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Ad hoc arbitration—the LMAA's formula for success

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Arbitration analysis: Ian Gaunt, president of the London Maritime Arbitrators Association (LMAA)—the world's leading body specialising in commercial maritime dispute resolution—discusses the benefits of the LMAA's ad hoc arbitration over institutional arbitration.

What do you consider to be the advantages of ad hoc arbitration over institutional arbitration?

Ad hoc arbitration in the hands of experienced arbitrators can be a far more pragmatic and flexible form of arbitration than institutional arbitration as administered, for example, by the International Chamber of Commerce (ICC).

As an example, an ad hoc tribunal can be established in a matter of days (or even hours) and there are none of the delays associated with the agreement of ICC terms of reference. For this reason, for example, when taken with the supportive and prompt intervention of the English Commercial Court, there is no need for emergency arbitrators which may be necessary in the case of institutional arbitrations to bridge the often-lengthy time gap between commencement of the arbitration and the establishment of the tribunal. The type of intervention or supervision conducted by institutions like the ICC is frankly found by parties in the maritime industries to be cumbersome, expensive and to lead to unnecessary delays.

NOTE: For more information about ad hoc arbitration and for comparisons with institutional arbitration, see our Practice Notes: 'Ad hoc arbitration – an introduction', 'Comparing institutional and ad hoc arbitration', and 'Arbitration – institutional and ad hoc rules'.

What is the LMAA's role and where does it sit in the international commercial arbitration community?

Internationally, the LMAA is the leading body concerned with maritime arbitration, that is to say:

- traditional shipping contracts
- contracts for the carriage of goods
- construction contracts for ships and offshore structures—such as rigs and accommodation platforms

According to estimates by international law firm, HFW in a recent survey, over 80% of the world's maritime arbitrations are conducted on LMAA Terms, and most by full or supporting members of the LMAA. This equates to about 1,600 new cases commenced annually (compared with, for example, about 50 investment

treaty arbitrations in all venues). Some of the cases are small but some are very large, involving tens or hundreds of millions of dollars.

Being concerned with ad hoc arbitration, which is far and away the most favoured form of arbitration in the maritime industries, the LMAA is not an arbitral institution in the conventional sense. It is an association of arbitrators who all have specialised knowledge in the field. It also has a role in promoting terms suitable for use in maritime arbitration and in informing users about the conduct of London-seated maritime arbitration.

What features of the LMAA Terms and of the LMAA small claims procedures might institutions learn from?

The LMAA Terms as such are not very dissimilar to those of the London Court of International Arbitration, except that they do not exclude the right of appeal on points of law otherwise available in London-seated arbitrations.

It is in the implementation of the LMAA Terms and procedures where the advantage of the LMAA and ad hoc arbitration lies. One particular feature of LMAA arbitration which should be mentioned, however, is the requirement for upfront disclosure of the principal documentation on which a party relies. This can significantly reduce the time and expense attributable to often excessive disclosure in institutional arbitrations at a later stage.

One of the drawbacks of institutional arbitration in the maritime sphere relates to the appointment of arbitrators by institutions. The attitude of many of the leading institutions in cases of significant value is that they have to appoint ‘big name’ arbitrators. Unfortunately, there have been many cases where such ‘big names’ do not have the industry knowledge and experience which the parties expect, and it has proved impossible to convince the appointing institution that they need to look to specialist arbitrators and build up a panel of arbitrators who have the requisite knowledge and experience.

The White & Case Queen Mary international arbitration survey 2018 found that 80% of respondents considered that institutions were best placed to make an impact on the future evolution of international arbitration. In his keynote speech at the Singapore International Arbitration Centre Congress in May 2018, Chief Justice Sundaresh Menon spoke of the ‘ascendancy of arbitral institutions in arbitration thought leadership’ and of a ‘duty’ on the institutions to shape arbitration’s future. What is your response?

This may be true in certain sectors, but it is certainly not true in the maritime field. It is not unusual for parties to maritime contracts, in the rare event that an institutional arbitration clause has been agreed, to agree on the need to switch to ad hoc arbitration under LMAA Terms.

In his instructive address to the International Congress of Maritime Arbitrators in Vancouver in 1991, Lord Mustill drew attention to the need for those involved in different forms of arbitration to learn from one another and suggested that the considerable body of experience built up in international maritime arbitration could offer many lessons for institutional arbitration. The points made in his speech then are no less relevant today. Unfortunately, however, some of those involved in international commercial arbitration are not terribly interested in learning from what has made the LMAA so successful in the specialist maritime sphere.

How do you see the future of maritime arbitration and of London as a seat?

London is currently the ‘go-to’ place for maritime arbitration. International parties are confident in the ability of London arbitrators to deal with maritime disputes in a pragmatic, reasonably cost effective and ‘commercial’ way, relying on the vast body of English commercial law decisions which provide a certainty not available in most competing venues. Users also appreciate the availability of a right of appeal on points of law which is not generally available elsewhere. As long as this confidence in the LMAA and the English Commercial Court continues, London will remain a significant centre for the resolution of maritime disputes.

The depth of specialist legal expertise available in London is not currently available in any competing venue. This means not only arbitrators, but specialist solicitors and barristers who understand the subject matter and who are able to assist in the process of dispute resolution by negotiation as well as by formal dispute resolution thorough mediation or arbitration. As long as this continues to be the case, and lawyers keep a keen eye on cost, London will, I think, remain pre-eminent in the field.

Interviewed by Susan Ghaiwal.

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