



MARITIME ARBITRATION IN THE UNITED STATES



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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.

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.