THE LMAA IN THE 21ST CENTURY: SECURING THE FUTURE FOR LONDON MARITIME ARBITRATION

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In this paper I reflect on the current landscape of London maritime arbitrations and muse on how London and LMAA arbitration might continue to inspire and attract supporters from all over the shipping world well into the 21st century. Key to achieving this are I think accessibility, quality and renewal.

At the end of the last century, and some time into the existence of the LMAA, we saw the arrival of the Arbitration Act 1996, embedding in English law the principle of party autonomy and choice in this form of dispute resolution. With a cadre of experienced shipping arbitrators readily accessible under the umbrella of the LMAA, shipping lawyers were equipped with the tools to offer to their clients a modern, responsive and confidential way of resolving commercial disputes. Further, charterparty forms saw modernisation and under the auspices of BIMCO, more and more contain a standard dispute resolution provision, calling for referrals to LMAA arbitration where the parties opt for English law in their contract. The acronym LMAA has also it seems become common currency in the shipbroking world, synonymous with London arbitration. I now regularly see fixture recaps, with very shorthand dispute resolutions clauses, eg “arbitration London/ LMAA rules”. And this spreads beyond charterparties as traders start to bring the LMAA Terms into their sale of goods contracts. This in itself is an achievement of which the LMAA can be justly proud.

Accessibility

One of the main reasons for this spread in my view is that it is easy, quick and cheap to appoint an LMAA arbitrator. There is no need to draft a longwinded request for arbitration or pay large upfront administration fees. In terms of protecting time limits and demonstrating a claimant’s resolve to pursue a matter, it is hard to imagine an easier way of achieving this. And so people choose LMAA arbitration as an echo of the rapid, market responsive way in which they do the rest of their business.

Unfortunately, the very shorthand to which I refer above can at present result in a rather longwinded approach to arbitration via the court and I think that it is time to address this. Since the Arbitration Act provides that an arbitration agreement which does not address the question of the number of arbitrators in a tribunal is to be treated as a reference to a sole arbitrator, the use of that convenient shorthand in fixture recaps and other contracts means that parties find themselves agreeing LMAA arbitration with a sole arbitrator. Where there is a failure by one party to cooperate with the other in the agreement of an arbitrator
or his appointment, an arbitration application to the High Court is required under s18 of the Act.

The Act quite naturally takes a different approach where the parties have agreed to have more than one arbitrator: if the other side does not cooperate with a claimant seeking to constitute that kind of tribunal the claimant can eventually appoint his choice of arbitrator as sole arbitrator. This happens without the assistance of the LMAA Terms and it may seem anomalous to suggest that the Terms should seek to address failures in the appointment procedure specifically in relation to sole arbitrators. The LMAA have hitherto in their Terms avoided the question of dealing with the failure of an appointment procedure, I assume for the very simple reason that the Arbitration Act makes provision for that problem, and further because the LMAA does not hold itself out as assuming an institutional role.

However, both the Small Claims Procedure and the Intermediate Claims Procedure now provide for the appointment of a sole arbitrator by the President in the absence of agreement between the parties, so it can be seen that the LMAA is evolving in that sense. What is left therefore is the contract where the parties have agreed LMAA arbitration but without further specifics.

If the practice of inserting a shorthand reference to “arbitration London/LMAA rules” in fixture recaps continues to gain ground, then the LMAA would be offering a great service to the shipping world were the main LMAA Terms to contain a similar mechanism for the appointment of a sole arbitrator which kept the parties out of court. There is no reason in principle to distinguish between small, medium and large arbitrations in this context: if the parties have chosen the LMAA Terms as the basis of their London arbitration, the LMAA can assist in ensuring that arbitration means arbitration and not an application to court first of all. Is that too much to ask of the Association – is that too much of an additional administrative burden? I would suggest not, but this does point up to me a wider question about the role of the LMAA going forward – association or institution? - highlighted perhaps in my next points.

Quality

So, we have a 21st century LMAA which is modern and responsive in terms of speed and ease of access. How do we assure its users of the quality of the service? With more centres emulating the LMAA and looking for larger shares of the dispute resolution business I think there is more pressure to demonstrate that LMAA arbitration is an excellent choice in terms not just of speed and efficiency but also fairness and impartiality in results.

First of all, speed of response. On the whole, I think that the LMAA can be justifiably proud of their members’ response to urgent matters in the recent market turmoil and the rash of arbitrations which it has provoked. Tribunals have the procedural powers to prevent excessive delay during the progress of an
arbitration and in general these days are seen to use them. What I find depressing is the difficulty so very often encountered in trying to agree sensible directions with opponents without involving the tribunal – and that’s a problem for the users of LMAA arbitration. However one aspect of speed of response, in terms of marketing the LMAA’s 21st century responsiveness, is the time taken for publication of awards. Can the LMAA offer anything to assure parties that awards will be produced within a sensible time span, as suggested in the Terms? Clearly, finding the time for a three man tribunal to sit down together and work out/agree on their award is likely to be logistically more complex than a single arbitrator, but parties are unlikely to see it that way. Is there a role that the President or Secretary could play in cracking the whip over tardy tribunals and if required in intervening proactively to ensure that parties do not wait an unreasonable time for their award?

Next, fairness and impartiality. With awards confidential and appeals few and far between, there is little public evidence of the quality of LMAA arbitration. When the LMAAA started out, the old case stated and appeals procedure ensured that London arbitrators could be seen to be developing and applying the law, although maybe at the expense of the prolongation of disputes and the proliferation of legal costs. It is not time to lobby for a return to that state of affairs, but do we risk a perception of stasis and secrecy? This is it seems to me another aspect of the association v institution debate about the role of the LMAA. Some thoughts:

- Should we see routine publication of more statistics/information about the awards and their type published by arbitrators, in a suitably anonymous format?

- How about tracing the trends in relation to the typical tribunal – sole, three man, two arbitrators and an umpire? Or the trends in types of disputes and the sums involved? The proportion of appeals dismissed to those upheld?

- And what about a continuing quality assurance scheme for full members, based on peer review? In other words, should a full member be required at intervals to demonstrate that his or her conduct of arbitrations and award writing continues to be of a high standard? Would it send a positive message to users of LMAA arbitration if LMAA full membership were to be, say, a renewable five year tenure rather than a lifetime entry on the CV?

- Parties choose their arbitrators: they do not choose their judge. Many clients will approach an arbitration on the basis that the appointee is “their” arbitrator. Yet the Arbitration Act imposes on arbitrators a statutory duty of fairness and impartiality as between the parties. London for shipping disputes very often represents the neutral venue. So fairness and impartiality should be a major selling point. However, on a day to day basis, and when discussing the merits of appointing a particular arbitrator
with a client, it is often hard to manage the clients’ expectation that we are picking an appointee to get the right answer. I do think that in an era of ever increasing concern about the cost of dispute resolution, we should be able to persuade our clients that we can confidently agree to the choice of arbitrator made by our opponents and limit the tribunal to a sole arbitrator at a third of the cost. To achieve this I think it would be helpful to see more routine disclosure by arbitrators of previous involvements with parties or of any matters which may give rise to justifiable doubt about his or her independence or impartiality.

Renewal

Is LMAA arbitration future proofed? First of all, most arbitrators practising now were experienced and respected arbitrators when I started out in shipping litigation over twenty years ago. Do we have the next generation of arbitrators lined up for the future, and can London still offer the same range of differing qualifications? I do not know the answer to that but I believe that the LMAA could try to play a positive role in encouraging the development of maritime arbitrators. This may need some thought about the qualification process for full membership – and some thought as to whether the association might play more of an obvious recruiting sergeant role. We have all got used to the idea of assistant mediators turning up at mediations for training purposes – if assistant/pupil arbitrators were similarly visible, I think that would send out a positive message about renewal.

And finally, is it time, with the LMAA in its pre-eminent position, to move on from holding itself out simply as an association, and to acknowledge that it can and should have a wider administrative role? A light touch one, admittedly, since there is no doubt that one of the chief attractions of LMAA arbitration is the absence of a secretariat and any administrative involvement in the running of the arbitrations. But the points raised in this paper would require a slightly beefed up administration and of course that would involve some cost. Could that be met by a levy element to appointment fees? I have no idea, but I think that as part of taking the LMAA through and beyond the 21st century, this is something which the users and supporters of LMAA arbitration should be ready to explore.