FOR OR AGAINST

The debate about whether to opt for litigation or arbitration continues, but in cross-border contracts, arbitration is king. This, by definition, will encompass a very high proportion of shipping cases and is no doubt the reason why almost all charter parties will include some form of arbitration clause. Recently, it has been suggested that litigation is preferable. The points made in support of that suggestion may have some relevance where there is no cross-border element to the contract and potential dispute, but otherwise they are unpersuasive and none of them truly add up.

Service and other considerations

In a shipping case where the parties to the contract are likely to be from different countries, effecting service of court proceedings is considerably more onerous than the equivalent commencement of an arbitration. In court cases, unless the intended defendant is EU–based, then it is necessary to obtain the permission of the court to serve those proceedings on the defendant. Sometimes the documentation will need to be translated and then served through diplomatic channels. Not only does this add to the cost of the proceedings, but the process of effecting proper service can take many months, adding to the delay. On the other hand, the commencement of a maritime arbitration is cheaper and quicker as it is achieved by the appointment of the arbitrator and the giving of notice of that appointment to the opponent. Notice requires no special formality and can be given by any means effective to deliver the notice to the address, whether by post, fax or e mail, as the English Commercial Court held in the Eastern Navigator last year.

Enforceability

Those preferring litigation over arbitration to resolve shipping disputes, rarely mention the significant advantages that arbitration awards enjoy over court decisions in terms of enforcement. The simple fact is that arbitration awards can be enforced under the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (The New York Convention) in approximately 140 different countries, including Russia, USA, China, as well as States in South America, the Middle East and the Far East. The Convention obliges signatory states to allow enforcement of foreign awards in the same way as domestic awards are enforced and there are only limited grounds on which a foreign court may validly decline to enforce an award. It is very unlikely that there will be any enquiry as to the merits of the arbitrators' decision and recognition is intended to be, though not always is, a mechanical process.

Typically, a court judgment of an English court will only be recognised abroad if there happens to be a bilateral treaty providing for mutual recognition of judgments; outside the European sphere, such treaties can be a rarity. The UK, for example has no bilateral agreement enabling English Court Judgments to be recognised in the US, China or Russia or indeed most countries outside Europe. In order to obtain recognition and enforcement of an English Court Judgment, it is often necessary to commence fresh proceedings in the courts where enforcement is sought. Those courts may well enquire into the merits of the case and reach a different decision than has been reached by the English Court. The victorious litigant may become submerged in a process of having to litigate his claim all over again in the courts where his opponent is based. Apart from the costs involved in such an exercise, there is a risk that the neutral and unbiased decision reached in London will not be mirrored by the local court, and enforcement will be refused. This is precisely what the parties seek to avoid when they choose a neutral venue for dispute resolution such as London. Parties choose London because of its reputation for unbiased procedures, quality and fairness, and the desire to avoid the possible pitfalls of the local courts of one of the contract parties. Potentially, this renders the entire court process undergone in England a wasted exercise and all the costs incurred thrown away.

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It might be said that in most cases, court judgments, like awards, are honoured and thus the issue of enforcement will rarely arise, or that claims against owners are generally secured, so foreign enforcement is rarely likely to be an issue. The former may be true but the importance of having chosen arbitration over litigation is highlighted by those cases in which the judgment of the court is not honoured voluntarily. The latter point only deals with one side of the coin. Whereas it is usual for claims against owners to be secured, it is far less common for claims against other parties involved in shipping to be similarly secured. This is for the obvious reason that an owner's asset is much more visible and exposed to the risk of arrest.

This enforceability of awards is a compelling reason for parties to continue to choose to arbitrate their disputes. The difficulties relating to service of court proceedings, though adding to the overall delay in and costs of proceedings, will usually be overcome. The issue of enforceability of a court judgment when compared with an arbitration award is a very much more serious (and expensive) matter and something which those managing risk should have well in mind.

Costs Issues

Apart from cross-border enforceability, parties opt for arbitration because of its confidentiality, the ability to choose the tribunal, the informality and flexibility of procedures. It is sometimes said that London maritime arbitration is more expensive than going to court. However, a case is no more expensive in real terms, whether it is brought in arbitration or before the English courts. The solicitors, experts and counsel are drawn from the same group of practitioners. There may be a difference as to where the money is spent but the overall cost is substantially similar. This is because, whilst the parties have to pay the members of the Tribunal but do not have to pay the Commercial Judge, they will have to incur the costs of applying to serve out of the jurisdiction (in most cases, as the intended defendant will usually be based outside Europe). Further, interlocutory court applications are usually more expensive than the equivalent application made to a Tribunal and the costs of enforcement of the English Judgment abroad (if enforceable at all) are likely to be substantially more than the costs of enforcement procedures in respect of an award. A more general point about costs of London arbitration is that these costs are often driven by the parties themselves and it is usually the case that the fees of a maritime tribunal are a fraction of the other costs incurred by the parties in bringing a case to a hearing.

The issue of costs is closely linked to the formality of the procedures. It is true that procedures before maritime arbitral tribunals can be similar to equivalent court proceedings, but they need not be. It is open to the parties to agree less formal procedures, which the flexibility of the arbitral process allows (for example dispensing with full disclosure), and which might save costs, but it is rarely the case that they will do so. It might occasionally be possible to reduce costs by the advisers being more flexible in their approach and the tribunals being more proactive in determining procedures. This is especially so in the maritime sector where the FALCA rules of the LMAA which exist for cases up to USD 250,000, and which provide for a shortened procedure, are rarely used. The arbitrators themselves have a duty to manage the reference, and ensure that procedures are adopted which avoid unnecessary delay or expense, in line with the general duty of the tribunal set out in section 33 of the English Arbitration Act 1996. This is not always easy but a more proactive approach in cases where more than USD 250,000 but less than about USD 1.5 million is at stake, where the full LMAA arbitration procedure risks the parties incurring disproportionate costs, is something to be considered.

Appeals and Finality

Those supporting litigation over arbitration suggest that the 1996 Act's rules for appeal are so restrictive as to prevent maritime cases reaching the court which in turn means that the development of maritime law will be hindered. They look back on the days of the old law, when appeals from maritime arbitration tribunals were far more common. A steady stream of reported cases cannot be a justification for parties to choose court in

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preference to arbitration. Where disputes arise, parties to contracts are not in the business of the development of law. The restricted nature of the appeal process is, however, consistent with the trend. Many of the jurisdictions now competing for maritime arbitration work have adopted the UNCITRAL model law on international commercial arbitration and this law does not permit any appeal at all on a point of law. Presumably the thinking is that confidentiality is sufficiently important to justify exclusion of rights of appeal. This exclusion leads to another consequence, and that is that arbitration awards are final under the model law.

Any supervisory role of the court undermines the concept of confidentiality of arbitration. Confidentiality/privacy is often cited as an attractive feature of arbitration. One cannot maintain confidentiality of arbitration and at the same time have a continual flow of cases into the public arena of the courts. Any supervisory role assumed by the courts will necessarily to some degree involve washing linen in public and a loss of confidentiality. The issue is one of balance, but arbitration cannot be private and confidential and at the same time provide cases enabling the development of English law. It is one or the other, but in England a compromise is reached.

The nature of the compromise under the English Arbitration Act 1996 is that appeals, both on grounds of serious irregularity, as well as on a point of law, are allowed. It is not surprising and a reflection of the fairness of the maritime arbitration community that examples of challenges based on serious irregularity are few and far between. Appeals on points of law are still permitted but only with the agreement of the parties (unlikely), or with leave of the court where the arbitrators' decision was obviously wrong or the point of law is of general public importance, and the decision of the tribunal is open to "serious doubt". It is also necessary that the determination will substantially affect the rights of at least one of the parties and it must be just and proper for the court to determine the point of law. This is not an easy test to pass, and is a reflection of the policy of non interference in arbitration by the courts. The strictness of this test is doubtless the reason for fewer maritime cases being decided on appeal from arbitrators. However, it does provide the court with residual control over the legal issues arising in arbitration and a mechanism whereby maritime law can continue its development in appropriate cases. Indeed, by way of example, in the December 2006 publication of Commercial Law Cases, seven cases were reported. Of these seven, four were shipping cases.

Additionally, the report into the practical operation of the Arbitration Act, compiled in 2006 after obtaining the views of many users of arbitration, reported that 70% of respondents considered that the court's powers in support of arbitration are appropriate as they stand, that 60% of respondents thought that the present position in connection with appeals from awards on a point of law should be retained on the current basis, and 72% of respondents thought that the approach of the court to intervening on the basis of serious irregularity was "about right". There is clearly a high level of satisfaction with the present situation.

Consistency of Justice

Arbitral tribunals are also criticised as failing to provide the same consistent quality of reasoning, understanding and justice in applying the law as found in court. At first blush, this is not surprising, as arbitrators are not Commercial Court judges, do not have the same training as Commercial Court judges, but, most importantly, do not purport to be Commercial Court judges. Broadly, an arbitration is intended to be commercial dispute resolution by those engaged in the trade. Those choosing arbitration over the English courts are well aware of this and presumably have decided that they do not wish their disputes to be decided in public by a Judge. It is, of course, much easier to criticise an arbitrator and blame the outcome, especially if it is unfavourable, on the ability of the arbitrator, than it would be to criticise a Judge, or for the adviser to acknowledge his own shortcomings. Arbitrators are party–appointed, so to some extent, any criticism of this sort, if it is of real concern, can be dealt with by the parties themselves. They must take care to appoint those arbitrators whose decisions are known to meet acceptable standards and who are perceived to have the necessary skills and expertise to reach a proper award.

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The Available Pool of Arbitrators

There are relatively few such individuals, and this has led to some criticism that the same faces are regularly appointed as arbitrators in maritime cases. This is not a bad thing, because it is this that gives London its body of experienced maritime arbitrators, which is at least one reason why parties chose to come here. However, steps need to be taken to ensure that when the existing group of arbitrators are no longer around, there is a crop of younger but experienced arbitrators to take their place. In practice, this is something with which the parties themselves can assist: there is a large number of experienced individuals who are on the LMAA's list of supporting members and who are willing to accept appointments as arbitrator. It is for the market in general and advisers to the parties to ensure, if they do not wish to continue to see the same faces as arbitrators, that appointments are made from this list as an alternative to automatically appointing from the list of full members. It is important to the future of maritime arbitration in London as a whole that there is a stream of suitable individuals who can take over from the current crop of maritime arbitrators.

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