A look at the London Arbitration Scene

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Chairman, ladies and gentlemen,

Let me start by thanking the London Shipping Law Centre for arranging this evening's forum and Reed Smith for so kindly providing such a splendid venue for this occasion.

I would like if I may to take a moment to congratulate the LSLC, and in particular Aleka Sheppard, for the hard work that has been done over the years in establishing and consolidating the unique position of the LSLC in the London Shipping market, both for its important educational role but also for the important opportunity that it gives to meet colleagues and sometime adversaries away from the constraints of our offices. The LMAA has worked with the LSLC on several occasions in the past in arranging conferences and seminars and looks forward to doing so in the future.

For those of you who were at the LMAA dinner last night, I must apologise in advance if some of my comments this evening appear familiar.

As you will seen, the title of my presentation is "A look at the London arbitration scene", a working title suggested by Aleka. To people of my generation references to the "London scene" may conjure up images of the so called swinging 60s when the London was the world leader in music and fashion, Carnaby Street worth a visit and the "I'm backing Britain" campaign promoting the value of buying British.

Comparisons between that imagine of the London scene and today's London Arbitration scene seem rather tenuous. Granted, many of today's practising arbitrators maybe in their 60s but I would hesitate most advisedly before using the term "swinging" when referring to them. The one rather corny comparison that I might

venture to make is that London leads – if less glamorously - the world stage in maritime arbitration now as it did in fashion and music in the 1960s.

Recently compiled statistics record slightly more than 3,500 appointments on LMAA terms during 2014. This equates to approx 2,300 arbitrations commenced during the year. This is a significant increase from 2013 and the highest number of appointments in any one year excluding the extreme spike that followed the market collapse in late 2008. Some 584 awards were published under the terms during the same period, of which approximately 20% followed an oral hearing with the remainder being decided on documents alone. From this figure, 138 appointments were made and 74 awards issued under the Small Claims Procedure: all of this in a flat and uninspiring charter market. This suggests the London Arbitration scene is in good health.

Statistically there is no doubt that London is the world leader in maritime arbitration. You will no doubt be familiar with the reasons that have traditionally been given for this.

English contract law owes much to shipping cases and the compliment is returned now by the faith placed by overseas shipping companies in the fairness and predictability of English law when it comes to the determination of their disputes.

Over time, all of the necessary ancillary services that make up a maritime hub have developed - in the form of specialist law firms and experts in fields ranging from the technical to commercial - in support of English High Court and arbitration proceedings. This depth of expertise and knowledge is not easily replicated in other venues seeking to establish themselves as viable resolute centres.

Having said this, we cannot, and should not, underestimate the determination of other venues to develop their arbitration services.

As you will have seen from the programme, the speakers this evening will be talking about a number of the more important current issues in arbitration in London.

When considering these we should keep in mind that, notwithstanding its leading position, all of us in London (whether lawyers, experts or arbitrators) operate in a competitive market that requires better, faster, cheaper and more user-friendly service. If it is not provided that market will in time move elsewhere. There can therefore be no question of London resting on its laurels with a deaf ear to the requirements of its users.

I would like this evening, if I may, to focus on one issue in particular that it seems to me we all need to give very serious thought to, namely, that of cost.

There are a number of aspects to this.

Let me first of all consider the question of arbitrators' costs. Although in my experience the number of challenges to arbitrators' costs is relatively few, we do appreciate that law firms and P&I Clubs operate, advise and often make tactical decisions based upon the likely cost of arbitration proceedings and that the tribunals fees is one, not insubstantial, element of this. Perhaps surprisingly, this has been perceived as something of an imponderable in the past.

The standard LMAA appointment fee is, of course, widely known in the market. The chargeout rates of individual arbitrators are not, however, so widely known. We have been surprised to hear from a number of law firms and P&I Clubs that they are reluctant to ask arbitrators what their hourly rates are for fear of somehow causing offence by doing so. As an Association, and as individuals, we are perfectly happy to answer such requests and provide details of our rates. We consider it perfectly natural that before appointing any professional, a party will wish to know their rate; indeed some of our full members actually state their charge out rates in their acceptance message. No offence will (or reasonably could be) be taken as a result of any such request and we trust that by making this known the parties'

advisors in a dispute may be better placed to provide estimates to their clients of the potential cost of arbitrating a claim.

As a slight aside, I was interested to read the comment in a recent report of a leading maritime law firm that LMAA arbitrators rarely require deposits or advances for their fees. This however is something that you may expect to change in the future as users (particularly the P&I Clubs) have expressed a positive preference for regular interim billing to keep track of their expenditure, and deposits for future fees in order to monitor, estimate and manage their costs exposure (and ensure, where they represent the respondents, that funds are provided by the claimants to cover the tribunal's fees).

The main issue of costs, however, arises in relation to the costs of the parties and their advisors at the end of a case, costs that we as arbitrators are increasingly being called upon to assess.

Users around the world complain about the cost of arbitration with unfailing consistency and there is force in what they say.

First, though, we need to put the point into perspective. A report published by Queen Mary College last year noted that the cost of litigating commercial cases in London was 18% lower than the nearest competitor in the EU. The feedback that we receive also suggests that legal costs in, for example Hong Kong and Singapore, are higher than in London.

In addition, the concerns raised are more often than not directed at the 20% or so of cases that proceed to an oral hearing rather than on documents alone.

These points aren't always appreciated by those expressing their concerns but it is important that the distinction between the different types of arbitration is understood and that London's reputation is not spoiled by misconceptions as to the true level of costs in the larger number of cases dealt with on documents alone.

That said, the fact remains that costs can be mouth wateringly high.

There are, of course, different ways of reducing costs. One way to reduce costs is to streamline the interlocutory process of arbitration and to cut down on the needless correspondence and delays that can push costs up by stealth.

Following a series of recent discussions with users of London arbitration we expect to issue guidelines in the near future aimed at maintaining momentum in arbitration references by focussing more attention on the LMAA Questionnaire and the information that it contains. We shall, certainly, be casting a much more critical eye on the cost estimates included in the LMAA Questionnaire which often show significant differences between the fees of the two parties and sometimes have the appearance of being almost plucked from the sky as an afterthought with little serious attention to detail. You may expect to see requests for clarification or explanation where such discrepancies exist as we consider it important to give serious attention to costs before these really begin to escalate in each case.

As importantly, the guidelines will encourage the issue of directions promptly after the exchange of questionnaires in order to progress a case to the point of an Award in the shortest reasonable period of time rather, than, as sometimes appears to be the case, allowing the parties to languish in uncertainty once they've exchanged. We hope that by setting out a timetable in this way the element of creeping costs that can occur where cases are delayed may be avoided.

One of the questions in the LMAA Questionnaire is whether either party consider it appropriate to cap on costs in the arbitration.

About ten years ago the LMAA came very close to imposing a default provision for the capping of costs at 30% of the amount in dispute subject to the right of either party to apply to lift the costs cap ceiling.

This costs ceiling was a principle that found its way into the Intermediate Claims Procedure. It certainly seemed to us at the time a sensible default position to adopt. Perhaps a little surprisingly to us the greatest opposition to this came from the P&I and Defence clubs who felt strongly that their rights of recovery in a successful case should not be restricted. Consequently the idea was shelved.

Typically, too, the usual response to this particular question in the LMAA Questionnaire is a negative one. It seems to me however that providing a cost cap is imposed at a suitable point in an arbitration reference (and the cap need not be a cap on all fees but might be directed at certain elements of costs in a case) it is a valuable way of focussing the parties on the most cost effective ways of fighting a case.

Another way of reducing costs is by imposing strict limits on the lengths of submissions, statements and experts reports, a route we've adopted in the Small Claims Procedure. We do not, for example, really need each experts report in a dispute to set out over two/three pages the technical details and specification of the vessel that is the subject of the report and to which no further reference is made at any later stage to the report itself.

Orders focussing attention on the most essential points only (and limiting the length of submissions and expert reports) may therefore become more common in the future. We need also to consider whether it is always necessary to bring witnesses over to attend the hearing. Often this is not necessary – reflected by the surprisingly large number of witnesses who travel to London to give evidence for sometimes considerably less than one hour only.

These are some of the ways in which we, as arbitrators can influence costs. Inevitably, though, any discussion of costs leads to the question of lawyer's fees. No one would deny the talented lawyer the right to be well rewarded to the exercise of their talents. I believe though that we have come to the point where some of the charges that we see claimed for both Counsel

and solicitors cannot be sustained or justified in the context of the disputes that come to arbitration.

I am not this evening seeking to point fingers in particular directions. Clearly, though, thought needs to be given to the way that brief fees are discussed (and perhaps not even negotiated) in far too many cases at the eleventh hour by which time it is too late to change horses, even if the fees demanded appear over high.

Traditionally, Counsel's fees have been left largely untouched as disbursements on assessment. They have however now become a major feature of the concerns expressed by users overseas and so may not be treated quite so sympathetically in the future. Is it, for example, always necessary to have a junior with leading counsel? Sometimes it will be but by no means always.

Perhaps more familiarly, the duplication of time and cost where two or more solicitors, assistants and Counsel are engaged in a case proceeding on documents alone can rarely be justified (or at least indemnified) where it produces cost totals out of all proportion to the amounts in dispute: more revealing breakdowns of time are already being demanded by arbitrators, and will be so increasingly. It used, of course, to be estimated that about two-thirds up to 70% of cost claimed would normally be awarded on taxation. This is fine where the sums claimed are proportionate. It is however not uncommon now to see costs reduced by as much as 50% (or more) on assessment.

I should say that I do not consider this to be a problem that is unique to London: to the contrary, similar concerns are raised as to costs in other arbitration centres. The danger, therefore, that I perceive may not be to simply encourage a switch to other jurisdictions but to discourage parties from arbitrating at all or (as we increasingly see) to handle cases in-house rather than through lawyers. For some parties this maybe the best way forward but many others will be left with their interests naively unprotected and exposed.

Another consequence of this may be (as we are already seeing more and more) that the parties agree to extend the limits of

the LMAA Small Claims Procedure to claims and amounts far above those recommended and that were never intended when those rules were drafted and ominously for the lawyers, with low ceilings on recoverable costs.

Clearly there needs to be a fair balance but we need to find effective ways of reducing the cost of arbitration and, although we have our ideas in this respect I welcome the opportunity to hear any comments and thoughts from you in the Q&A session at the end of this evening's presentations.

Thank you.