LEGAL ASPECTS OF SHIPPING: BASICS (Part 1)

- Jagmeet Makkar

LEGAL ASPECTS OF SHIPPING SERIES:

The purpose of this series is to share basic knowledge about the **contract** law, shipping disputes and prevention with the Shipping Professionals, both on-board and ashore. In this series, we will mainly concentrate on the English Law and look at the basics of a contract, various types of contracts, a few **landmark judgments** resulting in and establishing case law on the subject of contract. We will then move on to **ADR (Alternative Dispute Resolution)**, namely mediation, adjudication and Arbitration. We will then try to explore ways to **minimise loss of management time**, efforts and finally money by taking a few careful steps, while incorporating the Arbitration Clauses into the contracts.

In shipping, we enter into various types of contracts. It could be an employment contract such as a charter party; contract of affreightments; ship management & crew contracts; contracts with lubes / bunkers / stores / spares / equipment suppliers and shipyards for building or repairing ships etc. In many cases we work in an automatic mode without paying much attention to the simple yet very important question "when is a contract made" or "when does a contract come into existence"? Do we have to sign a document containing the terms and conditions agreed in order for a contract to exist or a verbal, faxed or emailed offer that may be accepted in totality with a clear understanding that such an acceptance shall lead the parties to enter into a legally binding contract? These are very interesting questions. Let us, for example, take the case of charter party negotiations.

HOW DOES A CONTRACT TAKE SHAPE?

The first step is to let the market know of the requirement. This could be done through circulating tonnage or cargo. A ship-owner may ask his broker(s) to place his ship in the market with brief specifications of the ship (T/C description or "Time Charter description") made known and approximate dates when she is coming open (or "will be available for the next business"). Interested parties then respond to this "invitation to treat" and give an indication or make an offer. This will then lead to coming to an agreement on "all" the terms of the offer.

It is important to remember that when a party receiving an offer does not accept "all" the terms of the offer without "any qualifications" and in turn makes a counter offer, then the original "offer" is considered "dead" and the so called "counter offer" becomes "the" offer which is now available to the party receiving such an offer to either accept it in its entirety and without any qualification, to "effect" a contract to happen or "kill" it and put forward a new offer. This battle goes on till all the terms are agreed by following a mechanism that is known as A/E i.e. Accept/Except. The terms that are accepted keep falling into a "thread" that will finally be used to make a "necklace" called a "recap", provided all the terms are finally agreed and no changes are made to the agreed parts (i.e. there is no back trading or simply back tracking). The "recap" is then the reference document for drawing up the charter party contract.

"SUBJECTS" IN CONTRACTUAL NEGOTIATIONS:

Subjects are the "qualifications" or "conditions" that must be fulfilled before the contract legally comes into existence. For example, there may be a case where, all the terms and conditions are agreed between the parties and the legal effect to this agreement can only be given "if" the agreed "subject" that "within 24 hours, the Board of one or both the parties will approve the deal". If the Board(s) turns it down, then the deal is said to have failed on "subjects". Alternatively, once approved, we say that "subject to Board Approval" has been lifted and there is a contract.

It is thus important to remember that unless all the terms are fully agreed and all subjects are lifted leading to acceptance of the final offer in its entirety, the contract does not come into existence under the English Law. However, for those who are more interested in a comparison between legal jurisdictions, the situation is different under the American Law where an agreement on the main terms may lead to existence of the contract even if the negotiations on the charter party details are pending. This is an interesting difference.

To begin with, let us look at generally accepted definitions of the limbs of a

contract. Later in the article and series, we will look a little deeper into each of the limbs.

LIMBS OF A CONTRACT:

There are four limbs of a contract, namely -

Offer; Acceptance; Consideration; Intention to be legally bound

Offer:

An offer is *an expression of willingness to contract on clear terms with the intention of creating a legally binding contract.*

Acceptance:

An acceptance is a *final unqualified expression of assent to all the terms of an offer.*

Consideration:

Consideration is *either giving of a benefit or a suffering of a detriment or a promise of either of these.* English Law lays a great emphasis on consideration with the famous words "consideration must be sufficient though it need not be adequate".

Intention to be legally bound:

A contract is a document that contains division of rights and obligations (responsibilities). When the parties enter into an agreement, would they like to make the *agreement a legally binding one such that they are then legally bound to discharge their obligations and can be sued if they fail to do so?* If the answer is affirmative, the fourth limb of the contract is then complete.

UNDERSTANDING LEGAL POSITION

It is important to understand the legal position under these four limbs. In this series titled legal aspects, we will consider each of these limbs one by one and with the help of a few cases learn to appreciate the legal position. In the present article, we will focus only on "offer".

OFFER: Making an offer is a serious matter. It should be done with the clear knowledge that if accepted, it will result in a legally binding contract. As we have seen earlier, during the process of negotiations, the A/E (accept/except) mechanism goes on and it becomes difficult to pinpoint the exact point where an offer has taken place and accepted. If the intention of the party making a statement is not to enter into a contract and such a statement is only an advertisement or making one's position known, this should be legally clear enough to mean such. These lesser, non-binding statements should be clearly distinguished. One such concept is an "invitation to treat". Accepting an invitation to treat does not result in a binding contract and it is not enforceable. An offer must be "capable of acceptance" and "there should be an intention to contract on clear terms". These are the yards sticks to distinguish an "offer" from the lesser non-binding statements.

Let us now look at some examples:

HARVEY V FACEY [1893] AC*

1. The appellants telegraphed: "Will you sell us Bumper Hall Pen**? Telegraph lowest cash price".
2. The respondents telegraphed back: "Lowest price for B.H.P. £900".
3. The appellants replied: "We agree to buy B.H.P. for £900 asked by you . . ." There was no reply from the respondents, but the appellants alleged that a contract had been concluded.

Lord Morris

1. The appellants sue for specific performance and injunction to prevent conveyance to another.
2. The first telegram asked two questions: (a) will you sell; (b) lowest price. The request "Telegraph" related only to (b).
3. Facey replied only to (b). The third telegram treats this as going to (a) as well as (b), but it does not: apart from price, everything is left open.

[Note: The case illustrates, in a simple way, that for a communication to be an 'offer', it must be clear that the person concerned is willing to make a contract. In this case, the critical second telegram was not clear on this point. Note also that 'price' might not be the only thing that needs to be agreed, especially in a sale of land.]

(Source: http: / / law2.biz.uwa.edu.au / lproksch/CasesS/HarveyS.htm)

* Appellate Court

**Bumper Hall Pen: is a real estate and not a writing pen.

#CLIFTON V PALUMBO (1944) CA*:

The case goes like this: Seller of an estate wrote to the prospective buyer 'I am prepared to offer you my estate for £600,000. … I also agree that a reasonable and sufficient time shall be granted to you for examination and consideration of all the data and details necessary for the preparation of the Schedule of Completion.' It was held that this was not an offer since the words; *'I am prepared to offer my estate for £600,000'* did not amount to an offer to sell.

*CA: Court of Appeal

#BIGG V BOYD GIBBONS LTD [1971] CA

Two parties were negotiating a sale of a freehold property called Shortgrove Hall by the exchange of letters. Bigg wrote on December 22 1969: *'As you are aware that I paid £25,000 for this property, your offer of £20,000 would appear to be at least a little optimistic. For a quick sale, I would accept £26,000 so that my expenses may be covered.'*

Boyd Gibbons replied on January 8 1970: *'I accept your offer.'*

Bigg replied on January 13 1970: *'I thank*

you for your letter accepting my price of £26,000. ... My wife and I are both pleased that you are purchasing the property.'

Boyd Gibbons then claimed that there was no contract as Bigg's letter of December 22 had not been an offer. It was held that there was a contract. The court stressed the italicised words, and pointed out that the letter of January 13 did not say *'may be purchasing'*, but it is questionable whether they should have been considering the letter of January 13 to decide the effect of the letter of January 8.

(#Source: http: / / www.spr-consilio . com / lawboxcontrcb.pdf)

Readers may like to visit above sites and look at a few more cases. English case law has developed over the centuries and development of some of the legal principles, going back hundreds of years, is very interesting.

In the next article, we will look at a few "invitation to treat" cases dealing with the issues of Tenders, Shop Displays, Advertisements etc.

For feedback and comments, please contact: shiplearn@yahoo.com

ABOUT THE AUTHOR

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He is a regular speaker at various international events and has contributed to a number of publications. Jagmeet is past chairman of the Institute of Chartered Shipbrokers (Hong Kong Branch) and presently serves on the Education & Training Committee of the Institute.

Jagmeet has recently been admitted as a council member of the Hong Kong Centre of International Commercial Arbitration (HKCICA) and appointed as an Arbitration Fellow (AFIDRRMI). He is a supporting member of the London Maritime Arbitrators Association (LMAA), Fellow of the Hong Kong Institute of Arbitrators, Member of the HK Maritime Arbitration Group (HKMAG); SCMA and CIArb. He is Education Officer, Institute of Chartered Shipbrokers, Hong Kong Branch, Member: Hong Kong Centre of International Commercial Arbitration (HKCICA) and Chair: Maritime & Logistics Arbitration, Member: Singapore Chamber of Maritime Arbitration.

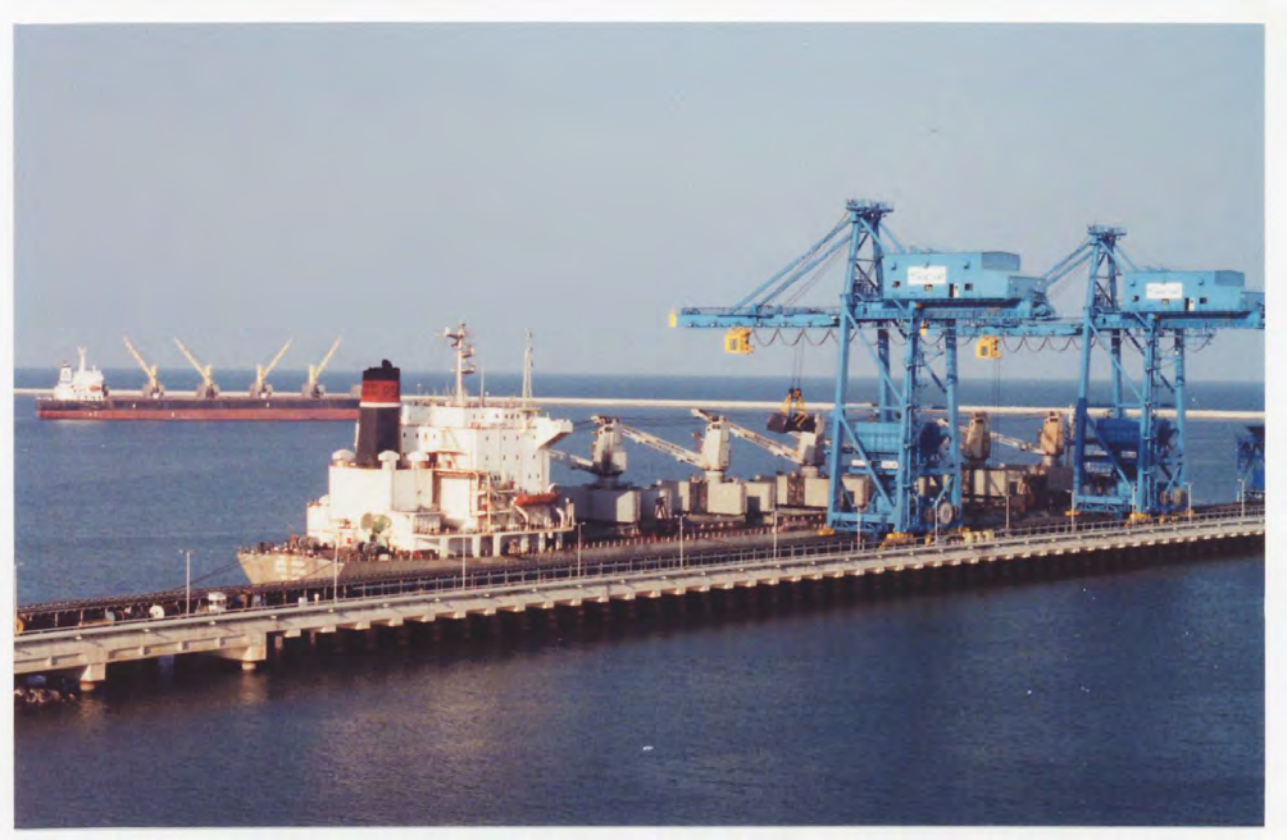

Photo credit: Vessels in Port; Photo by K Srinivasan, IMU, Chennai Campus.