The Distance between Arbitration and Litigation
– Use of Arbitrator's Own Expert Knowledge Revisited

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1. Introduction

This paper addresses the extent to which arbitrators may rely upon their own expert knowledge and experience in maritime arbitration from the perspective of users of the TOMAC (Tokyo Maritime Arbitration Commission) arbitration. Two cases are discussed: (1) *X v Y*, Tokyo High Court, 1 August 2018, and (2) *The Flag Mette* [2018] EWHC 1108 (Comm).

It is understood in Japan that, whereas judges are prohibited from relying upon their own personal knowledge, arbitrators are not. One of the differences between arbitration and litigation, it is frequently said to promote arbitration, is that arbitrators may be entitled to make use of their own expert knowledge and experience in deciding the case, making the arbitration proceedings cost-effective and the award more in line with the industry. This aspect of arbitration has been particularly emphasised in maritime arbitration. However, those arbitrators and parties' counsel who are very familiar with civil litigations may sometimes lose sight of the meaning of this statement. This is quite understandable because lawyers have familiarised themselves with the way to achieve fairness through an adversarial procedure. That does not exonerate them, as the Tokyo High Court decided in 2018. There, the appeal court judges stated that fairness in arbitration was to be achieved through lawyers' wisdom and good sense, not by pedantic legal principles of civil litigation.

Users of maritime arbitration should commend this decision because it may result in reducing costs by relying upon the tribunal's expert knowledge. How the cost can be saved may be observed in *The Flag Mette* [2018] EWHC 1108 (Comm) where an appeal arbitrator's award in Lloyd's Salvage Arbitration was based upon his personal knowledge and experience. There must be nevertheless certain limits to its knowledge to ensure fairness. When a recent discussion in Japan on the extent to which judges are entitled to use their own personal knowledge is referred to, maritime arbitrators are considered to have wide discretion as to whether they rely upon their own expert knowledge and experience.

In conclusion, the fact that the majority of the TOMAC arbitrators are non-lawyers should be appreciated positively. The list of the TOMAC arbitrators is valuable. Their expert knowledge and experience could be relied upon more to recover the originally intended, less expensive and speedy dispute resolution.

2. X v Y, High Court of Tokyo, Case No. 2018 (Ra) 817, 1 August 2018 [(1)]

[Synopsis]

In a patent cross-licensing agreement, X (Japan, the defendant and applicant), and Y (the Netherlands, the claimant and respondent), agreed that each party would mutually authorise the use of the other's patent rights and that Y would pay X the agreed royalties. This agreement included "material adverse impact clauses" (5.03, and 6.01) to ensure that Y was not at a disadvantage with its largest competitor, Z. It was thought by X and Y that Z was infringing X's patent. Clauses 5.03 and 6.01 provided for as follows:

> Clause 5.03: In order to ensure that Y was not at a material disadvantage with Z, if X fails to enter into a licence agreement with Z for X's patent in question and does not engage in litigations against Z to enforce X's patent right in significant markets in the US or EU, Y is exempt from its obligation to pay royalties.
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> Clause 6.01: X shall demonstrate by an external neutral evaluation that the terms of a new licensing agreement that X enters into with Z are not more favourable than the terms of this Agreement with Y.

X selected 14 of the more than 170 patents suspected of infringement by Z, identified five of them as suitable for litigation, and sued Z in the US and Germany. X subsequently settled with Z and concluded licence agreements for these five cases.

Y commenced arbitration in Tokyo to claim damages for the royalists that Y had paid to X, alleging that X's settlement with Z was in breach of Clause 6.01. The tribunal upheld Y, awarding that there was X's breach of Clause 5.3 and Y should have been exempt from the royalties. The tribunal therefore ordered X to reimburse the royalties to Y. The unsuccessful party, X, sought to have the award set aside alleging that, amongst other things, (a) the tribunal lacked jurisdiction to grant reimbursement because Y was claiming damages in the Claim Submissions, and (b) X was unable to present its case in the arbitral proceedings as to whether X was in breach of Clause 5.3.

[Decision]

The Tokyo High Court (a court of appeal) dismissed X's contentions. What is significant here is that the Court elaborated on how to achieve fairness in arbitration. The Court explained the policy of the Japanese Arbitration Act as follows:

'Arbitrators are expected to conduct the proceedings with conscious consideration for the characteristics of arbitration proceedings (e.g. single and final instance, speed, flexibility, and speciality), which are different from those in litigation. Imposing meticulous procedural duties and burdens on arbitrators, such as those in civil litigation, which undermine the characteristics of arbitration proceedings, is contrary to the legislative intent of the Arbitration Act. Also, making the procedures meticulous, which leads to the protraction of arbitral proceedings and the escalation of costs, is contrary to its legislative intent of promoting arbitration as well. Care must be taken to avoid escalation of unnecessary costs.'

The Court furthermore elaborated on the distinction between arbitration and civil litigation in the following terms:

'The Arbitration Act, Article 25 stipulates that, *"The parties shall be treated with equality in an arbitration procedure. The parties shall be given a full opportunity to explain his/her case in an arbitration procedure."* With regard to grounds for annulment or disapproval of an arbitral award, Articles 44 and 45 stipulate that *"the applicant was unable to defend in the arbitration procedure"* and *"the Arbitral Award contains a decision on matters beyond the scope of the Arbitration Agreement or of submission to arbitration"*.

It should be noted here that the standard of interpretation of these provisions of the Arbitration Act is not based on the meticulous legal doctrines of the Code of Civil Procedure, but on the international standard of basic principles to be observed in civil dispute resolution processes such as arbitration. The task of reaching a common understanding of the international standards between legal practitioners in civil law countries and common law countries has been, and continues to be, a difficult one. The international standard for that basic principle ultimately comes down to whether the provisions of Article 25 of the Arbitration Act were substantially observed. Whether it was substantially overserved is to be determined by the wisdom and good sense of the legal profession and not by the pedantic theories of civil litigation.

If, beyond the international standard of basic principles, the pedantic theories of the Code of Civil Procedure and the court precedents are also applied to cases where annulment of arbitral awards is sought, such a place would be avoided as a seat of arbitration in international contracts. This would mean that Japan would be excluded from the international contracts. This would be an obstacle to the development of international commercial arbitration in which Japan serves as the seat of arbitration, impeding Japan's economy and contradicting the legislative aim of the Arbitration Act. For example, whether the award goes beyond the scope of submission is to be assessed by whether it is outside of a reasonable frame based on the economic realities of the disputes and the parties'

> arguments, as well as if the award is a surprise to the applicant. These criteria should be used instead of the pedantic legal doctrines of the Code of Civil Procedure. … Instead of the meticulous standards, the broad standards (i.e. equal treatment, protecting opportunities to be heard) should be applied to individual cases through the wisdom and good sense of the legal profession. This is in line with the legislative intent of the Arbitration Act.'

Viewing the dispute from a socio-economic perspective, the Court found that the dispute was X's obligation to "pay back" the royalties that Y had paid to X. Hence, X's contention that the tribunal lacked jurisdiction to grant reimbursement because Y was claiming damages in the Claim Submissions had to be rejected. The arbitral award did not go beyond the scope of submission to arbitration.

Therefore, the issues were, in essence, whether both parties were treated equally and had a sufficient opportunity to be heard (Article 25) and whether they were able to defend in the proceedings (Article 44). There, the tribunal gave both parties the opportunity to present their case on Clause 5.3 and also questioned them as to whether Clause 5.3 was satisfied. Y subsequently clarified its argument that X was in breach of Clause 5.3 when Y amended the Claim Submissions to increase the claim amount. Accordingly, there was no ground to set aside the award on this point.

[The significance of this decision]

The Tokyo High Court upheld the tribunal's broad discretion to achieve the characteristics of arbitration. The tribunal should therefore be encouraged to conduct the arbitral proceedings in a manner that achieves cost-effectiveness. One way of reducing costs is for the tribunal to rely upon its expert knowledge and experience. As the parties are entitled to appoint their arbitrators on the basis of their expertise, depending upon the nature of the dispute, the tribunal is also expected by the parties to make use of its expertise. How the tribunal's expert knowledge can work to reduce arbitration costs seems to be illustrated in *The Flag Mette* [2018] EWHC 1108 (Comm).

3. *The Flag Mette* [2018] EWHC 1108 (Comm)

[Synopsis]

Mr Justice Teare dismissed the shipowner's application to set aside an appeal arbitrator's award in a salvage remuneration claim. The vessel was en route to Germany when its main engine spontaneously shut down in the northern sector of the Bay of Biscay, France. The vessel contacted the respondent salvor and entered into a Lloyd's Open Form of salvage agreement (LOF). The salvor's claim for salvage remuneration was referred to arbitration.

In general, the nature and degree of danger is an important factor in the assessment of remuneration. Analysis of the dangers is necessarily a hypothetical exercise because dangers are assessed by considering what would or might have happened to the vessel in the absence of salvor's assistance. Once the dangers are assessed, it is common practice to consider whether there was any "alternative assistance" that could have saved the vessel. This means considering whether anyone other than the actual salvor could have salved the vessel. The tribunal assesses the vessel's predicament by taking into account both dangers and alternative assistance.

There, the salvors contended for two dangers - the vessel was: (1) temporarily immobilised and in need of assistance from professional salvors; and (2) subject to a low order risk of collision had she transited the English Channel unassisted. Whilst the first instance arbitrator agreed with the salvor's first argument, he rejected its second submission, finding that that the vessel would not have been foolhardy enough to contemplate a Channel transit in the absence of assistance. He held that the vessel would have required tug assistance to be permitted to enter a port in France or to anchor in the bay. He awarded the salvor US$825,000 with an agreed currency uplift of 3.76%.

The salvors appealed against the first instance arbitrator's rejection of the second danger. Its argument was as follows: as it was unlikely that the French authorities would permit the vessel to enter a port or to anchor in the bay without the tug's assistance, it was probable that the vessel would have had to contemplate a Channel transit, however dangerous.

The shipowner argued that, although the authorities would not allow the vessel to enter the port without tug assistance, it was likely that the authorities would have permitted the vessel to approach the anchorage to anchor perhaps with the assistance of port tugs. In response to this, the salvor argued that there was no evidence that the authorities would be cooperative in the absence of assistance from a large tug, and the first instance arbitrator also found that (large) tug assistance would have been required to enter the port or to anchor. The appeal arbitrator used his own experience to support the salvor's argument and stated in his award as follows:

> "I have knowledge of previous cases where vessels in difficulty have been ordered away from the French coast. When considering dangers, an arbitrator is concerned with risks, not certainties. In the absence of a large tug, there was a sufficiently significant risk for me to take into account that the French authorities would not have permitted the Vessel to close the coast and come to anchor."

The salvor then maintained its submission that the vessel had no option but to proceed with the voyage through the Channel, no matter how foolhardy that might appear. The appeal arbitrator had, however, thought of "alternative scenarios" in which, if the French authorities would not permit the

vessel to enter the bay unassisted, she would proceed offshore and wait until assistance from a tug acceptable to the authorities became available or her engine was repaired by a service engineer who would come on board offshore, rather than proceeding down the Channel. His alternative scenario had actually been put to both parties because (a) he did not accept the salvor's hypothetical scenario that the vessel would proceed down the Channel and (b) he did not accept the shipowner's hypothetical scenario that the vessel would have been allowed to anchor in the bay without (large) tug assistance. These alternative scenarios, he said, gave rise to dangers as being a prolongation of the period of immobilisation and an increased risk of collision. He then concluded that the dangers to which the vessel was exposed would have been found to be a little higher than those found by the first instance arbitrator. He awarded US$1.2 million with an agreed currency uplift of 3.76%.

The shipowner applied to the High Court to set aside the appeal arbitrator's award, alleging that he failed to act fairly under s 33 of the Arbitration Act 1996, and that the award was affected by a serious irregularity under s 68(2)(a) as it was allowed on grounds not mentioned in the salvor's Grounds of Appeal or the appeal hearing.

[Decision]

Mr Justice Teare dismissed the shipowner's application. This paper focuses on the judge's following reasons with regard to the use of the arbitrator's expert knowledge:

> 'In considering that principle in the context of a salvage arbitration under LOF I have borne in mind my knowledge and experience of salvage arbitrations under LOF. The persons appointed by Lloyd's to act as first instance arbitrator or as the appeal arbitrator have, for many decades, been members of the Admiralty Bar with experience of salvage arbitrations. Such arbitrations always had, and retain to this day, a degree of informality. That is no doubt because in the typical case the issue is the assessment of salvage remuneration where the factors to be considered are well known. … Consistent with this relative lack of formality is a recognition or understanding that the arbitrator or appeal arbitrator may use his or her own knowledge, experience and understanding of salvage and matters relating thereto when assessing the level of salvage remuneration. Thus in the present case the appeal arbitrator had regard to his own knowledge of previous cases where vessels in difficulty off the French coast have been ordered away by the French authorities. ***Expert evidence is not required in the typical case.*** These characteristics of LOF arbitrations are intended to ensure that the process of LOF arbitration remains as cost effective as possible, keeping delay to a minimum.' (emphasis added)

The judge, drawing on his own experience as a former Lloyd's Salvage Appeal Arbitrator, went on to

say how the parties' counsel should act in such specialised arbitration as follows: 'As a result of the relative lack of formality and the expectation that the arbitrator or arbitrator on appeal will form his or her own views of the matters in issue based upon his or her own experience, knowledge and understanding of maritime matters counsel have to be prepared to deal with points raised by the arbitrator or appeal arbitrator which may not have been raised by his opposing counsel. '

Furthermore, regarding the issue of the award which allegedly went beyond the salvor's Ground of Appeal, the judge did not find a procedural irregularity. The Grounds of Appeal and the Award in any case found a risk of collision and the type of danger was the same. The only difference was the location, either in the Channel or in the bay. Effectively, this conclusion is the same as that of the Tokyo High Court decision in 2018.

[The significance of this decision.]

The decision that expert evidence could be dispensed with to prove that the French authorities were likely to refuse the vessel to enter the bay without (large) tug assistance is remarkable. This is significant from a cost-effectiveness perspective. If the same matter is litigated before a Japanese judge, its likelihood will probably need to be proved by evidence to allow the parties to present their case. Therefore, in practice, the salvor may be required to research the local regulations on this point, find statistics about the authorities' refusal, or obtain a statement of a relevant person or expert on the authorities' practice (such as a former official or local lawyer). The shipowners may also do the same to refute the salvor's submission. Obviously, it requires substantial time and cost.

4. What expert knowledge that maritime arbitrators are entitled to rely upon

As demonstrated by the Tokyo High Court decision in 2018 and *the Flag Mette*, arbitrators are entitled to, or even encouraged to use their own expert knowledge and experience to achieve the cost-effective procedures. This should not, nevertheless, mean that arbitrators' discretion is unfettered. From the fairness point of view, there must be certain limits to the type of knowledge and the way to use it – the practical issues are these. When it comes to considering the TOMAC arbitrators' discretion, it seems that discussions on these practical matters have not been well posed in Japan. This paper seeks to obtain insight from the recent discussion in Japan about judges' rights to use their own knowledge because this discussion can be reflected in arbitrators' expert knowledge as well.

In the context of civil litigation in Japan, the principle prohibiting judges from using their own personal knowledge can be summarised as follows:

As civil litigations take the form of applying the law to the facts, it is important to ascertain what the

facts are. The fact-finding process must be fair. The parties must be able to attend this process and be allowed to present their case on the evidence and its process. Therefore, judges are prohibited from using their own personal knowledge. Judges must not rely upon facts known to them by chance to decide the case. It is not permissible from the fairness point of view to decide cases on the basis of something that is not visible to the parties and is not a common understanding of the parties and the court, no matter how certain and truthful judges' knowledge may be. In other words, their personal knowledge needs to be "visualised" in the proceedings. On the other hand, however, such facts that are normally known to the "ordinary layperson" do not constitute "personal knowledge". What matters here is such knowledge that the ordinary layperson does not normally have but a judge personally has. For example, even if a judge has expert knowledge as a qualified architect or doctor, he or she is prohibited from using that expert knowledge without bringing it to the parties for debate and criticism. Furthermore, when a "technical advisor" is appointed by the court, judges are not allowed to consult for expert advice absent the presence of the parties. In this way, the use of expert knowledge by judges is being warned against.

Accordingly, the process of finding fact by evidence can be dispensed with if it is "a piece of knowledge that the ordinary layperson has", namely public knowledge. The practical issues here are the extent of public knowledge and how to distinguish it from judges' personal knowledge. Recently it is discussed in Japan as follows: (2)

> Judges apply critical evaluation to the testimony of witnesses. However, judges are not able to apply rigorous critical evaluation to their own processes of perception, memory, and expression. This is one of the reasons why judges are prohibited from relying upon their personal knowledge to dispense with evidence evaluation. If this is the case, judges may use their knowledge to find the fact without evaluating evidence so long as any suspicion of personal fallacy, a lack of objectivity, or bias has been already removed from such knowledge through "the social group's critical evaluation."(3) In other words, since the veracity of a particular fact or body of knowledge has already been critically verified in the society, the court need not repeat that process. For the purpose of striking a balance between fairness and cost-effectiveness, judges' reliance on their own personal knowledge is justifiable in this circumstance. Therefore, with regard to the definition of "knowledge that the ordinary layperson has", what matters is whether there has been critical evaluation in the society, not just whether it is publicly well-known. It merely means that, if certain knowledge is well-known, it is likely that such knowledge has passed the society's critical evaluation.
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> As to whether certain knowledge has passed the society's critical evaluation does not need to be proved by evidence; it is sufficient for judges to disclose the content and source of that knowledge to the parties as necessary and to give them the opportunity to argue that that knowledge is either untrue or not yet accepted by the society.

This discussion can be reflected in maritime arbitration. Knowledge upon which judges can rely without evidence is, in essence, that which has passed critical evaluation and has been accepted by the society. In the context of maritime arbitration, the "society" can be rephrased as the "maritime industry", rather than a group of unspecified ordinary laypeople. If so, knowledge accepted in the maritime industry can be used by maritime arbitrators without the parties' submission of proof that such knowledge is true. On the basis of this logic, the arbitrators are not in principle entitled to rely upon knowledge of special facts relating to a particular case. As this type of knowledge is so specific it does not seem suitable to conceive general acceptance from a group of maritime experts, and therefore such knowledge needs to be proved by evidence.

The remaining issue is the degree to which a piece of knowledge is accepted in the maritime industry. In fact, (a) the standards by which knowledge is generally accepted as true by an expert group and (b) the standards by which that knowledge is accepted as true in arbitration may not have to be the same. To put it another way, there could be a situation (a) where a piece of knowledge has not yet received unanimous acceptance by a group of experts or such level of acceptance has not yet been confirmed, but (b) where that knowledge has acquired critical verification by a group of maritime experts to the point that it can be relied upon in arbitration as being true.

This paper proposes that the decision as to whether a piece of knowledge in question has passed the standard (b) and can be used without evidence is left to the discretion of the maritime arbitrator, as long as the arbitrator has been appointed because of his expert knowledge. Of course, a piece of knowledge in question must be of a kind and in the range of knowledge that the parties would reasonably expect the arbitrator to have. There is even an argument that by appointing an arbitrator with expert knowledge the parties are taken to have assented to him or her using that general knowledge of the trade in reaching his decision.[(4)] In this sense, as decided in *the Flag Mette*, parties' counsel need to be prepared to deal with points raised by the arbitrator which may not have been raised by his opposing counsel. Furthermore, this approach enables the arbitrator to do his or her own research to check if its own knowledge is true or widely accepted by a group of experts to which the arbitrator belongs. An inquisitorial approach may be taken to this extent.[(5)]

Nevertheless, to ensure fairness, unless the expert knowledge is that which has met the standard (a) above and been accepted by a group of experts as unobjectionable, the arbitrator should disclose the matters within its own knowledge upon which it intends to reply to avoid any subsequent argument that the parties should be given an opportunity to address them. The problem of making use of the arbitrator's expert knowledge has essentially the same root as the arbitrator's bias, in that the fact-finding by the arbitrator's own knowledge without evidence has a risk of bias. Therefore, as with the arbitrator's duty to disclose matters which could arguably be said to give rise to a real possibility of

bias,[6] the tribunal's expert knowledge which excludes evidence should be disclosed too.

5. Conclusion

The burden of proof is actually a burden on the parties to pursue both litigation and arbitration, especially in countries where the standard of proof is a high one like Japan. It is indeed very time-consuming and expensive to find, communicate with, and obtain an opinion from experts. Furthermore, submitting an expert opinion is not the end of the process because the opponent will subsequently submit its expert opinion and the technical debate continues. Such expert opinions or other evidence might be dispensed with in arbitration if the arbitrator could rely on its expert knowledge to confirm that a party's submission is the case. Arbitration is at an advantage compared to litigation in this respect. The TOMAC arbitration can address the users' need to save costs because their arbitrators come from a wide range of maritime and shipping professions, including engineers, shipowners, charterers, traders, carriers, insurers, builders, salvors, and brokers. Indeed, making use of the tribunal's expert knowledge to dispense with evidence has potentially a risk of the tribunal's bias. Therefore, as the Tokyo High Court in 2018 aptly stated, we must exercise our wisdom and good sense to protect fairness while ensuring cost-effective and expeditious maritime arbitration.

Footnote:

(1) See also Koji TAKAHASHI, 'Country Report: Japan' in Franco Ferrari, Friedrich Rosenfeld and Dietmar Czernich, eds., *Due Process as a Limit to Discretion in International Commercial Arbitration* (Kluwer Law International 2020) 251, 252-256.

(2) Genta OKANARI, 'The Prohibition of the Usage of Private Knowledge of Judges' (2021) 68 Hougaku Zasshi (Osaka Metropolitan University's law journal) 1-66.

(3) OKANARI relies upon Piero CALAMANDREI, "Per la definizione del fatto notorio" in *Opere Giuridiche, Volume 5* (Roma TrE-Press, 2019) 425, 442-443.

(4) *Russel on Arbitration* (24th, 2015) [6-075].

(5) *Ibid.,* [5-110].

(6) *X v Y*, The Supreme Court of Japan, Case No. 2016 Kyo No. 43, 12 December 2017; *Halliburton v Chubb* [2020] UKSC 48 at [70].

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