The Standard

# STANDARD BULLETIN

SETTING THE STANDARD FOR SERVICE AND SECURITY

February 2012

# ARBITRATION SPECIAL EDITION

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IN THIS EDITION



We believe that the 15th anniversary of the entering into force of the English Arbitration Act of 1996 is a timely juncture to examine dispute resolution, particularly arbitration. The club has significant in-house legal expertise in all forms of dispute resolution options worldwide, coupled with close working relationships with all of the leading maritime law firms. Settlement may be the most attractive method to finalise a claim but, where appropriate, starting proceedings may be necessary to prompt settlement or protect a member, for example by securing proper recourse.

London continues to attract commercial parties who want to resolve their disputes in a neutral and, generally, commercially predictable jurisdiction. However, members are increasingly aware of alternative arbitration or litigation centres. Whether commercial parties choose arbitration or other Alternative Dispute Resolution (ADR) methods (including mediation or expert determination) or court litigation, it is clear that they want certainty of result and a reasonable level of costs.

There are advantages and disadvantages to arbitration/ADR and litigation. Traditionally, arbitration has been seen as being commercially orientated, private, confidential, faster and cheaper than court litigation. Commonly, arbitration tribunals are made up of one or more experienced arbitrators known to the parties. Proponents of court systems have increasingly argued that arbitration is no longer automatically faster or cheaper than court proceedings. Court judgments are public, can set precedents, allow the law to publicly develop, and therefore provide more commercial certainty for users of the court system. Court proceedings can also provide firmer interim or interlocutory measures such as injunctive relief, although senior courts may restrict their use as a means of enforcing compliance with an arbitration agreement.

Both arbitral and court practitioners and providers readily understand the benefits of an efficient dispute resolution process. Commercial entities should ensure that law and jurisdiction clauses within their contracts are clear and balanced. We discuss below several practical issues in relation to the drafting of arbitration clauses. Also, care should be taken to ensure legal costs are budgeted, controlled, justified and proportionate to the work done, time and effort employed, and expertise required.

In the following articles, we review the development of arbitration in England and Wales following the Arbitration Act 1996, and discuss practical issues flowing therefrom. We also consider the drafting of arbitration clauses and discuss the practice of arbitration in several alternative jurisdictions (Australia, China, Ireland, Hong Kong, the Middle East Region, Norway, Singapore and the US) before examining the increasing role of mediation and the EU's approach to injunctive relief in relation to arbitration agreements.

# THE ARBITRATION ACT 1996 – 15 YEARS ON

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## INTRODUCTION

The Arbitration Act 1996 (the Act) was six years in the making and its aim was not only to consolidate English arbitration law into one piece of legislation, but to clarify and modernise certain points of law (the text can be found at www.legislation.gov.uk/ukpga/1996/23/contents). For example, section 41 of the Act contains the powers of an arbitration tribunal in the event of a party's default; section 41(3) gives a tribunal the power to strike out a claim if the claimant is guilty of "*inordinate and inexcusable delay*" in the prosecution of their claim. This was deemed to be necessary, as in earlier cases, it was held that a tribunal had no power to strike out such a case under English common law.

The Act came into force on 31 January 1997 and was hailed by many legal commentators as being one of the most liberal/least restrictive and user-friendly pieces of legislation ever passed by Parliament. It uses plain English and its structure follows a logical progression.

## PARTY AUTONOMY

The Act provides for legal freedom between two contracting parties. Many of the provisions within the Act are default provisions, meaning they only apply if the parties do not agree their own bespoke provisions.

For example, in almost all matters of procedure, the "*parties are free to agree*" other arrangements if they wish. Therefore the parties are at liberty to agree how many arbitrators are to be appointed to hear a dispute, and the method by which they are to be appointed. The parties under the Act are able to agree how the arbitration is to proceed, for example, by written submissions only or by way of an oral hearing. They can also agree evidential issues, such as disclosure and what evidence is to be put before the arbitrator(s). Contrast this with the English High Court, which has compulsory rules and procedures, and strict timeframes.

The mandatory provisions within the Act (which are listed within schedule 1 of the Act) are not onerous and, indeed, often provide safeguards so as to protect the parties to the arbitration. For example, section 33(2) places a positive obligation on the arbitrator(s) appointed to '*adopt procedures...avoiding unnecessary delay and expense*'. Section 33(1) places a positive obligation on the arbitrator(s) to '*act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent…*'.

## ARBITRATION VERSES COURT PROCEEDINGS

Following the enactment of the Act, arbitration was viewed in the UK as being the best alternative to litigation. Not only were the parties free to agree much of the procedure for the arbitration process, which remained strictly private and confidential between those said parties (as did the result), but it was also viewed to be a cheaper and quicker alternative to proceeding through the English courts. Fifteen years have passed since the Act came into force. The complaint often now made is that arbitration can be just as expensive as litigation and it can take longer to get a decision than if the matter were to go to court.

## APPEALS UNDER THE ACT

Under the Act, there is very limited scope for a party to appeal a tribunal's decision to the High Court. Indeed, appeals can only be made on the basis of a tribunal's substantive jurisdiction, serious irregularity and appeals on points of law (under sections 67, 68 and 69 of the Act). For example, under section 69, a party can only obtain leave to appeal on a point of law if the question is one of '*general public importance and the decision of the tribunal is at least open to serious doubt*' or the decision made by the arbitrator(s) is '*obviously wrong*'.

## COMMENTARY

The Arbitration Act 1996 is viewed by many as having been a success in codifying the law in this area. Whilst arbitrations still have the advantage of privacy and confidentiality, they can be as slow and expensive as court litigation. However, arbitrators should remain robust and diligent when a party is late with its submissions/evidence or if the parties needlessly increase costs. Delays and wasted costs will discourage commercial parties from choosing London as their preferred arbitral jurisdiction.

Currently, London arbitration remains one of the most popular forums for dispute resolution, with the standard of arbitration awards generally being high and the impartiality of arbitrators rarely being raised as a sustainable issue.

# DRAFTING OF ARBITRATION CLAUSES

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## INTRODUCTION

The club regularly considers and advises members upon the structure and effect of their contracts of carriage. Last year, in addition to examining numerous charterparty and bill of lading contracts, the club reviewed more than 450 offshore contracts. The purpose of these offshore contract reviews was to advise members of the effect of their contractual arrangements and to highlight any contractual P&I liabilities that may expose them to risks beyond their existing cover.

It is desirable when drafting an arbitration clause to carefully consider the seat of the arbitration, the applicable arbitration rules and the composition of the tribunal to make sure the clause will effectively allow a fair resolution of disputes by an impartial, qualified tribunal without unnecessary delay or expense. We see many different formulations of arbitration clauses and we set out below some of the common questions that we are asked to consider. Tightly drafted arbitration clauses can give contractual certainty, avoid multiplicity of proceedings, prevent races to establish jurisdictions and minimise legal costs.

## WHAT IS THE 'SEAT' OF THE ARBITRATION?

The selection of the place where the arbitration will be located (the 'seat' of the arbitration) is a key element in arbitration clauses since it will determine which procedural law will govern the arbitration (unless the parties expressly choose a different law). Therefore, local arbitration regulations will govern the scope of the arbitrator's jurisdiction, the availability of interim measures, the extent of the disclosure or the right of a party to challenge an arbitral award. It also means that the local courts will have supervisory jurisdiction over the arbitration.

Commercial parties will seek a jurisdiction that will enable proper and expeditious settlement of their disputes without undue interference with the arbitral process. Historically, London has been widely accepted as an attractive neutral venue for the resolution of contractual disputes. Several jurisdictions have developed as maritime and energy hubs, and have gained favour from shipowners as alternative places for arbitrations.

We recommend that arbitration clauses are clear and concise. They should identify the city and country of the seat of the arbitration. It is possible to have hearings in a different jurisdiction from the seat of the arbitration, although this may lead to confusion. Parties may also want to specify the language to be used in the process.

## DO I NEED TO CHOOSE THE GOVERNING LAW?

If the contract is between two parties within the same jurisdiction or its performance will have a close connection with a particular jurisdiction, then generally that country's law will be the governing law of the contract. The parties to a contract can choose which law will apply to any disputes under the contract.

Arbitration clauses typically stipulate the governing law and location of the arbitration, for example English law and London jurisdiction. The parties can agree other legal systems and locations for the hearing. However, it is not always the case that the law and jurisdiction naturally follow each other. Arbitration clauses may provide for English law and Hong Kong arbitration, or arbitration in London subject to US law. Caution should be taken with clauses such as these, since arbitrator(s) will need to be appointed in the appropriate jurisdiction in accordance with the appropriate law. Clauses that 'mix' the law and jurisdiction may lead to a significant increase in legal costs as advice will have to be sought from at least two jurisdictions.

We recommend that suitable investigations are made before the parties agree to 'mix' the law and jurisdiction elements of any dispute resolution clause.

## ARE ARBITRATION RULES FIXED?

The parties to a contract can adopt various different arbitral rules. For example, they can:

- draft entirely bespoke provisions,
- evolve dispute resolution to an institution, or
- agree to existing arbitral rules and structures.

Bespoke provisions may suit parties who desire full party autonomy and who, say, may want to drastically reduce obligations in relation to disclosure of documents, forgo written arbitration awards or allow a tribunal to be composed of impartial members with the necessary expertise.

For institutional arbitrations such as those conducted by the International Chamber of Commerce (ICC, www.iccwbo.org) or the London Court of International Arbitration (LCIA, www.lcia.org), the supervising institution will administer the arbitral process and assist with certain procedural issues in accordance with its rules. The role of the institution, the cost and the level of administrative control will differ from one institution to the other. The institutional fees may make the use of such institutions prohibitive.

Contractual partners can agree to resolve their disputes on an ad hoc basis subject to a particular set of arbitral rules, for example: UNCITRAL, the London Maritime Arbitrators Association (LMAA, www.lmaa.org.uk) or the Singapore International Arbitration Centre (SIAC, www.siac.org.sg). Such ad hoc arbitrations are generally cheaper and more flexible because the proceedings are administered by the tribunal rather than by a supervisory institution, and the parties can devise the ideal procedure to settle their dispute. However, the flexibility is also a potential weakness for it depends on co-operation between the parties and their lawyers. When problems arise, the intervention of the local court may be necessary, which may then increase the legal costs incurred in resolving the dispute.

### HOW IS THE TRIBUNAL COMPOSED?

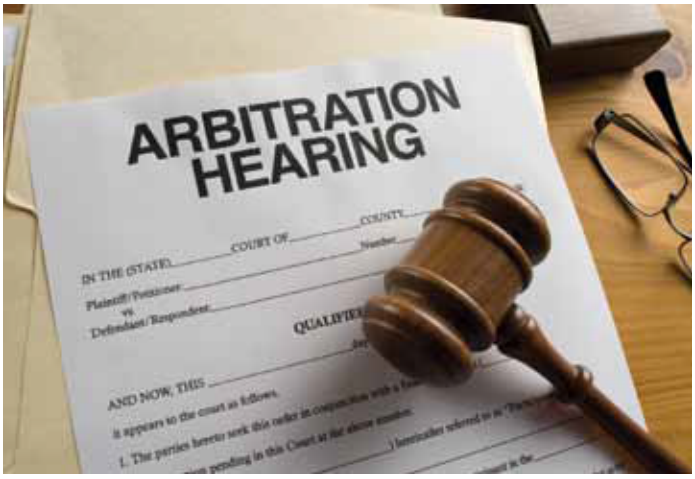
The parties may want to decide whether they want their dispute to be heard by a sole arbitrator (to be agreed between the parties or chosen by reference to the arbitral rules) or by three arbitrators (each party appointing one arbitrator, the third one being designated by the first two or as directed by the relevant rules). A larger tribunal may improve the quality of assessment and increase the parties' confidence in the arbitration process. A tribunal of several arbitrators would increase costs, but finalisation of the award (with reasons, if requested) should be faster.

### IS AN ORAL HEARING NECESSARY OR CAN WE USE 'DOCUMENTS ONLY'?

Several sets of arbitral rules set up specific 'documents only' mechanisms. For simple disputes (which may not necessarily be limited to relatively small sums), these can lead to significant cost savings, particularly if the parties are diligent in the timely production of papers. Certain disputes lend themselves more to oral hearings. For example, it may be appropriate to test witness evidence by cross-examination or the parties may feel that their case may be more attractive to commercial arbitrators if they are able to contextualise the commercial relationship by appearing before the tribunal.

### DOES THE CHOICE OF LAW OR THE DISPUTE RESOLUTION CLAUSE AFFECT MY CLUB COVER?

No. Neither our rules nor the pooling agreement requires a contract to be governed by, or be subject to, any specific law or jurisdiction. The parties are free to structure their dispute resolution clauses as needed, including the choice of arbitral or court proceedings.




# PRACTICAL AND PROCEDURAL ASPECTS TO THE ARBITRATION ACT 1996

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### STARTING ARBITRATION IN ENGLAND

The Arbitration Act 1996 (the Act) emphasises party autonomy; the parties to an arbitration agreement have a wide (but not unfettered) ability to design bespoke arbitration provisions. However, in the absence of agreement, the Act imposes a default framework. For example, section 14 of the Act explains the various ways in which arbitration can be commenced:

a) Parties can agree amongst themselves when proceedings are to be considered commenced.
b) If an arbitrator is named in the arbitration agreement, proceedings are considered commenced when one party serves notice on the other party requiring that party to submit the matter to the said arbitrator.
c) Where the parties are free to appoint an arbitrator of their choosing, proceedings are considered to be commenced when one party serves notice on the other party requiring that party to appoint an arbitrator or to agree to the appointment of an arbitrator.
d) If a person who is not a party to the proceedings is to appoint an arbitrator, proceedings are considered to be commenced when one party gives notice to that person requesting him/her to make the appointment.

Arbitration clauses often state how many arbitrators should be appointed and the relevant time limits for responding to notices of arbitration. It is crucial to adhere to any such time limits to ensure that any potential claims are not time barred. When considering how and when to start arbitration proceedings, care should be taken to closely follow the requirements of the relevant arbitration clause.

### LONDON MARITIME ARBITRATORS ASSOCIATION

When considering contracts of carriage, the club often sees standard arbitration clauses (such as the BIMCO/London Maritime Arbitrators Association (the LMAA) clause or the LMAA Fast and Low Cost Arbitration (FALCA) clause) and has experience of advising members in relation to London arbitrations. Charterparties often provide for arbitrations in accordance with terms of the LMAA. The LMAA terms can be found on their website (www.lmaa.org.uk). There are several different sets of terms, however, the majority of arbitrations would fall within LMAA Terms (1996) unless the charterparty provides for other terms to apply. For example, if the claim is for less than $50,000, this would be governed by the Small Claims Procedure (2006). The Terms are supplemented by schedules, which set out further procedural and practical issues of note.

The LMAA website is a useful tool for members' insurance managers/in-house legal representatives. It sets out the parameters and procedural steps for arbitrations from start to finish. It also explains in unequivocal language frequently asked questions and those that would practically play on the minds of claims-handlers within an owner's or charterer's operating department. The website lists all full and supporting LMAA members, setting out their experience and qualifications. It also covers issues in relation to fees and costs, interest rates and time limitations.

## COSTS AND DELAYS

Arbitration has traditionally been thought of as a cheaper and quicker method of dispute resolution than litigation. In reality, however, arbitration can still result in significant delays and expense. An arbitrator is not powerless in the face of delay by parties and can easily and quickly give directions. Parties who initially fail to comply with directions are generally safe from sanction in the absence of '*inordinate and inexcusable delay*'. However, arbitrators can order compliance, and a party's delay or non-co-operation could lead to a direction that part or all of their claim/defence is struck out or that certain evidence should not be taken into account.

Further, an arbitrator can limit recoverable costs. An arbitrator cannot be capricious and must take the nature of the circumstances of the dispute into account. However, he may direct that there should be a cap on the costs that may be recovered by the winning party and that the losing party will only be asked to pay up to the amount of the cap.

Often an arbitrator will direct the parties to declare how they intend to run an action so that he can limit costs to a specified amount sufficiently in advance of the incurring of costs. An arbitrator also needs this information in order to meet his responsibilities of '*avoiding unnecessary delay*'.

## PRACTICAL TIPS

When a charterparty is being negotiated, the parties are often concentrating on how their future co-operation will be to their mutual advantage. Often they do not concentrate on dispute resolution provisions as they do not plan to have disputes. However, arbitration clauses in the charterparty are clearly significant and care should be taken when the charterparty is being negotiated and drafted. It is normally advisable to use the standard arbitration clauses to ensure that any future disputes are expeditiously dealt with at a reasonable and predictable cost, in a jurisdiction that provides sufficient experienced and impartial arbitrators. It is prudent to seek assistance either from the club or members' preferred lawyers regarding the drafting of arbitration clauses, and also at the stage of serving notice of arbitration, to ensure that any potential claims are fully protected and are not jeopardised from the outset.

# MARITIME ARBITRATION IN THE UNITED STATES


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## INTRODUCTION

Arbitration of maritime disputes in New York has a long history. In 1826, arbitrators in New York decided a shipbuilding dispute between New York financiers and the Government of Greece in Exile, then residing in London. In 1914, the New York Produce Exchange Time Charter Party form was issued with an arbitration clause. Following World War II, the US merchant fleet transported materials around the world to rebuild the world's economy. Disputes arose and multiplied. To avoid the costs and delay of court proceedings in such a specialised industry, it became common to ask persons in the industry to decide the disputes on an ad hoc and informal basis.

In 1963, several commercial persons formed the Society of Maritime Arbitrators, Inc. (SMA) (www.smany.org) in the belief that persons in the industry are in the best position to decide maritime disputes correctly, promptly and inexpensively. During the period after World War II and the early years of the SMA, persons with disputes met with trusted peers at lunch or after work, showed them the documents, explained their cases and received a decision. This occurred often, but not always, with the assistance of a maritime lawyer.

Inevitably, the process became more formal. Parties presented more and more complex disputes to arbitrators. Lawyers became increasingly indispensable in compiling and presenting a case. Losing parties were less accepting of an adverse result. Rules were adopted (the text of the present SMA Rules can be found at www.smany.org/sma/about6-1.html). Today, many arbitrators hear cases in all-day and consecutive day sessions. Nevertheless, the commercial, informal, consensual and flexible origins of maritime arbitration in New York ripple to this day through the conduct of maritime arbitrations in New York. As formulated by recent past president David Martowski, the SMA's mission is to "get it right, expeditiously and at reasonable cost".

## COMMERCIAL ARBITRATORS

The notion that maritime disputes are best resolved by one's commercial peers remains an essential component of SMA arbitrations. SMA membership includes persons who have worked in-house for shipowners, charterers and commodity houses. Most SMA members do not have formal legal training. They are shipping executives, mariners, engineers, accountants, architects and risk managers. Lawyers in private practice are not allowed to be members of the SMA (a roster of members can be found at www.smany.org/sma/members.html).

## PROCEDURES

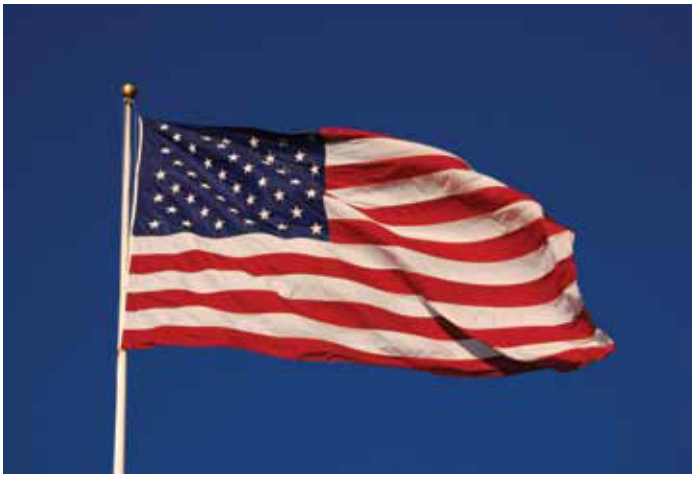
Typically, arbitration in New York is before three persons. There is no central administration and no fee to be paid to an administrator. The claiming party notifies the other side by letter that it is commencing arbitration and identifies its arbitrator. There are no formalities as to service. The defending party responds and identifies its arbitrator. The two arbitrators chosen by the parties confer and select a chairman.

Once the panel is in place, the chairman will notify the parties and ask them to advise the panel on how they wish to proceed. If hearings are contemplated a first or 'organisational' hearing will take place. Scheduling will be discussed at the organisational hearing or through an exchange of messages. Hearing dates or, if the dispute will be submitted on documents alone, dates for each party to submit its case, will be agreed. There are no formal pleadings, although often the parties will agree, or the panel will direct, that brief statements of the claims and defence be exchanged at an early stage. Depending on the nature of the dispute and the parties, the arbitrators may ask for an advance to be paid into an escrow account to cover their fees. Although not usual, a party may ask the other side to provide security for costs.

The panel has broad powers and '*shall grant any remedy or relief which it deems just and equitable, including, but not limited to, specific performance*' (SMA Rules, Section 30). These powers even include the power to direct a party to provide security for the merits of a claim. While this power is sparingly used by the arbitrators, it has been exercised in appropriate cases and is enforceable by the court as a 'final' award on that issue.

'Discovery' prior to hearings is not as broad as it is in a US court prior to trials. Unless the parties agree, there are no pre-hearing depositions; witnesses are examined under oath in the presence of the arbitrators. Documentary discovery is less broad as well. The parties make requests for documents. If the other side objects, the panel decides whether the document or category of document should be produced. Maritime arbitrators in New York are aware that the broad discovery devices in US court proceedings can be abused. In arbitration, a party must be prepared to justify why it believes a document, or category of document, is relevant and material to its case or defence.

It is increasingly common for both sides to be heard more or less at one continuous set of hearing dates, as is usual in court or in arbitrations in London. The arbitrators will accept evidence by affidavit. If the witness is an important one for the claimant or the defence, the arbitrators will expect the party to present the witness live and for cross-examination by the other side as well as by the arbitrators.



The panel will ensure that the process is fair to both parties. A court reporter is present at all hearings and generates a transcript of what is said. Once the evidentiary phase is closed, the parties will exchange main and reply briefs.

The parties always have the option to refer the dispute to mediation. The panel chosen to decide the dispute does not typically become involved in any mediation because one or both of the parties may concede points during the mediation process. This could affect the views of the arbitrators in the event the mediation fails and the arbitrators have to decide the merits.

## AWARD

After deliberation, the arbitrators will issue their award on the merits. The arbitrators have the power to award the prevailing party its costs, including attorney's fees and the fees of the arbitrators. The decisions on the merits and the amount of costs are decided at the same time in one award. Although it is at their discretion, SMA arbitrators today routinely make an award of costs and fees to the prevailing party, often in substantial amounts.

## FINALITY

It is rare for a commercial or maritime arbitration award in New York to be vacated on any basis, and the parties can be reasonably confident that the award will, in fact, be a final resolution of their disputes. The grounds for setting aside an award are limited by statute and/or the grounds stated in the UNCITRAL Convention on the Recognition and Enforcement of Foreign Arbitral Awards (www.uncitral.org). Courts have interpreted and applied the grounds strictly in such a way as to favour the finality of arbitration awards. This is especially the case with commercial and maritime arbitrations. Such grounds include fraud/corruption, evident partiality (requiring proof of actual bias), refusal of the arbitrators to hear '*material and pertinent*' evidence, and where the arbitrators exceed their powers under the terms of the reference. In the case of an award governed by the UN Convention, an award may be vacated if it '*violates public policy*'. Generally, US courts do not review commercial and maritime awards for '*errors of law*'.

## PUBLICATION OF AWARDS

In contrast to other arbitration centres, arbitration awards issued by SMA arbitrators in New York are published and available online and in printed form. This is in keeping with the original guiding idea of the SMA that parties to a dispute are seeking peers to review their actions and the language of their contracts. Accordingly, all persons in the industry benefit by learning how peers interpret the language of commonly used contracts and the actions of persons involved in a maritime dispute or casualty. If, however, the parties wish to keep their dispute and its result confidential, they may agree to do so. More than 4,000 awards are available for review. A panel of arbitrators is not 'bound' to follow the decision of a prior panel.

## CONSOLIDATION

If the arbitration agreements in the chain of charters are subject to the SMA Rules, the parties in such a chain have agreed '*to consolidate proceedings relating to contract disputes with other parties which involve common questions of fact or law and/or arise in substantial part from the same maritime transactions or series of related transactions*'. This rule streamlines proceedings and reduces costs.

## ALTERNATIVES TO SMA ARBITRATION

While most maritime arbitrations in the US involving international parties occur under the auspices of the SMA, there are other organisations in New York and elsewhere in the US that deal with resolution of maritime disputes. The American Arbitration Association (AAA) (www.adr.org) conducts arbitrations in practically any field. By contrast to the SMA, the arbitrators are typically practicing lawyers, the arbitration is administered, for which a fee must be paid, and the awards are not published. In Houston, the Houston Maritime Arbitrators Association (HMAA) is active (www.hmaatexas.org). Its members include commercial persons as well as practicing attorneys.

## CONCLUSION

Arbitration of maritime disputes is alive and well in the US and New York. The arbitrators are skilled and experienced, as is the maritime bar. The procedures are easily tailored to the needs of the particular dispute without needless formality. Consolidation of disputes among parties is available and cost-effective. The prevailing party is awarded its costs, including attorney's fees, and awards are final. Publishing the awards has created a culture of transparency and predictability for users, lawyers and arbitrators. Accordingly, arbitration in the US remains an important option for anyone in the maritime industry to consider.

# GROWTH OF ARBITRATION IN SINGAPORE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## INTRODUCTION

With the rapid growth of most Asia-Pacific economies, Singapore has continued to see a steady increase in the number of international arbitrations. Apart from the general trend towards alternative dispute resolution, the growth of arbitration in Singapore was encouraged by the Singapore government to promote Singapore as a centre for international arbitration. With further liberalisation of the legal sector in Singapore, it is likely that Singapore will continue to grow as an arbitration hub. As Standard Asia is based in Singapore, with a team of seven claims-handlers, we are well placed to assist our members in any disputes that are referred to arbitration in Singapore.

## LEGAL FRAMEWORK

The first major step was the creation of a legal framework within which international arbitration could flourish. Singapore acceded to the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards (the New York Convention) on 21 August 1986, making Singapore arbitration awards enforceable in over 140 countries worldwide.

This was followed by the establishment in 1991 of the Singapore International Arbitration Centre (SIAC) as Singapore's main arbitration institution. On 31 October 1994, Singapore adopted the 1985 UNCITRAL Model Law on International Commercial Arbitration (Model Law) when it enacted the International Arbitration Act. In 2004 the Singapore Chamber of Maritime Arbitration (SCMA) was established within the umbrella of the SIAC. It now acts independently from the SIAC. The aim of the SCMA is to provide a framework for maritime arbitration which is responsive to the needs of the maritime community.

## SCMA

As of May 2009, the SCMA has been reconstituted as a company separate from the SIAC. This marked a departure from the International Chamber of Commerce (ICC) model, which proved unpopular with the maritime community which prefers a model similar to the London Maritime Arbitrators Association (LMAA), where the arbitration body does not manage the arbitration process.

The advantages of the SCMA:

- It presents an arbitration framework that reflects the needs of users; membership is open to all companies and individuals involved in maritime business or academia.
- It adopts rules familiar to the maritime community; the SCMA rules follow the approach of the LMAA.
- Although the SCMA has a panel of available arbitrators, parties can choose anyone they wish to arbitrate.
- The SCMA does not have a mandatory scale of arbitrator's fees: it is for the parties to agree rates with the arbitrator.

- A claimant commences arbitration by serving the claim on the respondent. There is no need to submit papers to SCMA.
- The SCMA is not involved in the management of the arbitration but is available to facilitate the process and so no management costs are charged by SCMA.
- There is a presumption of a panel of three arbitrators, but parties can agree on a sole arbitrator if they choose.

### LEGAL PROFESSION ACT

Restrictions on foreign lawyers representing parties in arbitration in Singapore were removed in 2004 under the Legal Profession Act. Previously, foreign lawyers could only participate in arbitration proceedings in Singapore where the applicable law of the contract was not the law of Singapore. Foreign lawyers now have unrestricted representation in arbitration proceedings in Singapore. Members who arbitrate in Singapore are therefore free to engage lawyers of any nationality.

Law Minister Mr K. Shanmugam recently reiterated Singapore's commitment to arbitration and said that Singapore will constantly re-examine its legal regime to ensure that it is arbitration friendly. He pointed out that Singapore has ensured that the legislative framework is "supportive of arbitration" and "has adopted international best practices".

### ATTITUDE OF THE COURTS

These developments have been reflected in a judiciary that is supportive of arbitration and generally loath to interfere. According to the SIAC, courts in Singapore 'offer maximum judicial support of arbitration and minimum intervention granting parties full and consistent support in the conduct of international arbitration'.

The court generally will not usurp the role of the tribunal and will only intervene sparingly and in very narrow circumstances, for example where the arbitral tribunal has no jurisdiction to grant the relief sought (Court of Appeal decision in *NCC International AB v Alliance Concrete Singapore Pte Ltd [2008] SGCA 5*).

Furthermore, the courts generally have no discretion and must grant a stay of court proceedings in favour of arbitration unless 'the arbitration agreement is null and void, inoperative or incapable of being performed'.

Once an award has been made it is readily enforceable by the Singapore courts. Enforcement of an arbitration award in Singapore by way of execution proceedings requires the leave of court, and such leave is often granted without notice.

The grounds for setting aside an award are limited. If an application to set aside an award has been made, the court has no power to investigate the merits of the dispute or to review any decision of law or fact made by the tribunal.

### OPENING OF MAXWELL CHAMBERS

The pro-arbitration movement culminated with the formal opening of the Maxwell Chambers on 21 January 2010. It is the world's first integrated dispute resolution complex, which houses state-of-the-art facilities for arbitration hearings, boasting 14 custom-designed and fully equipped hearing rooms, with a full suite of recording, translation, transcription and video-link systems for overseas witnesses. There are a further 12 preparation rooms secured by a private lift lobby not accessible to the public.

Apart from the SCMA and SIAC, various other international arbitration institutions are also housed in Maxwell Chambers, including the Permanent Court of Arbitration, the American Arbitration Association, the International Court of Arbitration of the International Chamber of Commerce and the Arbitration and Mediation Centre of the World Intellectual Property Organisation.

# ARBITRATION IN THE PEOPLE'S REPUBLIC OF CHINA


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Arbitration proceedings are governed by the Arbitration Law 1995 and the Civil Procedure Law 1991, which are not based on the UNCITRAL Model Law, but are similar in scope.

Maritime arbitration is usually conducted under the Rules of the China Maritime Arbitration Commission (CMAC). The Commission is based in Beijing, but has branches in a number of locations throughout China, including Shanghai.

CMAC is an 'administered arbitration' scheme and arbitration is commenced by notice to the CMAC. Generally ad hoc arbitrations held in China are invalid, but it is possible to enforce the awards of foreign ad hoc arbitrations in China. China has ratified the New York Convention.

There is a scale of fees for commencing and thereafter continuing the arbitration. The arbitrators must be chosen from a panel of arbitrators numbering over 200. The parties can choose from the panel or ask the chair of CMAC to appoint. Normally three arbitrators are appointed, with one chosen by each party and the presiding arbitrator jointly appointed, but a sole arbitrator is appointed for cases below Yuan 1 million. The scale of fees is a percentage of the sum in dispute and includes the cost of the arbitrators, but there is facility for an increase in costs for arbitrators' special remuneration, experts and expenses. The losing party is liable for the arbitration costs and the Tribunal can award legal costs against the losing party. The arbitral award is required to be issued within six months of the establishment of the Tribunal, unless a special request for an extension is made to CMAC. The award is final.

If one of the parties to the contract is foreign, the contract can be subject to a foreign law. Foreign lawyers may also appear in a CMAC arbitration. Under the UNCITRAL Model Law, the Tribunal has the power to order interim measures such as freezing assets or preserving evidence. Under Chinese law, interim measures must be ordered by the Courts. Therefore, a party must apply to the Tribunal for an interim measure and, if approved, the CMAC may apply to the Court. However, the Chinese courts often require counter security from the applicant and these can sometimes be equivalent to the amount of the claim.

# ARBITRATION IN HONG KONG

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Hong Kong Arbitration Ordinance 2011 provides legislative support for arbitration in Hong Kong, based on the UNCITRAL Model Law. The law for domestic and international arbitration is now unified.

Administered arbitration may be conducted under the Rules of the Hong Kong International Arbitration Centre (HKIAC), ICC or the parties can agree ad hoc arbitration under UNCITRAL Rules of Arbitration or whatever rules they chose. Where the parties have agreed an ad hoc arbitration, the HKIAC may appoint arbitrators where the parties have failed to agree, have not designated an appointing authority or the designated authority has failed to appoint. As the statutory default appointing authority, the HKIAC may also be requested to decide on the number of arbitrators if the parties have not, or are unable to agree, on this.

If the HKIAC Administered Arbitration Rules apply, arbitration is commenced by notice to the HKIAC. A registration fee is payable. The parties may choose their arbitrator(s) and the HKIAC is required to confirm the appointment. The arbitrator does not have to be on the HKIAC panel. If the parties cannot agree, the HKIAC will appoint. A fee is payable to the HKIAC for administering the arbitration and this is a percentage of the sum in dispute. The parties can agree to apply a HKIAC scale to the fees of the arbitrators or each appointing party can agree with the arbitrator an appropriate fee. The parties can chose the law of the dispute and foreign lawyers or other persons can represent the parties.

The Tribunal may order interim measures. The award is final and not subject to review on the merits, except where the arbitration agreement between the parties expressly states that an appeal can be made on the grounds that an arbitrator has made an error of law or misconduct by the arbitrator. The New York Convention applies to Hong Kong.

The Hong Kong Maritime Group provides a list of arbitrators with experience of maritime disputes. Its members are happy to conduct HKIAC Administered Arbitration Rules arbitration, but also ad hoc arbitrations or rules based on LMAA.

# ARBITRATION IN IRELAND

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## INTRODUCTION

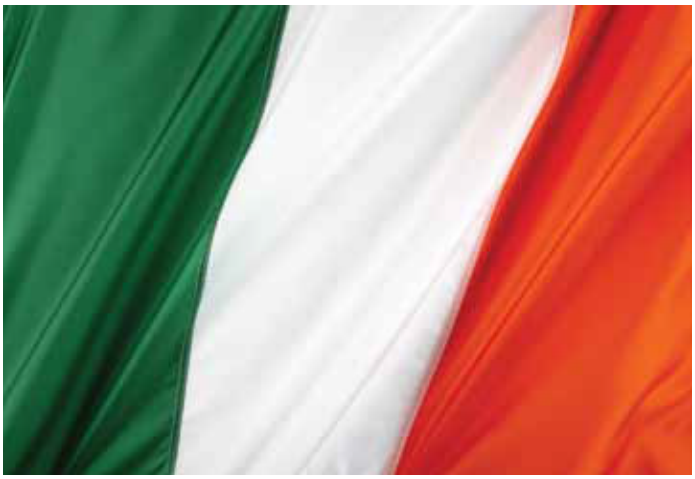
We review the development of arbitration in Ireland and focus on the arbitrators' powers in relation to the conduct of an arbitration before looking at hearings, awards, appeals, costs and enforcement.

## STATUTORY DEVELOPMENT

Ireland has a long history and tradition of resolving disputes by arbitration and by its predecessor systems under its ancient laws. The Arbitration Act 1954, as amended by the Arbitration Act 1980, was very closely modelled upon the UK Arbitration Act 1950 (which has been replaced by the UK Arbitration Act 1996) and was the principal source of arbitration law in Ireland up to the passing of the Arbitration Act 2010 (the 2010 Act), which became operative on 8 June 2010 (www.irishstatutebook.ie).

The 2010 Act sets out a new regime for arbitrations in Ireland and repeals all prior legislation dealing with arbitration. Whilst Irish law operated a dual approach previously, with different regimes applying to domestic and international arbitrations, the new Act applies the UNCITRAL Model Law (Model Law) uniformly to all arbitrations. Indeed, the 2010 Act imposes a number of important changes to the way in which arbitrations, particularly domestic arbitrations, were previously conducted. A key objective of the new legislation was to standardise and modernise arbitration law in Ireland, as well as making Ireland a more attractive venue for international arbitrations.

The court's ability to intervene in the arbitral process has been dramatically restricted by the 2010 Act and time will tell what approach the courts will take in cases of apparent injustice where the 2010 Act provides that they shall not interfere.



A further departure contained in the 2010 Act relates to the number of provisions that apply unless otherwise agreed by the parties. It is essential therefore to be aware of the provisions where the parties can come to an agreement as well as the default position. Where there has been no agreement between the parties, default procedures will apply.

### TRIBUNAL CONSTITUTION

An arbitration agreement must be in writing, which includes any electronic form, or through pleading in a statement of claim that is not denied by the respondent. An arbitration clause may be incorporated into a contract by reference. An arbitration commences either on the date the parties agree that it commences on or on the date when a written request to refer the matter to arbitration is received.

Unless the parties agree otherwise, the default position is for one arbitrator to hear the dispute. If there is no agreement on the choice of arbitrator, the court will appoint one, having regard to necessary qualifications and their independence and impartiality. A party may, in writing, challenge the appointment of an arbitrator within 15 days. The only basis for challenging an arbitrator is impartiality or lack of qualifications.

If an arbitrator cannot or will not perform their duties without undue delay, then their mandate will terminate if:

- the arbitrator withdraws, or
- the parties agree to terminate, or
- the court orders termination on an application by a party.

### ARBITRATORS' POWERS

Unless the parties agree otherwise, an arbitrator can:

- require evidence to be given on oath and may administer that oath,
- award interest, either simple or compound,
- award security for costs, although costs will not be ordered against a party solely because they are outside the jurisdiction,
- order specific performance of a contract (other than for the sale of land), and
- order a losing party to pay the legal costs of the winner.

An application to court to stay proceedings must be granted if the application is brought before the party submits its first statement of the substance of the dispute, unless the court holds that the arbitration agreement is void or of no effect.

The arbitrator can conduct the proceedings as they see fit within the Model Law and they can determine the admissibility, relevance, materiality and weight of any evidence. However, the parties must be treated equally and given a full opportunity to present their cases. All statements, documents or other information supplied by one party to the arbitrator must be communicated to the other party.

Pleadings must be delivered within time limits set by the arbitrator. A party may amend its pleadings, unless the arbitrator considers that inappropriate on the grounds of delay. If without showing sufficient cause, a claimant fails to deliver their statement of claim on time, the arbitrator can terminate the proceedings. If the respondent fails to deliver a defence, the arbitrator can continue with the case without taking the failure to deliver a defence as an admission.

### COSTS

The parties have the option of agreeing the costs arrangement. However, in the absence of agreement, the arbitrator is at liberty to decide the level of costs paid by each party.

### HEARING AND AWARD

The arbitrator decides whether to hold an oral hearing or conduct the arbitration on documents only, but if a party requests an oral hearing, there must be one, unless there has been a prior agreement to the contrary. An arbitrator may appoint an expert and may require the parties to supply that expert with information or documents. The parties may examine the expert on their report.

If the dispute settles, the arbitrator will terminate the proceedings and may, if requested, record the terms as an agreed award, which has the same status as any other arbitral award. An arbitral award must be in writing and it must be signed, dated and state the place in which it is made. The award must set out reasons, unless the parties have agreed otherwise. The arbitrator will give a signed copy to each party.

### APPEALS

A party has 30 days within which to ask the arbitrator to correct an error (computational, clerical or typographical) or to give an interpretation of a part of an award.

The only recourse against an award is an application to the High Court to set it aside on very specific grounds, including incapacity, invalidity of agreement, party not being given proper notice of the arbitration or their inability to present their case. An application to set aside must usually be brought within three months. There is no appeal from the High Court's decision on any matter.

### ENFORCEMENT

An arbitral award is enforceable either by action or leave of the court in the same way as a judgment of the court. An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the competent court, shall be enforced, unless it can be brought within the terms of the grounds for refusing recognition or enforcement of an arbitral award.

### COMMENTARY

Given that arbitration is a private forum, there is necessarily an absence of authoritative information on how many arbitrations happen in Ireland and how satisfactory a process it is for those involved in it. The expectation is that there will be an increase in arbitrations in the future now that the 2010 Act is in force. Ireland is well placed as a venue for international commercial arbitration due to its location, language, neutrality, legal framework, and the relevant skills and facilities it offers to parties to international disputes. The policy behind the 2010 Act is to severely restrict the grounds for court interference in the arbitral process in favour of party autonomy, and it is considered that this will make Ireland a significantly more attractive venue for international commercial arbitration.

# ARBITRATION IN AUSTRALIA

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Several recent reforms to Australia's International Arbitration Act 1974, and the establishment of a local maritime dispute resolution body, have resulted in Australia becoming an attractive alternative seat for arbitration. Members trading to Australia and the Asia-Pacific region, or undertaking projects in Australia's burgeoning offshore oil and gas industry, might therefore wish to bear Australia in mind as an arbitral forum when negotiating arbitration agreements in their contracts.

## LEGAL FRAMEWORK

International arbitration in Australia is regulated by the International Arbitration Act 1974 (IA Act), which incorporates the UNCITRAL Model Law on International Commercial Arbitration into Australian law. Each of Australia's seven States, and its two Territories, also have their own Commercial Arbitration Acts, which govern domestic arbitration.

## RECENT REFORM

Prior to 2010, there was some confusion in Australia regarding the interaction between the IA Act and the State and Territory Commercial Arbitration Acts, and whether international disputes could be resolved under the latter. There was also wider scope for a court to refuse to enforce foreign arbitral awards. This hampered Australia's efforts to become an attractive centre for arbitration.

Recent reforms, however, have made it clear that the IA Act is now the exclusive law governing international arbitration in Australia. Furthermore, the amended IA Act now provides a narrow and exhaustive list of grounds upon which a court may refuse to enforce an arbitral award, namely:

- the party challenging the award was under some incapacity at the time the arbitration agreement was made,
- the arbitration agreement is not valid under the law of the country where the award was made,
- no proper notice of the appointment of the arbitrator or the arbitration proceedings was given to the challenging party,
- the award is beyond the scope of the arbitration agreement,
- the composition of the arbitral tribunal was not in accordance with the arbitration agreement,
- the award has not yet become binding on the parties or has been set aside or suspended, and
- to enforce the award would be contrary to public policy.

Parties now have more certainty and can feel comfortable that an arbitral award will not be set aside by a court in Australia unless one of the conditions above can be satisfied. This engenders confidence that international arbitration in Australia will offer finality of result and will not merely be the first step in a protracted dispute resolution process that goes on to be fought out in court.

## ARBITRATORS' POWERS

Another feature of the new IA Act is the ability of parties to opt to have arbitration proceedings consolidated, thereby reducing costs, and to only disclose confidential information in limited circumstances. Unless the parties otherwise agree in their arbitration agreement, arbitration tribunals can also now:

- order a party to pay security for costs,
- order a party to pay interest if the amount of the arbitral award is not paid by a certain date,
- limit the amount of costs that a party is to pay to a specified amount,
- make orders allowing a party to inspect, photograph or conduct experiments on evidence, and
- allow a party to apply to a court to obtain subpoenas requiring a person to produce documents to the tribunal or to appear for examination before the tribunal.

Parties should therefore consider these various 'opt-in' and 'opt-out' provisions when negotiating arbitration agreements in their contracts in order that their choices are clearly reflected. In addition, the new IA Act gives Australia's international arbitration institution, the Australian Centre for International Commercial Arbitration (ACICA), the power to appoint an arbitrator in cases where:

- a party fails to appoint an arbitrator within 30 days of a request to do so, or
- the parties cannot agree on the appointment of an arbitrator, or
- an arbitration panel is to be made up of three arbitrators and the two appointed arbitrators cannot agree on the appointment of the third arbitrator, or
- an arbitral institution fails to appoint an arbitrator as required.

The previous practice had been to give this function to the courts. Giving ACICA these powers avoids the additional costs and delay in having to apply to court.

## LOCAL DISPUTE RESOLUTION BODIES

Both the Australian Maritime and Transport Arbitration Commission (AMTAC) and the Maritime Law Association of Australia and New Zealand (MLAANZ) maintain registers of maritime arbitrators, have their own arbitration rules and model arbitration clauses. They each provide an expedited and streamlined service, known as the 'rocket docket' procedure, for disputes involving sums of less than A$100,000 and can deliver a final arbitral award within three months from the commencement of arbitration proceedings.

## COSTS

Costs can be awarded to the winning party, but these are subject to the tribunal's discretion.

## COMMENTARY

Australia is an alternative place for arbitration with sufficient numbers of suitably qualified lawyers and arbitrators. Sound infrastructure is now in place for maritime dispute resolution in the form of ACICIA, AMTAC and MLAANZ. There are also strong indications that the amendments to the IA Act are already leading to more certainty for parties who arbitrate in Australia and are lowering costs. For example, Australian courts have recently:

- upheld arbitral awards made as far afield as Uganda,
- shown a clear intention to uphold even widely drafted arbitration clauses, and
- ordered indemnity costs against a party who sought to oppose the enforcement of an arbitral award made against it.

Parties can therefore be more confident that arbitration in Australia will offer finality of result in settling their disputes.

# THE NORWEGIAN ARBITRATION ACT

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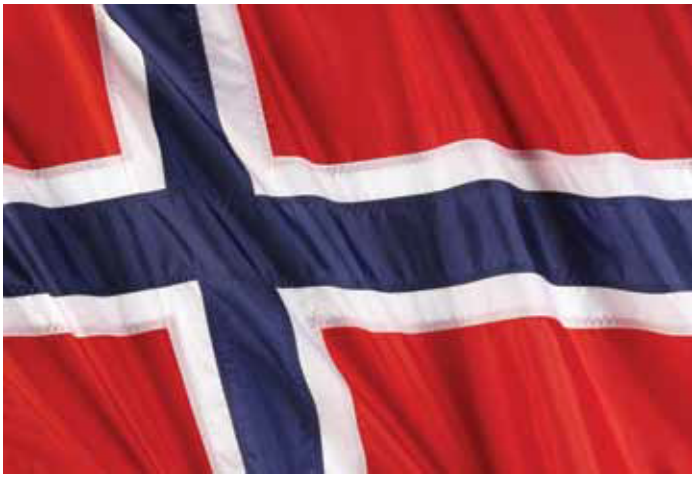
## INTRODUCTION

We have had recent experience of dealing with a member's successful arbitration in Norway against hull underwriters. The case illustrated rapid dispute resolution in which the tribunal applied principled logic in coming to the correct interpretation of a standard loss-of-hire form.

## CURRENT LEGISLATION

Arbitration in Norway is governed by the Norwegian Arbitration Act of 2004 (the Act), which came into force on 1 January 2005. Norwegian courts recognise and enforce valid arbitration agreements. The main features of the Act are highlighted below.



- The Act is based on UNCITRAL's Model Law on International Commercial Arbitration.
- There is no requirement that the arbitration agreement must be in writing.
- The Act provides a framework for arbitration. However, the parties are free to choose which provisions of the Act are to apply.
- It applies to both domestic and international arbitration, as long as the proceedings are conducted in Norway.
- It has default provisions on:
  - the appointment of the arbitral tribunal,
  - the conduct of the arbitral proceedings,
  - the liability for costs of the proceedings,
  - the arbitral award,
  - claims for invalidity and setting aside of arbitral awards, and
  - recognition and enforcement of arbitral awards.
- The parties must agree on whether the arbitration and award are available to the public or are kept confidential.

The choice of procedural rules is still mainly left to the discretion of the arbitral tribunal. Consequently, if the parties wish to influence the applicable procedural rules, they have to agree upon such rules in the arbitration agreement or in a subsequent agreement. The parties could agree to use the Arbitration Rules of the Oslo Chamber of Commerce (www.chamber.no).

## TRIBUNAL CONSTITUTION

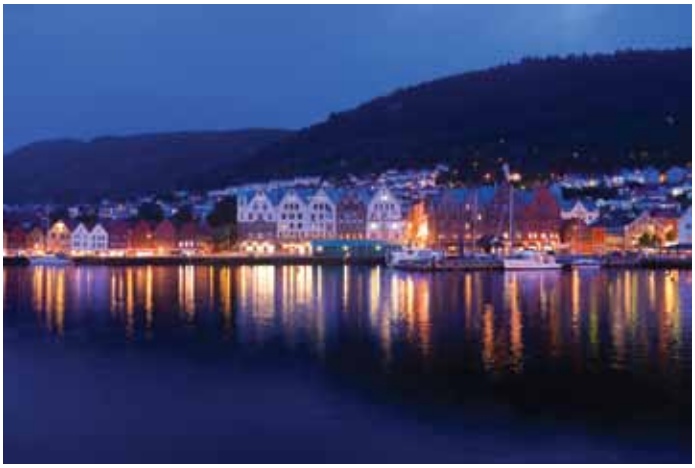
The Act provides for three arbitrators to form the tribunal, although this can be altered by agreement. If the parties cannot agree upon the appointment of all three arbitrators, each party shall (within one month) appoint one arbitrator and these two arbitrators shall subsequently (within one month) appoint the third arbitrator. The third arbitrator will be the chairman of the tribunal. If any party fails to appoint its arbitrator, or the two party-appointed arbitrators fail to appoint the third arbitrator within the set deadlines, each party may request the local District Court to appoint the remaining arbitrator(s) of the tribunal. Any arbitrator of the tribunal shall be qualified for the assignment, be independent of the parties and be free of bias.

## RECOGNITION OF FOREIGN AWARDS

The Act also has provisions on the recognition and enforcement of foreign arbitral awards. In principle, any foreign arbitral award may be recognised and enforced in Norway if it meets the relevant requirements under the Act. In order to enforce a Norwegian arbitral award in another contracting state, the provisions of the New York Convention have to be met, including the requirement that the arbitration clause must be in writing.

## COSTS

Often each party will bear its own legal costs and expenses. However, it is possible for a successful party to seek a recovery of their legal costs and expenses. The club recently supported a member in an arbitration in Norway. The member pursued a claim against a local Norwegian insurer under a loss of hire policy. The member was awarded 100% of the claim and 100% of their Norwegian legal costs. In this case, the entire costs of the proceedings (including the arbitration deposit fees and the lawyers' costs) were expensive. There was never any guarantee that any costs would be awarded. The case highlights the need to seek prompt advice from suitably qualified local lawyers whilst being aware of the risk of incurring potentially irrecoverable legal fees.



^ Bergen, Norway

# ARBITRATION IN THE MIDDLE EAST

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## INTRODUCTION

Arbitration in the Middle East has, until recently, been problematic. Dispute resolution procedures were generally not in line with international standards, and enforcement of legal rights was unpredictable. However, the recent development of arbitration centres in countries in the Middle East has highlighted the Middle East as a potential viable option for arbitration and dispute resolution. Such regional arbitration institutions include the Cairo Regional Centre for International Commercial Arbitration (CRCICA), the Abu Dhabi Commercial Conciliation and Arbitration Centre, the Bahrain Arbitration Centre and the Dubai International Arbitration Centre (DIAC).

In 2006, the UAE adopted the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), with several other Middle Eastern States following suit. 2008 was a significant year in firmly establishing UAE and in particular Dubai as legitimate options for arbitration. In that year the UAE federal government drafted a new arbitration law. The Dubai International Financial Centre (DIFC) enacted a comprehensive and jurisdictionally inclusive new arbitration law. Additionally, the partnership between DIFC and the London Court of International Arbitration creating the DIFC – LCIA Arbitration Centre.

## SHARIA LAW

In order to fully comprehend the arbitration systems in the Middle East, it is important to acknowledge the significance of Sharia (Islamic law) in all aspects of Middle Eastern law and society. Arbitration has been practised in the Middle East since the early days of Islam, with reference made to arbitration in two of the main sources of the Sharia: the Koran and the Sunna. The adherence to Sharia law has in some cases resulted in the separation of religious and civil codes, with the result that some countries (for example, Yemen, Jordan and Kuwait) allow the parties to choose which code should be applied by the arbitrator. Those countries that have not opted to separate arbitration from Sharia law administer arbitration with strict adherence with Sharia principles. Anyone considering a country in the region as a possible arbitration location should therefore investigate carefully which type of system is applied.

## ENFORCEMENT OF FOREIGN AWARDS

Enforcement of foreign awards is becoming more straightforward as more countries adopt the New York Convention. It severely restricts the ability of a country to refuse to enforce a foreign award. One exception, however, that has been invoked by many Middle Eastern countries, most notably in Saudi Arabia, is the possibility of repudiating a foreign award that is 'contrary to the public policy' of the country in which enforcement is sought. An encouraging recent development occurred in the Dubai court of first instance, which ordered the recognition and enforcement of a London Arbitration Award under the New York Convention. The defendant had contested the proceedings, calling on the court to invalidate the award on technical grounds that are strictly applied to domestic awards under the UAE civil procedures law. The Dubai court dismissed the defendant's counterclaim for lack of jurisdiction and ruled that the civil procedures law invoked by the defendant apply only to local awards.

## MODERNISATION INITIATIVES

Due to the application of Sharia law, the occasional unpredictability of enforcement of foreign awards and the perception that the developments made are relatively recent, many foreign investors will not consider the Middle East when considering where to seat their arbitration. In an effort to attract foreign arbitration, many Middle Eastern countries have taken steps to reform and modernise their arbitration laws and practice. Measures range from the adoption of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (as undertaken by Bahrain, Iran, Jordan, Oman, Egypt and Tunisia), the adoption of western arbitration models (as in Qatar and Lebanon) and the opening of additional arbitral institutions, such as the International Arbitration and Conciliation Centre in Qatar and the DIFC-LCIA Arbitration Centre in Dubai, which supplement well-established centres such as CIRCICA and DIAC. Most recently, Bahrain partnered with the American Arbitration Association to launch the Bahrain Chamber of Dispute Resolution (BCDR-AAA). The new legislation guarantees that disputes heard at the BCDR-AAA will not be subject to challenge in Bahrain, provided the parties agree to be bound by the outcome.

## DUBAI CASE STUDY

Possibly one of the most interesting case studies relating to the development of a viable arbitration system relates to Dubai. The Dubai International Financial Centre (DIFC) was established following the 2004 amendment to the UAE Constitution allowing for the creation of a financial free zone. By government decree, DIFC is exempt from UAE civil and commercial laws and regulations. A new DIFC Arbitration Law enacted in 2008 is based on the familiar UNCITRAL Model Law. The 2008 law creates a legislative platform for comprehensive dispute resolution and is applicable equally to civil and commercial arbitration, both international or domestic. This is an extension of the 2004 DIFC law, which applied only to disputes and transactions having some connection with the DIFC. Broadening the scope of the DIFC by eliminating jurisdictional restrictions, coupled with the internationally recognised model, has made the prospect of Dubai-based arbitration more attractive to both foreign and Middle Eastern businesses.

## COMMENTARY

Recent regional developments have had the effect of increasing Middle Eastern presence in the global arbitration market. When drafting arbitration clauses, local advice should be sought to ensure clarity and enforceability.

# MEDIATION – AN ALTERNATIVE TO ARBITRATION?

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## INTRODUCTION

Commercial parties increasingly recognise that disputes can be costly and distracting, and can consume significant management time. Litigation or arbitration is often confrontational, particularly within adversarial common law jurisdictions. Whilst legal expenses may be recovered, there is always an element of unrecoverable costs and despite authoritative legal advice, litigation risk means that litigation will always represent a gamble. Few, if any, legal advices come with guarantees of success. Mediation can be seen as a means of resolving disputes via compromise. Litigation can prompt parties to become more entrenched. However, compromise is always necessary in a commercial environment; just as parties are prepared to compromise and negotiate contracts or relationships, they should equally be open to compromise in order to settle their disputes. Compromise that allows the parties to retain or improve their commercial relationship can be attractive to both sides. Mediation can allow rigorous assessment of a case's strengths and weaknesses, and give indications as to the likely approach of any ultimate arbitrator/judge, whilst giving the parties opportunities to reach an amicable settlement and potentially maintain commercial relationships. Mediation as a form of alternative dispute resolution (ADR) has become increasingly popular in many European countries, including the UK, as well as other jurisdictions such as the US and Canada.

## ROLE OF THE MEDIATOR

In mediation, the parties meet and constructively discuss the dispute in question. A neutral third party (the mediator) actively assists the parties in working towards a mutually acceptable negotiated settlement. The mediator does not act as a judge or arbitrator, adjudicating over the proceedings. As such, the mediator does not impose upon the parties a resolution or settlement. Instead, the mediator simply facilitates discussions and helps to identify common aims and objectives between the parties, in the hope that a mutually acceptable settlement can be reached.

## ADVANTAGES

There are a number of advantages to mediation compared with, say, arbitration. All discussions during a mediation are strictly private, confidential and 'without prejudice'. Nothing that is said by either party in mediation is admissible as evidence in current, or future, legal proceedings. The same principle applies for any documents that are disclosed in mediation. However, if a settlement agreement is reached and signed by the parties, then the written settlement becomes legally binding and enforceable, as if it were the subject of a contract or court order.

Mediation offers speedy resolution. For example, mediation can be arranged within a few weeks and, whilst the mediation itself may take a day or two, the whole mediation process is much quicker than, say, seeing arbitration through to a final award. For the same reason, mediation is generally much cheaper than pursuing a claim through to arbitration. If the parties are able to reach a quick and amicable settlement of a dispute, they are more likely to maintain a working, commercial relationship, than if matters are to proceed by way of formal legal proceedings.

Whilst mediations are strictly private and confidential, as are their outcomes, it is widely reported that mediations have a high success rate (between 70% to 80% in the UK).

## COURT APPROACH

In the UK, the courts are actively encouraging parties to consider mediation. For example, the Civil Procedure Rules, the Commercial Court Guide and the Pre-Action Protocols all seek to encourage parties and prospective litigants to consider mediation.

In addition to this encouragement, parties are also at risk as to costs if they refuse to mediate their differences. For example, in the widely reported Dunnett v. Railtrack PLC, the English Court of Appeal disallowed Railtrack's legal costs, notwithstanding that it was successful on appeal in defending the claim being pursued against it, because it refused to meet Mrs Dunnett for a mediation despite the court stating at an earlier hearing that the parties should attempt mediation.

Further, in Halsey v. Milton Keynes General NHS Trust, the Court of Appeal stated:
*"All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR. The Court of Appeal indicated that the courts would be robust in their encouragement, and parties will now face significant adverse cost consequences if they unreasonably refuse to consider mediation."*

## RECOMMENDATIONS

Whilst mediation may not be a suitable alternative to arbitration in every scenario, parties who litigate or arbitrate their differences now need to seriously consider mediation during the legal process and may be exposed to cost consequences if they refuse to attempt mediation without good reason. We recommend that parties consider incorporating a 'mediate before arbitrate' provision in their contracts. This can save time in agreeing the location, timing and format of a mediation in the event of a dispute. However, even without such prospective agreements, parties to a dispute should actively explore mediation as part of their dispute resolution process.

# EU DEVELOPMENTS – *THE FRONT COMOR*

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## INTRODUCTION

One of the most reported cases in recent years has been the European Court of Justice (ECJ) decision in Allianz SpA. v. West Tankers Inc. (*The Front Comor*). In this case, the ECJ, in practical terms, abolished anti-suit injunctions (or restraining orders) issued in support of arbitration agreements within the European Union (EU).

## FACTS AND ENGLISH PROCEEDINGS

*The Front Comor* hit a jetty at a Syracuse oil terminal. The ship was chartered to Erg, which was also the jetty owner. The charter was subject to English law and contained a London arbitration agreement. The jetty owners claimed against their Italian insurers. That policy was limited and Erg started London arbitration proceedings against the owner for the balance of its losses. Erg's insurers then started proceedings in Italy against the owners in order to recover the payments they had made to Erg. The owners' lawyers successfully obtained an anti-suit injunction against the insurers in the English High Court, restraining these Italian proceedings. They argued that the dispute arose from the charter, which contained an arbitration agreement. Therefore, they said, the insurers were bound by that agreement. The English courts, including the House of Lords, agreed. It was not disputed that the Italian courts had jurisdiction to hear the insurer's claim. The owners argued that that action should be discontinued in favour of proceeding under the charter's provisions.

## THE ECJ APPROACH

The ECJ found that the Italian proceedings were a claim for damages governed by the Brussels Convention and, as such, the applicability of the charter's arbitration agreement came within the scope of the Brussels Convention. Thus, the Italian court alone had the ability to rule upon any jurisdictional objections made to it in relation to the arbitration agreement (including its applicability and validity). The ECJ ruled that such anti-suit injunctions were counter to the mutual trust that the courts in various EU member states enjoyed and were in breach of EU Regulation 44/2001, which provides a set of uniform rules governing civil and commercial disputes within the EU (the Regulation).

## PRACTICAL IMPLICATIONS AND FURTHER DEVELOPMENTS

A common complaint following *The Front Comor* decision was that it would have the practical effect, in the future, of there being conflicting decisions in parallel proceedings in the EU. It was feared that the *Front Comor* decision would render London arbitrations vulnerable to 'torpedo' actions and, in effect, render London arbitration agreements worthless. The European Parliament and the European Commission have acknowledged this, and in December 2010, the Commission published proposals for reform of the Regulation.

These proposals are aimed at improving judicial co-operation within the EU and enhancing the autonomy of the arbitration tribunal. It is proposed that the arbitration exclusion with the Regulation be retained and expanded upon such that a court in the EU **shall** stay court proceedings once the court of the member state where the seat of the arbitration is located (or the arbitration tribunal itself) has been 'seized' to consider the question of arbitral jurisdiction. The draft proposals also make clear that an arbitration tribunal will be seized when a party has nominated an arbitrator or requested the support of an institution, authority or a court for the tribunal's constitution.

These proposals are still to pass through the European Parliament, but if they do it could prove to be an effective solution to the current parallel proceedings problem and, if implemented, will improve the effectiveness of arbitrations in the EU. The ECJ's judgment does not affect the ability of parties to seek injunctive relief to uphold arbitration agreements where, say, competing proceedings are issued outside the EU.

## COMMENTARY

English injunctions against proceedings being pursued in other EU jurisdictions may be seen as high-handed. However, they have been a useful tool for any party to enforce a contractually agreed dispute resolution process. If such a process is not binding then the parties may enter a race to establish the hearing of their dispute in their favoured jurisdiction. Neutral jurisdictions may be ignored in favour of potential, partial or claimant-friendly jurisdictions. Additional legal costs would be incurred and parties would be discouraged from addressing early settlement of their disputes. Also, there is a risk that arbitration could proceed in one jurisdiction but that, say, subrogated insurers could pursue their claim in another jurisdiction, opening the real possibility that conflicting decisions could result. The *Front Comor* decision is important as its ramifications may drive changes to EU law that, eventually, may support party autonomy and assist those who wish to rely on contractually agreed provisions.

# SUMMARY


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Many arbitration, mediation and other alternative dispute resolution clauses now give parties the ability to agree where, when and how their disputes are resolved. Certainty in this area allows the parties to enter commercial agreements with confidence. Many jurisdictions offer arbitration services, but we recommend that arbitration clauses are clearly drafted and nominate an agreed, neutral jurisdiction with established procedural rules that will assist the parties in coming to a resolution. Early settlement discussions or mediation offer further means to finalise disputes without recourse to legal costs and expenses. In the event of a dispute, the club can provide advice and assistance in the interpretation of members' dispute resolution clauses. In addition to our London office, our other claims offices in New York, Piraeus and Singapore, coupled with our network of correspondents, mean that the club is ideally placed to assist members in dispute resolution worldwide. The club's in-house legal staff can provide timely and effective advice in a wide variety of matters.

If you have any questions in relation to dispute resolution, please contact me, our in-house authors or your usual club contact.

# PUBLICATIONS


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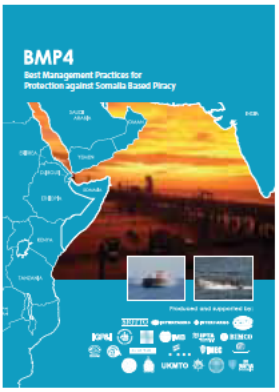
**Club News**

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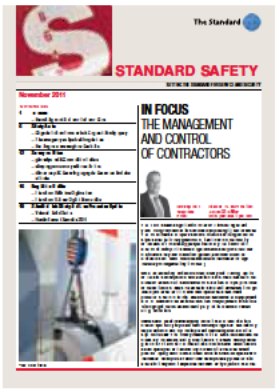


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The Standard Bulletin is published by the managers' London agents:

**Charles Taylor & Co. Limited**

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London, WC2R 3AA, England

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