

# TEN TIPS FOR HANDLING CLAIMS IN LONDON ARBITRATION

By

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London remains the most popular venue of choice for the resolution of maritime disputes. A very substantial percentage of the cases that come to London to be determined are referred to arbitration pursuant to clauses agreed between the parties in their contracts. Most of these arbitrations take place before arbitrators who are full members of the London Maritime Arbitration Association (“LMAA”) and are conducted on terms of the LMAA that are revised from time to time to reflect developments in arbitration practice.

International trade, the sale and chartering of merchant ships and the transportation of goods by sea have always given rise to disputes. Indeed, much of English contract law is based on old shipping cases and even today shipping cases are often very influential and shape the development of the law generally. For anyone involved in shipping, therefore, at least some knowledge of the law is important. Often, though, little thought is given to the means of resolving disputes, such as arbitration, even though a case may be won or lost by the way it is handled. The intention of this paper is to offer a few tips (the “top ten”) and a brief insight to some of the more practical aspects of arbitration in London.

## **1. Know your time bar**

The LMAA terms do not impose any time bar for the commencement of arbitration proceedings. Time bars are to be found either in express terms of the contract or in general English contract law.

Contracts will often contain terms that establish a time bar. These may take different forms.

Examples of time bar clauses are:

- Clauses that require claims and supporting documents to be delivered to the other party within a specific period, for example, 60 days from the completion of discharge failing which the claims are waived and time barred and so cannot be pursued in arbitration (or anywhere else);
- Clauses that require the claimant's arbitrator to be appointed within a particular period, for example, 12 months after the completion of discharge or redelivery of the vessel (and occasionally even 12 months after the completion of loading – read the clause carefully!);
- Clause Paramounts by which the terms of the Hague or Hague-Visby Rules are incorporated to the contract, thereby incorporating the one year time bar provisions of those Rules.

Checking and making a note of the time bar must be one of the first things to be done when a dispute arises (or even if there is only a risk that one might arise). A good claim that is time barred has no value.

## **2. How many arbitrators?**

In most cases each party appoints their own arbitrator and the two appointed arbitrators then appoint a third arbitrator or umpire. There is a difference between a third arbitrator and an umpire. Where there are three arbitrators, the views of the majority prevail. Where an umpire is appointed, he or she takes no part in the arbitration until the arbitrators appointed by the parties cannot agree. He then takes over the running of the case and the two arbitrators stand down. Although the parties can choose their own arbitrators, they have no say in the choice of the umpire. For these reasons, the arbitrators often ask the parties to agree that the third panel member will act as third arbitrator rather than umpire, even if the arbitration clause refers to an umpire.

Often to save costs, the two arbitrators appointed by the parties will sensibly ask the parties to agree that no third arbitrator is appointed unless or until they cannot agree on any point. Very often this means that awards are

written by only two arbitrators. Obviously, though, when an oral hearing takes place a full tribunal must have been appointed.

Beware, an arbitration clause that refers to “*Arbitration in London, English law to apply*” is considered to be an agreement to refer any dispute to one arbitrator only. If the parties cannot agree who that arbitrator will be then an application must be made to the English High Court to appoint the arbitrator. This can take months and involve significant costs.

### **3. A sole arbitrator need not be bad news**

Parties are often reluctant to agree to have just one arbitrator decide their disputes. Sometimes this is because they are suspicious of anyone suggested by their opponent and sometimes it is because there is a lot of money at stake.

The LMAA Small Claims Procedure provides for just one arbitrator and states that if the parties cannot agree who that arbitrator will be then the President of the LMAA will make the appointment. This ensures the neutrality of the arbitrator appointed, and cheaper than a tribunal of two or three arbitrators and just as impartial. Don't forget – most of the LMAA arbitrators are professional and full time arbitrators and the majority of awards published in London are unanimous. By all means make enquiries about the background of the arbitrator suggested as sole arbitrator (details are on the LMAA website at [www.lmaa.org.uk](http://www.lmaa.org.uk)) or consider suggesting that the appointment be made by the LMAA: do not, though, dismiss the idea of a sole arbitrator too easily.

### **4. Giving notice of arbitration**

It is important to read the arbitration clause properly as some clauses require the party commencing the arbitration to give particulars of the claim when giving notice of the appointment of an arbitrator while other clauses specify that the notice must be served on an officer of the company. This is a vague term but probably refers to a senior manager or director. It may therefore be necessary to make a company search to find who the officers of the company are: otherwise a notice served on the wrong party (for example, the

opponents P&I Club) may be invalid. Alternatively, the company might be requested to confirm that notice of arbitration may be served on their lawyers/P&I Club, although clear words would be required for such a variation to the arbitration clause.

A notice of arbitration must:

- State that arbitration has been commenced and name the arbitrator appointed by the claimants (with their contact details);
- Make it clear that the party receiving the notice is required to appoint and provide details of the identity of their arbitrator.

Where the arbitration clause does not specify the time within which the party receiving notice of arbitration must appoint their arbitrator, the period laid down by the Arbitration Act 1996 is fourteen days (Arbitration Act 1996, s.16). However, before the claimants arbitrator may be appointed sole arbitrator, a second notice must be served giving the respondent seven clear days notice that if they do not appoint their arbitrator within that period, the claimants arbitrator will be appointed sole arbitrator (Arbitration Act 1996, s.17).

Unless therefore the clause states otherwise, two notices may need to be sent to the respondent to appoint their arbitrator before the claimant's arbitrator may be appointed sole arbitrator.

## **5. Disputing the arbitrators' jurisdiction**

Sometimes there may be a dispute as to whether or not a binding contract was concluded between the parties. Logically, if there was no binding contract there can be no arbitration clause either because the clause gains its life from the contract.

Before the Arbitration Act 1996 such questions had to be decided by the courts. If they found that there was a binding contract the matter was sent to the arbitrators who could then determine the merits of the claims under that contract. This was a lengthy and often costly exercise. Under s.31 of the Arbitration Act 1996, though, the arbitrators are given the power to

determine and make an award as to their own jurisdiction. Any objection to the jurisdiction of the arbitrators must however be raised at the very beginning of the reference and, ideally, when appointing their arbitrator the objecting party should make it clear that the appointment is being made without prejudice to the argument that the tribunal in fact have no proper jurisdiction.

If the arbitrators find that there is no contract that will be the end of the matter. If, however, they consider that there is a contract and that they do have jurisdiction the arbitrators will then move on to consider the dispute itself.

The English courts retain a residual jurisdiction to decide whether the arbitrators have jurisdiction. In practice, though, most disputes about jurisdiction are now decided by the arbitrators themselves.

## **6. LMAA Terms**

These terms govern the conduct of arbitrations where either the contract clause refers to them or where the appointed arbitrators have both accepted their appointment on LMAA Terms.

The terms cover all aspects of the conduct of the arbitration, setting out the general procedural requirements that should be met during the course of the reference, order of proceedings and timetables. Details of these terms may be found at [www.lmaa.org.uk](http://www.lmaa.org.uk). Each arbitration tribunal, however, has some discretion to vary the procedures where this is appropriate and to allow the parties more time to take any particular step in the arbitration. It should not, however, be assumed that requests for more time will always be granted as the arbitrators must act fairly and balance the interests of both parties. A good reason must always therefore be given for any request made for more time. If the tribunal feels that no more time should be allowed, or that any time extension given must be final they will state that their order is made **in Final and Peremptory Terms**. This is the final chance to serve submissions or comply with any other order of the tribunal that has been made. If it is ignored the tribunal may move forward to the next stage of the arbitration, or even to its award, without further input from the party in default. A working

knowledge of the LMAA terms is therefore very important for anyone who has a dispute in London maritime arbitration.

## **7. Security for Costs**

Arbitration can be expensive and if a party wishes to make a claim against another party they may have to provide security for the costs that the other party will incur defending the claim. This is known as security for costs and can be a very important way safeguard against the risk of speculative claims being pursued in arbitration.

Arbitrators cannot, as a general rule, order that a party put up security for a claim. They do however have the power to order that a claimant provide security for the costs of the party against whom the claim is made. This cannot be demanded by right but is something in the discretion of the arbitrators. Usually, the arbitrators will require some evidence that the claimant may have difficulty paying the legal costs or that it will be difficult to recover them if the claim fails, perhaps because the claimant is based in a country where enforcement of foreign arbitration awards is difficult. A request for security for costs can only be made after the Defence in the case has been served – this is so that the arbitrators can understand the nature of the dispute before considering if it is appropriate to order that security for the respondent's costs be provided.

## **8. Is an oral hearing necessary?**

Most arbitrations do not require an oral hearing and are determined on the basis of written submissions only. Oral hearings are costly and usually only necessary where very substantial sums are in dispute or where there are important conflicts in the evidence of the parties that require the attendance and questioning of witnesses before the tribunal.

Either party may apply for an oral hearing but the arbitrators have the discretion to decide whether an oral hearing is necessary or not. Usually, where an oral hearing takes place it is necessary to instruct London solicitors and counsel to conduct the hearing. Although therefore a party may like the

idea of an oral hearing they must be careful to calculate the cost of asking for one in the majority of cases.

An obvious advantage of an arbitration decided on documents only (apart from the lower cost) is that it allows a case to be handled by lawyers, or a party, who may not be in London, or even in England. Parties often like to use lawyers or consultants who they know well, who speak their language and who may be less expensive than some London lawyers. This is something that the LMAA is happy to accommodate and encourage as far as possible.

## **9. Costs**

Usually costs are awarded to the successful party: often, though, both parties succeed on some points and not others. The arbitrators have a discretion in awarding costs and can apportion costs to reflect this. If therefore a claimant pursues six or seven points and succeeds in obtaining an award for payment on two of those points, the arbitrators may only award them the costs of the two successful points and direct that they pay the respondents costs for the other four or five points. The claimant may therefore collect money from the respondent but still end up paying costs to the respondents.

It is common, of course, for parties to exaggerate their claims for bargaining purposes or in the hope that they may obtain an unexpected success on points they appreciate are not so strong. This may seem a good idea when a case begins. Usually, though, weak cases are exposed and a claimant who continues to pursue weak claims in arbitration may well end up having to pay their opponents costs on those points. This can be very expensive.

## **10. The conduct of the arbitration**

Arbitration need not be expensive. Often if it is expensive this is because of the way in which it has been conducted by the parties. The following are just some suggestions for the handling of arbitration cases:

- Try to avoid involving the arbitrators at every stage of the case: remember that each arbitrator will charge for every message that he

has to read. Unless therefore the arbitrator has to see a message, do not send them a copy (if you have a problem with your opponents you can always send the complete exchange to the arbitrators when you have to, but often it will be possible to reach agreement on matters without involving the arbitrators);

- Try to avoid pursuing speculative arguments.
- Be prepared to admit facts if they are obvious – it saves time and money.
- Try to have some personal contact with your opponent. Experience shows that cases where the parties or their lawyers speak to each other are less expensive to run and have a far better prospect of settlement than those where the only contact is by fax or e-mail.
- Be prepared to explore settlement possibilities in without prejudice correspondence (which cannot be brought to the attention of the arbitrators).
- Be prepared to review the strength of your case at each stage of the arbitration as new arguments or information is received from opponents – the merits of a claim do change as the case progresses. It is important to bear in mind that there will usually be a winner and a loser at the end of any arbitration. Starting an arbitration need not mean finishing it by an award. There may be many opportunities to settle it along the way.
- Try to avoid sending angry messages, they rarely work! If you receive a message that makes you angry wait a few hours before dealing with it.

Good Luck!