What makes LMAA arbitration different?

By Ian Gaunt, President The London Maritime Arbitrators Association

Introduction

London maritime arbitration is a major part of London's successful dispute resolution offering to the world. In relation to both the number of international arbitrations commenced and international arbitral awards issued, the LMAA is by some margin top of the list, both in London and internationally, to the considerable benefit of the UK in invisible exports and to the continuing development of the English law of contract. It has developed to reflect the requirements and expectations of the UK and international maritime community but has certain characteristics which distinguish it from those of general commercial (often institutionally administered) international arbitration. This article sets out to identify and explain some of these differences and suggest that these differences need to be taken into account when supranational bodies (ICCA and IBA) in particular seek to devise and impose prescriptive rules with universal application in international commercial arbitration cases generally.

The development of the LMAA and LMAA Terms arbitration

The tradition of maritime arbitration as part of London's maritime cluster can be traced back as far as the 1650s when trade was negotiated in London's coffee houses that later developed into the Baltic Exchange. Until relatively recently, when trading ceased to be conducted face to face, a majority of the world's dry cargo business was concluded at the Exchange which still fulfils an important role in shipping, in particular in the publication of freight indices. The Exchange still maintains a dispute resolution panel distinct from the LMAA.

In former times disputes arising were referred to leading shipbrokers chosen by the parties to decide because of their knowledge and experience of shipping matters as well as the informality,

speed and confidentiality of the process. Lawyers originally played little role n this settlement process.

Against this background, the LMAA was established in 1960 with the object *"to advance and encourage the professional knowledge of London maritime arbitrators and, by recommendation and advice, to assist the expeditious procedure and disposal of disputes*". Over time, this led to the evolution of the LMAA Terms as they are today.

The LMAA's leading role in maritime arbitration internationally

The LMAA is an association of practising arbitrators and not an arbitral institution in the usual sense. It produces arbitration terms and procedures which are very widely used in maritime arbitration in London. In relation to both the number of international arbitrations commenced and international arbitral awards issued, the LMAA is by some margin, top of the list, both in London and internationally.

In summary:

- There are approximately 1,700 new LMAA Terms arbitrations each year (on the basis of a five-year average).

- These give rise to over 3,000 appointments (the figures differ because there may be one, two or three arbitrators appointed in each reference).

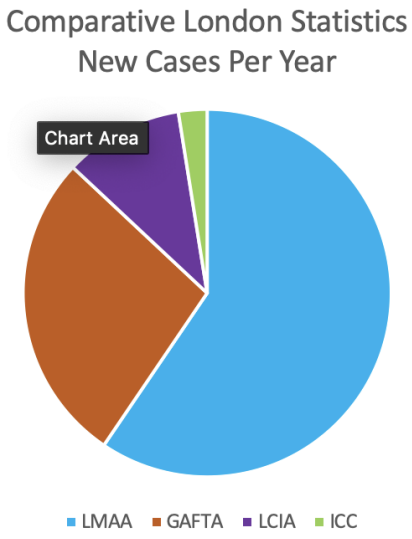
- More than 500 awards on LMAA Terms are published each year.

- Research by HFW, a leading law firm, in its report entitled "*The Maritime Arbitration Universe in Numbers One-Year On*" (May 2019), confirms that approximately 80% of all maritime arbitrations worldwide take place on LMAA Terms.

The LMAA's position as regards London-seated international commercial arbitration cases by comparison to some of the leading arbitral institutions is as follows:

	Arbitrations commenced per year (average 2014-2018)	Awards issued per year (average 2014-2018)
LMAA	**1,728**	**532**
GAFTA	**799**[1]	**180**[2]
LCIA	**305**[3]	**56**[4]
ICC	842[5] globally (**73** in London in 2018)	512 globally (London figure not known)

Graphically the position can be illustrated thus:



1 Source: GAFTA. This number comprises 537 references plus another 262 string arbitrations recorded separately by GAFTA since 2015 regarding Brazilian soybean meal pellets.

2 Source: Statistics provided by GAFTA. Based on four years (1 October 2014-30 September 2018) and including both first tier (average 144 per year and/or appeal (36 per year) awards.

3 Source: LCIA Annual Casework Reports.

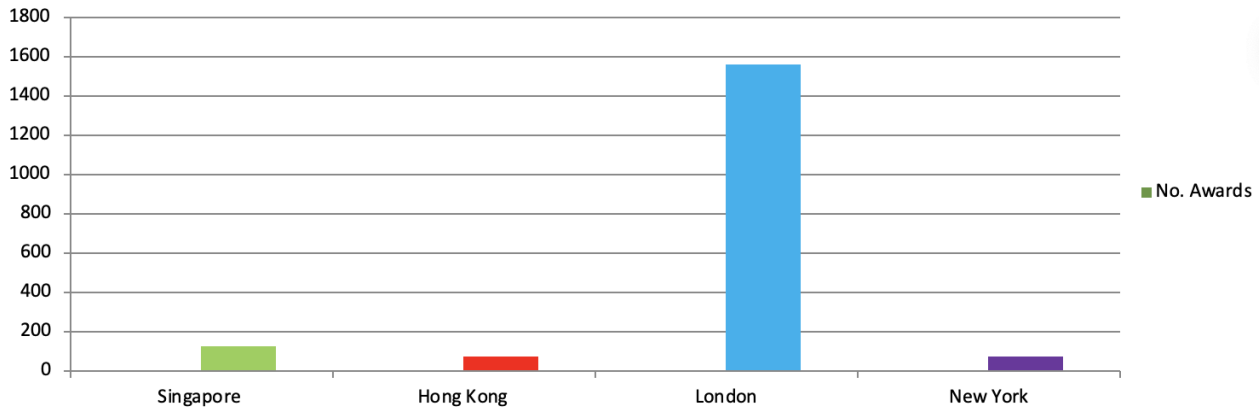
4 This is a figure for cases administered under LCIA Rules that reached a final award in the period 2013-2016 inclusive. The LCIA Report "*Costs and Duration: 2013-2016*" gives a figure of 224 cases reaching a final award during that period.

5 Source: ICC published figures for 2018..

In an international context, the position is as follows:

Institution or Rules	New maritime cases in 2018
LMAA Terms	1561
HKIAC (Hong Kong Intl Arbitration Centre)	47
SIAC (Singapore Intl Arbitration Centre)	72
SCMA (Singapore Chamber of Maritime Arbitration)	56
SMA (Society of Maritime Arbitrators New York)	70 (estimated)

The following shows the position in graph form:



LMAA Terms and procedures

LMAA arbitrations are conducted on an *ad hoc* basis. The LMAA is not an arbitral institution and it is important in what follows to understand that, unlike the ICC, LCIA and other arbitral institutions, the LMAA does not administer arbitrations.

The LMAA does however produce procedural terms and procedures for arbitration and they are regularly revised (most recently in 2017). The comprise:

- LMAA Terms 2017;
- Intermediate Claims Procedure 2017 (for claims from USD100-400,000); and
- Small Claims Procedure 2017 (for claims up to USD100,000).

Provision for LMAA arbitration is very commonly incorporated into maritime contracts exclusively or is a standard option in many standard form contracts including those promoted by BIMCO the leading international shipowners organisation. For example the following is the current version of the dispute resolution clause (Clause 54) of the NYPE[6] Standard Form (2015) Charterparty, which is the latest version of the most popular form of time charter and which gives contracting parties a choice of three law and jurisdiction options.

> ***54. Law and Arbitration***
> *(a)* **New York**. …*
> *(b)* **London**. This Charter Party shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Charter Party shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause.*
> *The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) Terms current at the time when the arbitration proceedings are commenced.*
> *The reference shall be to three arbitrators. A Party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator within fourteen (14) calendar days of that notice and stating that it will appoint its arbitrator as sole arbitrator unless the other party appoints its own arbitrator and gives notice that it has done so within the fourteen (14) days specified. …*
> *(c)* **Singapore**.*
> ***…***

[6] New York Produce Exchange

Specific features of LMAA arbitration

There are some fundamentally important differences between LMAA arbitration, which is *ad hoc*/un-administered, and what is commonly referred to generically as "international commercial arbitration" (much of which is institutional e.g. ICC, LCIA or HKIAC etc.). LMAA arbitration has a number of distinguishing features:

Commencement of references by notice and appointment

Under typical LMAA arbitration clauses the commencement of an arbitration is effected simply by notice including the appointment of an arbitrator.

The effect of this, read together with the LMAA Terms 2017 and section 14 of the Arbitration Act 1996, is that the arbitration starts and the limitation clock stops when the Claimant has given notice of arbitration. In a three-arbitrator tribunal scenario the claimant's arbitrator is appointed immediately and the respondent's arbitrator usually within 14 days. This is in marked contrast to institutional rules providing for the commencement of arbitration by the giving of a notice[7] but appointment of arbitrators happens later, sometimes after a lengthy period of examination of the credentials of the arbitrator by the institution.

Fees

Under the LMAA Terms 2017 the parties making the appointment(s) are each required to pay an appointment fee of GBP350, and no advance fees or deposits are payable at the time of appointment. By contrast the rules of all arbitral institutions require early payment on account of fees. Whilst the customary institutional practice provides greater security for the arbitrators'

[7] Notice should include *nomination* of an arbitrator (see for instance ICC Arbitration Rules (2017) Article 4 and the LCIA Arbitration Rules (2014) Article 1) but does not require appointment.

and the institution's fees, the provision of the required deposits can significantly slow the commencement of the arbitral proceedings.

The appointment process

In LMAA Terms arbitration, appointment procedures are simple and quick with appointments usually made and communicated by very brief e-mails sent directly to arbitrators without explaining the issues in dispute. Usually very little information is contained in the appointment request received by the arbitrator.

By contrast in for example. ICC and LCIA arbitration, the request or notice of arbitration must set out a description of the nature and circumstances of the dispute giving rise to the claims and of the basis upon which the claims are made (ICC Rules (2017) Article 4.3(c)) or a statement briefly summarising the nature and circumstances of the dispute (LCIA Rules (2014) Article 1). Therefore, by the time of appointment by the ICC court or LCIA court, much more is usually known about the nature of the dispute which perhaps assists with the disclosure obligations of the arbitrators. The process is however considerably slower and more bureaucratic and the time needed for Terms of Reference for example in ICC arbitration is often considerable.

Overlapping issues and disclosure

In *ad hoc* maritime arbitration there is widespread use of the commencement of arbitration and simultaneous appointments of arbitrators to stop time running for short (e.g. 12 month) limitation purposes. This may have a knock on effect on the disclosure which an arbitrator may be able to make at this stage based on his or her knowledge of the issues in the case. In many cases therefore an arbitrator appointed in *ad hoc* proceedings, may not know at the time of accepting an appointment exactly who the parties are[8] or the nature of the issues in dispute. If

[8] They may often be single purpose shipowing companies whose beneficial ownership is obscure or may simply be described as cargo interests whose precise identity only becomes apparent after the arbitration has got under way.

an arbitrator were subsequently to face a challenge based for example on the IBA Guidelines because he or she was appointed in an earlier reference with the same party or with overlapping issues and had not made disclosure when accepting the later appointment, the arbitrator may not actually know enough about the earlier reference even when the later appointment is made to be in a position to disclose overlapping parties or overlapping issues. This may well not be for want of any diligence on the part of the arbitrator, but because of the way in which the mere appointment of an arbitrator is of greater significance in maritime arbitrations. It is perhaps a matter of preferring speed and efficiency and, an arrangement which is widely accepted in the maritime business over a prescriptive regime for disclosure. In fact in the maritime and commodities fields there is a high incidence of appointments in arbitrations with overlapping issues, in particular involving chains of charterparties or sale contracts. The LMAA Terms recognise this and make provision for tribunals to make orders for concurrent conduct of the related arbitrations. Consequently, there is also a high number of arbitrations with multiple appointments of the same arbitrators. It has indeed long been a feature of LMAA arbitrations that the same arbitrator is appointed to deal with connected or overlapping cases. It is considered by parties to reduce the likelihood of inconsistent decisions, save costs and speed up the resolution of disputes involving overlapping factual situations which frequently arise.

Regular instances of multiple appointments

Given the highly specialised nature of the maritime business world and the concentration of expertise among lawyers and arbitrators and the parties' insurers as well as the high volume of maritime arbitration cases, it is quite common for arbitrators from the relatively small pool of specialists to receive multiple appointments from the same firms of lawyers within a comparatively short time frame. Whilst this would on its face offend against the IBA Guidelines' Orange List[9] without disclosure, the practice is widely accepted in the international maritime community and the practical problems in making disclosure in the manner prescribed in the

[9] Guideline 3.3.8

Guidelines in the context of maritime arbitration are well understood in the maritime community.

Decisions on documents alone

Another particular distinguishing feature of London maritime arbitration is the very high proportion of cases which are decided on documents alone, that is, without a hearing. This has proved to be both efficient and popular. In many of these cases the arbitration will be conducted and the award published by a tribunal of two arbitrators if they are in agreement. Some 80% of the 500+ awards rendered in LMAA arbitrations annually follow this procedure.

Third Party Funding

It is perhaps only recently the case that third party funding on any scale has been acceptable or widely used or discussed in international commercial arbitration generally. However, for almost two centuries much ship owning and ship chartering activity has been underwritten by mutual protection and indemnity associations and insurers often referred to collectively as "P & I or Defence Clubs". These Clubs generally offer optional legal expenses insurance to their members through "defence" cover (which may be effected through separate affiliated Associations or through optional defence cover offered by a P & I Club). Worldwide there are 17 major Clubs and Defence Associations. Much of their business is managed from offices in London, but increasingly also in other international maritime hubs. As a result, it is relatively common that one or both parties' cases is funded and handled by one of this relatively small number of Clubs or Defence Associations. Arbitrators in maritime cases supported by Clubs are frequently not aware of the involvement or identity of the Club or Association. This means that an arbitrator may receive many appointments involving the same Club or Association and not necessarily know that that is the case, either at the point of appointment or subsequently.

This system of funding of maritime arbitration (and litigation) was initially overlooked by the ICCA-Queen Mary task force established to devise rules to govern third party funding in international arbitration[10]. Now that this established and accepted arrangement has been recognised, it is to be expected that, as in the case of the IBA Guidelines on Conflict of Interest, maritime arbitration will be specifically carved out of the ICCA sponsored regime[11].

No need for emergency arbitrators

The LMAA adopted the most recent version of its Terms in 2017. Unlike recently revised versions of the rules of arbitral institutions worldwide which have shown great zeal in competing to adopt such provisions, the LMAA Terms do not contain provision for the appointment of emergency arbitrators. The introduction of provisions for the appointment of emergency arbitrators was indeed considered. However the LMAA Committee responsible for producing the new Terms came to the conclusion that for London-seated arbitrations (which means most arbitrations conducted under LMAA Terms and, currently, a huge proportion of international maritime arbitrations worldwide), the provisions of the English Arbitration Act 1996 are quite sufficient to enable a party to make a speedy application to the High Court for emergency relief or "interim measures" even in the usually very limited time before it has been possible to constitute the arbitration tribunal. An application to the court will, it is considered, avoid some of the procedural weaknesses which practice has shown to result from the appointment of an emergency arbitrator under other rules.

As has been pointed out above the London system of maritime arbitration which has traditionally proved so successful is based on *ad hoc* procedures. The tribunal decides on its own procedures (subject to mandatory provisions of the Arbitration Act 1996). Above all the tribunal can be, and almost always is, set up extremely fast. This is in contrast with the practice and procedure of many of the major arbitral institutions The need for emergency arbitrators in

[10] https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf
[11] ibid Appendix B, Question 2

institutionally supervised arbitrations is in effect a mark of the slowness of the process of constituting the arbitral tribunal.

Purists might argue that arbitration is intended to be a process where the courts are kept at arms' length and where the arbitration tribunal appointed by agreement between the parties should have universal and almost sovereign competence. This may be an ideal for some, but the practical point is that a court system which is supportive of the arbitral process, as in the case of English-seated maritime arbitrations, is, from the point of view of users, far superior to an institutional system which tries to address the slowness of the appointment process by introducing the concept of the emergency arbitrator. The English courts have proved to be highly supportive of arbitration and will ensure that preliminary orders issued prior to the appointment of a tribunal (usually a matter of no more than 2 weeks) will be strictly limited and can be effectively overridden by the legitimate decisions of the tribunal once effectively appointed.

It is also notable that emergency arbitration provisions still raise several doubts in terms of the effectiveness and efficacy of the protection they are meant to ensure, as uncertainties persist regarding the enforceability internationally of rulings given by emergency arbitrators.

Not only is there in some cases doubt as to the enforceability of a ruling of an emergency arbitrator as a final award under the New York Convention but a further practical limitation of the emergency arbitrator régime has been highlighted by a decision of the English Commercial Court in *Gerald Metals SA v The Trustees of the Timis Trust & others* [12], in which the LCIA's refusal to grant an application for appointment of an emergency arbitrator effectively prevented a successful application to the court for a worldwide freezing order. The court found that whilst section 44(3) of the Arbitration Act 1996 allowed the Court in urgent matters to make orders preserving evidence or assets, section 44(5) demanded that the Court only act '*if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively'.* This produced the hardly desirable result that the refusal of the LCIA to appoint an emergency

[12] [2016] EWHC 2327

arbitrator when requested to do so, had the effect of limiting the scope of the court's jurisdiction to grant freezing injunctions in support of arbitration under section 44 of the Arbitration Act 1996.

It might also be noted that the orders of an emergency arbitrator, if appointed, are highly unlikely to be binding on third parties in the way in which the freezing order of a court would be and therefore less effective in the relevant circumstances. The inability to obtain a freezing order in circumstances where the emergency arbitrator theoretically has power only to grant a more limited remedy may be a serious restriction in the armoury of remedies otherwise available to a party to an English-seated arbitration.

Not only this, but the appointment of emergency arbitrators is expensive. The application fee payable to the LCIA is GBP8,000 and the emergency arbitrator's fee is GBP20,000. Such fees will be seen by many parties in an average maritime claim situation to be very high and, from a purely cost point of view, the remedies available from the court in support of the arbitration to be much more cost-effective.

Having observed the development of the debate about emergency arbitrators in the UK and other jurisdictions, the LMAA is confident that its decision not to adopt such provisions for *ad hoc* maritime arbitration was entirely justified, just as the perceived need for such provisions in the context of institutional arbitration actually highlights the delays inherent in the institutional system of arbitration in getting the tribunal appointed in a speedy and cost effective way and an aspect of the arbitral process which weighs heavily in favour of ad hoc arbitration[13]

The LMAA and disclosure; Halliburton v Chubb

Returning to the question of disclosure which is the subject of the current appeal in the UK Supreme Court in the much discussed case of *Halliburton v Chubb*, the LMAA, and arbitrators

[13] For an interview of the writer on this subject with Marie Kelly, Partner of Norton Rose Fulbright, see http://www.nortonrosefulbright.com/knowledge/videos/158401/lmaa-arbitration

appointed on LMAA Terms very aware and mindful of issues of disclosure and bias. LMAA Terms arbitrations are, of course, the subject of scrutiny and supervision of the High Court under the Arbitration Act 1996.

Despite the more limited practice of disclosure in LMAA arbitrations for reasons which have been considered above, Full Members of the LMAA are bound by the LMAA Code of Ethics which draws heavily on the IBA Guidelines.

The LMAA's position in relation to the issues before the Supreme Court in *Halliburton v Chubb* is that:

- The test for apparent bias under section 24(1)(a) of the Arbitration Act 1996 is the same as the test for common law bias;
- Disclosure should be given where it is arguable that the matters to be disclosed give rise to the appearance of bias[14];
- Beyond that, whether disclosure is required in any particular case is highly context and case specific and great caution should be exercised before setting down any further guidelines intended to be of universal application;
- The mere fact of appointment in overlapping subject matter arbitrations does <u>not</u> give rise to any appearance of bias. There may be cases in which at some stage the fact of appointment in an overlapping arbitration should be disclosed, but the reason for disclosure is not likely to be an issue of impartiality under section 24(1)(a) of the 1996 Act but may arise from the duty to act fairly, a part of every arbitrator's duty under section 33 of the Act;

[14] The formulation used by the Court of Appeal was that disclosure must be given of facts and circumstances which *might* lead the fair minded and informed observer, having considered the facts, to conclude that there was a real possibility that the arbitrator was biased. That seems to be equivalent to saying that the point is arguable. The test is expressed in terms of arguability in Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451 at [21}, cited by the Court of Appeal in it judgment at [59].

- It is hoped that the Supreme Court will be very cautious in promulgating any specific advice or guidance which is expressed to apply to all types of arbitration because arbitration rules and practice differ markedly. Parties can contract into whatever system of appointment-related disclosure they wish to have, and arbitral institutions like the ICC and LCIA can impose such rules as their users wish to see imposed. Party autonomy is at the heart of the Arbitration Act. Where a particular dispute resolution market has developed a popular and successful set of arbitration terms – as has the LMAA – it is suggested that the Court should be slow to superimpose some different or greater form of disclosure: the rules stated by the Court of Appeal are appropriate and sufficient.

Conclusions

To those not conversant with maritime arbitration practice the foregoing may, it is hoped, help to point up some of the salient differences between specialist maritime arbitration practice and "international commercial arbitration" practice more generally. London-seated maritime arbitrations are of course by any test "international commercial arbitrations", and indeed are far more prolific in terms of numbers than arbitrations conducted by any arbitral institutions, whether seated in London or elsewhere. This is the result of a system which responds to the requirements of the stakeholders in the international maritime market who are responsible for 90% of the world's freight movements. There is no doubt, as pointed out by Lord Mustill in his Cedric Barclay lecture at the first International Congress of Maritime Arbitrators in Vancouver in 1991[15], that there is much room for general international commercial arbitration practitioners and maritime specialist arbitrators to work together to achieve a better mutual understanding, it is necessary for the generalists to better understand the requirements of those involved in specialised arbitration when evolving and promulgating prescriptive rules of universal application to govern international commercial arbitration in a generic sense. If this article helps to promote this understanding it will have fulfilled its intention.

[15] The Ten First Cedric Barclay Lectures: edited by Bruce Harris and Philip Yang: Law Press Hong Kong 2017