Webinar Presentation Tuesday 4th August 2020

Arbitration: Principles and Practicalities

The webinar today aims to provide an insight into the world of arbitration and, particularly, London maritime arbitration.

Arbitration is the chosen method of dispute resolution in many commercial contracts. In the maritime context it is used almost, but not entirely, in time, voyage and bareboat charter parties; sale and purchase agreements; and specialist contracts for towage, wreck removal, agency agreements, shipbuilding and ship repair. While a charter party arbitration clause can be incorporated into a bill of lading, arbitration clauses are not the usual means of dispute resolution as between carrier and holder in liner trades where reference is normally to the courts at the carrier's principal place of business.

My presentation will cover the concept, features, legal background, procedural matters, the role of the London Maritime Arbitrators' Association (LMAA) and conclude with an outline of the conduct of a reference from dispute to award.

(i) *Arbitration as an alternative dispute resolution mechanism*

Rather than going to court, disputes can be resolved by a number of different means including negotiation, conciliation and mediation. Arbitration, as it is today, is such an alternative form of dispute resolution which has legal force with arbitrators' awards widely enforceable across the world.

The concept has developed because of contracting parties' preference for their disputes to be resolved by their commercial peers. There is a presumption that the application of market, specialist or technical knowledge, backed by practitioners' often long experience, will result in a pragmatic outcome.

Arbitration can be traced back to the Sumerian Code of Hamurabi in the early second millennium BC. It was known in Classical Athens where there is a record of a maritime arbitration concerning a dispute over a contract of carriage of goods following an incident during a sea voyage and then in ancient Rome.

Examples of commercial arbitration in London can be traced back to the seventh century AD. This was also a common means of settling disputes in the later Middle Ages where we find the Court of Piepowders at fairs and markets, although the system at that time was relatively informal.

The Arbitration Act 1698 was the first English statute to give formal recognition to the system for merchants to submit their disputes to arbitration.

In Anthony Trollope's nineteenth century novel, "The Eustace Diamonds", there is a suggestion that the disputed ownership of the eponymous necklace should be referred to arbitration.

Arbitration continued to develop with further Acts passed between 1889 and 1934.

The Arbitration Act 1950 included the problematic "case stated" procedure which gave the courts considerable power to become involved in questions of law. However, parties could tie cases up in the courts and this could be used to delay proceedings and created additional expense thereby undermining the objectives of arbitration. This resulted in the loss of arbitration to London and the provision was repealed by the Arbitration Act 1979.

The big change took place a few years later. Following considerable work by the Departmental Advisory Committee on Arbitration Law under the Chairmanship of the late Lord Justice Mustill (as he then was), new legislation was passed and the Arbitration Act 1996 (which I shall now refer to as "the Act"), came into force on 31st January 1997. I shall come back to the content of the Act a little later.

(ii) *Features of arbitration*

Confidentiality

In contrast to the public gaze of disputes which come before the courts, arbitration is held behind closed doors. This is not because they are "secret courts" but because parties often prefer to keep the content of their disputes between themselves, especially where there are sensitive commercial issues involved. Or it might be that they want to resolve a particular point without prejudicing their future working relationships.

Awards may, however, be published with party consent, while preserving the anonymity of those involved.

A reference normally comes into the public domain only where a challenge is successfully brought and is heard in the Courts but this, as I shall explain when discussing the contents of the Act, is relatively rare.

Flexibility

Unlike the often rigid of rules necessarily laid down by the courts covering procedural and evidential issues, arbitration offers parties greater freedom to decide how a dispute is to be conducted. In the case of LMAA arbitrations, published Terms set out the framework for the conduct of a reference and the normal procedure to be adopted. However, it is for the Tribunal to decide "all procedural and evidential matters" and this will normally be done taking into account the parties' own views.

Choice of tribunal

Judges are appointed in accordance with court listing procedures and might not have specialist knowledge of a particularly technical issue. Arbitration offers parties some degree of influence over the appointee or appointees. An arbitration clause is likely to require a claimant to nominate an arbitrator and for the respondent to do likewise. This means that an appointment can reflect the subject matter. Thus, if there is a dispute involving complex matters concerning, for example, a mechanical breakdown, the parties might wish to appoint an experienced ship's engineer to the Panel. However, it must be emphasised that an arbitrator must act in the interests of both parties in the reference; the arbitrator is ***not*** the representative of his appointing party.

Finality

The object of arbitration is to provide parties with an award which brings the dispute process to an end. The Act has been deliberately tightly drawn to ensure that the courts are not brought into routine cases. Rights of appeal on points of law are limited so that in the overwhelming majority of cases the award is the end of the matter. It has been suggested that limiting recourse to the courts hinders the development of English law. However, there are provisions for challenging an award on a point of law but they are conditional to avoid the award becoming a first step on the ladder to the Supreme Court as this would defeat the stated objective of dispute resolution by an impartial tribunal without unnecessary delay or expense. My own view is that when interpreting the legislation, the approach followed by the courts in considering an application to challenge an award reflects the right balance between finality in the generality of cases and the need in limited circumstances for judicial involvement.

Enforceability

The Award brings the Tribunal's role to an end. However, a successful party will want to be able to obtain payment, or other relief awarded, and this might not always be easy when the unsuccessful party is unwilling to meet its obligations. Where payment is not forthcoming, an award may, by leave of the court, be enforced in the same way as a judgment of the court. As is often the case, the parties may be in different jurisdictions and, in such event, enforcement can be facilitated through the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1958. The Convention has been ratified by 164 states. Subject to following procedural requirements, enforcement between states is usually a matter of course and the courts will not normally revisit the merits of the case.

(iii) *Salient provisions of the Arbitration Act 1996*

The Act has been drafted to provide a self-standing mechanism for the functioning of arbitration as a means for dispute resolution. With this in mind, parties and tribunals are given considerable scope for agreeing the process for dealing with a reference. Many of the sections are default provisions which take effect only where there is no party agreement on specific issues or arrangements to be applied or powers given to the tribunal. In practice, arbitrations are invariably conducted pursuant to stated rules developed by organisations, such as the London Maritime Arbitrators' Association (LMAA), with provisions reflecting the content of the Act and their own procedural requirements.

It is also important to note that the legislation recognises that where parties have chosen to resolve their disputes through arbitration they should, as far as possible, be left to themselves. Thus, court intervention is limited to playing a supportive role where required to assist parties or the tribunal and certain supervisory powers. During the Bill's passage before the House of Lords, Lord Wilberforce said that the legislation:

"has given to the court only those essential powers which I believe the court should have".

The non-intervention role of the courts is set out at s1 (c) of the Act which states:

"*in matters governed by this Part the court should not intervene except as provided by this Part.*"

I am now going to consider those individual sections which are of particular relevance. Time constraints mean that it is not possible to deal with all of the points which typically have to be thought about but the following will provide a broad overview of the position:

s7. *Separability of arbitration agreement*

This means that an arbitration agreement is separate from the underlying contract in dispute. This is important because it prevents a disaffected party from alleging that, because the underlying contract is invalid or unenforceable, the arbitration clause is similarly tainted and the tribunal has no jurisdiction. The arbitration agreement is therefore treated as a separate and self-standing contract.

s15. *The arbitral tribunal*

It is for the parties to agree the number of arbitrators. If there is no agreement, the default position is a sole arbitrator.

Subsequent sections set out procedural and default provisions covering the appointment of arbitrators, the role of a Chairman or Umpire and the removal, resignation or death of an arbitrator.

s30. *Competence of tribunal to rule on its own jurisdiction*

and

s67. *Challenging the award: substantive jurisdiction*

As these two points are interlinked, I shall deal with them together. Section 30 gives the tribunal power to decide whether it has the necessary jurisdiction to determine whether:

- There is a valid arbitration agreement;
- The tribunal is properly constituted; and
- Matters submitted are in accordance with the arbitration agreement.

This is the doctrine of "Kompetenz-Kompetenz". Challenges to a tribunal's jurisdiction are not unknown and are often brought as a means of delaying,

derailing or blocking an arbitration. A tribunal can decide the issue either in an Award on jurisdiction or in an Award on the merits of the case. Of course, if the tribunal decides that it does not have the necessary jurisdiction then that brings the reference, or such part of it as has been successfully challenged, to an end.

But while the tribunal can rule on its own jurisdiction, it might not have the final word. Jurisdiction is one of the areas where the court can become involved if the tribunal's award is challenged under s67. Section 67 is a mandatory provision and not one that can be excluded by agreement between the parties. Under s67, a party may challenge a tribunal's award as to its substantive jurisdiction. Nevertheless, this right is not unfettered but subject to strict conditions. A challenge cannot be brought as an afterthought to an award where jurisdiction was not previously questioned. In addition, a party failing to comply with the provisions or take action within the laid down time limit will lose the right to challenge the award.

The remedies available to the court are to confirm the award, vary the award or set aside the award in whole or in part.

s33. *General duty of the tribunal*

This is an important statement setting out how the tribunal is to conduct proceedings. Specifically, the tribunal must:

- act fairly and impartially giving each party a reasonable opportunity to put his case and deal with that of his opponent; and
- adopt procedures suitable to all the circumstances of the case, avoiding unnecessary delay or expense to provide a fair means for resolving the matters for determination.

This has particular relevance to the interlocutory period when parties are busy exchanging submissions. Despite timetables and party entitlement to exchange certain submissions laid down in the LMAA procedures, parties often require extra time to serve papers or seek leave to serve additional documentation. This is not unreasonable and unless it is clear that a party is playing for time, tribunals will normally allow extensions or additional service. Parties are also generally amenable, perhaps thinking that it would be unhelpful to object to the other side's application because they might want an extension in due course.

Where there is application for service of additional submissions or documentation, the tribunal will normally provide the other party with a right of response or right to make representations. As a very rough and ready guide if you give to one, you give to the other. Each must be offered equal opportunity to submit documentation and make representations. Sometimes this will lengthen proceedings but fairness is paramount.

s34. *Procedural and evidential matters*

The tribunal has wide-ranging powers to decide all procedural and evidential matters. This section should be viewed in tandem with the LMAA rules which set out the procedural basis for conducting London maritime arbitration.

s52. *Form of award*

The section provides that parties are free to agree on the form of the award. However, it then continues saying that to the extent that there is no such agreement, then the award shall:

- be in writing;
- be signed by the arbitrators or those consenting to the award;
- contain reasons unless the parties have agreed to dispense with reasons;
- state the seat of the arbitration; and
- be dated.

Given that the absence of any of the identified provisions could be expected to cause difficulties with enforcement of the award outside England and Wales or Northern Ireland, it is perhaps odd that the requirements in this section are not mandatory provisions. However, it has been suggested by a respected authority that parties agreeing their own form of award should use these rules as a minimum standard.

There is no required or recommended style of an award. This is left to individual arbitrators to decide with two main alternative formats widely used. The first, which is my preference, is to start with the dispositive section of the award, that is, setting out the decision itself including costs and interest; the detailed reasons, including the background to the dispute and interlocutory process, are then set out as an attachment forming part of the award. The alternative is to do it the other way round, starting with the reasons and concluding with the dispositive award.

s57. *Correction of award or additional award*

This provision recognises that nobody's perfect and we all make mistakes. This is the so-called "slip rule" which allows a tribunal to:

- correct clerical errors;
- correct errors arising from an accidental slip or omission;
- clarify ambiguities; and
- make an additional award in respect of any claim presented to, but not dealt with by, the tribunal.

No matter how carefully an arbitrator proof-reads an award, the eye can occasionally deceive and an error in calculations, the misplacing of a decimal point or the typographical transposition of a party might pass by unnoticed. Such errors can be corrected within given time-limits.

A tribunal may also provide clarification of its award or remove any ambiguity. And there is also a useful power to deal with a matter that should have been dealt with in the award but was overlooked.

However, it must be emphasised that this is for correcting mistakes. It does not allow a tribunal to change its mind and reassess the merits of the dispute.

Challenges to an award

There are three areas where an award can be challenged through the courts. I have already referred to challenges to the tribunal's substantive jurisdiction under s67.

s68. *Challenging the award: serious irregularity*

This is a mandatory provision and cannot be excluded or varied by party agreement. The section sets out provisions for a party to challenge an award due to serious irregularity affecting the tribunal, the proceedings or the award. It sets out a closed list of instances of serious irregularity including:

- the tribunal's failure to comply with its duty under s33;

- exceeding its powers;
- failing to conduct proceedings in the agreed manner;
- failing to deal with all the issues put to it;
- uncertainty or ambiguity as to the effect of the award;
- the award being obtained by fraud or procured contrary to public policy;
- failure to comply with the required form of the award; and
- any irregularity in the conduct of the proceedings or the award.

But this is subject to the overriding requirement that the court considers that such serious irregularity "has caused or will cause substantial injustice to the applicant". This sets a high threshold to stop challenges being brought on technical or unmeritorious grounds.

While "serious injustice" is not defined, in its report the Departmental Advisory Committee on Arbitration Law suggested that:

"… it is only in those cases where it can be said that what happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the Court to take action. […] In short, Clause 68 is really designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected."

The courts have frequently invoked this provision to make it clear that relief will be granted only in the most serious and extreme cases.

If the conditions for showing serious irregularity are fulfilled, the court may remit the award to the tribunal, in whole or in part, for reconsideration; set the award aside in whole or in part; or declare the award to be of no effect, in whole or in part.

s69. *Appeal on point of law*

This is a non-mandatory provision. The right to appeal on a point of law can be excluded by party agreement, as is the position under the LMAA Small Claims Procedure.

Again, reflecting the desire to avoid a return to the uncertainties and delays caused by the relative ease before 1979 of taking questions of law to the courts, the Act sets out tightly circumscribed conditions before an appeal can be made. The preconditions are that an appeal can be made only with the agreement of

all the parties but, other than in exceptional circumstances, such agreement is unlikely or the more usual course (when granted), by the leave of the court.

Leave will be granted only where the court is satisfied that:

- determination of the question will substantially affect the rights of one or more of the parties;
- the question was one the tribunal was asked to determine;
- that on the basis of the findings of fact in the award:
  - the tribunal's decision was obviously wrong, or
  - the question is one of general public importance and the tribunal's decision is open to serious doubt, and
- despite the decision to go to arbitration, it is just and proper for the court to determine the question.

Depending on its determination, the court may confirm the award, vary the award or remit the award to the tribunal for reconsideration.

Despite the presumption of finality, the right to appeal on a point of law under section s69 is an important factor in London arbitration. As far as I am aware, this right does not exist in other jurisdictions which follow the UNCITRAL Model law.

However, it must be emphasised that such challenges are strictly confined to points of law. A tribunal's findings of fact cannot be challenged. This does lead, from time to time, to parties attempting to get round this by dressing issues of fact up as issues of law. Unlike the innocents in Shakespearean drama who never see through the thin disguise of somebody they know well, the courts quickly spot an attempt to describe facts as law.

Number of appeals

The path to a successful challenge is difficult. Over recent years only a handful of applications under s68, serious irregularity, and relatively few under s69, point of law, have been successful. Indeed, the number of applications appears to be in decline as applicants recognise, for reasons that I have already explained, the high legislative threshold they must meet if they are to succeed.

Moreover, reflecting the principle that where arbitration is the chosen method of dispute resolution then the matter should normally end with the award, the Act also places limitations on subsequent rights of appeal to the higher courts.

(iv) ***Arbitration clauses in maritime contracts***

Turning now, briefly, to the question of arbitration clauses in maritime contracts, it goes without saying that certainty is essential. In order to be effective and avoid dispute on its intentions and scope, it is important that the arbitration clause is clear in setting the procedures to be applied. There are a number of standard provisions which are well known to and understood by market practitioners. The BIMCO Dispute Resolution Clause is incorporated into standard BIMCO forms. It offers users a choice of jurisdiction with London arbitration, in accordance with LMAA Terms and English law, the default forum in the absence of an alternative stated choice. The clause is also available for incorporation into other documents. BIMCO provisions are not exclusive and most shipping contracts have some form of dispute resolution provision, usually an arbitration clause, although some are better formulated than others.

If a dispute arises but the parties did not include an arbitration agreement in their contract, they would have to try to agree a provision if they subsequently wanted to arbitrate a dispute. This will bring its own frustrations because agreement is often in short supply when a dispute is underway.

(v) ***The role of the London Maritime Arbitrators' Association (LMAA)***

The LMAA was founded in February 1960 and so celebrated its 60th anniversary earlier this year. The LMAA is an association of practising maritime arbitrators. Unlike the London Court of International Arbitration (LCIA) or the International Chamber of Commerce (ICC), it does not administer arbitrations.

The LMAA has three categories of membership:

- Full Members of whom there are currently 36;
- Aspiring Full Members with a current listing of 30; and
- Supporting Members

Full and Aspiring Full Members actively accept appointments. Many of the more than 700 supporting members come from the Bar, solicitors and defence clubs

and have an interest in arbitration, often as users of the system, while some also accept appointments. Membership is worldwide reflecting the global value of London as a centre for resolving maritime disputes.

The LMAA President is normally elected for a two-year term of office. Bruce Harris took over earlier this year from Ian Gaunt. Governance is vested in an elected Committee together with specialist committees, as appropriate, including the Supporting Members' Liaison Committee and the parallel Supporting Members' Liaison Committee (Asia Pacific) which meets in the Far East. Management is overseen by the Honorary Secretary and day to day administration is carried out by the Executive Secretary.

Statistics are collected and published every year. The figures for 2019 record a total of 2,952 appointments which, given that tribunals vary between a sole arbitrator and three-member panel, is estimated to translate into 1,756 references during the year. The majority of awards are made on documents alone. Of a total of 529 awards, 74 were made following an oral hearing. Due to the method of collection and fact that not everybody will respond, the figures are likely to be an underestimate of the position.

The LMAA publishes Terms and Procedures for the conduct of references. They have been amended, updated and improved from time to time. The current set, issued in 2017, apply to arbitrations commenced after 1st May 2017.

There are three sets of Terms. The Terms to be applied will depend on the provisions in the arbitration agreement and set out procedural arrangements for the conduct of the particular reference.

The Small Claims Procedure applies to disputes of up to USD100,000 while, where agreed, the Intermediate Claims Procedure covers disputes of, normally, between USD100,000 and USD 400,000; always exclusive of interest and costs. The procedures are designed to offer a relatively fast means of determining a dispute with cost recovery subject to laid-down capping. The Small Claims Procedure is conducted by a sole arbitrator who, if not agreed by the parties, will be appointed by the President.

The LMAA Terms 2017 apply to all other references.

All three sets of terms set out procedural arrangements for the service of claims submissions, counterclaims, defence submissions and reply. Where the LMAA

Terms apply, comprehensive arrangements are further set out the in Second Schedule covering a range of matters including, in certain circumstances, the exchange of a questionnaire completed by the parties to identify issues for determination, evidence to be adduced, the anticipated timetable, if there is a need for an oral hearing and whether mediation might be of assistance. The provisions are, of course, a framework. As already explained, under s34 of the Act the tribunal has the necessary powers to set out procedural and evidential matters. Of course, references rarely develop exactly as set out in the procedures and it is often necessary to adjust the timetable or modify the provisions where parties request more time to prepare submissions or leave is sought to serve additional evidence or documentation.

Under the Small Claims Procedure, the arbitrator is encouraged to produce the award within one month of closing interlocutory proceedings while under the Intermediate Claims Procedure the period is six weeks. Quite rightly, parties do not want to be left waiting and, wherever possible, it is important that the award is published within the set timescale.

For awards under the Terms, the recommended period is six weeks. However, a lot will depend on the surrounding circumstances although urgent cases should be dealt with as quickly as possible.

As to the composition of the tribunal and always subject to the provisions of the contractual arbitration agreement, the Terms and Intermediate Claims Procedure provide that if the tribunal is to consist of three arbitrators then once the parties have appointed their respective arbitrator, the two so appointed are entitled to act together. As long as they are in agreement and no substantive hearing is to take place, the two arbitrators have the power to make decisions, orders and awards and it is unnecessary to appoint a third arbitrator which, of course, has cost saving implications.

(vi) ***Outline of procedures from a dispute referred to arbitration up to the Tribunal's award***

In this final section, I am going to describe in brief outline the chronology of a dispute and the road to resolution. It is necessarily very general and every case will be different but it is intended to provide an outline idea of how the process develops.

The story starts when the owners of the m/v *"Nightmare"* let her to charterers for four months on the New York Produce Exchange Charter Party 1946 to which a number of terms and conditions were added, including the BIMCO Dispute Resolution Clause 2017.

Things went wrong almost from the beginning. The vessel suffered repeated bouts of engine breakdown, the charterers alleged that on delivery the holds were unfit to load a grain cargo, the owners alleged that bunkers put on board by the charterers were unfit and caused damage to the engines and on redelivery there were disputes about the quantity of bunkers remaining on board and finally the owners contended that damage resulting from the charterers' use of the vessel went beyond fair wear and tear.

In the first instance, the parties tried to resolve their differences amicably. Relations were never entirely cordial but the parties were talking to each other. However, that did not continue and both parties brought in their lawyers. The lawyers were also unable to assist in finding a solution to what had become a complex web of claims and counterclaims.

The owners therefore sent the charterers notice that they were starting an arbitration, named their appointed arbitrator and requested the charterers to appoint theirs within the fourteen days laid down in the Dispute Resolution Clause otherwise the arbitrator already appointed would be appointed as sole arbitrator. The charterers responded after ten days giving details of their nominated arbitrator. The claims were of such value that the reference would be in accordance with the LMAA Terms 2017.

All exchanges were then conducted through and by the parties' respective lawyers. It was agreed by all concerned that the process would follow the timetable laid down in the Second Schedule to the Terms, subject to any applications made for variation.

The owners' claims submissions were served within twenty-eight days of the tribunal's appointment. The charterers were required to serve their defence submission and any counterclaim within a further period of twenty-eight days but at 2 pm on the last day, having been unable to agree a three-week extension with the owners, they applied to the tribunal for an extension. The owners objected but, after considering all the representations made, the tribunal granted the application but on the basis of a further fourteen days.

On the last day of the extension, the charterers served their defence and counterclaim. The owners then had twenty-eight days to serve their submissions in reply to the claim and their defence to the counterclaim. At 4 pm on the last day for service, the owners, having been unable to agree an extension with the charterers, made application to the tribunal for, and were granted, a ten-day extension for service. The owners then failed to serve within the designated extended time and the charterers applied to the tribunal to make an order for service. The order was made but, as the owners complied with its requirements and served their reply and defence to the counterclaim, there was no need for a final order to be made. The charterers then served their submission in reply to the defence to the counterclaim within the laid-down fourteen-day period.

The charterers then made application to the tribunal to serve additional documents. This was granted with the owners being given the right to respond and for the charterers to have the right of reply. Each party requested disclosure of documents held by the other. The requests were agreed by the tribunal.

There had by now been a considerable number of exchanges between the parties. However, the parties agreed, without any need for the tribunal's intervention, that an oral hearing was unnecessary and that, following closing submissions by each party, the reference could proceed to award on the basis of the written submissions served.

The tribunal declared the proceedings to be closed and that no further submissions or documents would be accepted or considered and started work on its award. The award was published four weeks later and, on payment of the tribunal's fees, it was released and hard copies sent to the parties by courier.

This is, by necessity, an example of how a refence is conducted. But cases will have their varied and individual features often giving rise to complex interlocutory issues long before reaching the merits of the dispute.

(vii) *Conclusion*

Shipping has changed greatly over the years, particularly in the last fifty with the advent of ever-larger vessels designed to carry specialised cargoes. But there will always be disputes. Maritime arbitration is a fascinating means of resolving those disputes.