

## EFFECTIVE CASE MANAGEMENT

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London has, until now, been **the** arbitral forum of choice for maritime disputes. Over the past 50 years the vast majority of maritime arbitrations have been held under the auspices of the LMAA. It would be dangerous to assume, however, that this default position will remain. A third of the world's tonnage is now owned or managed in Asia and South-East Asia. That proportion is likely to increase with the glut of new-building over the past few years. The P&I Clubs, to whom we all owe so much, now have offices in the Far East to service their members. Hong Kong, and Singapore in particular, are becoming important centres for arbitrations that are held in English and which apply English law. Chinese and Indian parties increasingly wish to arbitrate there. It is inevitable in this changing market-place that we are all going to have to work harder to maintain the LMAA's pre-eminent position.

Others speakers have already identified ways (some more controversial than others) in which practice and procedure could be altered in order to streamline hearings and reduce costs. A number of distinguished LMAA arbitrators have sought to encourage more effective case management in LMAA arbitrations, most recently Patrick O'Donovan at the recent joint LMAA/CI Arb seminar. I make no apologies for repeating today some of the points that Patrick made in his presentation. Experience suggests that, unless Tribunals are prepared to take a firm hand and to recognise that they need not be beholden to the parties in managing a reference, there will be occasions where parties will either ride roughshod over the proceedings or will simply not focus early enough upon what needs to be done for the efficient and cost-effective disposal of the reference. In order to prevent this from happening all (and not just some) Arbitrators need to take a more robust and pro-active role in the management of references. They should have the confidence to recognise that they are not the servants of the parties, and that it may sometimes be inappropriate for them to go along with what is being asked of them. The parties and their representatives do not always know what is best for them.

There are a number of case-management techniques that are in wide currency in international commercial arbitrations (and indeed in the Commercial Court) but which are not always adopted in LMAA references (even though some of them are identified in the LMAA Procedural Rules). I would like to highlight just a few today.

1. **Preliminary meetings.** Paragraph 15 of the LMAA Terms provides that the Tribunal may at any stage of the arbitration require that there be a preliminary hearing to enable the parties to review the progress of the case and that such a hearing should be held in complex cases, including most cases involving a hearing of more than 5 days' duration. In my experience Tribunals do not

always call for such hearings and are often prepared to accept the parties' estimate of the likely length of the main hearing without any inquiry. The advantage of a preliminary hearing is that it forces the parties and the Tribunal to give active consideration to what the real issues in the case are and how they can best be managed. I query whether such meetings should only be the norm in cases involving a longer than 5 day hearing. The length of the hearing is surely something that is best discussed and determined in a preliminary meeting. Such meetings can take place by way of conference call.

2. **Preliminary or key issues.** Courts and tribunals have historically been reluctant to countenance the determination of preliminary or key issues unless they were satisfied that they were likely to be dispositive of either the whole or a significant part of the case. The Commercial Court is now much more ready to determine important issues in a case at an early stage and arbitrators should be too. The resolution of key issues or sample claims in a case involving many different heads of claim will often permit the parties to see where the land lies and thereby facilitate a settlement without having to go through the expense and delays associated with a hearing that resolves all of the issues between them.
  
3. **Correspondence with the Tribunal.** As counsel one is always vaguely aware of the several bundles of inter-solicitor correspondence that constitute the only files in a case that will never be looked at. It comes as a real shock to see how much of that correspondence flies across an arbitrator's desk. In one recent reference I received or sent (mainly received) over 470 emails. In another, where I was sole arbitrator, over 250. Both of those cases proceeded to full hearings within 8 months of appointment and were very actively case-managed. Nevertheless, many of the emails should never have been sent to the Tribunal. Orders not to make applications without first trying to agree them with the opposing party (in line with the LMAA procedural rules) would be respected for a week or two before the resumption of the tsunami. Threats of costs' orders against the parties fell on deaf ears (as did much of the parties' correspondence). And of course the Tribunal's costs mounted significantly because if an arbitrator receives correspondence from the parties he or she has to read it and, where appropriate, discuss it with the other tribunal members before responding to it. This all comes at a price. Add to that the very much more significant costs generated by the parties in writing the correspondence in the first place and it is easy to see why arbitration can be such an expensive process. The solution is simple - the parties' representatives should only copy a tribunal into correspondence or make applications when it is strictly necessary to do so and should run the risk of facing stringent costs orders when they overstep the mark.

4. **Disclosure.** Many parties, and not a few tribunals, assume that traditional High Court-style disclosure should be given in every LMAA arbitration. I believe that assumption to be completely misconceived and I know that a number of full-time LMAA arbitrators share that view. Paragraph 3 of Schedule 3 to the LMAA Rules recognises that orders can be made to limit the ambit of disclosure to avoid unnecessary delay or expense and encourages the tribunal and parties always to give “consideration” to this, although I would suggest that the rule is couched in far too permissive terms. It is now the norm in international commercial arbitrations for parties to disclose only those documents upon which they rely in the first instance, leaving it to the opposing party to request those further specific categories of documents that they wish to see disclosed. I believe that this procedure should now become the norm in LMAA arbitrations as well. Requests for specific disclosure are made through the medium of a Redfern Schedule, named after Alan Redfern who devised the procedure. It is similar to a Scott schedule in layout. The party requesting disclosure sets out the category of documents that it wishes to have disclosed together with succinct reasons as to why such disclosure should be given. The opposing party then responds item by item in a separate column. The Tribunal then records its decision in the right hand column. Properly managed, this procedure can lead to a significant reduction in the amount of disclosure that is required to be given (and therefore cost). It also ensures that the parties are focussing on the real issues at all stages.
5. **The hearing.** Mention has already been made of those all too many cases where the evidence and argument is not completed within the time allotted. It can often be very difficult to reassemble the tribunal and parties. Consequent adjournments inevitably mean extra expense and a delay in the publication of the award. The solution to this is simple and one that I believe should be universal. Once a hearing date has been fixed (at or following a preliminary meeting at which proper consideration has been given to the issues to be determined, the evidence to be called and the appropriate length of the hearing) the parties should thereafter be duty-bound to ensure that the hearing is completed within the time allotted. How does one achieve that? By limiting the time available for opening and closing submissions and by adopting a chess-clock procedure that divides the available time between the parties.
- a. **Openings.** Written openings are now submitted in all LMAA arbitrations, and are becoming increasingly detailed. This does not, however, discourage some advocates from seeking to make a detailed oral opening and to use that opening to draw the Tribunal’s attention to the key documents upon which they rely. In most cases, however, this should not be necessary. The written openings should have identified the key documents and the Tribunal should have read them

- in advance of the hearing. There are very few cases in which the opening submissions of both parties should last more than a morning.
- b. **Chess-clock procedure.** The chess-clock procedure is increasingly used in arbitrations. In my view its use should be the rule rather than the exception. It encourages the parties and their advocates to focus on the real issues in the case. We all know from experience that most cases turn on very few key points at the end of the day and that much of the evidence that is adduced proves to be completely irrelevant to the outcome. The available time will usually be divided 50:50 between the parties, to use how they wish. When one party is, for good reason, calling significantly more witnesses than the other then a different allocation of time may be appropriate. The fair division can usually be agreed upon between the advocates, although there are occasions when the Tribunal will have to rule. Absent any bombshells, there should be no excuse for hearings overrunning. There may not be time for the advocates to put every part of their case to the other side in cross-examination, but so what? Provided this is recognised and understood and the important points are challenged, no prejudice will ensue.
- c. **Expert evidence.** The issue of hot-tubbing of experts has already been raised, and it is a technique that can work well and save a considerable amount of time, provided that the tribunal member is on top of the relevant technical issues and incisive in its questioning. It is remarkable how the demeanour of some expert witnesses will change when sitting alongside their opposite number and answering questions from the tribunal rather than the advocate on the other side. It is not unusual in international commercial arbitrations for the Tribunal to meet the experts in the absence of the parties and their representatives and either to set them joint tasks or to seek to have them reach agreement on selected issues. Such a procedure has its attractions (the experts may be more willing to unbend) but also its potential pitfalls. In my view this technique should only be adopted if the parties are agreeable and are kept fully informed as to the subject-matter and scope of any discussion between the Tribunal and the experts.
- d. **Closing submissions.** These are usually given in writing and (where appropriate) supplemented by short oral submissions focussing on the other side's written submissions. That is as it should be. If they can be produced on the final day set aside for the hearing then they should be. It is remarkable how productive an advocate can be in producing submissions to a tight deadline when the evidence and argument is fresh in his or her mind. There is nothing worse as an advocate than having to write and deliver submissions long after a hearing is over and the adrenalin has subsided. And there is nothing worse as a Tribunal than having to consider such submissions after the faces of the

witnesses have slipped from the memory and the whiff of cordite is no longer lingering in the air. In some cases it will be necessary to defer closings. As a Tribunal I have found it useful in more complex cases to get the parties to agree a list of those issues that will be addressed in their closings and to identify those issues on which I would welcome particular assistance. This helps to ensure that all are agreed as to the issues that really matter and that the submissions do not end up as ships that pass in the night.