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.