Arbitration in London- who is it for, and are changes needed?

The Law Commission are currently conducting a review of the Arbitration Act 1996 (the "Act") and proposing some changes to it.

This is your opportunity to make your views on the Act known – but act now as the consultation period ends on 15 December 2022.

Click on this link to access the questionnaire.

I am a big fan of the Act, and always include an LMAA[1] or IYAC[2] arbitration clause in all yacht building (and most other maritime) contracts that I draft.
Why do I do so?

Here are my top 10 reasons:

1. **Confidentiality.** Arbitration is a confidential private process – unlike court litigation which is public.

   No need to wash your laundry in public! There is a proposal being considered by the Law Commission to introduce a new statutory obligation of confidentiality in the amended Act.

2. **Adaptability.** The procedure can be adapted and developed to suit the industry concerned. Specific qualifications or expertise can be written into the arbitration clause, where necessary. For example, some maritime contracts require the appointments of a commercial person, or someone who is a member of the Baltic Exchange. GAFTA[3] and other trade bodies have strict requirements to ensure their qualified arbitrators have the necessary competence and skills to act as arbitrators.

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[1] London Maritime Arbitrators Association.
[2] International Yacht Arbitration Council
[3] Grain and Feed Trade Association

3. **Expertise.** The problem with the courts is that you have no say in who the judge is or whether they know anything about the subject matter of your dispute. Educating a judge on the subject matter can be time consuming and expensive. Contrast that with the position in arbitration, where the parties can choose an arbitral tribunal who understand the industry.

   Expertise also applies to the extensive range of maritime commercial and legal skills available in London, and not just to arbitrators.

4. **Enforceability.** Believe it or not, it is often easier to enforce an arbitration award overseas than a court judgment if the country where enforcement is to take place has signed and adopted the New York Convention 1958 ("NYC") but does not recognise a court judgment of the foreign state concerned.

   Given it is pointless succeeding in litigation if the resulting judgment cannot be enforced, this is a big plus for arbitration and should be considered carefully when drafting the contract.

   There is a long list of signatories to the NYC you can review here.

5. **Speed.** It is not a given that arbitration is faster that using the courts, but there is scope to shorten arbitration procedure, for example by adopting a civil law approach to document disclosure or using a more streamlined procedure for smaller claims. For example, the LMAA has adopted and developed small and intermediate claims procedures that are faster and cost effective.

   One of the changes to the Act proposed by the Law Commission is to introduce a new summary procedure that will enable bad claims to be disposed of more quickly by Tribunals.

6. **Convenience.** The pandemic has expanded the use of remote court hearings with witnesses attending over Teams or Zoom. The same is true for arbitration, but arbitration tribunals have the opportunity to take this further where necessary for smaller claims, and I can easily see that the days of witnesses and experts travelling long distances to give evidence may be numbered, except perhaps in the largest cases.

7. **Location.** This is really a subset of convenience. The "seat" of the arbitration is just the formal name of the jurisdiction governing the court with powers to supervise the arbitration and hear any applications in relation to it. Often the seat will be, say, London, but that does not impact the ability to hold physical hearings elsewhere, with greater ease and flexibility than would be the case for a court.

8. **Finality.** One of the successes of the Act has been the way the right to appeal an arbitration Award has been limited to questions of law that will substantially affect the rights of one or more of the parties, or where there is a finding of fact that is obviously wrong or concerns a matter of general public importance. Serious irregularity is also covered. In other words, If the Tribunal do their job well, an appeal is virtually impossible [4]

9. **Informality and simplicity.** The advantage of arbitration is that an overly formal approach can be avoided by careful drafting of the arbitration clause and good case management by the Tribunal.

   However, arbitration can sometimes end up looking a little like court proceedings, with formal pleadings, lengthy documentary disclosure, witness and expert evidence etc. This can be the fault of the party representatives.

   My view is that parties should try to take a more informal approach and avoid overly technical (i.e., unhelpful) formal written pleadings, and use less formal written submissions instead -after all, arbitration was developed largely by the shipping and commodities industries to be used by non-lawyers to resolve disputes before tribunals made up of their peers.

   Expert determination can be included in the contract so that purely technical disputes with no or little law involved are referred to an expert, leaving more complex disputes which involve legal argument to the arbitration tribunal. This is generally how dispute resolution clauses in yacht building contracts are drafted, for example.

   Just make sure proper attention is paid to the arbitration clause by whoever drafts your contracts! I cannot overstate how important this is.

10. **Court support when its needed.** Arbitrators have considerable power to run an arbitration as they see fit, but there are some things that do or may require a reference to court. An example is injunctive relief, and another is determination of a difficult preliminary question of law. Fortunately, the courts are always willing to step in and assist, if necessary, but only if necessary.

    So in answer to the question about who arbitration in London is for, my answer is "*everyone concerned with contracts governed by English law*". London has an unequalled skills base, and arbitration held under LMAA rules far exceed in number those of any other forum.

    The Act, currently being reviewed by the Law Commission, has been in general a huge success and not many changes are needed to keep it state of the art. The last thing we need is to revert to the pre-Act position where there were far too many references to court using the discredited "case stated"procedure, and hopefully that can be avoided.

[4] I'm paraphrasing here for reasons of space but see further Ss. 68 and 69 of the Act.

QUENTIN BARGATE - Founder, Chief Executive Officer

Quentin, the firm's founder, leads its superyacht and dispute resolution practice areas. With over 35 years' experience, and a winner of many industry awards, he is widely acclaimed as a leader in the industry.

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