Maritime dispute resolution: is it so very different?

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Asked to speak to a title ending in a question mark, such as "Political correctness: is it dead?", a speaker will often present a carefully balanced list of arguments either way before coming to a conclusion, which will normally be tentative. If that is what you expect today, you will be disappointed. My subject is "Maritime dispute resolution: is it so very different?" and I say here and now that my answer to that question is an unhesitating and resounding "Yes!" Just as my answer to the question "*Political correctness: is it dead*?" would be a very firm "Sadly, no".

What qualifies me to speak on this topic? Well, I have been involved, in one way or another, in arbitration for about 55 years and I have been arbitrating for over 40. In that time, I have principally arbitrated maritime disputes, or disputes in some way closely related to shipping. But I have also had experience of such diverse cases as - to take a couple of examples - a claim against Lloyds under a run-off policy, and an agreement between a government and a private company over the manufacture of identity cards. Perhaps more relevantly for today, I have been present at numerous arbitration conferences at which I was a member – sometimes the only member – of a tiny minority; I have been very closely associated with arbitrators who practise in other areas, and I have chaired the Chartered Institute of Arbitrators, where I was constantly exposed to other disciplines. It is from this background that I state my very firm conclusion.

Let me try to explain. Maritime arbitration is very different from other types of arbitration, as much as anything because of the very specialised nature of the world of shipping that gives rise to it. Until relatively recently, that world was principally the world of tramp shipping, which is different from that of liner shipping – the running of regular services between scheduled ports. Tramp shipping, in contrast, as many of you here know perfectly well, involves the hiring of ships on a relatively *ad hoc* basis, for specific voyages or for a period of time, but it also includes longish-term contracts of affreightment, to carry a series of similar cargoes between fixed ranges of ports over a period.

Because of the relatively *ad hoc* nature of this activity, it has developed various features. For one thing, it is essentially speculative. That is a factor that conditions not only the trade but also affects its players and the way they behave. As for the business, it is a truism that the unexpected always happens, especially at sea, and this gives rise to many problems. As for the players, they are often gambling – taking chances that their bets will pay off; and this frequently leads to deliberately loosely drafted contracts, as well as other consequences.

Further, because the contracts are – indeed, have to be – concluded very quickly, no great care is taken over draughtsmanship, so maritime arbitrators often have to struggle to try to make out what the parties intended by the words they used.

Another problem is that much of the language used in shipping and in the contracts we have to work with is quite arcane, and thus relatively incomprehensible to those without relevant experience.

Let me enlarge briefly on some of these characteristics. And I start with the last one, language. Often in contract negotiations for the hire of ships, a great deal of abbreviations are used, quite apart from the rather special terminology to which they relate. To take one simple example, an email recapitulating a charterparty contract may refer to:

> Discharging ports: 1/2 SP each out of WC India… rotation in CHOPT…
>
> Laytime: 200 MTPH SHINC for loading…
>
> Laytime to be reversible
>
> Demurrage: USD 19,000 PDPR.

How is a lay person to know what all that means? And even if he or she understands some of the expressions, how are they to know the ramifications of concepts such as reversible laytime, or precisely what demurrage is and what it covers?

The speculative nature of much of the trades we are concerned with can give rise to difficult questions of damages when there is a breach of contract. We all know that there are certain basic principles relating to foreseeability and remoteness that are of general application, but without a good knowledge of the shipping business it is not always at all easy to apply those in some of our cases: even with such knowledge there are sometimes still problems.

I mentioned that the speculative nature of the business seems to condition many of its players. Tramp shipowners, especially when fixing ships for what they expect to be relatively short periods, are frequently gambling that all will go well in terms of timing, or that if they do not go so well, that the charterers will have to pay compensation. The charterers, of course, hope for the opposite. One of the effects of this and other similar considerations is that parties will sometimes deliberately leave wording loosely drafted on the basis that if a problem arises concerning that wording, they will be able to negotiate, and if necessary arbitrate.

It is not only day-to-day trading that is speculative: it is often said that successful shipowners make their fortunes by judicious buying and selling of ships – capital deals, rather than current account ones. That too involves a high degree of gambling.

At this point, it is worth noting a particular feature of this business, which is that the parties involved do not seem to have any problem about anticipating the possibility that they may have to arbitrate, or any particular difficulty about going to arbitration - even for amounts that may, by comparison with other areas of arbitration, seem quite small. For instance, I have just been appointed in a case where the claim and counterclaim total about US$8,000 only. This phenomenon itself has other effects to which I shall come.

Much that happens in the course of a shipping contract is physically remote from the parties: the main events occur on board ship or at sometimes distant ports. It is not unknown, in these circumstances, for facts to become misrepresented: even for false documents to be created – for example, a ship's logs may be "flogged". A certain degree of experience is needed to appreciate when this may have happened.

So far I have spoken about tramp shipping, which forms a substantial proportion of the cases that go to maritime arbitration; but nowadays we also have a lot of work relating to offshore operations - oil and gas exploration and the vessels involved in that - itself a highly specialised business - and also shipbuilding, amongst other areas of dispute.

So much – admittedly briefly – for some of the special characteristics of the shipping business itself, and the disputes to which it can give rise. What of the way in which maritime arbitration is conducted? This of course varies from country to country – a civil law jurisdiction will approach procedural matters in a very different way from a common law one, but the fact is that the latter, and particularly the United Kingdom, the USA, Hong Kong and Singapore, hold sway when it comes to arbitrating commercial shipping disputes.

One of the features that marks out maritime arbitrations from other types of arbitration is a degree of procedural flexibility and informality which is substantially different from anything one finds in other areas of arbitral activity. In this respect it is noticeable that whereas the major conferences of arbitrators in what is now often called "international arbitration" expend large amounts of time discussing forms and procedures, and in some cases formulating these (for example the IBA's various guidelines), when maritime arbitrators meet – as they do roughly every 2 1/2 years at ICMA – 90% or more of their discussions are about substantive matters, and procedure hardly gets a look in.

A striking and concrete example of this distinction may be found in the fact that whilst, of course, we have to maintain actual and apparent independence, no one suggests that there can be any question of maritime arbitrators routinely declaring how many appointments they have had from any one party, or from any one law firm; or that they should limit such appointments to a very small number in any particular period of time. That simply would not work and would be seen as wholly unnecessary in, for example, London (home of at least 75% of the world's maritime arbitration) where the busier arbitrators have scores, if not hundreds, of open files (happily not all of them constantly active) at any one time.

Who are these arbitrators? Well, they come from different backgrounds but generally have one thing in common – long and deep experience of commercial shipping, whether that experience be practical, commercial or legal, or some combination of those. This of course reflects a major attraction nowadays of arbitration in any specialist field – the tribunal can be made up of the parties' peers.

In addition, the practitioners – usually lawyers – who advise and assist parties in their maritime arbitrations are almost always experts in the field, whose practices are focussed on shipping and related matters. So, they know whereof they speak – usually, at least! They can focus on the real points at issue and, being familiar with maritime arbitration, they can effectively craft appropriate procedures in conjunction with tribunals. It is true, of course, that protocols such as the LMAA Terms exist, but compared to (for instance) institutional arbitration rules, these are remarkably light of touch and are mainly focussed on getting speedy and efficient outcomes – as well as dealing with the important matter of arbitrators' remuneration!

A striking feature of most maritime arbitration is that - like the business behind it - it is *ad hoc*. This is what parties want. Administered and institutional arbitrations have never really worked in our sphere. Shipping parties do not want the heavy administration, the bureaucracy and the resultant substantial costs, let alone the lack of control they have over matters such as the choice of tribunal, and procedures. They do not want preliminary meetings. They do not want Terms of Reference. They do not want awards being reviewed, often for allegedly misplaced commas, by young law graduates who know nothing of the business and whose first language is often not English. Such mechanisms are seen by shipping people, rightly in my view, as holding up progress and adding to expense, whilst not improving the process.

Many years ago the ICC thought it could get involved on an organised basis in maritime arbitrations. To that end, in conjunction with the CMI it set up the International Maritime Arbitration Organisation (IMAO). After, I think, about 20 years, the IMAO only had something like 9 cases, and the ICC and CMI stopped promoting it. The current statistics for such bodies as the ICC and the LCIA show that the proportions of their cases that are maritime are relatively tiny.

The fact is that – and I would say for good reason – shipping parties want a specialised, *ad hoc*, way of resolving their disputes: using people who are expert in the field, whether as arbitrators or lawyers or expert witnesses. They do not want the heavy – and expensive – hand of an institution, and they want to be able to appoint their own nominees. Further, in general and save for very small arbitrations, they do not want sole arbitrators.

That last thought leads me to another consideration. In London now, probably 80% of our cases are dealt with on documents alone. No preliminary meeting, no hearing: quite often just written submissions with supporting documents. So much quicker and cheaper than a more formal process. And there is an additional advantage: because the party-arbitrators are experienced in the business, objective and indifferent to the source of a particular appointment, they agree on an award in 80 or 90% of those cases without having to appoint a third - again resulting in a huge saving in time and money.

In the recent past (and for me that now means 20 or more years) some major law firms have set up "arbitration departments" to deal with all kinds of arbitration, as if there is something so substantial and so common to all sorts of arbitration that they can be lumped together. I am convinced that this is not the case. And it is not only maritime arbitrations that are particular – there are also, for example, all the commodity cases. I have experienced lawyers from the arbitration departments of such firms presenting cases: frankly, although they do their best, they are not a patch on the specialist shipping people.

Similarly, I have sat with non-shipping arbitrators. Again, this is unsatisfactory. One can, unfortunately, occasionally see a parallel situation for this in our Commercial Court in London, when it sometimes happens that a judge who, at the bar, had no particular experience of shipping or arbitration, gets to hear a maritime arbitration case. Very occasionally, though they plainly do their very best, they do not have the touch of someone who had a more relevant background.

So, to summarise, these are the main characteristics of maritime arbitration which lead me to say that it is particular: the very special nature of the business and those involved in it; the relatively modest sums involved; the large number of cases; the specialisms of the advisers and the arbitrators; the informality and the flexibility of procedures.

Parties involved in commercial shipping want to be able to arbitrate for relatively small amounts of money (although I would not personally mind having many of the sums that I have awarded or dealt with over the years); they want to be able to do that before a tribunal of their own choosing, normally made up of people experienced in shipping and, as a general rule, they do not want lawyers on the tribunals. They like to remain in control of their arbitrations without interference from some other body. If cases can be dealt with on documents alone, often by two arbitrators only, so much the better. Shipping parties do not want to be asked for substantial deposits or to have to pay large fees to their arbitrators. Nor do they want to have their preferred arbitrators being prevented from taking more than a certain number of appointments from one source.

So yes; maritime dispute resolution is very different.

By way of postscript, let me say just this. Many years ago, at an international conference, an American lawyer rather grandly announced that "We have to remember that arbitration is not just for the lawyers"! I rather rudely riposted that arbitration is not *at all* for the lawyers, or indeed for the arbitrators: it is for the parties.

Arbitration is a consensual process adopted by the parties. So it should serve those parties and it should therefore give them what *they* want, not what somebody else thinks they should want.

Bruce Harris

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