Sir David Foxton

Why shipping law still matters

The 38th Donald O'May Lecture

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This is the text of the 38th annual Donald O'May lecture delivered by Sir David Foxton, a judge of the Commercial Court. The Donald O'May lecture is organised by the Institute of Maritime Law at the University of Southampton, and sponsored by Ince and by Informa Law. The full text of the lecture will be published in Lloyd's Commercial and Maritime Law Quarterly in 2021.

It is my great privilege to have been asked to deliver the 38th Donald O'May lecture, organised by the Institute of Maritime Law at Southampton University. This is the first of those 38 lectures to have been delivered wholly remotely. I very much hope it will be the last.

I am acutely conscious that I follow a set of far more illustrious predecessors. I can only hope that, like flotsam and jetsam, I am dragged along in their wake. My personal engagement with shipping law began inauspiciously. In 1988, as Sir Bernard Eder's pupil at what was then 4 Essex Court, I attended a conference with the future Lord Thomas of Cwmgiedd. At the start he introduced me to a number of men – and I am afraid they were largely men in those days – who he told me were from the "West of England". I had no idea what a P and I Club was, and I proceeded to share my memories of growing up in Taunton. I soon found that I had entered a world where the West of England meant something far removed from scrumpy on a Sunday afternoon and Ian Botham hitting sixes out of the County Ground. The prospect that I would ever deliver the Donald O'May lecture was vanishingly remote.

The title of this lecture was originally going to be "Does shipping law still matter?" However, as the lecture is one of the great occasions in the maritime law calendar; named in honour of one the most distinguished and highly regarded maritime solicitors, and the lecturer is the general editor of *Scrutton on Charterparties and Bills of Lading*, I decided that it was unlikely that my audience would be sitting on tenterhooks waiting to find out what my answer to that question would be.

As we are celebrating, albeit in somewhat muted fashion, the 125th anniversary of the Commercial Court, which has done so much to develop and promote English shipping law, I decided that that was an appropriate occasion to consider three topics:

> First, how shipping disputes came to acquire their central role in developing English commercial law;
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> Second, how the significance of shipping law has changed over the century and a quarter since the "Notice as to Commercial Causes" was published in February 1895;
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> And finally, why shipping law remains central to the continuing strength of English commercial law today.

The importance of shipping law to the development of English contract law

The first 100 years of the Commercial Court were dominated by shipping and international carriage of goods by sea disputes, by shipping practitioners and by judges steeped in shipping law. Some 80% of the nearly three hundred cases reported in the first five volumes of the *Times Reports of Commercial Cases* were shipping or marine insurance disputes. There was some ebb and flow in the work over the following decades. The Long Weekend of the 1930s appears to have been a relatively inactive period, and the 1950s likewise. However that flow of shipping work experienced a huge surge in the 1960s and 1970s, and was still going strong, although the tide was beginning to abate, when the Commercial Court celebrated its centenary in 1995.

Shipping law has played a key role in formulating some of the key doctrines of English commercial law. For example the law of discharge of contracts for breach was almost entirely hammered out on the anvil of English shipping disputes, in cases such as Hain v Tate & Lyle, Chandris v Isbrandtsen-Moller, The Simona and, of course, The Hong Kong Fir. Shipping law provided the three-fold classification of contractual provisions for the purpose of termination – the Holy Trinity of condition, warranty and innominate term – which has provided English law with a flexible and calibrated response when determining the consequences of non-performance on the parties' continuing contractual relationship. Many other legal systems, by contrast – for example those based on or similar to the Russian Civil Code– are still grappling with the issue of when breach will not simply excuse the obligation of counter-performance for so long as it continues, or give a right to seek judicial termination, but actually provide a contracting party with the self-help remedy of terminating its contract.

It was shipping law - in The Suisse Atlantique – which made it clear that termination for breach did not undo the effects of contractual exclusion and limitation clauses, albeit it might fairly be said that it is shipping law which provides the last toehold for the otherwise discredited doctrine of fundamental breach through the increasingly arcane concept of deviation. Most of the cases which identify those circumstances in which a party faced with a repudiatory breach is not simply entitled, but effectively obliged, to terminate the contract also have a distinctly maritime flavour – for example The Odenfeld, The Alaska Trader and The Aquafaith. The doctrine of frustration was largely shaped by shipping law, deriving its name from the maritime concept of frustration of adventure. The dislocating effect of geopolitical crises on seaborne international trade has provided a steady stream of disputes in which the courts were able to refine and re-define the doctrine, with two world wars and three Middle East conflicts combining to generate a significant body of authority.

The law of remoteness of damage has an equally waterborne flavour. Hadley v Baxendale may only have involved an unsuccessful voyage across inland waterways. However it was the vagaries of seaborne trade against a background of fluctuating markets which provided the classic formulation of the contractual rule in The Heron II and the more controversial attempt to restate it in The Achilleas. Remoteness in tort has also been heavily influenced by developments afloat, albeit more generally in that most treacherous part of any voyage, the dock. Maritime law has also made profound contributions to the law of illegality, estoppel and election and issues of the currency of loss. It is possible to multiply the examples endlessly.

Now the question we are here to explore is why.

It is relatively easy to see why English law achieved such a dominant position in international trade. As Lord Justice Scrutton, scion of a shipping and stevedoring dynasty, noted in Gosse Millard v Canadian Merchant Marine Ltd England was the home of "the courts of the greatest shipowning country in the world". As Michael Collett QC has noted, that made England the place for cargo and chartering interests to bring suit against English domiciled shipowning defendants. Those shipowners also chose English law to govern their contracts. These factors generated a substantial body of case law which was soon systematised in treatises, and later collected in specialist law reports.

But why did shipping law prove such a fertile ground for the development of commerce-friendly principles of private law? A number of possible causes suggest themselves.

First, there is the nature and complexity of the maritime adventure. There are the vagaries of weather and navigation. The differing methods of loading, stowing, carrying and discharge of cargoes of vastly differing physical characteristics. The rise and fall of markets for both shipping and cargo. And of course the financial importance of the ticking clock which forms an inevitable back drop to any seaborne enterprise.

These matters left ample room for things to go wrong, and for the parties to seek to allocate responsibility for those known and unknown unknowns through the terms of their contract. The matter has seldom been better put than it was by Lord Diplock in The Johanna Oldendorff when he said this:

> "Despite the transformation that has taken place in shipping, in port facilities and in communications during the last four hundred years, the business nature of the adventure to which the contract between charterer and ship owner relates remains essentially the same. It is an adventure which of its nature has always been exposed to the risk of being prevented, impeded or delayed by a variety of causes beyond the control of either party. If it is known in advance how loss due to delay from any particular cause is to be borne as between charterer and ship owner, account can be taken of the risk in fixing the freight payable.
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> What matters from a commercial point of view is not so much that the risk should be borne by one party rather than by the other, but that it should be known, at the time the charter party is made, by which of them it will be borne".

Some sense of the range of risks run can be seen from the list of standard exceptions considered in *Scrutton on Charterparties and Bills of Lading*. From the modest beginning of an exclusion of the "dangers of the sea only", we have reached a point where successive editions have claimed that "an exhaustive enumeration is impossible". They embrace:

- enemies within and without in the form of barratry, pirates, robbers and thieves
- strikes in all manner of guises,
- leakage, ullage, spiles and jettison,
- the full Game of Thrones spectrum of fire and ice, and
- perils of the seas and a variety of mishaps on land.

Those risks fall to be allocated not simply once and for all, as is often the case with contracts in the nature of an exchange. Instead they fall to be allocated differently for those different stages of the voyage famously differentiated by Lord Diplock in The Johanna Oldendorff: the loading or approach voyage, the loading operation, the carrying voyage and the discharge operation.

Another important factor is that, certainly by comparison with other areas of commerce such as banking and insurance, shipping transactions have come to be conducted against the background of a relative equality of bargaining power between those providing ships or carriage by sea, and those utilising them. I say relative because, of course, it cannot be forgotten that there was a period when, in Anthony Diamond QC's words, 'shipowners had been able to introduce into the small print on the reverse of their bills of lading exceptions clauses relieving them from an ever increasing range of liabilities'. That was a market failure which generated a variety of judicial and legislative responses culminating in the Hague Rules of 1924, the Visby Protocol of 1968 and the Hamburg Rules.

However, there have been a variety of forms of charterparties which, particularly in the twentieth century, have been the subject of ebb and flow, as the balance of commercial advantage shifted between owning and chartering interests. The original standard forms tended to be produced by conferences of shipowners such as the Baltic and White Sea Conference Copenhagen 1906 which originated the GENCON charterparty, or the Chamber of Shipping Welsh Coal Charterparty of 1896 whose convoluted demurrage clauses proved such a goldmine to the legal profession. However, these came to be modified through charterer involvement, as in the Americanised Welsh Coal Charterparty of 1953. Or they found themselves competing with more charterer-friendly rivals such as the Baltimore Berth Grain charterparty. The owner-friendly Baltime time charterparty had to compete with NYPE form, approved by the charterer-dominated shipping committee of the eponymous commodity exchange at 2 Broadway, New York. Other charterparties were the product of joint effort – for example the Chamber of Shipping River Plate or CENTROCON Charterparty which was agreed between the UK Chamber of Shipping and representatives of Argentine shippers, and the North American Grain (NORGAIN) Charterparty, a joint effort of BIMCO, the Chamber of Shipping of the United Kingdom and the Federation of National Associations of Ship Brokers and Agents. The WARSHIPOILVOY charterparty was the product of oil company executives seconded to the US government during the second world war, and used by most oil majors for 10 years thereafter. However when rates turned against owners, it was replaced by the oil majors' own, charterer-friendly, forms such as the Essovoy, Mobilvoy and Texacovoy. The majors also developed their own time charter forms such as the Shelltime form.

These various standard forms are invariably supplemented by a lengthy list of bespoke "rider clauses" which often exceed the printed terms in length. That is something unthinkable for the ISDA Master Agreement, and involves a much more significant degree of bespoking than seen, for example, in the Bermuda Form insurance policy. The widespread practice of incorporating charterparty terms into bills of lading – for example through the CONGEN bill – has ensured a beneficial spill-over of the fluidity of charterparty negotiations into the terms of the contract of carriage. The result is that shipping contracts are often made by knowledgeable and evenly-matched contracting parties, a contest in which the batting and the bowling is in a state of competitive equilibrium. There are, moreover, in most cases "repeat contractors" on both sides. The great American jurist Karl Llewellyn noted the commercial imbalance which tended to follow when a repeat contractor is able constantly to re-visit and

revise a standard form, learning from a failure to achieve a desired contractual advantage in a way not open to its succession of one-time counterparties. As he pithily observed:

> "The committed bargainer, defeated once and again, recurs to the attack. After each case he can redraft and fight again".

Further, in contrast with many other contracts such as contracts of insurance, the informational asymmetry in shipping transactions is far from unilateral. The shipowner is better informed as to the location, speed and physical characteristics of its vessel. The shipper or charterer better understands the physical and commercial attributes of the cargo. While this no doubts explains the relatively limited contribution shipping law has made to those parts of the law of contract concerned with defective consent, it has provided a sound platform on which to develop principles of law addressing breach, termination, causation and damages. It has avoided the imbalances seen in aspects of banking law, where the bank's standard terms dominate, generating legal principles such as the law of contractual estoppel which have not met with a wholly enthusiastic response.

The nature of the judicial response to shipping law disputes

There are, therefore, a number of reasons why shipping transactions proved fertile ground for commercial disputes between the competing interests. But what was it about the judicial response to those disputes which has met with such approval? Professor Francis Reynolds QC has suggested that the influence of shipping law had led "to a rather strict law of contracts, where the courts encourage people to stand by their rights, and do not seek to grant relief merely because they disapprove or suspect if fully informed they would disapprove of the conduct of one party". It is certainly the case that commercial judges have been resistant to any suggestion that legal doctrines operating outside the contract should be capable of modifying the operation of the parties' contractual rights. The example Professor Reynolds almost certainly had in mind when making his observation was the emphatic rejection by the House of Lords of the argument that the right to withdraw a vessel from service under a time charter for non-payment of hire could be qualified by the equitable doctrine of relief against forfeiture. It is also undeniably the case that English shipping law has always attached a particular premium to certainty. Robert Goff LJ, when explaining in The Scaptrade why there was no room for relief against forfeiture in a time charterparty, explained the position as follows:

> "It is of the utmost importance in commercial transactions that, if any particular event occurs which may affect the parties' respective rights under a commercial contract, they should know where they stand. The court should so far as possible desist from placing obstacles in the way of either party ascertaining his legal position, if necessary with the aid of advice from a qualified lawyer, because it may be commercially desirable for action to be taken without delay, action which may be irrevocable and which may have far-reaching consequences. It is for this reason, of course, that the English courts have time and again asserted the need for certainty in commercial transactions - for the simple reason that the parties to such transactions are entitled to know where they stand, and to act accordingly."

Indeed the courts have fashioned legal doctrines so that they facilitate immediate decision-making in the face of the inherently uncertain. That is an approach best captured in Scrutton J's judgment in Embiricos v. Sidney Reed & Co when he said the following:

> "Commercial men must not be asked to wait to the end of a long delay to find out what in fact happens, whether they are bound or not. They must be entitled to act on reasonable commercial probabilities at the time when they are called upon to make up their minds".

While English shipping law has been "strict" in the way described by Professor Reynolds, it has not been unduly "black letter" or formalistic in its approach. A defining hallmark of English court decisions on shipping law disputes has been an approach to the issues with an informed understanding of where the risks of particular eventualities would ordinarily lie as between the two parties from a commercial perspective. The court will then only sanction a departure from that allocation when an intention to do so is sufficiently clearly manifested in the contractual terms. There has been recent judicial and academic emphasis on the collaborative nature of many types of contract, with the suggestion that their relational nature carries with it duties of good faith. This topic was the subject of Vesanti Selvaratnam QC's Donald O'May lecture last year. While shipping contracts range from long term time charterparties for periods of years to those for specific voyages, sometimes between parties whose dealings might amount to no more than the exchange of the bill of lading, the defining approach of English shipping law has been to approach those contracts on the assumption that they are not so much *relational,* as *risk-allocational*.

The approach is well-captured in Popplewell J's observation in The Eleni P of the interpretative presumption with which the issue of responsibility for delay in a time charterparty is to be approached. He said:

> "Time charters give rise to particular considerations because of the allocation of risk which is inherent in their nature. Under a time charter the risk of delay is fundamentally on the charterer who remains liable to pay hire in all circumstances unless exempt from doing so under an off-hire provision. Accordingly the burden lies on a charterer to bring himself within the plain words of an exception from the obligation to pay hire; and all other things being equal, doubts as to the meaning of such exceptions are to be resolved in favour of owners. This approach, described as long ago as 1948 as a cardinal rule, has been articulated and applied in many cases both before and since the recent House of Lords and Supreme Court cases on approach to construction generally".

Shipping and international trade law abounds with examples of the courts requiring a high threshold of contractual clarity to depart from an established understanding of where risk or responsibility lies. These include:

- the FOB buyer's obligation to make arrangements to ensure the ship arrives at the right time;
- the voyage charterer's non-delegable duty to provide cargo;
- the principle "once on demurrage always on demurrage" which weighs against the application of exception clauses to delay once laytime has been exhausted;
- the inapplicability of charterparty exceptions during the vessel's approach voyage;
- and the presumption that a cesser clause will only operate to relieve a charterer for liability for freight when the shipowner is able to effectively exercise its lien

Mr Justice Staughton observed of this last rule of construction in The Rio Claro:

> "Those who rely on the ordinary meaning of English words when drafting a contract or considering whether they should sign it may find themselves misled; they should have looked at *Scrutton* and *Carver* as well. But it is not for me to criticize such time-hallowed doctrine, which no doubt tends to avoid uncertainty and dispute".

And who can doubt the wisdom of requiring those who draft charterparties to have a copy of *Scrutton* to hand. And perhaps a copy of *Carver* as well.

Another good example of this judicial method is the approach to bill of lading clauses which are said to relieve the shipowner from liability when it delivers otherwise than against production of a bill of lading. The obligation to deliver only against production of the bill is one to which English shipping law has accorded particular importance. The Court of Appeal in Michael Fielding Wolff v Trinity Logistics stated it had "long been a cardinal principle". The English courts have been noticeably hostile to the argument that contractual terms can relieve the shipowner of that liability. Indeed so hostile, that one might begin to wonder whether any provision would be found to have achieved this object.

These cases exemplify a judicial approach to the contract of carriage in which the court's appreciation of the commercial understanding of the allocation of risk and responsibility informs the process of contractual construction and the hierarchy of contractual provisions. The recognition that, for those who contract, not all contractual terms are created equal has been a distinct hallmark of English shipping law. It is one which has been particularly manifest when determining the relative significance of terms on the front and the back of bills of lading. That tendency in English shipping law was already manifest by the time the House of Lords in Glynn v Margetson & Co resolved that a broadly-worded liberty to deviate clause in the printed terms had to give way to "the main object and intent" of the contract, the carriage of a perishable cargo between named places.

It more recently re-asserted itself in the House of Lords' decision in The Starsin when identifying the carrier under a bill of lading. Lord Hoffmann said that where the majority in the Court of Appeal had gone wrong was "that they conscientiously set about trying, as lawyers naturally would, to construe the bill of lading as a whole" whereas "in fact the reasonable reader of a bill of lading does not construe it as a whole. For some things he goes no further than what it says on the front". A similar approach was adopted by the Court of Appeal in Trafigura Beheer BV v Mediterranean Shipping Co SA when rejecting the contention that a clause on the reverse of the bill of lading released the claimants from liability for delivery without production of the bill of lading because "the basic obligation to deliver against an issued (genuine) bill of lading is given its own prominence on the very front of the bill".

So central is the concept of allocation of risk to English shipping law that even outside the express terms of a charterparty, the Court will often imply a right to an indemnity as a further means of giving effect to the allocation of risk implicit in the commercial bargain. This was the subject of Lord Hamblen JSC's 2018 Donald O'May Lecture, "Under charterers' orders: to indemnify or not to indemnify?". In that, he referred to the implied right to indemnity as "a striking example of the willingness of the Commercial Court to recognise and act upon accepted industry understanding". The court's assessment of allocation of risk is central to the right to indemnity. Lord Sumption JSC explained the basis of the implication in the following terms in The Kos:

> "The owners are not entitled to an indemnity against things for which they are being remunerated by the payment of hire. There is therefore no indemnity in respect of the ordinary risks and costs associated with the performance of the chartered service. The purpose of the indemnity is to protect them against losses arising from risks or costs which they have not expressly or implicitly agreed in the charterparty to bear. What risks or costs the owners have agreed to bear may depend on the construction of other relevant provisions of the contract, or on an informed judgment of the broad range of physical and commercial hazards which are normally incidental to the chartered service, or on some combination of the two."

The place of shipping law today

No one could plausibly claim that, in quantitative terms, shipping law holds the same central place in English commercial law which it did 50 or ever 25 years ago. There are a number of reasons for this state of affairs, and not all of them are to be regretted.

There were a significant number of shipping cases which arose from judicial attempts to work around structural failings in the common law which have since been addressed by statutory interventions. Who but the most committed litigator could regret the demise of the large number of cases on the recoverability of economic loss which to a significant extent flowed from the difficulties of transferring rights of suit, since addressed by the Carriage of Goods by Sea Act 1992? The flood of cases resulting from the difficulty of conferring contractual rights on third parties, which led to the Himalaya clause and the doctrine of bailment on terms, has been significantly reduced by the Contracts (Rights of Third Parties) Act 1999. The absence of cases of this kind is not a symptom of shipping law's decline, but the result of the successful application of statutory balm to long-recurrent common law irritations.

The Arbitration Act 1996 has been another factor. In 1992, Professor Reynolds identified as one reason for the prominence of shipping cases in English commercial law "the claim by English courts to review the decisions of arbitrators on points of law". While some – Lord Thomas, for example – have bemoaned the effect on the development of English commercial law of a more restrictive test for permission to appeal against arbitration awards on points of law, there seems no prospect of this being reversed. The burgeoning number of disputes on "arbitration law" which have help fill the diary of the practitioner and the volumes of the law reports are but a poor recompense: a *lex specialis* essentially devoid of wider application or insight.

However, there are more arbitration appeals on points of law in shipping cases than any other type of arbitration. The LMAA, unlike most arbitration institutions, does not include a waiver of the right to appeal on points of law in its rules. The existence of the possibility of appeals on points of law remains a singular and attractive feature of London shipping arbitration, a reflection of the mutual interest of the members of the maritime community in retaining the ability to obtain definitive rulings on points of importance. No doubt it is for this reason that the Singapore Ministry of Law instituted a public consultation on amending the International Arbitration Act to introduce an opt- in provision for an appeal process on points of law, specifically referring to the shipping community as possible users, although no such amendment has as yet been implemented.

In addition, advances in the shipping industry have caused a decline in the volume of shipping litigation. Ships are larger, better built, and, particularly after the introduction of the International Maritime Organisation Code in 1998, better maintained. They are increasingly specially constructed for the carriage of particular cargoes rather than the general cargo carriers of yore – heavy lift ships, reefer vessels, cement and car carriers, LNG and livestock carriers and so on. Weather reporting and routing are better, navigation with the benefit of satellite technology more accurate. And general cargo is now almost invariably loaded, stowed, carried and discharged in containers, rather than in breakbulk form, making theft, rather than damage, the most significant source of outturn disputes. The reality is that carrying a delicate cargo in winter across the oceans has now become an activity with significantly better identified, and consequently better-managed, hazards than investing in collateralised debt securities.

Finally, litigation costs have increased at a greater rate than the average value of damaged cargoes, while the values in issue in new categories of dispute – failed investments, cross-border fraud, antagonistic business ventures in emerging markets – have grown. As a result, these new categories of dispute have proved more lucrative hunting grounds for litigators and advocates than the shipping stamping grounds which so attracted previous generations.

Does this mean that shipping law has moved from the mainstream to what Lord Sumption JSC described when handing down judgment in Volcafe Ltd v Compania Sub Americana de Vapores SA as one of the "obscurer corners of the law"? My response to that Aunty Sally is no. Shipping law is still a context in which important legal principles are shaped and restated. The last five years have brought a number of significant cases:

- K Line v Priminds Shipping, an outstanding recent judgment by Mr Justice Andrew Baker on the types of loss covered by liquidated damages clauses, a decision on its way to the Court of Appeal;
- Classic Maritime Inc v Limbungan on "but for" causation and the ability to recover substantial damages in contract;
- The New Flamenco addressing which beneficial consequences of breach have to be brought into account when assessing damages for breach of contract;
- MSC Mediterranean Shipping Co SA v Cottonex Anstalt on legitimate interest as a constraint on a party's entitlement to keep a contract alive;
- Spar Shipping AS v Grand China Logistic Holding (Group) Co Ltd on the identification of contractual conditions;
- The Global Santosh on agency and vicarious performance in chain contracts; and
- PST Energy 7 Shipping LLC v OW Bunker Malta Ltd on the identification of contracts of sale.

If we extend our rearward view a little further, we find The Kos on bailment, The Rainy Sky, another significant milestone in the endless battle between the purposive sheep and the literalist goats, and The Glory Wealth on the relevance of an unaccepted repudiation by the innocent party to the assessment of damages.

Further, the volume of shipping work in both the Commercial Court and in arbitration remains significant. For the year ending 30 September 2020, over 100 shipping claims were commenced in the Commercial Court and another 200 in the Admiralty Court – roughly 20% of the total. A survey performed by Holman Fenwick & Willan LLP – entitled *The Maritime Arbitration Universe in Numbers* - reported over 1,730 maritime arbitrations in London in

2019. Although London is a major centre for all types of arbitration, maritime arbitrations still significantly outnumber non-maritime arbitrations in London

In any event, the significance of shipping law to English commercial law falls to be measured in more than the hard currency of decided cases and disputes referred to litigation or arbitration. Those who argue for the continued relevance of post-imperial Britain in a much-changed world point to the significance of its cultural and historical heritage, and the soft power that is said to bring. Whatever the validity, or otherwise, of that argument in geo-political terms, we underestimate the value of the cultural heritage and soft power of shipping law at our peril. Shipping law remains essential to a proper understanding of many of the key doctrines of English commercial law and of the cases in which those doctrines were formulated. Law students continue to have first contact with those doctrines by reading the shipping decisions in which they were decided, and practising lawyers continue to revisit them in that context.

Shipping law remains a valuable guide to understanding the architecture of English commercial law which it did so much to create. It remains the first port of call for many commercial lawyers and commercial judges when looking for analogies to guide them on unfamiliar issues, or when searching for hard-edged and clear statements of principle to apply to disputes raising similar issues in very different commercial contexts.

In 2020, eight of the thirteen judges of the Commercial Court or London Circuit Commercial Court, three of the five former Commercial Judges in the Court of Appeal and three commercial judges in the Supreme Court have some shipping law in their professional backgrounds. For those in the audience wondering who the third blue water Supreme Court Judge is, please do not forget the two tours of duty which Lord Burrows JSC served as an editor on the 20th and 21st editions of *Scrutton on Charterparties and Bills of Lading*.

The shared inheritance of shipping litigation provides a point of reference for judges and advocates outside the limits of legal argument. I can recall coming close to the end of my time estimate in the Court of Appeal, and the presiding judge (Gross LJ) telling me, much to the bafflement of my landlocked opponent, that my laytime was nearly up, and that demurrage loomed. And, in an even more irreverent example, an opponent asking the judge if the transcript writer's break could be taken early - to allow the barrister an opportunity to de-ballast.

In his 1997 Wilberforce Lecture, entitled "The Future of the Common Law", Lord Goff of Chieveley wrote that:

> "For the English the characteristic commercial contract is a contract for the carriage of goods by sea".

If we ask ourselves that question today, is that answer still true? Or would the answer now be the International Swap Dealers' Association Master Agreement? Or perhaps the oral joint venture agreement with a disputed choice of "British law" without which no oligarch dispute in the Commercial Court would be complete? In this lecture, I have offered my own thoughts as to why the contract for the carriage of goods by sea became the characteristic commercial contract in English law, and why it should remain so. Even though shipping disputes no longer generate the volume of commercial litigation they did in 1997, still less in 1895 when the Commercial List came into being or 1934 when Scrutton LJ died in harness, shipping

disputes remain essential to the proper understanding and future development of English commercial law. If I had adhered to the false controversy of my original title, and asked "Does shipping law still matter?", the answer would have been: emphatically, yes.