TWENTY ESSEX

Looking for a "commercial man": common difficulties in maritime arbitration clauses

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Starting an arbitration is a key stage in resolving a dispute. Getting the right arbitrator is essential since they will be making decisions which bind the parties. But following the right legal procedure for appointing a tribunal is also key. If the appointment procedure goes wrong then it can be costly to correct and may even result in a claim being barred as out of time. Further, if the appointment does not comply with the arbitration agreement then the tribunal may lack jurisdiction and the award could be unenforceable or open to challenge.

The law reports tell many stories of parties getting an appointment wrong, whether by missing a time limit, failing to send the notice to the right person, using the wrong wording or choosing an arbitrator who does not possess the qualifications specified by the arbitration clause. Such cases involve some knotty legal problems, but many such issues can be avoided by sensible wording of the arbitration clause, and care taken in the appointment process.

This article looks at common difficulties arising out of clauses in shipping contracts, where parties have control over the terms of their contracts at the outset and can take steps to avoid pitfalls relating to the appointment of arbitrators.

Standard form clause

Standard form arbitration clauses are designed to work effectively and are good choices. The arbitration clauses recommended by BIMCO and the London Maritime Arbitrators Association are tried and tested, so merit serious consideration. They also strike the right balance between having sufficient detail, but avoiding undue complexity.

However, commercial parties often like to use a bespoke amended standard form or adjust the standard form terms. These tweaks should be considered carefully because they may run into problems at a legal level. A common problem is where there are inconsistent clauses in a fixture recap, the standard form and the additional clauses.[1] Surplus clauses should be removed where possible so as to avoid uncertainty about the terms of the arbitration agreement.

Nevertheless, some "tweaks" may be advisable. For example, a service of process clause may be helpful in setting out the address and means by which a notice of arbitration should be served.

Parties commonly use rather old standard forms (for example the NYPE form dating from 1946 remains very popular). Arbitration clauses, like all things, start to show their age after a while. While some outdated wordings will be read as workable where possible, for example a reference to previous legislation will be read as referring to current legislation, others will be more problematic. Dispute resolution clauses should be reviewed regularly as badly applied drafting can lead to costly disputes.

Basic wordings

Simple wording in a recap can work effectively. For instance, "ARBITRATION IN LONDON" will be enough to achieve an effective agreement for London arbitration. However, this sort of simple

1. *Transgrain Shipping BV v Deiulemar Shipping SPA (In Liquidation), The Eleni P* [2014] EWHC 4402 (Comm).

agreement, while enforceable, can give rise to issues in practice.

First, even if the contract does not provide for LMAA arbitration, LMAA arbitrators often accept appointment "on LMAA terms", which will effectively mean that the arbitration is subject to those terms. This can lead to tricky problems if only one or two arbitrators accept appointment on LMAA terms. It is preferable to pre-empt such issues by including provision in the arbitration agreement addressing the applicability of the terms.

Furthermore, a standard form clause is a more practical choice since absence of agreement on the number of arbitrators means that this wording will default to an agreement on a sole arbitrator (Arbitration Act 1996 section 15(3)). The downside of this is that if one side is uncooperative on agreeing a sole arbitrator then it will be necessary to make a court application to make a valid appointment of a sole arbitrator.

This is inconvenient and expensive. It is something that may be fixed by future legislative change: the Law Commission is now undertaking a consultation to review the Arbitration Act 1996 with a view to modernising it. The aim is to ensure that London arbitration remains the gold standard in international arbitration. It may propose adjustments to the rules on appointment so that court applications can be avoided where the clause is treated as providing for a sole arbitrator. In the meantime, though, parties would be well advised to provide for a tribunal of three or to provide for default appointments to be made by a third party such as the President of the LMAA.

Umpires

Umpires used to be commonly agreed in arbitration clauses in shipping contracts, and the wording does remain in some fixtures. However, this is now regarded as old fashioned since it is less flexible and efficient than a clause providing for a single arbitrator or a panel of three arbitrators. The Law Commission is considering whether the legislation can modernise this type of clause. As matters stand a clause providing for an umpire must be given effect but often the parties will be asked to agree on the appointment of a third arbitrator in place of an umpire.

Commercial men

Some arbitration clauses are old-fashioned in more objectionable ways and this is another area that could be subject to legislative reform. Many charterparties are still in use that provide for appointment of "commercial men" as arbitrators. Such clauses introduce two layers of uncertainty: the meaning of "commercial", and the meaning of "men".

As to the first point, there is no clear legal authority on the effect of this wording other than a court decision ruling that it excludes practising lawyers[2], though a full-time maritime arbitrator would qualify. Depending on the nature of the underlying contract (and therefore of any potential disputes), it may be sensible to be more specific about the arbitrator's experience of background: eg, in a shipbuilding context, it may be preferable to require an arbitrator with experience of shipbuilding, as opposed to (eg) a chartering or freight expert. However, as a general rule, keeping it simple helps make the clause "future-proof". Complex requirements as to qualifications are usually best avoided as they may be impractical, especially as the clause may need to cover disputes pursued several years later.

As to the meaning of "men", it is now generally (though tacitly) understood that "men" should be construed as including individuals of any sex or gender. However, many users may take the clause at face value or avoid testing it. It is difficult to tell how often parties (or their lawyers or the party appointed arbitrators) have been influenced by this wording as a reason for appointing a man as arbitrator and passing over (or excluding) the selection of someone of a different gender. Whether the choice is made deliberately or less consciously this could amount to unlawful direct discrimination[3]. For a UK qualified lawyer it could amount to professional misconduct to give instructions to a barrister to accept appointment on a discriminatory basis, even where the client has requested this, and the matter would require reporting to the Solicitors Regulation Authority or the Bar Standards Board.[4] Further, the use of such wording is inconsistent with the general direction of travel in terms of improving diversity and equality in appointments. Making sure that any new legislation facilitates greater diversity in appointments and tackles the potential for discrimination is within the Law Commission's remit to modernise the Arbitration Act 1996.

In the meantime, parties should avoid such wording, and instead use clauses which require the appointment of "individuals" or "arbitrators".

Trade associations

Some clauses provide for membership of a trade association. Clauses that provide for appointment of a member of the Baltic Exchange or the London Maritime Arbitrators Association are relatively easy to apply. Both full and supporting members of the LMAA "count" for the purpose of a

2. *Rahcassi Shipping Company SA v Blue Star Line Ltd, The Bede* [1969] 1 QB 173 (Comm).

3. Equality Act 2010 s47(6). The Act more broadly covers those who are in employment or self-employed where their contract requires them to do the work personally but such employment does not include an arbitrator, *Jivraj v Hashwani* [2011] UKSC 40.

4. https://www.barstandardsboard.org.uk/media/1933294/bsb_handbook_version_3.3.pdf

clause requiring an LMAA member, and the membership is publicly listed on the LMAA website. There is a close relationship between the Baltic Exchange and the LMAA going back many years, and many LMAA arbitrators are also members of the Baltic. Membership of the Baltic Exchange is not publicly listed.

However, there are some wordings that can cause delay and extra cost, typically where it is not clear what the parties had in mind. For example, where the trading association no longer exists or was mistakenly named, or is described in vague terms (one recent example was a clause requiring a member of a "commodity or marine trade association") the ensuing uncertainty can generate unnecessary disputes and costs.

Conclusions

This article has highlighted specific areas where parties should take care in agreeing on terms for the appointment of arbitrators if disputes arise. Once a dispute has arisen it may be difficult to cooperate on appointing a tribunal so it is important to make an effective agreement in advance.

Of course, the appointment mechanism is usually only one aspect of the arbitration agreement, albeit a fundamentally important one. Our final note is to flag up the importance of other, related, provisions which may address matters such as governing law, service of process and contractual time-bars. Contractual time-bars apply as a matter of agreement (as opposed to statutory time limits imposed by legislation) and while they are enforceable and may be useful for parties in drawing a line under disputes, they can give rise to difficulties. It is important for parties to give careful thought to the arbitration agreement as a whole, and to ensure that all aspects reflect their intentions.

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Read her online bio ›

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Twenty Essex is home to four additional members of the Baltic Exchange: Tim Young QC, Sara Masters QC, Michael Collett QC and Angharad Parry.

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