

Fixing or unfixing a charter party

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This paper was originally delivered at the 1989 Annual Conference of MLAANZ held in Adelaide in October 1989.

I. "COMMERCIAL JUSTICE AND STERILE LEGAL APPLICATION — 'THE TWAIN SHALL NEVER MEET'."

Such was the lament of Ian Timmins in a letter to *Fairplay* magazine of 9 March 1989 when criticising the decision of Steyn J in the case of *Start Steamship Society v Beogradska Plovidba (The Junior K)*.¹

The question for the court's consideration was whether a binding contract for the charter of the vessel had been entered into when the final telex communication between the brokers had stated, inter alia, "Confirm telcons here recap fixture sub details". The telex had then set out the terms which had been agreed and concluded with the words "subdets Gencon CP".

After that telex had been sent the defendant charterer had indicated that it did not wish to proceed with the negotiations. The plaintiffs, owners of the vessel, regarded that as a repudiation of the contract and claimed damages. They obtained leave to issue and serve proceedings out of the jurisdiction which the defendant then challenged. In order to establish the right to serve out of the jurisdiction the plaintiffs needed to show that they had a good arguable case or, as Steyn J described it, a "realistic prospect of success".² If he decided that the words "subdets Gencon CP" showed that the parties did not intend to be bound immediately, it followed, he said, that the plaintiffs "have no good arguable case on the merits. The plaintiffs submit that the point is arguable; the defendants contend that the meaning of the expression is clear beyond any doubt".³

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¹ [1988] 2 Lloyd's Rep 583.

² See n1, 585.

³ Ibid.

In reaching his conclusion that no binding contract had come into existence he said:⁴

On the other hand, in negotiations parties are free to stipulate that no binding contract shall come into existence, despite agreement on all essentials, until agreement is reached on yet unmentioned and unconsidered detailed provisions. And the law should respect such a stipulation in commercial negotiations. That seems to me to be exactly what happened in this case. The Gencon charter-party is, of course, a detailed and well-known standard form. It is plain that the parties had in mind a contract on the Gencon form but that they had not yet considered the details of it. By the expression, "Subject to details of the Gencon charter party" the owners made clear that they did not wish to commit themselves contractually until negotiations had taken place about the details of the charter-party. Such discussions might have covered a number of clauses. It does not follow that the owners were willing to accept all the detailed provisions of the standard form document. After all, it is a common occurrence for some of the detailed provisions of the Gencon form to be amended during the process of negotiation. In any event, the Gencon standard form contains within it alternative provisions which require a positive selection of the desired alternative.

He then referred to Box 16 on the first page of the Gencon Standard Form which deals with the subject of laytime. That then refers to clause 6 which contains various options available to the parties. He referred to the fact that no discussion had taken place between the parties as to which of those options was to apply.

In support of his conclusion Steyn J referred to the decision of Staughton J in *The Solholt*⁵ in which he had made the following observation:⁶

Also on July 27 further employment for the vessel was arranged. She is described as having on that day been "fixed subject to details". That means that the main terms were agreed, but until the subsidiary terms and the details had also been agreed no contract existed.

Steyn J also referred to the decision of Leggatt J in *The Nissos Samos*⁷ in which he had said:⁸

"Subject details" is a well-known expression in broking practice which is intended to entitle either party to resile from the contract if in good faith either party is not satisfied with any of the details as discussed between them.

Steyn J's interpretation of these remarks is that Leggatt J:⁹

was not intending in the relevant passage to state any new principle of law. Reading his judgment in context it seems to me clear that in the relevant passage Leggatt J, in so far as he refers to the qualification of good faith, is simply recording and stating a broking view as to the matter and not the strict legal position.

The Nissos Samos was a case involving negotiation for the sale of the vessel for scrap and the question was whether there was a concluded contract on a particular date, which was April 23. On that

⁴ See n1, 585-586.

⁵ [1981] 2 Lloyd's Rep 574.

⁶ See n5, 576.

⁷ [1985] 1 Lloyd's Rep 378.

⁸ See n7, 385.

⁹ [1988] 2 Lloyd's Rep 589.

day one of the parties had sent a telex which had used the words “subject details”. Leggatt J decided that there was no completed contract on that date but there was seven days later on 30 April.

Timmins was not alone in his disappointment at the decision in *The Junior K*. He was joined by Lee Turner, a broker from California, USA, who also wrote to *Fairplay* magazine and said:

The reason that fixtures are made ‘subject c/p details’ is that the latter can be excessively lengthy and require many days of negotiation in themselves. Not, as Mr Justice Steyn stated, “to make clear that there is no binding contract”. Who would want to include all the c/p terms in the main trade if the two parties cannot get within shouting distance of each other on such basic matters as rate and dates? So we trade the basics first to see if there is common ground and then proceed to the charter party later. This is not because the principals do “not wish to commit contractually”, as the learned Judge thinks — at least not if they are honest and ethical — but because the alternative is too unwieldy in most circumstances.

The author went on to refer to some forms of charter parties in which the terms can all be agreed in the main trade. He referred to tanker charters and grain charters and suggested that this was because they were using documents which had been long established in the trade and were covering well known trades.

That particular broker went on to suggest that the court has given sanction “to every unscrupulous charterer or owner who, having committed himself to the essentials of a fixture, seeks a bolt-hole out of it...”. He also suggested that instead of using the words “subject to c/p details”, a wording such as “c/p details to be traded after conclusion of fixture on main terms” may now be more appropriate. The author considered those words would make it clear “as to what the situation ought to be”.

II. THE UNITED STATES POSITION

The American broker may have greater reason for expressing his concern at the decision. The United States law on “sub details” can be seen in the decision of The United States Court of Appeals in *Great Circle Lines Ltd v Matheson & Co Ltd (The Cluden)*.¹⁰

In that case the charterers sued the owners for wrongful withdrawal from an alleged charter party contract. The head note reads: “The Court of Appeals, Cardamone, Circuit Judge, held that fixture establishing the main terms and agreeing to negotiate over details constituted a meeting of the minds sufficient to support formation of a charter party”.

The facts were that on 24 October 1979 the parties had agreed on the name of the charterer, and its guarantor, a description of the *Cluden*’s

¹⁰ 681F2d121 (2d Circuit 1982).

characteristics, time and place of delivery, duration of the charter, place of redelivery, trading exclusions (certain cargoes were forbidden), commissions, and the printed form NYPE 46. They also reached agreement on the hire rate.

A telex confirming those matters included the words: "so we fixed sub details".

On 25 October 1979 the owners had sent a recap telex to the charterers. This telex used the words "subject to details NYPE 46". The charterers telexed back with suggested amendments to NYPE. There were numerous changes to the standard clauses, which altered 108 lines, and also 33 rider paragraphs were suggested as well as a proposal for alterations to the terms agreed the previous day.

On 26 October 1979 the owners accepted some of the charterer's suggested amendments to the form, rejected others and proposed New York instead of London for the arbitration site. The owners asked for a reply by 2.30pm London time or 9.30am New York time. Evidence was given by the charterer that the telex was not received until after 9.30am. In the absence of a response the owner chartered the vessel to a third party. The question for the court's decision was whether or not the owners had wrongfully withdrawn from a concluded charter party. At both first instance and before the US Court of Appeals it was held that the contract had been concluded.

The judgment of the court referred to the general contract law principles which provide that "no contract exists when the parties fail to agree on all the essential terms or where some are too indefinite to be enforceable". The judgment also referred to the "long standing customs of the shipping industry" which needed to be considered "when deciding whether there has been a meeting of the minds on a maritime contract". The court stated:¹¹

The shipping industry is a fast moving and ever changing business, where dealings between the parties called "trade" are usually conducted with a sense of urgency under severe time constraints. To bring owners and charterers together, it is the custom of the industry to deal through brokers who receive and send telex traffic all over the world.

Charter parties are formed in two stages. First, significant 'main' terms are negotiated through brokers. These terms usually include the name of a charterer, name of owner, ship and its characteristics, time and place of delivery, duration of charter, place of re-delivery, hire rate, printed form upon which the contract is based, and any other term that a party deems important. These are considered the 'bare-bones' of the contract. The 'main' terms when agreed upon are entitled a 'fixture'. Second, after a 'fixture' has been reached, the parties continue to negotiate 'details' amending the form of contract specified in the 'fixture'. These minor or side issues 'flesh out' the original agreement or fixture. The 'details' include a wide variety of matters, for example: fuel used, speed of vessel,

¹¹ See n10, 125.

condition of ship's holds, exact times of ship's delivery to charterer, brokerage, breakdown, bunkering, option to extend charter, cargo capacity, demurrage and whatever else is deemed by the parties to be of minor importance. The details are not meaningful of the trade in the same way as the main terms of the fixture, in as much as the fixture affects the trade directly and determines whether it will be a successful piece of business. Where no amendment of details is agreed upon, however, the terms of the printed form govern.

The court rejected an argument that the phrase "subject to details" created a condition subsequent which, upon its failure, terminated the existence of the contract already formed. It found that argument to be not persuasive. It regarded the identification of the NYPE 46 form as the "contract-saving mechanism" agreed to by the parties in the event that there was a failure to agree on the details.

Somewhat surprisingly, the court also relied upon a statement in *J Bes Chartering and Shipping Terms*,¹² which defines a "fixing letter" as a summary of the principal conditions of a charter party, in order to reject the charterer's argument that owing to its London situs its understanding of the terminology in use in the industry was different to that found by the trial court.

The charterers therefore succeeded in forcing the owners to arbitrate even though in English law neither the fixture nor the arbitration clause would necessarily have been binding.

III. REQUIREMENTS OF ENGLISH/AUSTRALIAN LAW

C Debattista, in an article in the *Lloyd's Maritime & Commercial Law Quarterly*¹³ criticises this decision as it creates considerable uncertainty in seeking to classify certain terms as "main terms" on the one hand and as "details" on the other. He points out that "bunkering" which appears in the court's catalogue of "details" is described as a condition in the Bimco "Recommended Principles for the Use of Parties Engaged in Chartering and Ships Agency Procedures". These were adopted in 1969 as an attempt to solve a problem caused by fixtures which are made "subject to details".

In another article S N Ball concluded a discussion of the American decisions on this subject by suggesting that it was:¹⁴

unlikely that such decisions would be regarded as acceptable here. Their reasoning is based on unfounded assumptions about the intentions of the parties and they adopt an unacceptably narrow view of what is essential in a charter-party. They are also decisions taken very much on the facts of individual cases, which reflect the commercial history of each bargain.

It is the purpose of the remainder of this paper to consider whether the quote at the beginning of this paper is justified and whether English

¹² (9 ed, 1975) 45.

¹³ [1985] LMCLQ 241.

¹⁴ [1984] LMCLQ 250, 253.

law in this area does in fact seek to meet the commercial expectations of its customers. It is possible to demonstrate that courts are prepared to hold parties to their arrangements even where they have not, strictly, agreed on all the terms of their contract. This is clearly an important area of concern for those at the coalface negotiating commercial contracts, such as shipbrokers, who are required to conclude complex commercial contracts involving a myriad of factual circumstances. As Timmins also said in his letter to *Fairplay*:

Commercial efficacy in this modern world of instant communications, time differences and spot vessels, necessitates fixtures being concluded out of office hours and during holidays, with main terms negotiations usually concerning any 'nasties' so that the actual details become secondary to the main terms.

The principal restraint which the law imposes in this area is the basic requirement for certainty in commercial transactions. An example of the law's requirement is well stated in Treitel *The Law of Contract*.¹⁵

An agreement is not a binding contract if it lacks certainty, either because it is too vague or because it is obviously incomplete.

The classic case in this area of the law is that of *G Scammell and Nephew Ltd v Ouston*¹⁶ in which the House of Lords held that an agreement to buy goods "on hire-purchase" was too vague to be enforced, since there were many kinds of hire-purchase agreements in widely different terms and it was impossible to say on which terms the parties intended to contract. Viscount Maugham said in that case: "In order to constitute a valid contract the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty".¹⁷ In another part of his judgment he said:¹⁸

In commercial documents connected with dealings in a trade with which the parties are perfectly familiar the court is very willing, if satisfied that the parties thought that they made a binding contract, to imply terms and in particular terms as to the method of carrying out the contract which it would be impossible to supply in other kinds of contract.

Other examples of agreements which have been held to be too vague to be enforceable are those which have contained descriptions such as "subject to war clause", "subject to strike and lock-out clause", and "subject to forc e majeure conditions".

That is the general rule which, if given full force and effect by the law would strike down agreements which the parties otherwise intended to have commercial effect. Such examples do tend to support the fears of the commercial community. There are numerous ways, however, by which the court would seek to give effect to commercial

¹⁵ (7 ed, Stevens & Sons, London, 1987) 40.

¹⁶ [1941] AC 251.

¹⁷ See n16, 255.

¹⁸ *Ibid*.

documents even though they may be vague and uncertain in some respects.

A. Custom

The courts can resolve some vagueness by applying custom. One example¹⁹ was a contract to load coal at Grimsby “on the terms of the usual colliery guarantee”. Such an agreement was upheld on proof of the terms usually contained in such guarantees at Grimsby.

B. Implication of Reasonableness

Another example of a case in which the court came to the rescue of parties was in *Hillas & Co Ltd v Arcos Ltd*²⁰ where the parties had made an agreement for sale of timber “of fair specification” that had involved a contract for the sale of 22,000 standards of softwood goods for the 1930 season. The contract also provided that: “Buyers shall also have the option of entering into a contract with sellers for the purchase of 100,000 standards for delivery during 1931. Such contract to stipulate that, whatever the conditions are, buyers shall obtain the goods on conditions and at prices which show to them a reduction of 5% on the F.O.B. value of the official price list at any time ruling during 1931”. When the plaintiff sought to exercise that option the defendant purported to cancel the contract. As the contract had been made between persons who were well acquainted with the timber trade the court applied the standard of reasonableness in giving certainty to a vague phrase.

The court found that there was sufficient evidence to prove that the parties had made a contract and not merely agreed to make a contract in the future.

Lord Wright said as follows:²¹

Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat*.

In an article in the *Law Quarterly Review*²² G H L Fridman commented upon this decision as follows:²³

In effect, however, as the language of Lord Wright indicates, this maxim does not really state a principle of law so much as what might be called a general directive to be followed whenever the express language of the parties permits. All

¹⁹ *Shamrock SS Co v Storey & Co* (1899) 81 LT 413.

²⁰ (1932) 147 LT 503.

²¹ See n20, 514.

²² (1960) 76 LQR 521.

²³ See n22, 523.

it does is to put succinctly the desire of the courts to assist the survival of the intention to contract in spite of the atmosphere of uncertainty which the language of the parties is alleged to have created. Matters must be so balanced that "without violation of essential principle, the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains". (Lord Tomlin in *Hillas & Co Ltd v Arcos Ltd*.)

The author then went on to discuss the choice which courts face between the application of the maxim or idea of validation and the application of the principle that courts do not construct contracts.

Another well-known decision is that of *Nicolene Ltd v Simmonds*²⁴ where steel bars had been bought on terms which were certain except for a clause that the sale was subject to "the usual conditions of acceptance". There were, in fact, no usual conditions of acceptance and it was held that the phrase was meaningless. The Court however took the course of severing and ignoring those words and thus not vitiating the whole contract. This raises the difficulty as to whether or not the disputed clause can be described as meaningless, as in that case, or is suggestive of the fact that there is still an essential term to be agreed between the parties before they could be said to have entered into a binding agreement.

The authors of *Time Charters*²⁵ refer to the case of *F & G Sykes (Wessex) v Fine Fare Ltd*.²⁶ In that case a national supermarket chain were to be supplied with chickens by the plaintiff. The supermarket chain withdrew from the contract two years after it had been made and in defence of the claim for damages it asserted that there was no contract for the reason that, although the parties had agreed on the number of chickens to be supplied during the first year of the contract, the contract had provided in relation to the four subsequent years that the plaintiff would deliver "such other figures as may be agreed between the parties hereto". The Court of Appeal held for the plaintiffs. In the words of Lord Denning M R:²⁷

In a commercial agreement the further the parties have gone on with their contract, the more ready are the Courts to imply any reasonable term so as to give effect to their intention. When much has been done, the Courts will do their best not to destroy the bargain. When nothing has been done, it is easier to say there is no agreement between the parties because the essential terms have not been agreed. But when an agreement has been acted upon and the parties, as here, have been put to great expense in implementing it, we ought to imply all reasonable terms so as to avoid any uncertainties. In this case there is less difficulty than in others because there is an arbitration clause which, liberally construed, is sufficient to resolve any uncertainties which the parties have left.

²⁴ [1953] QB 543.

²⁵ Wilford, Coghlin, Healy & Kimball *Time Charters* (2 ed, Lloyd's Press, London, 1982).

²⁶ [1967] 1 Lloyd's Rep 53.

²⁷ See n26, 57-58.

C. Implication of Terms

This also leads to the situation in which the courts will imply terms in order to give business efficacy to an agreement. A classic case in that regard is *The Moorcock*.²⁸ In that case the plaintiff's vessel had suffered damage when lying at the defendants' jetty. The defendants had agreed to allow the plaintiff to discharge and load the vessel at their wharf and for that purpose to be moored alongside the jetty. During low tide the vessel, as the parties contemplated, rested on the mud at the bottom of the River Thames. Damage to the vessel was found to have been occasioned by a ridge of hard ground beneath the mud and the plaintiff claimed compensation. The Court of Appeal said that a term had to be implied into the contract imposing an obligation on the defendants to see that the bottom of the river was reasonably fit, or to exercise reasonable care in finding out its condition, and to advise the plaintiff of its condition. Bowen L J said:²⁹

In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of these perils or chances.

The leading Australian authority in this area is *Codelfa Construction Pty Limited v State Rail Authority of New South Wales*.³⁰ The High Court refused to imply a term into a construction contract because it was impossible to say, with any degree of certainty, what the term would have been. The parties had contracted under the misapprehension that construction work could proceed on a three shifts per day basis. An injunction obtained by local residents made this impossible but it was by no means clear what term the parties would have included to deal with the eventuality. The difficulty which the courts face in this regard was described in the following way by Mason J (as he then was):³¹

For obvious reasons the courts are slow to imply a term. In many cases, what the parties have actually agreed upon represents the totality of their willingness to agree; each may be prepared to take his chance in relation to an eventuality for which no provision is made. The more detailed and comprehensive the contract the less ground there is for supposing that the parties have failed to address their minds to the question at issue. And then there is the difficulty of identifying with any degree of certainty the term which the parties would have settled upon had they considered the question.

The degree of incompleteness of an agreement will be of critical importance. If important questions have been left resolved then the

²⁸ (1889) 14 PD 64.

²⁹ See n28, 68.

³⁰ (1982) 149 CLR 337.

³¹ See n30, 346.

court will not hold the parties to a binding agreement. An example is where a lease fails to specify the date on which the term is to commence.³² If however the agreement expressly requires further agreement to be reached on points which have been left open then the court is given less room to move. As is well known agreements for the sale of land are usually made “subject to contract”.

There are also examples of cases in which the parties have incorporated a provision which requires further agreement at some later stage in relation to some aspect of the agreement. A good example is *Foley v Classique Coaches Ltd*.³³ In that case the plaintiff owned a petrol-filling station and adjoining land. He sold the land to the defendant on condition that they should enter into an agreement to buy petrol for the purpose of their motor coach business exclusively from him. That agreement was duly executed but was broken by the defendant who then argued that the agreement was incomplete because it had provided that the petrol should be bought “at a price agreed by the parties from time to time”. The Court of Appeal rejected that argument and held that in default of agreement a reasonable price must be paid.

Another area is the situation in which the courts have been prepared to find that there was a “contract to make a contract”. Such agreements are binding. It may for instance be agreed between parties that they will execute a formal document incorporating terms on which they have previously agreed. In *Morton v Morton*³⁴ the parties agreed “to enter into a separation deed containing the following clauses” and then a summary was given of those clauses. That was held to be a binding contract. Once again there is a narrow line to be drawn between such agreements and mere agreements to negotiate which are too uncertain to be given binding force.

D. Ship Sale Contracts

In the shipping context the case of *The Intra Transporter*³⁵ is an example of an instance where the sale of a ship and a charter party “subject to details” was held not to be binding before the details had been settled. In that case negotiations had been conducted during February and March 1983 for the charter of the defendant’s vessel for carriage of a cargo of about 10,000 tons of steel reinforcing bars from Puerto Acevedo to Dubai. Leggatt J referred at the commencement of his judgment to the fact that “on any view the parties reached an advanced stage in the negotiations, such that there was a form of

³² See *Harvey v Pratt* [1965] 1 WLR 1025.

³³ [1934] 2 KB 1.

³⁴ [1942] 1 All ER 273.

³⁵ [1985] 2 Lloyd’s Rep 159.

charter party signed on behalf of the plaintiffs by Global, pursuant to an authority which they claimed to have possessed. The question is whether the parties in fact made a binding contract”.

The competing arguments were described by Leggatt J as follows:³⁶

The plaintiffs contend that there was no point by which the negotiation was, or appeared to have been, concluded. The parties did no more than clarify the salient terms on which they expected to be able to enter into a charter-party. The defendants, on the other hand, say that there are at least two alternative points at which a concluded agreement can be discerned, irrespective of whether the negotiating parties realised it.

The judgment recounts in considerable detail all the telex exchanges between the brokers acting for the two principals. Leggatt J found that an agreement had not been reached by the date upon which it was asserted by the defendants that a binding agreement had been reached.³⁷

It may well be that the terms were all worked out, but, as Mr Kopiski's telex message implied, that charter-party was not intended to be binding until it was signed. Until it was, there was opportunity for further negotiations. In particular, the plaintiffs did not want to be committed to the defendants until they had concluded their sale contract with Al-Shirawi. That is why the telex messages of Mar 7, 1983, concentrated on resolving the one issue then live between the parties, but made no mention of the charter-party having, at that point, become binding, because it had not. Hence Mr Kopiski still regarded himself as being free to arrange for provisions to be inserted in the charter-party, which would match the requirements of the letter of credit to be furnished by Al-Shirawi.

In effect what Leggatt J found in that case was that the parties had implicitly agreed that the charter party would not be binding until such time as the commercial sale contract had been concluded and the two documents married together. He concluded his judgment by

It looks as though, when the sale to Al-Shirawi fell through and the plaintiffs withdrew from the charter-party, Mr Phillips was left averring that he did not see any outstanding points and that therefore the vessel was fully fixed. Unfortunately, for the reasons I have given, the fixture had eluded him, which had so nearly been within his grasp.

Another example of a case requiring formal signature before a binding contract had been entered into, in a shipping context, is that of *Okura & Co Ltd v Navara Shipping Corp S A*.³⁹ In that case a contract had been entered into for construction and sale of a ship. However, delays in its building entitled the purchaser to cancel the contract, which it did. Negotiations then recommenced. At first instance Neill J had held that a binding agreement had come into existence at a point of time at which all essential terms had been agreed. He found that although a written memorandum recording the terms was no doubt necessary, the signing of the memorandum of agreement was not a

³⁶ Ibid.

³⁷ See n35, 163.

³⁸ See n35, 164.

³⁹ [1982] 2 Lloyd's Rep 537.

condition precedent to the formation of a binding contract. He found in favour of the purchaser on the basis that the builder had subsequently repudiated that agreement. In the Court of Appeal their Lordships found that there had not been a concluded agreement at the time when Neill J had held there was such an agreement. As Lord Denning M R said:⁴⁰

Everything was provisional only. The parties were not to be bound unless and until they signed an agreement... Item 11 of the telex clearly contemplated that there should be a memorandum of agreement in mutually acceptable terms... The telex itself was not binding. It was a preliminary to a future document which was to be binding when signed. The future document was drafted but it was never signed. It was never agreed by the parties.

A different approach was, however, taken in the case of *Damon Compania Naviera S A v Hapag-Lloyd International S A*.⁴¹ Hapag-Lloyd had decided to sell three of its vessels. Two brokers negotiated the sale and purchase to the stage at which the arbitrator was satisfied that both the brokers, who were experienced men, "were convinced that they had a concluded a valid sale contract between their respective principals and all that remained was the performance by the sellers and the respondents of their respective obligations".

There then followed some further exchanges of telexes to enable the completion of a memorandum of agreement. Delay was experienced whilst the purchasers decided which entity they were to use as the purchasing company. A memorandum of agreement, as drafted by Hapag-Lloyd's broker, was in the Norwegian sale form and provided in Clause 2 for the payment of a deposit of 10% on signing the contract. Clause 13 went on to provide that in the event that the purchase money was not paid on delivery the sellers would have the right to cancel and the deposit would be forfeited. The memorandum was never signed by the purchasers or any company on their behalf. There were further communications in which the buyers regretted the delay in signing the memorandum but referred to unforeseen complications with bankers. There was also a communication in which the purchasing company was identified and the vendor's broker was requested to send a fresh memorandum of agreement identifying the new purchasing company, Messrs Damon Compania Naviera S A. Once again, the purchasers failed to conclude the agreement or pay the deposit and Hapag-Lloyd withdrew from the contract and reserved its right to claim compensation.

Fox L J, with whom Stephenson L J agreed, said:⁴²

But I see nothing in the present case to lead me to the conclusion that the parties contemplated the execution of the memorandum of agreement as a pre-requisite

[1982] 2 Lloyd's Rep 541.

[1985] 1 Lloyd's Rep 93.

⁴² See n41, 97-98.

to the conclusion of a contract. That they contemplated and indeed agreed upon the execution of a written memorandum I accept. But that, of itself, is not conclusive. It is open to parties to agree to execute a formal document incorporating terms which they have previously agreed. That is a binding contract. In the present case, on July 8 all the terms of the sale were agreed. And it seems to me that all the indications are that they were not intended to be subject to the execution of the memorandum. Thus the arbitrator found (i) that the agreement was without any "subjects"; (ii) that the two experienced brokers, Mr. Panas and Mr. Nebelsiek, were convinced that they had concluded a valid contract between their principals; and (iii) the agreement would be regarded in the shipping market as a binding contract not requiring a signed memorandum to validate it.

It had also been argued by the purchaser that as it had failed to pay the deposit that prevented any contract of sale from coming into existence at all because the payment of the deposit was a condition precedent to the formation of the contract. This argument was also unsuccessful although there were precedents in relation to contracts relating to the sale of land which supported the argument. Fox L J concluded:⁴³

I see no reason for inferring that no contract arises until the deposit is paid. The provision for the payment of the deposit is simply a term of the contract. In the absence of special provision it does not seem to me to carry with it any implication that it is a condition precedent to the existence of contractual relations.

There is therefore an alternative possibility that a document is intended only as a solemn record of an already complete and binding agreement. This is an example which is well known to those involved in the insurance area where a contract of insurance is generally regarded as completed when the insurer initials a slip even though the execution of a formal policy document is contemplated.

It is worth noting that section 37(1) of the Marine Insurance Act 1909 provides legislative assistance in the marine insurance area where a contract of marine insurance has not been concluded by fixing a premium. That subsection provides: "(1) Where an insurance is effected at a premium to be arranged, and no arrangement is made, a reasonable premium is payable."

E. Chartering Cases

It is of note that in *Shipbroking and Chartering Practice*⁴⁴ by R Ihre, L Gorton and A Sandevan, the authors say, in relation to fixtures which are made "subject to details":

Technically, the parties are now regarded as committed to the charter (even if a party formally may still have the right to 'jump off' during the following discussions regarding the details of the charter party — or if insurmountable obstacles appear relating to any subjects)... One should not, however, use details of the charter party as an excuse to break off the negotiations if the real reason is something else.

⁴³ [1985] 1 Lloyd's Rep 99.

⁴⁴ (2 ed, Lloyd's Press, London, 1984).

In *The Samah*⁴⁵ Parker J held that there was a binding charter party on which the owners could be sued. This was, however, on the basis that the agent of the charterer had put his signature to a time charter party with the ostensible authority of his principal. Parker J did not, however, accept the argument put forward by the plaintiff that the language of the negotiating telexes was the language of firm offer and firm acceptance and that both parties regarded the two vessels being chartered as being fixed. One of the telexes had stated “subject to satisfactory modifications of vessels to be approved by charterers” and “modification to be discussed with owner”. The owners had argued that although there were certain details to be agreed there had been sufficient already agreed to constitute an enforceable agreement and that the law could fill any gaps. The defendant had argued successfully that there was clearly no intention at that stage to contract and that even if there was there was insufficient certainty for an enforceable contract to arise. In finding on that issue for the charterer Parker J had said, in commenting on the telex negotiations:⁴⁶

At this time very little was known at all about the proposed modification. The telex specifically provides that the details are to be agreed and that the modification of plans, other than the water ballast tanks, is to be discussed with the owners. The owners had not then seen the charterers’ pro forma. It is undoubtedly possible to contract when much is left outstanding and for a party to commit himself to the acceptance of certain conditions which he has not seen. The present case is, however, not one of certain matters merely being left unmentioned. The parties have specifically stated that the details of the main modifications are to be agreed and the possible modification of other tanks is to be discussed. Furthermore, when Hellenic Seaways Overseas Corporation, the agents in Piraeus for the plaintiffs, sent forward to Mr Maris the pro forma charter-party, they stated: ... You can add or alter clauses considering the special trading in which above mentioned vessels will be employed.

This recognises that the fixture was an unusual one for which special clauses would be required, as indeed they ultimately were. Mr Rokison submits that the introduction of the special clauses later was merely a variation of an already binding fixture on the terms of the charterers’ NYPE pro forma. But I cannot accept this. The reality of the situation is that both parties recognised that special provisions would have to be made. The charterers indeed set about drafting them. In my judgment neither party intended the final telexes to constitute a binding contract and neither party considered at the time that they had done so. Furthermore, even if they had so intended or considered, they would not have succeeded. The parties having expressly stated that certain further matters were to be agreed or discussed, the Court cannot fill the gap.

Another case of interest is the decision of Mustill J (as he then was) in *The Wave*.⁴⁷ The owners had asserted in that case that there was no concluded charter as various matters had yet to be agreed. In particu-

⁴⁵ [1981] 1 Lloyd’s Rep 40.

⁴⁶ See n45, 42.

⁴⁷ [1981] 1 Lloyd’s Rep 521.

lar, they referred to the following matters which had not been the subject of agreement:

- (1) The identity of the charterers;
- (2) The identity of the cargoes to be excluded;
- (3) The vessel's warranted fuel consumption; and
- (4) The rate at which the charterers were to pay for overtime.

Once again this was a case involving the ostensible authority of an agent. At the trial the defendants did not appear. The defence had asserted that there was no concluded contract and the basis for that assertion was brought to the court's attention by the plaintiff's counsel as they had been asserted in certain pre-trial exchanges.

Having reviewed the negotiations, Mustill J found that as a matter of fact all of these matters had been settled with a sufficient degree of certainty for there to be a contract.

IV. CONCLUSION

Whilst American and English law has a divergence of approach in interpreting the words "subject to details", parties to contracts involving an American element or more particularly an arbitration clause calling for arbitration in New York need to be aware of this difference in approach.

As has been seen there have been cases in the English courts in recent years in which the courts appear to be more flexible in holding parties to their bargains notwithstanding some unresolved matters. Another example is *Pagnan v Feed Products Limited*⁴⁸ where the English Court of Appeal upheld a decision of Bingham J, who held that the parties had made a mutually binding contract for the sale and purchase of corn gluten feed pellets although agreement had not been reached on loading rate, demurrage and despatch and carrying charges. The court found that although the buyers and sellers expected terms to be put forward for agreement, neither party intended express agreement on those terms to be a pre-condition of any concluded contract. Bingham J held that the parties intended to bind themselves on the terms agreed whilst leaving certain subsidiary and legally inessential terms to be settled later. In his judgment Bingham J made the following comments:⁴⁹

Where the parties have not reached agreement on terms which they regard as essential to a binding agreement, it naturally follows that there can be no binding agreement until they do agree on those terms. But just as it is open to parties by their words and conduct to make clear that they do not intend to be bound until certain terms are agreed, even if those terms (objectively viewed) are of relatively minor significance, the converse is also true. The parties may be their

⁴⁸ [1987] 2 Lloyd's Rep 601.

⁴⁹ See n48, 611.

words and conduct make it clear that they do intend to be bound, even though there are other terms yet to be agreed, even terms which may often or usually be agreed before a binding contract is made.

As Bingham J repeatedly stated in his judgment it is the intentions of the parties, viewed objectively, which the court is required to discern. The proper inferences to be drawn will differ from case to case. Some negotiations may be protracted, some may be conducted in writing through lawyers and between parties who have had no dealings of any kind previously. Other negotiations may take place by way of exchanges of telexes or facsimiles between professionals who have been engaged in the same trade and have had numerous previous dealings with each other. All cases have to be approached depending upon the circumstances in which the negotiations have taken place.

Interestingly, Sir John Donaldson M R also dealt with this problem in the case of *Pagnan v Granaria*.⁵⁰ That was also a sale of goods contract which concerned the question as to whether or not a valid and subsisting contract had been entered into. In his opening remarks Sir John Donaldson said as follows:⁵¹

Parties negotiate contracts necessarily term by term, and the time comes when they seem to be in agreement. As one continues to turn the pages of the documentation or listens to the evidence, it emerges that the parties are drifting apart. In that situation there are usually three possible analyses. First, the parties have indeed concluded an agreement, but thereafter one or both have sought to renege from that agreement or to amend what has been agreed. Alternatively, the true view may be that the parties were in agreement on all the terms but had not yet agreed to contract on those terms. That is more familiar in land law where there is a "subject to contract" situation, but it can arise in commercial contracts. The third possibility is that the parties were not really agreed on all the terms, even if they appeared to be or thought that they were, due to some misunderstanding or muddle, the true analysis being that there had been a pause in the negotiations but the negotiations viewed as a whole were a continuing process and the point at which it could be said that a contract had been concluded had never been reached.

It is likely that Australian courts would follow the decisions of the English courts in this area of the law. The lesson for shipbrokers and others who enter into such contracts is that they should desist from using such descriptions as "subject to details" and furthermore seek to agree on as many of the terms of their agreement as they possibly can, at least where English law applies, where they wish to be bound to the terms of an agreement. Where there are terms left undecided at a point of time at which they wish to be bound then they should make that situation clear in their documentation.

Perhaps another solution is to be found in the Civilian doctrine of culpa in contrahendo. This was referred to by Steyn J in *The Junior*

⁵⁰ [1986] 2 Lloyd's Rep 547.

⁵¹ See n50, 548.

K.⁵² He commented that Leggatt J's remarks in *The Nissos Samos* were reminiscent of that doctrine whereby damages are recoverable against the party whose blameworthy conduct during negotiations for a contract brings about its invalidity or prevents its perfection. Perhaps with the ever-growing proximity of the UK to Europe such a principle of law may find its way into the Common Law and thus keep Timmins happy.

In the meantime FONASBA has recommended a clause to be inserted in negotiations which would apply until such time as a fixture has been concluded. The suggested clause reads as follows:

Subject to Details

1. It is mutually agreed between the parties that no charter agreement shall be deemed to exist until each and every term, condition and exception of the charter shall have been agreed.
2. If a "fixture subject details" shall have been made, the party supplying the particulars of the remaining charter terms shall be required to communicate the same to the other party within 24 hours SHINC unless otherwise mutually agreed. The parties shall have not more than 24 hours SHINC to agree the same. Failing such agreement the parties shall be free from any commitment whatsoever.

⁵² See n1, 589.