GETTING OFF TO A GOOD START

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The importance of getting an arbitration off to a good start cannot be emphasised enough.

A failure to do so may:

- Enable an opponent to delay progress in the reference and increase costs by picking up on technicalities;
- Cause a claimant to have to go through the whole exercise again (in an extreme case by having to commence a new arbitration reference from the beginning), and
- In the worst case cause a claim to become time barred so that it cannot be validly pursued at all.

There is no point in having a good claim that can't be pursued.

Start the Arbitration Properly

The importance of the notice of appointment of arbitration is often overlooked. If however a notice is not given properly and in accordance with the requirements of the arbitration clause it may invalidate the entire arbitration.

Check arbitration clause requirements

For example, it is important to know how many arbitrators are to be appointed. Usually provision is made for a tribunal of three arbitrators, one appointed by each party and the third by the two appointed arbitrators. Sometimes, though, the arbitration clause may refer to just one arbitrator with the consequences that are considered below. Under the LMAA Small Claims Procedure the tribunal comprises a sole arbitrator, with the President of the LMAA making the appointment if the parties cannot agree on the identity of the sole arbitrator.

Beware, under the Arbitration Act 1996 an arbitration clause that refers to "*Arbitration in London, English law to apply*" is deemed to be an agreement to refer any dispute to one arbitrator only. If the parties cannot agree who that arbitrator will be then an application must be made to the English High Court to appoint the arbitrator. This can take months and involve significant costs. In such cases it may be worth offering to vary the arbitration clause to allow each party to appoint their own arbitrator or to apply the LMAA Small Claims Procedure.

In the case of many tanker voyage charterparties (for example the Asbatankvoy) provision is made for the appointment of three arbitrators and if one party does not participate and appoint their own arbitrator the claimant must appoint and pay for all three and the process may take up to six weeks to complete. As an alternative, there is no reason why the BIMCO Dispute Resolution clause should not be incorporated in the recap with the words "BIMCO Dispute Resolution Clause to apply, with arbitration in London and subject to English law.

Some arbitration clauses specify that the arbitrators shall have particular qualifications, for example, be a member of the Baltic Exchange, LMAA or possibly be a qualified lawyer or engaged on a day to day basis in chartering or ship operations. While it may be that a failure to make objection to the

appointment of an arbitrator with the right qualifications may preclude a party from later raising objections it might nevertheless give that party the opportunity to delay matters and increase costs if they so choose.

What happens if there is no response to the appointment of an arbitrator? It does not follow that the claimant may appoint their arbitrator as sole arbitrator. In the case of the standard NYPE arbitration clause they may do so but only after serving an initial 14 day and then a second seven day notice on their opponent.

Sometimes, though, the clause provides for a shorter or longer period before the claimants' arbitrator may be appointed sole arbitrator. Other clauses require an application to be made to the President of the LMAA to make the appointment of a second, and possibly third arbitrator or, as noted above, require the claimant to appoint the second and third arbitrators.

In each case the failure to follow the prescribed procedure may at very least delay the arbitral process.

If you want to see cases move forward swiftly pick the arbitration clause that requires the other party to appoint their arbitrator in the shortest time and then permits the appointment of the appointed arbitrator as sole arbitrator. The BIMCO Dispute Resolution Clause only allows 14 days after which the first appointing party may appoint their arbitrator as sole arbitrator if no appointment has been made by the second party.

Deferring the appointment of a full tribunal

In cases where the arbitration clause requires the appointment of three arbitrators it is common for the two appointed arbitrators to suggest to the parties that they vary the arbitration provision to defer the appointment of a third arbitrator unless or until the two appointed arbitrators find themselves unable to agree. In this way costs are kept down as it may never become necessary to appoint a third if the two arbitrators agree. Where, however, an appointment has to be made (for example, in case of a hearing) by deferring the appointment the two arbitrators are given an opportunity see for themselves the nature of the disputes and make an appropriate choice of suitably qualified third arbitrator.

Applicable law

Bear in mind also that the naming of the place (or seat) of arbitration does not automatically make the contract subject to the law of that place. Any good arbitration clause should therefore refer not only to the place of arbitration but also the applicable law of the contract.

Give proper notice of arbitration

When asking the arbitrator to accept the appointment make it clear that you are asking them to accept the appointment. An enquiry as to availability is different to a request to accept and may (if there are time bar issues) create unexpected problems.

What to include in the notice

There is more in giving notice of arbitration to an opponent than merely saying "*We appoint Mr.... as our arbitrator*". A notice of arbitration must:

- State that arbitration has been commenced and name the arbitrator appointed by the claimants (with their contact details);
- Make it clear that the party receiving the notice is required to appoint and provide details of the identity of their arbitrator.

It may be important to consider whether to be specific or not in the extent of the appointment made. Charterers, for example, will usually wish to make an appointment for "*all and any claims arising under the charter party*" to include any possible cargo claims or other claims not known at the time of the appointment. An owner, on the other hand, may wish to limit the appointment to specific claims to avoid inadvertently interrupting the time bar for cargo claims that might later be brought against them. It may not always be in a party's interest to make an appointment in respect of "*all claims*", particularly in view of a recent High Court decision that the term covers all counterclaims as well as claims. The extent of the appointment should also be made known in the request to the arbitrator to accept the appointment.

It is important to read the arbitration clause properly as some clauses require the party commencing the arbitration to give particulars of the claim when giving notice of the appointment of an arbitrator failing which, in extreme cases, the notice may be considered wholly invalid.

Service of the notice

Ideally, of course, notice may simply be served by e-mail on the other party. When parties are in dispute, however, simple solutions often go out of the window and so consideration needs to be given to any specific notice requirements contained in the arbitration clause.

Some arbitration clauses require that notice must be served on an officer of the company. This is a vague term but probably refers to a senior manager or director. It may therefore be necessary to make a company search to find who the officers of the company are: otherwise a notice served on the wrong party (for example, the opponents P&I Club) may be invalid. Alternatively, the company might be requested to confirm that notice of arbitration may be served on their lawyers/P&I Club, although clear words would be required for such a variation to the arbitration clause.

Beware, brokers and P&I Clubs are not considered as having general authority to accept notices of arbitration on behalf of their principals or members! This is an area in which particular care needs to be exercised as very often nowadays parties complain that they have received no notice of arbitration as the same was either not passed on by the brokers or the brokers had no authority to receive notices of arbitration on their behalf. Issues may also arise as to whether a notice sent merely to a generic e-mail address are effective.

Appointments made by the LMAA

In cases involving the LMAA Small Claims Procedure provision is made for the appointment of the arbitrator by the President of the LMAA if the parties are unable to agree on the appointment. As noted above, some charters also provide for the appointment of a second arbitrator by the LMAA. In such cases proof of service on the respondent will be required. It is not enough to show that notice was

given to the brokers for the fixture. Ideally notice should be served on the party themselves, failing which the broker should at least provide confirmation that they have passed on the notice to the respondent and provide the e-mail address for the respondent. In this way the President may be satisfied that the notices given by the claimant have reached the respondent who has then failed to respond.

It is suggested that such problems may be avoided by inserting a notice provision in contracts specifying to whom notices should be sent (in the same way as appears in shipbuilding contracts).