JUDGMENT : MR. JUSTICE CRESSWELL. Commercial Court. 22nd May 2001

This judgment considers the scope and ambit of section 68 and 70(4) of the Arbitration Act 1996. There are before the court applications as follows. First, an application pursuant to s.68 of the Act 1996 challenging the award on the basis of alleged serious irregularities affecting the proceedings which are alleged to have caused a substantial injustice to Petroships. Second, an application pursuant to s.69(2)(b) of the Arbitration Act 1996 for leave to appeal on points of law. Third, an application pursuant to s.24 of the Arbitration Act 1996 to remove all three members of the tribunal on the basis that the tribunal allegedly failed properly to conduct the arbitration, and that a substantial injustice has been and will be caused to the claimants, justifying removal. The third application pursuant to s.24 was withdrawn by letter from More Fisher Brown, solicitors for the owners, today.

This judgment considers the application under s.68. The application under s.69 will be dealt with in due course on paper in the usual way.

The parties to the arbitration were as follows. The claimants were Petec Trading and Investment Corporation of Vietnam ("Petec"), voyage charterers of the vessel PETRO RANGER and the respondents to the present applications. The respondents were Petroships Pte Limited of Singapore ("Petroships"), disponent owners of the PETRO RANGER and the claimants in the present applications. The arbitrators were joined to the application under s.24 of the 1996 Act. All three members of the tribunal attended the hearing yesterday.

The dispute between the parties arose out of the following facts.

(1) The PETRO RANGER, (a medium-sized oil tanker) loaded cargoes of gasoil and kerosene at Singapore and sailed with the cargo for Ho Chi Minh City in Vietnam on 16 April 1998, pursuant to a charterparty dated 25 March 1998.

(2) The vessel should have taken approximately two days to complete her voyage (i.e. the voyage should have been completed by about 18 April) to the Vietnamese discharge port, but she was hijacked by pirates shortly after leaving Singapore.

(3) The pirates bound and threatened the crew and, having taken effective control of the vessel, forced her to deviate from her contractual route, and sailed her many miles north of where she would otherwise have been into Chinese waters in the vicinity of the city of Haikou.

(4) So far as Petroships was concerned the PETRO RANGER had simply disappeared (the pirates enforced radio silence). A report was made to the International Maritime Bureau. All attempts to make contact with the vessel were fruitless. It subsequently transpired that the pirates had over-painted the name on the hull of the vessel, changing the name from PETRO RANGER to WILBY. The pirates also placed false registration papers on board and created false bills of lading for the cargo.

(5) Nothing was known of the fate of the PETRO RANGER until she was detected by the Chinese authorities on 26 April (this was already 8 days after what should have been about a 2 day voyage would have been completed). When detected she was discharging the remaining oil into a lighter (the JIN CHAO) brought alongside her by the pirates or those with whom they were collaborating.

(6) It subsequently transpired that a substantial quantity of oil (some 5,900 m.t. of gasoil) had already been discharged and taken away before the vessel was detected. This oil was never recovered.

(7) Both vessels (the PETRO RANGER and the JIN CHAO) were suspected of being involved in smuggling (the authorities did not initially detect the pirates) and were escorted by the authorities to an anchorage off Haikou. No further cargo was discharged until 22 May.

(8) The vessel was placed under armed guard and access was controlled by the Chinese authorities. News filtered out of China that a vessel which could be the PETRO RANGER was being detained in Haikou. The claimants and somewhat later the defendants sent representatives to Haikou to investigate.

(9) Eventually, the cargo remaining on board both the PETRO RANGER and the lighter JIN CHAO having been discharged into shore tanks controlled by the Chinese authorities, the PETRO RANGER was allowed to sail on 28 May 1998. The cargo which had been discharged into the shore tanks was auctioned off by the authorities shortly afterwards.

The Claim

It was in these circumstances that Petec commenced the arbitration, bringing a claim against Petroships for the loss of the entire cargo. Eventually it was accepted that piracy had taken place, and the claim in respect of the cargo discharged and taken away before the Chinese authorities intervened on 26 April was abandoned during the course of the reference. However, the claim was maintained in respect of the cargo remaining on board the PETRO RANGER at the time of the intervention, as well as in respect of the cargo which had been stolen and was on board the lighter JIN CHAO when the intervention occurred.

The Award

By its award the tribunal found in favour of Petec for the full value of its (amended) claim, and dismissed Petroships' separate counterclaim for freight. The applications before the court are concerned with those parts of the award and reasons which deal with Petec's claim. No issue arises in relation to the counterclaim.

Sections 68, 69 and 70(4) of the Arbitration Act 1996

Before turning to consider the issues which arise, it is convenient to set out sections 68, 69 and 70(4) of the 1996 Act and make certain observations in respect of s.68 and s.70(4).

Section 68 of the Arbitration Act 1996 provides:

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant -

(a) failure by the tribunal to comply with section 33 (general duty of tribunal);

(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);

(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

(d) failure by the tribunal to deal with all the issues that were put to it;

(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;

(f) uncertainty or ambiguity as to the effect of the award;

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;

(h) failure to comply with the requirements as to the form of the award; or

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may -

(a) remit the award to the tribunal, in whole or in part, for reconsideration,

(b) set the award aside in whole or in part, or

(c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(4) The leave of the court is required for any appeal from a decision of the court under this section."

I set out below the following commentary on s.68. 1 - 7 below are drawn from the Departmental Advisory Committee on Arbitration Law, Report on the Arbitration Bill (Chairman, The Right Honourable Lord Justice Saville) February 1996.

1. Section 68 sets out a closed list of irregularities (which it is not open to the court to extend).

2. Section 68 reflects the internationally accepted view that the court should be able to correct serious failure to comply with the "due process" of arbitral proceedings: cf Article 34 of the Model Law.

3. A serious irregularity has to pass the test of causing "substantial injustice" before the court can act (s.68(2)).

4. The test of "substantial injustice" is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process, that the court will take action.

5. The test is not what would have happened had the matter been litigated. To apply such a test would be to ignore the fact that the parties have agreed to arbitrate not litigate.

6. Having chosen arbitration, the parties cannot complain of substantial injustice, unless what has happened cannot on any view be defended as an acceptable consequence of that choice.

7. Section 68 is designed as a longstop, only available in extreme cases, where the tribunal has gone so wrong in its conduct of the arbitration in one of the respects listed in s.68, that justice calls out for it to be corrected.

8. Section 68 must not be used as a means of circumventing the restrictions upon the court's power to intervene in arbitral proceedings. Further, the distinction between s.68 and s.69 must be maintained. In addition, the court's powers under s.70(4) should be borne in mind (see below).

*9. Section 68(2)(d) ("failure by the tribunal to deal with all the issues which were put to it") does not require a tribunal to set out each step by which they reached their conclusion or to deal with each point made by a party. There is a distinction between criticism of the reasoning and a failure to deal with an issue (Thomas J. in **Hussmann v. Al Ameen** [2000] 2 L.L.R. 83, at 97, column 1).*

Section 69 provides:

(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.

An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.

(2) An appeal shall not be brought under this section except -

(a) with the agreement of all the other parties to the proceedings, or

(b) with the leave of the court.

The right to appeal is also subject to the restrictions in section 70(2) and (3).

(3) Leave to appeal shall be given only if the court is satisfied -

(a) that the determination of the question will substantially affect the rights of one or more of the parties,

(b) that the question is one which the tribunal was asked to determine,

(c) that, on the basis of the findings of fact in the award -

(i) the decision of the tribunal on the question is obviously wrong, or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

(4) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.

(5) The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required.

(6) The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal.

(7) On an appeal under this section the court may by order -

(a) confirm the award,

(b) vary the award,

(c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or

(d) set aside the award in whole or in part.

The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(8) The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal.

But no such appeal lies without the leave of the court, which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal."

Section 70 provides:

(1) The following provisions apply to an application or appeal under s.67, 68 or 69 ...

(4) If on an application or appeal it appears to the court that the award --

(a) does not contain the tribunal's reasons; or

(b) does not set out the tribunal's reasons in sufficient detail to enable the court properly to consider the application or appeal,

the court may order the tribunal to state the reasons for its award in sufficient detail for that purpose."

Merkin on Arbitration, at paragraph 21.71, provides the following commentary: *"Section 70(4) is concerned with reasons. Clearly it is not possible for the court to review an award if the reasons for the award are not given or are inadequate. Under the 1950 and 1979 Acts, there was no general obligation on the arbitrators to give reasons for their award, and the only way in which reasons could be obtained was where it was necessary for the court to have reasons, or adequate reasons where the award was inadequately reasoned, for the purposes of an appeal on a point of law: the relevant procedure was laid down in s.1(5) - (6) of the 1979 Act. The 1996 Act has altered the position, by imposing a general obligation on the arbitrators to give reasons, in s.52(4), enforceable by an application to the court under s.68 on the ground of serious irregularity in the award should they fail to do so. Consequently, there is no longer any need for the judicial review provisions to deal with the situation in which, by wrongful omission, no reasons have been given. Nevertheless, the court may still require reasons, or adequate reasons where the reasons given are inadequate, for the purposes of exercising its various jurisdictions under ss.67 to 69, and s.70(4) so provides. The novel feature of s.70(4) is to extend the court's ability to order reasons beyond appeal on point of law under s.69, to applications under s.67 and 68."*

The owners' application under s 68

The owners' application under s.68 falls to be considered under the following headings: (i) frustration, (ii) exceptions clause piracy, (iii) exceptions clause restraint of princes, (iv) the JIN CHAO cargo, (v) bailment, (vi) costs. (i) to (iii) were defences raised by owners in answer to the charterers' primary case - breach of charterparty/failure to deliver. (iv) concerns particular issues as to the cargo on the JIN CHAO. (v) relates to charterers' alternative case that owners were in breach of duty as bailees. (vi) relates to discrete points in respect of costs.

Frustration

The tribunal dealt with frustration in its reasons at paragraphs 34 - 38 as follows.

"34. We shall consider first the frustration issue. It was introduced by the amendment to the Points of Defence & Counterclaim which we permitted at the start of the hearing. The plea was that the Charter was frustrated by 26th April, alternatively 14th May. As a general rule, frustration occurs by operation of law and is based upon an objective test of the relevant circumstances. We needed to consider whether the delay constituted a frustrating event in the context of a voyage where the vessel had not been destroyed and there remained cargo for on-carriage. Having heard and read the relevant evidence, we indicated during Mr. Dunning's closing submissions on behalf of Owners that we did not consider that 26th April was a possible date for frustration.

"35. Our reasons for reaching this conclusion were as follows. First, on 26th April the drama of the hijacking by the pirates and the detention of the vessel by the Chinese authorities only became known for the first time; there was no evidence which suggested that on that date further performance of the contractual voyage would not have been possible even if (as was obvious) there would inevitably be some delay. Second, the evidence was that between 26th April and 13th May there was a degree of community of approach between the parties, even if it fell short of formal collaboration. There was a similarity of approach in the documents formally submitted to the Chinese authorities on 13th May and co-operation through meetings and exchange of information. We do not, however, find that there was a formal

agreement between the parties that Owners would look after cargo's interests. We note that during this period, apart from the customary formal reservation of positions, there were no written or other exchanges between the parties which suggested that they were at arms' length or preparing for a fight with each other.

"36. On reviewing what was done, said and written between 26th April and 13th May we find that the parties were to all intents and purposes working towards the same end; that end was the release of the vessel, crew and cargo. Mr. Tan in oral evidence told us that on 13th May he still wished the vessel and cargo to proceed to Ho Chi Minh City. Capt. Wild's evidence was that he left Haikou on 14th May because he had agreed with Mr. Tan that nothing could be done for the time being and that in any event Owners would be in attendance and await developments from the Chinese authorities. Given Mr. Tan's intention to stay in Haikou and his hope that the voyage to Ho Chi Minh City could continue, we find that Capt. Wild was given the clear impression that Owners, through either Mr. Tan or Mr. Ng, would as an absolute minimum keep Charterers advised of any material developments and, in particular, whether there was any change in Owners' approach to completion of the voyage. There was no evidence to suggest that Mr. Tan did anything to dissuade Capt. Wild from the impression he had been given.

"37. On 14th May there was a letter from Ms Fu to Mr. Wang Jing which suggested that the Marine Police had decided to confiscate the cargo. We consider the letter to be inconsistent with the steps which the parties took the previous day at the instigation of the Chinese authorities. We find the suggestion made by Ms Fu to be the result of supposition on her part, which was perfectly understandable in the prevailing circumstances. The evidence overall shows that nothing of consequence happened after the presentation of the Petitions on 13th May until Mr. Wang Jing arrived on 15th May. His instructions, according to his evidence, were to provide advice and assistance in obtaining the release of the vessel, the crew and the cargo; we do not consider that those instructions are compatible with the Charter having been frustrated at that time. We find that there was no new event or material change in circumstances between 13th and 15th May.

"38. Accordingly, we are unable to conclude that the Charter was frustrated at the latest by 14th May, which was the date advanced by Owners. Indeed the parties' conduct shows that they did not consider the delay to have such effect as to make further performance impossible; they seem to have been working together for the purpose of having the voyage completed. In our view the parties' conduct, although not always the deciding factor, is particularly relevant in this case because it serves as a guide as to what was believed to be possible at the material time. We hold, therefore, that the Owners' submission that the Charter was frustrated by 14th May at the latest fails. It follows that there is no need for us to decide Charterers' submissions on estoppel by representation and the more novel concept of estoppel by convention. We observe in passing that in a letter to Charterers dated 21st May Mr. Tan as Owners' representative was still discussing 'delivery' of the cargo in general terms."

Mr. Dunning Q.C. for the owners submitted as follows. In both its written and oral submissions Petroships maintained that the voyage charterparty was frustrated not because of impossibility (which is the issue that the tribunal has addressed) but because of radical change of circumstances. The tribunal failed to deal with this issue. Petroships' written closing submissions at the arbitration (paragraphs 7 - 13) put frustration solely on the basis of radical change of circumstances (and not on the basis of impossibility), and the relevant circumstances were set out in more detail in paragraphs 11 and 12. As to paragraphs 34 - 38 of the reasons, Mr. Dunning submitted that the tribunal nowhere indicated that it was considering or applying the test of frustration as set out in detail in the submissions; there was no reference to "*radical change*" or any words to similar effect; there was no reference to the test itself; there was no reference to the authorities relied upon; there was no reference to the comparison between (a) the circumstances which were in the parties' reasonable contemplation as likely to exist if the chartered voyage proceeded without the piracy incident or the Chinese intervention and (b) the circumstances which existed (whether known to the parties or not) between 26 April and 14 May as a result of what had in fact happened. Nor was there any reference to the circumstances put forward in support of the change (paragraphs 11 and 12 of the written closing submissions) or any indication that such circumstances had been considered in the context of a decision as to whether such a change had taken place. In addition, paragraphs 35 - 38 included various positive indications that a different issue was under consideration.

Mr. Popplewell Q.C. for the charterers submitted as follows. It would be most surprising if the tribunal did not have the correct test in mind when deciding the essentially factual question of whether the charter was frustrated because (i) The test was set out clearly by the owners in their written pleading, opening and closing skeleton and was never challenged at any stage by the charterers. It was common ground. (ii) No one was contending for a test of impossibility. Nor was there ever any room for any factual dispute about the continued possibility of the charter being performed. It was never suggested that at any relevant stage the performance of the charter was impossible and it was perfectly obvious that it was possible. It would have been fatuous if the tribunal had purported to apply that test: it would have admitted of only one obvious answer. (iii) These were very experienced arbitrators, two of whom had a legal background as senior maritime partners of leading city firms of solicitors. The test for frustration is hornbook law. It is in this context that the court should approach an analysis of the language of the award, keeping in mind the general principles of approach referred to above. The award does not suggest that the tribunal applied a test of impossibility. Indeed such a suggestion is inconsistent with several of the paragraphs in question. The finding of frustration was essentially a finding of fact which the tribunal, with its commercial experience, was fully entitled to make. The tribunal addressed the issue of frustration. It held that the contract was not frustrated. If it obviously made an error of law, the court can interfere under s.69. If it is not obvious that it made an error of law the court cannot and should not interfere. It is in any event clear from the letter of 19 February 2001 (see below) that the tribunal did address and purport to apply the test advanced by Mr. Dunning on behalf of owners. Even a failure to mention an issue in an award does not, by itself, show that the arbitrators overlooked that issue; and if the allegation of having overlooked an issue is put to them and they do not accept that it

was overlooked, that reinforces the conclusion that there was no irregularity: see ***The "Berge Sund"*** [1992] 1 L.L.R. 460, at 468.

On 19 February Mr. Maskell, a member of the tribunal, wrote to the Judge in charge of the Commercial List on behalf of the tribunal. The letter commenced: *"We do not wish to burden your Lordship unnecessarily with extra paper, but in view of the fact that we have been attacked under s.68 as well as s.69, we hope that this explanation of the proceedings will assist you in reaching a decision."*

As to frustration, the letter stated the following: *"We consider this point is one that properly falls under s.69. We did consider the arguments of Counsel for the Respondents carefully, because, although the frustration issue had arisen late i.e. during the Hearing, it was perhaps the point on which the Respondents had their best chance. Counsel for the Respondents put forward his test and put forward two dates ie 26th April and 14th May, on which he alleged the contract was frustrated. We held that the first date was far too early for an objective bystander to say that the contract was at an end and with regard to the second date, we applied Mr. Dunning's arguments, but asked the question why had he picked 14th May rather than 13th or 15th, for example. The facts that existed on 13th May were that the parties both believed the contract existed. Nothing relevant occurred until 15th May, when the famous meeting took place at which a proposal was made to cut the Gordian knot, without the presence or participation of the Claimants. Mr. Dunning chose the date of the 14th. We could not accept his arguments that the 14th was crucial, other than by reference to the fact that it was on the 15th that the important meeting took place. We considered that Mr. Dunning's arguments were unconvincing. We accept that if we have applied the wrong test, that is a matter for the Court, but we addressed the arguments presented by Mr. Dunning. He never gave us a satisfactory answer to the 13th/15th question."*

Analysis and Conclusions: Frustration

1. It is common ground that the relevant principles are accurately summarised in Chitty on Contract, General Principles, vol.1, 28th Edition, at paragraphs 24-012 and 24-013:-

   "Test of a radical change in the obligation. The test which found favour with the House of Lords in ***Davis Contractors Ltd. v. Fareham U.D.C.*** and in later cases may be formulated as follows: If the literal words of the contractual promise were to be enforced in the changed circumstances, would performance involve a fundamental or radical change from the obligation originally undertaken? Thus, Lord Radcliffe said:

   "'...frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do... There must be ... such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."

   "Lord Reid put the test for frustration in a similar way. 'The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end." Later in his speech, he approved the words of Asquith L.J. that the question is whether the events alleged to frustrate the contract were 'fundamental enough to transmute the job the contractor had undertaken into a job of a different kind, which the contract did not contemplate and to which it could not apply." It is submitted that the test put forward by Lord Reid is substantially the same as that of Lord Radcliffe.

   "In subsequent cases the House of Lords has expressly upheld the ***Davis Contractors*** *formulation of the test for frustration. In* ***National Carriers Ltd. v. Panalpina (Northern) Ltd.*** *Lord Simon restated the test as follows:*

   ""Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance."

   "Yet, at the same time it was said that the doctrine should be flexible and capable of new applications as new circumstances arise."

2. I do not consider (applying the relevant principles as to s.68, see above) that there was a serious irregularity within s.68(2)(d).

3. I consider, however, that the tribunal's reasons are not set out in sufficient detail to enable the court properly to consider the application under s.69. I accordingly order (pursuant to s.70(4) of the 1996 Act) the tribunal to state (by reference to the relevant principles: see 1 above) its reasons for rejecting owners' case (see paragraphs 11 and 12 of the written closing submissions) that the voyage charterparty was frustrated because of radical change of circumstances.

Exceptions Clause: Piracy

The charter included the following express term:

"19. General exceptions clause ... And neither the Vessel nor Master or Owner nor the Charterer, shall, unless otherwise in this Charter expressly provided, be responsible for any loss or damage or delay or failure in performing hereunder, arising or resulting from - ... perils of the sea; act of public enemies, pirates or assailing thieves; arrest or restraint of princes, rulers or people, or seizure under legal process provided bond is promptly furnished to release the Vessel or cargo."

The tribunal dealt with this issue and its reasons in paragraphs 40 - 42.

"40. Owners rely, however, on two excepted perils to excuse themselves from liability. First, clause 19 which mentions acts of public enemies, pirates and assailing thieves. Owners say that but for the hijacking, none of the cargo would have been lost. Charterers conceded that the amount of the cargo discharged from the vessel, taken away and disposed of by the pirates prior to the intervention of the Chinese authorities on 26th April was covered by the exception. The claim in respect of that cargo, therefore, was not pursued.

"41. As to the remainder of the cargo, the evidence was that it was on the vessel and the lighter 'Jin Chao' on 26th April when the Hainan Marine Police intervened and detained both. The cargo was physically removed from the vessel and the lighter by the actions of the Hainan Marine Police and/or the PSB through their control of the vessel and the lighter on and after 22nd May. The main thrust of Owners' evidence was that such was the control of the Chinese authorities that they, Owners, were almost helpless. Such evidence is, we consider, inconsistent with Owners' plea that the piracy continued beyond 26th April; in our view that would presuppose control by the pirates. At 26th April, however, the Chinese authorities were physically and legally in control of the vessel, the lighter, the cargo and the crew.

"42. Accordingly we find the actions of the Chinese authorities to have been a new and major development on 26th April. The consequence is that we hold that from that date the exception of acts of public enemies, pirates and assailing thieves in clause 19 of the Charter no longer operated in Owners' favour; we also hold that the Carriage of Goods Act 1936 section 4(2)(f) and (q) no longer operated in favour of Owners to the extent that Owners relied upon those sections in relation to the same perils."

Mr. Dunning for the owners submitted as follows. Petroships' case in its written closing submissions was that the loss of that part of the cargo in dispute at the hearing "arose or resulted" from the piracy for the reasons set out in paragraphs 66 - 70 of the closing submissions. The case was that all the subsequent problems arose or resulted from the piracy and would never have been encountered but for the piracy, which (because it involved smuggling within Chinese waters) exposed the vessel and cargo to the risk of detention. In particular the critical issue raised by the way that Petroships' case was put was whether the loss of the cargo "arose or resulted" from the piracy because it was the pirates who took the vessel and her cargo into Chinese waters (many miles from where she would otherwise have been); it was the pirates who were involved in smuggling the cargo into China; it was common for pirates to take hijacked vessels and their cargoes to southern Chinese ports around Haikou; the pirates were likely to attract the attention of the Chinese authorities; and once the attention of the authorities was attracted to the smuggling by the pirates, the cargo was likely to be detained or lost by detention. The tribunal failed to deal with this issue.

Mr. Popplewell for the charterers submitted as follows. The relevant breach of charter was a failure to deliver the cargo. The tribunal held that from 26 April the taking of control by the Chinese authorities brought to an end the causative effect of the piracy. The tribunal addressed the issue of whether the piracy exception applied and held that the piracy was not causative after the intervention of the Chinese authorities on 26 April. To allege that the tribunal did not specifically address an argument of the owners on the issue is not an allegation capable of amounting to serious irregularity under s.68(2)(d) of failure to deal with an issue.

In Mr. Maskell's letter of 19 February the tribunal wrote, in paragraph 2 under the heading "Exceptions clause":

"This was a very high profile case. A book has been written on the incident and it has been extensively reported in the press. We were very conscious of the political implications in any decision we reached and this was very important in the context of the exceptions clause arguments.

"We commenced from the basis that it was for the Respondents to bring themselves within the ambit of the clause and we found that, on the facts, they had not done so. We all felt that there was a very high probability that the piracy took place with the knowledge and approval of certain Chinese Government officials. The fact that the pirates were not prosecuted and ultimately returned to Indonesia or Malaysia gave serious grounds for such suspicions. However, for us to make such a finding, would have required a criminal standard of proof and would not necessarily have improved the case for the [respondent]. We believed that the piracy exception ceased on 26th April, but that it protected the Owners until then. This was conceded by the Claimants.

"With regard to the second exception, for the reasons given between paragraphs 50 - 65 of the Award, we were of the opinion that the Owners could not show, on the facts, that they were within the terms of the exceptions clause, and we so found."

Analysis and Conclusions: Piracy

1. As to paragraph 2 of the letter from the tribunal, Mr. Dunning (as I understood him) very properly accepted that he did not and could not invite the tribunal to find as a fact that "the piracy took place with the knowledge and approval of certain Chinese government officials". Further in this connection, the use by the tribunal of the word "suspicions" should be noted.

2. I do not consider (applying the principles set out above) that there was serious irregularity within s.68(2)(a) or (d).

3. Nor do I consider that an order under s.70(4) is appropriate (but see further under the JIN CHAO below).

Exceptions clause: Restraint of Princes

The tribunal considered the excepted peril of arrest or restraint of princes at paragraphs 43 - 65. Mr. Dunning realistically did not pursue the application under s.68 in this connection. To use his words, owners' case is "largely s.69."

The JIN CHAO Cargo

In a letter dated 12 February 2001 Barlow Lyde & Gilbert, solicitors for the charterers, wrote to the Judge in charge of the Commercial List as follows:

"Our clients' position in relation to these various heads of application is as follows ...

"(3) Petec accept that at the very least the Tribunal has failed to give any reasons for any findings that it has made in relation to the "JIN CHAO" cargo. Therefore it is not apparent whether the Tribunal considered the position of the "JIN CHAO" cargo. Petec are content for this matter to be remitted to the Tribunal for the giving of further reasons and/or for consideration.

"(4) It is also accepted that the Tribunal has not addressed the question of whether Petroships were in breach of their duty as bailees ... Our clients accept that if Petroships obtain permission to appeal on the question of frustration and subsequently succeed on their appeal, it will be necessary to remit to the Tribunal the issue of whether Petroships breached their duties as bailees of the cargo.

"(5) As for costs, our recollection of what was agreed by the parties differs somewhat from that of Messrs. More Fisher Brown. Nevertheless, we are content for this question to be remitted to the Tribunal and for Petroships to put to the Tribunal the arguments identified in section 10(E) of the Arbitration Claim Form.

"It follows that in relation to items (3), (4) and (5) there is no dispute that these matters should be remitted either now or, in the case of item (4), if the need arises at a later stage. There is therefore no need for an oral hearing in respect of these aspects of the application."

The letter from the tribunal stated, at paragraph 3 under the heading "The JIN CHAO Cargo", the following:

"We will not labour this point, in that Messrs. Barlow Lyde & Gilbert accept the criticism. However, we submit that it is not right to conclude that the matter was not considered. The question of the "JIN CHAO" cargo as a matter of separate liability was raised by way of amendment on the first morning of the Hearing. The Respondents' skeleton arguments, however, only refer to it lightly in Paragraphs 2 and 5 not at all in the section dealing with "piracy" or actions of the Chinese Authorities.

"The question of the "JIN CHAO" cargo was raised more specifically in Paragraph 65 as a matter of quantum. The Claimants' Closing Submissions also only raised the question as a matter of quantum. In his final submissions, Mr. Dunning said that, logically, we should consider the "JIN CHAO" cargo as part of the cargo subject to the piracy exception and that the intervention of the Chinese Authorities was not a novus actus.

"After considering the evidence, we took the view that after 26th April, when the Chinese Authorities took control of the vessel, the piracy exception had come to an end and that the only exception available to the Owners was one of arrest or restraint of princes, etc. The way the argument was put to us was very much on the basis that the cargo discharged prior to 26th April was one type and the other cargo fell to be considered as a whole whether or not it was "JIN CHAO" cargo. We found that both parcels were discharged into the same shore tanks (Paragraph 26) and that contributed to our decision that the "JIN CHAO" should be treated in the same way from a legal point of view. We decided in Clause 64 that the Owners had not reached the necessary burden of proof; consequently the "JIN CHAO" cargo should be treated in the same way as the remainder. Both counsel, in their final submissions, essentially dealt with this portion of the cargo as a matter of quantum."

Mr. Dunning for the owners submitted as follows. Throughout the arbitration Petroships maintained a further and separate defence in relation to the JIN CHAO cargo that had already been stolen by the pirates and placed on board the lighter called the JIN CHAO at the time when the Chinese authorities arrived on 26 April. The tribunal ignored this issue. The tribunal did not deal with the question of whether Petroships were liable for the loss of these 619 m.t. of gasoil, notwithstanding that these 619 m.t. had been forcibly taken from the ship by the pirates and thereafter Petroships never had possession or control of them. Accordingly, the tribunal failed to *"deal with all the issues put to it"* (as regards the JIN CHAO cargo) within the meaning of s.68(2)(d) of the 1996 Act.

Mr. Popplewell for the charterers submitted that since the letter from Barlow Lyde & Gilbert the tribunal have effectively furnished further reasons in their letter of 19 February, paragraph 3 (see above). It is apparent from those reasons that they considered that the effective cause of the discharge of the JIN CHAO cargo was the same as that of the cargo on the vessel, namely the voluntary act of the owners as a result of the deal. The fate of the JIN CHAO cargo went with the fate of the cargo on board the vessel. The letter of 19 February is not part of the award, but the court will only remit for further reasons or for serious irregularity if it is satisfied that there would otherwise be substantial injustice. Given that the court knows that the tribunal would give reasons which would be a complete answer to the point, there can be no injustice in not remitting the award on this point.

Analysis and Conclusions: JIN CHAO Cargo

1. I consider that the original concession by Barlow Lyde & Gilbert was sensible and appropriate.

2. I remit this part of the award to the tribunal for reconsideration under s.68(2)(d) (3)(a). Owners are entitled to have this issue dealt with. In dealing with the JIN CHAO cargo, it would assist the court when considering the application under s.69 if the tribunal would amplify its findings of fact and address the following question - what would probably have happened to the PETRO RANGER, the remaining cargo on the PETRO RANGER and the cargo on the JIN CHAO, if owners and the Chinese authorities had not reached the "unspoken understanding" referred to in paragraph 61 of the reasons?

Bailment

It is common ground that the position is accurately set out in Barlow Lyde & Gilbert's letter of 12 February. I make no order in this connection. The parties might, however, consider whether it would be sensible to invite the tribunal (by agreement) to deal with this alternative case now.

Costs

I refer to Barlow Lyde & Gilbert's letter of 12 February in so far as it deals with costs. I remit this discrete issue as to costs for reconsideration under s.68(3)(a).

As the application under s.24 has been withdrawn, I confine myself to the following. Paragraphs 105 and 106 of the Report on the Arbitration Bill by the Departmental Advisory Committee on Arbitration Law contain the following commentary:

"105. We have included, as grounds for removal, the refusal or failure of an arbitrator properly to conduct the proceedings, as well as failing to use all reasonable despatch in conducting the proceedings or making an award, where the result has caused or will cause substantial injustice to the applicant. We trust that the courts will not allow the first of these matters to be abused by those intent on disrupting the arbitral process. To this end we have included a provision allowing the tribunal to continue while an application is made. There is also clause 73 which effectively requires a party to `put up or shut up' if a challenge is to be made.

"106. We have every confidence that the courts will carry through the intent of this part of the Bill, which is that it should only be available where the conduct of the arbitrator is such as to go so beyond anything that could reasonably be defended that substantial injustice has resulted or will result. The provision is not intended to allow the Court to substitute its own view as to how the arbitral proceedings should be conducted. Thus the choice by an arbitrator of a particular procedure, unless it breaches the duty laid on arbitrators by Clause 33, should on no view justify the removal of an arbitrator, even if the court would not itself have adopted that procedure. In short, this ground only exists to cover what we hope will be the very rare case where an arbitrator so conducts the proceedings that it can fairly be said that instead of carrying through the object of arbitration as stated in the Bill, he is in effect frustrating that object. Only if the Court confines itself in this way can this power of removal be justified as a measure supporting rather than subverting the arbitral process."

Careful regard should be had to these observations before any application is issued under s.24.

As to the conduct of arbitrations generally, in major arbitrations arbitrators should consider directing the representatives of the parties to liaise with a view to producing a short agreed list of the important issues of fact and law. A separate section of the document might list what is common ground between the parties. Had this approach been followed in the arbitration in the present case some of the problems which have given rise to this hearing might have been avoided.

The application under s.69 will be considered on paper in the usual way when (a) the tribunal has complied with the orders referred to above and thereafter (b) the parties have had an opportunity to provide revised (and hopefully shortened written submissions) confined to the application under s.69. I order accordingly.

(Discussion followed)

MR. G. DUNNING Q.C. (instructed by Messrs. More Fisher Brown) appeared on behalf of the Applicant.
MR. A. POPPLEWELL Q.C. and MR. N. CALVER (instructed by Messrs. Barlow Lyde & Gilbert) appeared on behalf of the First Respondent.