitrators to publish their reasons in that form.

28. In the present case I have no doubt that the parties are bound by agreement between themselves and the arbitrator not to refer to the reasons in support of an application of

this kind. Although the Small Claims Procedure does not specifically state that the arbitrator will publish his award and reasons in this form, it must be read together with the Commentary which makes the position clear. By making use of the procedure the parties agreed to the publication of an unreasoned award together with "privileged" reasons. However, that agreement does not bind the court and this is one of those cases in which the only evidence of the manner in which the arbitrator reached his decision is contained in his reasons. If they cannot be adduced in evidence, therefore, the application is bound to fail. In my judgment for the reasons given earlier I think the right course is to allow the Buyers to rely on them in support of their application, notwithstanding their agreement to the contrary, thereby enabling the court to look at them and the parties to make submissions in relation to them.

Was there a serious irregularity?

29. The first ground of the Buyers' application is that the arbitrator reached his conclusion in reliance on an issue that had not been raised in the course of argument and on which they had not been given an opportunity to address him. It is apparent from the summary of the parties' submissions set out in the arbitrator's reasons that the main issue between the parties was whether clause 19 applied at all in the circumstances of this case. That, of course, was a question of construction in relation to which the parties advanced various arguments. The arbitrator's conclusions on this issue are contained in paragraphs 29-31 of the award. He held as a matter of construction that clause 19 applied to all defects that affected the vessel's class and therefore applied in cases where the defect could be rectified without the need for drydocking. Having reached that conclusion he went on to explain how he thought the clause operated in this case. He said

> "The fact that the Class Surveyor did not at that moment determine whether the vessel should be dry-docked immediately or whether the vessel could await her next normal dry-docking does not affect that situation. If by 28th July 2003, after a further inspection, the Surveyor determined that the vessel could wait until her next dry-docking, then paragraph 2 of clause 19 would become operative. If he decided in the alternative that the defect did not need a repair before her next dry-docking, then paragraph 3 would have come into operation."

30. The Buyers submitted that the passage just quoted formed the foundation of the arbitrator's decision, but in my judgment that is quite unsustainable. It has been said many times that awards must be read fairly as a whole and that it is not legitimate to isolate one passage and treat it as containing the whole substance of the award. What has happened in the present case is that the arbitrator has decided, having regard to the language of clause 19, that it applied to all underwater defects, whether or not they required the vessel to be dry-docked in order for repairs to be carried out. He has then explained how he thought the clause could have operated in the particular circumstances of this case had matters taken a different turn. He may have been right or wrong about that, but it does not mean that his views on that point provide the basis for his decision. In my view they do not, being essentially collateral to his conclusion on the question of construction and amounting to nothing more than what Colman J. in *Bulfracht (Cyprus) Ltd v Boneset Shipping Co. Ltd (The 'Pamphilos')* [2002] 2 Lloyd's Rep. 681 described as "peripheral explanation". The foundation of the arbitrator's

decision was the language of the clause itself read in the context of the rest of the contract. In truth this application is really nothing more than an improper attempt to challenge the arbitrator's conclusion on a question of law. I am unable to accept the submission that there has been anything approaching a serious irregularity in the way in which the arbitrator reached his decision on this issue.

31. This means that the question of substantial injustice does not arise, but it is perhaps worth making one further point. There can, of course, be no appeal against the arbitrator's conclusion that clause 19 applies to all underwater damage, but in any event the Buyers have not persuaded me that he was wrong on that point. It follows that even if the arbitrator had reached that conclusion by an unfair procedure, they could not show that the irregularity had caused them any injustice.

32. The Buyers' second ground of complaint is that in assessing damages the arbitrator failed to take into account a quotation for the cost of carrying out the necessary repairs which they had obtained and which had been put before him as part of the evidence.

33. The arbitrator dealt with the question of damages very briefly in paragraph 33 of his reasons as follows:

> " However, only Sellers obtained a quote to rectify the defect in dry-dock and in the absence of any quote from Buyers in accordance with the terms of Clause 19 I HAVE FOUND that the quote obtained by Sellers is the only appropriate one and have awarded accordingly."

34. The arbitrator did not summarise at any length the evidence or the parties' submissions in relation to damages, but he did record in paragraph 7 of his reasons that

> " In accordance with their obligations under clause 19, Sellers provided an estimate from A & P Falmouth (a shipyard at the port of delivery) estimating a cost of Sterling £3,932.00, equivalent to US$6,094.00, and called upon Buyers to provide a copy of their estimate in accordance with Clause 19. However, Buyers failed to do [so]."

35. Full copies of the parties' written submissions were before the court, having been exhibited to the witness statements filed in connection with this application. In their first set of written submissions the Buyers simply contended that clause 19 did not apply at all in this case. They admitted that they had not provided the Sellers with an estimate of the direct costs of repairs in accordance with clause 19, but they denied that they were under any obligation to do so. They made no submissions on the proper method of calculating damages if the arbitrator were to reject their argument and hold that clause 19 did apply. However, towards the end of their second set of submissions the Buyers referred to a quotation which they had later obtained from a company called Sub Marine Services which they invited the arbitrator to treat as being tendered under clause 19.

36. Mr. Geary on behalf of the Buyers submitted that the arbitrator had simply ignored this piece of evidence, but I do not think that is correct. In my view he took care to make it clear that the Buyers had failed to provide a quotation in accordance with the terms of clause 19. There is no reason to think that he overlooked the Buyers' quote; he simply decided that because it had not been produced in accordance with the requirements of

clause 19 it could not be taken into account in assessing damages under that clause. That is a question of law which could only be challenged by way of appeal. Whether the arbitrator was right or not does not matter for present purposes. There is no evidence of any irregularity here. Once again, this represents what I consider to be an improper attempt to challenge the arbitrator's conclusion on a question of law by way of an application under section 68.

37. In these circumstances I am satisfied that there has been no irregularity in this case and that the application must be dismissed.