Hybrid Arbitration Clauses – A Matter of Taste ?

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In this paper I look at the growing appetite, particularly in Asia, for creating a hybrid arbitration agreement, choosing from the increasingly long menu of available forum options, governing laws and procedural rules, and at some of the unintended consequences such choices can bring. A new 'recipe' may look appealing on paper, but each element of the three-course meal may prove less digestible in practice, and the resulting 'taste' may not always be to the parties' liking.

Background

Arbitration as a form of dispute resolution dates far back into history. It has been formally recognised by the English Courts since the sixteenth century and it has consistently been the preferred forum of dispute resolution of the maritime industry. This remains the case today, with an estimated 85-90% of all maritime disputes being referred to arbitration in one or other jurisdiction.

One reason for this, identified and developed by various UNCITRAL initiatives since its inception in the 1960s, is that international arbitration facilitates trade across borders. Where parties from different countries wish to contract with each other, but do not wish to submit themselves to the courts of the one party or the other, arbitration allows parties to elect a neutral forum, such as London, to which the parties may submit any disputes which might arise between them.

Although many countries, China being one example, have a substantial domestic shipping market, shipping is predominantly an international business. Parties to a shipping contract will very frequently be in different countries, subject to different types of legal system (common law, civil law etc), governed by different legislation and cultural norms.

Cross-border trade has become increasingly relevant and prevalent since the 1950s, due in large part to decolonisation around the world which created many new sovereign states. 41 current states gained independence from the UK and France alone in the 10 years between 1956 and 1966. Indeed, in researching this paper, I came across the astonishing fact that the majority of states which were established by 1970, had not existed just 25 years before. Today there are in the region of 195 recognised sovereign states around the world, almost all of whom enter into cross-border trade to a greater or lesser extent.

Two initiatives in the 1950s and 1960s revolutionised the world trade and arbitration landscape : the first was the New York Convention, the second was the creation of UNCITRAL. The purpose of both was to harmonise and facilitate cross-border trade.

New York Convention

Facilitating parties located in a particular country to trade internationally, to enter into major, for example construction, projects, not with their near neighbours but with parties located far away from them, geographically and culturally, is at the heart of the commercial arbitration world. And the foundation stone of the international commercial arbitration system is one key international convention : The Convention on the Recognition and Enforcement of Foreign Arbitral Awards made in New York in 1958 – The New

York Convention (NYC). The text of the NYC can be found in five authentic translations including Chinese on the NYC website[1].

The NYC has been phenomenally successful. Indeed, many will say it is the most successful international convention ever drawn up, due to the significant number of signatories it has garnered and to its continued use and relevance, almost sixty years after it was drawn up. There are currently 159 contracting states which are party to the Convention – that is over 75% of the 195 sovereign states around the world, which I mentioned earlier.

Despite its title, which refers only to the recognition and enforcement of *arbitral awards*, the NYC in fact regulates the recognition and enforcement of both arbitration agreements and arbitration awards, namely the beginning and end of the arbitral process.

UNCITRAL

The United Nations Commission on International Trade Law (UNCITRAL) was set up in 1966 to modernise and harmonise the rules on commercial transactions and international law standards around the world. Its work in subsequent decades has had a major impact on international arbitration.

First, in 1976, the Commission drafted the UNCITRAL Arbitration Rules, a set of arbitration rules specifically designed for use in ad hoc arbitrations. The text of the Rules can be found on the UNCITRAL website[2]. The Commission was *"convinced that the establishment of rules for ad hoc arbitration that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international relations".*

[1] www.newyorkconvention.org

[2] www.uncitral.org

The UNCITRAL Arbitration Rules effectively pick up where the NYC stops, the latter regulating the beginning and end of the arbitral process. The Rules offer regulation of the procedure of the arbitration, once a valid arbitration agreement is in place until the issue of an arbitration award and are specifically designed to result in an award which will be recognised and enforceable under the NYC. Unlike the NYC, which will apply as a matter of national law in those states which are signatories to the Convention, the Rules are contractual terms which will only apply to an arbitration if they are agreed between the parties. Like the Convention, the UNCITRAL Arbitration Rules have proved to be very popular and have been the starting point for the draftsmen of the texts of many arbitral bodies' arbitration rules since then.

Secondly, in 1985, UNCITRAL published its Model Law[3]. Again, the text can be found on the UNCITRAL website. The Model Law is a template, creating a suggested framework to assist states in modernising, or in some cases creating, a national law on international arbitration. This template arbitration law was amended in 2006 and has been widely adopted, either in its original or amended version, particularly by states who either had little or no specific arbitration legislation or where the existing arbitration legislation focussed primarily or solely on domestic arbitration. According to International Arbitration Law[4], 74 jurisdictions have adopted the Model Law, either by directly incorporating the text of the Model Law into their legislation or by drafting their legislation based on the Model Law text.

[3] UNCITRAL Model Law on International Commercial Arbitration

[4] www.internationalarbitrationlaw.com

The Traditional Arbitration Agreement

Having established that international maritime business has a continued appetite for arbitration and that international bodies, documents and legislation have provided effective tools to facilitate this, I would next like to look at the agreement to arbitrate, as it is from this agreement that the precise mode of arbitration is determined.

Ideally, an arbitration agreement will contain at least three components:

(i) A choice of forum – for an arbitration agreement to be valid there needs to be a mandatory and exclusive agreement to refer disputes to arbitration.

(ii) A choice of seat or place – here we are talking about the juridical seat or place of the arbitration, the *lex arbitri.* N.B. The seat of the arbitration is not necessarily the venue of an arbitration hearing and the law of the seat may be just one of a series of laws referred to in the arbitration agreement and indeed in the contract containing the arbitration agreement. I will come back to this a little later.

(iii) A choice of procedural rules – in order for an arbitration to be effective and efficient, the parties should try to agree procedural rules which will apply to the arbitration. These may be the rules of an institution such as CIETAC, the UNCITRAL arbitration rules in the case of an ad hoc arbitration, or the procedural rules of a body chosen by the parties, e.g. LMAA Terms and Procedures.

(iv) Often, in addition to the place or seat of arbitration (which provides the overall governing law of the arbitration), there will be an express choice of procedural law.

An example of a traditional arbitration clause in the maritime field is :

London arbitration / English law / LMAA Terms

Although arbitration can be agreed after a dispute has arisen, an agreement to refer differences to arbitration is more commonly reached by parties in advance, for example, when a fixture or contract is negotiated and entered into. As a result, the parties, or in the case of shipping contracts often the parties' brokers, will propose arbitration provisions which are familiar to them.

By way of example, up until the 1990s, a very large proportion of the shipping contracts concluded worldwide were agreed between brokers who were located in the City of London and who met face-to-face at the Baltic Exchange to conclude a whole raft of maritime contracts, for example, charterparties between shipowners and charterers, carriage contracts between shippers and liner services, sale and purchase contracts between cargo buyers and sellers, to name but a few examples. Where the parties' representatives (the brokers) were located in London, it was natural for those brokers to agree upon London arbitration as the place of the arbitration. In addition, because London has the depth of maritime expertise both commercially and legally, supported by the Commercial and Admiralty Courts of London, it was natural for London arbitration to be combined with a choice of English law.

This approach, of combining the same jurisdiction and local law, was the norm until fairly recently. Whether it be London arbitration/English law, Shanghai arbitration/PRC law, the concept was one of an arbitration having a physical 'home', often directly related to a hub of relevant expertise.

The 'Hybrid' Experiment

The maritime world, as with so many aspects of modern life, has become global and digital. Long gone is the physical trading floor of the Baltic Exchange, where brokers used to fix charterparties in person. Maritime contracts are no longer physically concluded in one place and maritime services (broking/insurance/legal) are now provided worldwide. In addition, parties, facilitated by modern means of communication, more often deal directly with each other, without automatically involving brokers in the traditional maritime centres, such as London. In particular, following the physical shift of much maritime-related business from Europe to Asia, there is a new generation of Asian users of arbitration, emerging in all fields of the maritime industry.

For example, over 90% of shipbuilding takes place in just three Asian countries, led by China and followed by Korea and Japan. Only one (Dubai) of the top ten container ports is outside of Asia, while seven of those container ports are in China. All of the top eight largest ports by volume are in Asia, again seven of those being in China, and Asian countries account for five of the top seven owners of the world shipping fleet, Greece being the largest shipowning country, followed by Japan, China and others in Asia.[5]

As a result of the direct involvement of this new generation of users of maritime arbitration in Asia, a new trend in the approach to arbitration agreements appears to be emerging, namely mixing and matching forum, governing law and procedural rules, in a way which has not been seen traditionally.

In principal, each component of the arbitration agreement (seat/law/rules) is separate and can be chosen individually, according to the parties' preferences. Experience indicates that a hybrid approach to law and jurisdiction often

[5] UNCTAD Review of Maritime Transport 2016

arises as a result of negotiation, for example where there may be one Western party and one Asian party to a contract, the Western party might naturally look to a Western forum, such as London arbitration, while the Asian party may prefer, for example, one or other variant of Chinese arbitration. The compromise might therefore be for the parties to agree an Asian seat, for example, Singapore arbitration, combined with a Western governing law such as English law.

There is nothing wrong, in principal, in this approach of mixing and matching components of an arbitration agreement. However, it can be a trap for the unwary and at the LMAA we repeatedly hear of parties being surprised, and often disappointed, by the unexpected end result.

For the purpose of this paper, I propose to take one example as a case study. As it is an option which is currently seen with a certain amount of regularity, and it is one of the variants offered by the current standard form BIMCO arbitration clause[6], namely *Singapore arbitration/ English law*. I propose to consider this example in order to provide an insight into the often unintended and unexpected consequences and complications which might arise when agreeing a hybrid arbitration clause.

By way of background, the current BIMCO dispute resolution clause offers three named variants of seat of arbitration, namely London, New York and Singapore. The standard form clause combines London arbitration with English law and New York arbitration with US Maritime law in the traditional way. However, in relation to Singapore arbitration, recognising perhaps the new fashion to mix the old with the new, Singapore arbitration is offered with two variants of governing law, namely Singapore law or English law. It is this latter hybrid variant which I would like to focus on for the purpose of this paper, as it appears to be the more popular of the two types of Singapore

[6] BIMCO Dispute Resolution Clause 2016

arbitration variants with which the industry is becoming familiar and because it is potentially the more troublesome one, being a hybrid, as discussed.

Traps for the Unwary

I would like to focus on three areas in which this hybrid provision might unexpectedly have unintended consequences or cause complications, namely in relation to (i) the appointment of the tribunal, (ii) the procedure by which the arbitration will be run and (iii) the status of the Award once published.

(i) Constitution of the Tribunal

Firstly, how the tribunal is appointed.

At the outset, it is necessary to understand what the provision *Singapore arbitration/English law* actually means. The reference to Singapore arbitration means that Singapore is the seat of the arbitration. Thus, the law of the seat, the *lex arbitri,* is Singapore law. The reference to English law means that this is the law which will govern the arbitration procedure. It may also be the governing law of the contract, depending upon the other provisions which the parties may have agreed. This means that there is a hierarchy of laws which come into play, with the law of the seat being the overriding law, where there is discrepancy between the law of the seat and the procedural law. In this example, the arbitration law of Singapore[7] (which has adopted the Model Law with amendments) will override the arbitration law of England[8] (which is not a Model Law country).

It is common, and often parties' preference, in maritime arbitrations that a tribunal be made up of a panel, usually three members (although it can be more), including party-appointed arbitrators. This is also familiar to all those

[7] Singapore International Arbitration Act (CAP 143A) – SIAA
[8] Arbitration Act 1996 - AA

from a Model Law country, where the Model Law has been adopted without amendment, as Article 10(2) of the Model Law provides that, absent determination by the parties, the number of arbitrators shall be three.

However, absent any express agreement between the parties, either to the number of arbitrators who will make up the tribunal or to a set of procedural rules which provide for a tribunal of three, a choice of Singapore arbitration will result in a sole arbitrator tribunal (this is the default position under both Singapore arbitration law[9] and English arbitration law[10]). However, unlike the position in a London seated arbitration, in the case of a Singapore seated arbitration, the appointing authority, in cases where the parties cannot agree on a sole arbitrator, is an arbitration institution rather than the court. As a matter of Singapore arbitration law[11], it is the Court of the Singapore International Arbitration Centre (SIAC) (not the Court of Singapore) which is the appointing authority to perform the functions provided for under Article 11(3) and 11(4) of the Model Law, in particular, to appoint a sole arbitrator where the parties cannot agree. This has two consequences which may surprise parties who are used to London arbitration.

Firstly, it means that the appointing authority is not a body with particular expertise in maritime matters. SIAC is not an institution specialising in maritime arbitration, with access to a panel of experienced maritime arbitrators. By contrast, in London arbitration, the appointing authority will be either the President of the LMAA (where LMAA procedural rules apply) or a judge of the Commercial Court in London, both of whom are very familiar with maritime arbitrators.

Secondly, it means that an arbitral institution and its administrative fees (which may be significant) become part of the appointment process. Institutional appointments can be a lengthy process, thus an appointment by

[9] SIAA s.9
[10] AA s.15(3)
[11] SIAA s.8(2)

a body such as SIAC, may involve delay of weeks or even months. During this time, if urgent or emergency relief is needed, this may require the parties to utilise the services of an emergency arbitrator, which can itself bring about complications, for example, in relation to how an order of an emergency arbitrator may be quantified in due course. It is open to debate whether such an order constitutes an "order of the tribunal" for enforcement purposes ?

Statistics, gathered by the LMAA over a period of more than 20 years and available on its website[12], indicate clearly that the maritime industry prefers the more flexible approach of ad hoc arbitration, for example, as offered under the LMAA Terms, over that of large institutional bodies such as the ICC. Taking the LMAA Terms as an example, even where the parties have not agreed to a procedure for appointment of the tribunal, provisions are set out in the LMAA Terms and Procedures[13] in order to facilitate the appointment process. Such provisions offer a timetable by which a tribunal shall be appointed and a mechanism by which the tribunal can be completed by the President of the LMAA, if one party does not participate or follow that procedure. This avoids recourse, by way of further application, to the courts.

In an LMAA arbitration the parties appoint their own arbitrator. There are therefore no institutional fees involved in the appointment process. Where the parties cannot agree on a sole arbitrator and the President is called upon to make an appointment[14], a small fee is charged. The net result is therefore that the appointment process is quick, simple and cheap, avoiding costly administrative fees and delay which might otherwise involve recourse to an emergency arbitrator if procedural matters arise whilst the institutional appointment process is ongoing. In the very rare circumstance where urgent recourse in relation to an interlocutory matter is needed, during the short (usually 14 day) appointment process, then the London Court, with its

[12] www.lmaa.london

[13] LMAA Terms 2017 paras 8-11

[14] LMAA Terms 2017 para 11, LMAA ICP para 5, LMAA SCP para 2(b)

specialist body of Commercial and Admiralty Court judges, is readily available to support the London arbitration process.

(ii) The Arbitration Procedure

A second area where an agreement to a hybrid arbitration clause may result in an unexpected consequence is that of the procedure of the arbitration. Over recent years, utilising modern means of communication and technology, the LMAA has sought to streamline its arbitration process in order to make it more quick and efficient for the parties.

One of the major differences which sets LMAA arbitration apart from other forms of arbitration is the fact that around 85% of all LMAA arbitrations[15] are concluded on a documents only basis, without the need for a physical hearing. Many arbitral institutions, including SIAC, will mandate or require at least one, if not two, physical hearings; the first in relation to determining procedure and the second in relation to hearing the testimony of witnesses and experts. Oral hearings are frequently the most costly element of any arbitration and yet experience indicates that such hearings rarely result in any substantive difference to the outcome of a particular case. In London arbitration, the option of an oral hearing is still available, where it is considered necessary by the tribunal or where the parties agree[16]. However, an oral hearing is neither mandatory nor is it usual. This offers significant cost and time savings to the parties.

It is critical that this point be understood in order that parties can make an informed choice when agreeing to the seat of their arbitration. In particular, parties need to be aware that the choice of a London seat of arbitration, in combination with agreement to the LMAA Terms, is unlikely to require parties to physically attend a hearing in London, whilst an agreement to, for example,

[15] ibid. 12 above

[16] LMAA Terms 2017 para 15(d)

Singapore arbitration, is far more likely to require the parties to attend at least one, if not more than one, oral hearing.

In addition, as mentioned earlier this paper, it is of paramount importance to understand that the place, i.e. the seat of the arbitration, is not the same as the venue of an oral hearing. Accordingly, even if a London arbitration were to result in an oral hearing of evidence, that hearing can take place at an agreed venue other than London, for example in China, Hong Kong or any other place more convenient to the parties, e.g. where the evidence or witnesses are located.

(iii) Right of Appeal

The third and final area of unintended consequence I would like to focus on in this paper is that of the status of the arbitration award, once published. As mentioned above, many countries, including the major maritime jurisdictions in Asia outside China (Hong Kong, Korea, Malaysia and Singapore) and many others worldwide have all adopted the UNCITRAL Model Law in one form or another. The result of this is that the arbitration award is final and binding in all respects once published, subject only to the grounds available for setting aside an award provided for by the Model Law[17]. These grounds echo the grounds set out in the NYC, by which recognition and enforcement of an award may be refused[18].

By contrast, English law stands alone in offering a limited right of appeal[19]. Previous English arbitration legislation[20] offered a broad right of appeal of an arbitral award. The current English arbitration legislation very deliberately limits the right of appeal, in order to ensure that the appeal process cannot be abused, as a means to delay or defeat the enforcement of an award.

[17] Model Law 1985 Article 34
[18] NYC 1958 Article V
[19] AA 1996 s.69
[20] AA 1950

However, a limited right of appeal still exists. This right of appeal is available only in relation to a point of law and cannot be used to appeal a finding of fact. There is a high bar to overcome in order to gain access to the right of appeal, broadly requiring the agreement of either the parties, the tribunal or the court. It is not an automatic right which can be exercised by one party at will.

In this way, English law offers a limited 'safety net', with which users of London arbitration are familiar. Industry feedback indicates that it is for this very reason, namely a familiarity with and preference for the English law right of appeal, that parties are often willing to compromise on an Asian seat of arbitration other than London combined with English law. This is done in the mistaken belief that this hybrid compromise will preserve the limited right of appeal offered by the English Arbitration Act.

However, this is probably the greatest, and most frequently encountered, unintended consequence of agreeing a hybrid provision which combines a Model Law Seat with English law, in our example, a Singapore seat with English law. As discussed earlier, the law of the seat of the arbitration (in our example the Singapore International Arbitration Act) will override the (English) procedural law of the arbitration where an inconsistency arises. Singapore arbitration law, which incorporates the Model Law, provides that an award will be final and binding, with an application for setting aside being the exclusive recourse against an award. This overrides the right of appeal otherwise provided under English law by the English arbitration legislation. As a result, industry experience indicates that parties are both surprised and disappointed that their express choice of English law, including a limited right of appeal, is overridden by their choice of seat of arbitration and the *lex arbitri*.

Conclusion

In summary, the world of maritime arbitration, like most aspects of life, is one which does, and must, evolve. Where some 50 years ago a mere handful of arbitration bodies existed, in particular, CIETAC and CMAC in China, LMAA in London and SMA in New York, in the last decade or so new arbitration bodies and institutions have become ubiquitous, having sprung up to service predominantly the domestic markets of their respective countries. KLRCA, (now AIAC) in Malaysia, SCMA in Singapore and EMAC in Dubai are a few examples.

Against this background, it is only natural that parties may seek to choose from the increasingly large menu of arbitration seats, governing laws and procedural rules on offer. The aim of this paper is not to stop change but to ensure, as far as possible, that the menu ingredients chosen are not a 'clash of flavours' which leave a sour taste or give the parties indigestion. Better to be aware of the effects of one 'ingredient' on the other. There may be a good reason why certain 'flavours' are consistently paired.

Choose wisely for a sweeter result.