

ANNEX – HANDOUT

To

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Litigation:

The vast majority of shipping and commodities’ litigation, under English Law, takes place in accordance with the Civil Procedure Rules (“CPR”) in the Commercial Court and Admiralty Court which are both “High Courts” within the Queen’s Bench Division, so closely linked that they share a Court Registry (known as “*The Admiralty & Commercial Court Registry*”). Some, relatively low value shipping litigation, however, is handled nowadays within the London Mercantile Court.

CPR Part 58 and the Practice Direction thereto concern the Commercial Court. CPR Part 59 and the Practice Direction thereto concern the Mercantile Court. However, there are certain CPR provisions which are specifically relevant to shipping. For example, CPR Part 61 and the Practice Direction thereto concern the Admiralty Court and CPR Part 62 and the Practice Direction thereto concern Arbitration Claims.

Arbitration:

Most shipping and commodities’ arbitration, under English Law, takes place in accordance with the London Maritime Arbitrators Association (“LMAA”) Rules, or the Grain and Feed Trade Association (“GAFTA”) Rules, or The Federation of Oils, Seeds

and Fats Associations (“FOSFA”) Rules. Indeed the LMAA’s website proudly proclaims that the LMAA is “*The World-Wide Leader in Commercial Maritime Dispute Resolution*”.

Most contracts of affreightment (by which I mean the arrangements whereby a shipowner, either directly or through an agent, undertakes to carry goods by sea, or to provide a vessel for that purpose) include a clause providing that any dispute arising thereunder shall be referred to arbitration, often (even where neither of the parties involved has any relation with England) in London and with the application of English Law. This is invariably the case in relation to charterparties, though arbitration clauses are less frequently found in Bills of Lading except where the bill incorporates an arbitration clause in the charterparty under which it is issued. Arbitration differs from litigation in Court in that the procedure is not available as of right in the event of any dispute, but is dependent upon prior agreement between the parties. It also possesses many attractions to the prospective litigant. Its procedure is cheaper, speedier and less formal, many disputes being resolved by the arbitrator on a mere review of the documents. Arbitrators selected by the parties themselves are usually experts in the field who do not regard themselves as so strictly bound by legal precedent as the judiciary, being more prepared to make awards on the merits of the particular case before them (and often more able to understand the practicalities arising). Finally, parties who, in often sensitive commercial markets, wish to avoid the details of their agreements being published are attracted by the privacy associated with arbitral proceedings, since arbitration awards are not published in the United Kingdom. A major disadvantage of the privacy of arbitration, however, stems from the fact that a series of *ad hoc* awards generally unaccompanied by “*Reasons*”, is not conducive to the establishment of the precedent necessary to make the law as predictable as it might otherwise be.

Since 31 January 1997, the law of arbitration in England, Wales and Northern Ireland has been governed by the provisions of The Arbitration Act 1996. The 1996 Act introduces a new concept of the “*seat of the arbitration*”, which is identified as the juridical seat of the arbitration as distinct from the actual physical location of the arbitration proceedings.

Whilst in the majority of cases the two will be interchangeable, in other cases the juridical may be located elsewhere, as for example, where different parts of the proceedings are held in different countries. Such seat can be specified by the parties themselves in the arbitration agreement, or maybe delegated to some other person or Tribunal authorized by them for the purpose. In the absence of such specific designation, the seat must be determined objectively, having regard to the parties' agreement and all the relevant circumstances. The provisions of the 1996 Act will apply where the seat of arbitration is in England, Wales or Northern Ireland.

Arbitration is founded on mutual agreement, a fact which the 1996 Act seeks to recognize by investing the parties with extensive powers over the conduct of arbitration proceedings. In general, they are permitted to determine such matters as the size and composition of the arbitration tribunal, the procedure to be adopted and the availability or otherwise of a right of appeal to the High Court on a point of law. Certain mandatory powers are, however, reserved to the Court for reasons of public policy, such as the power to stay legal proceedings, to remove an arbitrator, or to enforce an arbitration award. Otherwise the parties are granted a wide autonomy in regard to arbitration proceedings, many provisions of the Act being applicable "*unless the parties have agreed otherwise*".

Section 1 of the 1996 Act states that "*the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense*", and in achieving this objective "*the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest*". The parties are further enjoined to "*do all things necessary for the proper and expeditious conduct of the arbitration proceedings*".

The tribunal, for its part, is required "*to act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and ... adopt procedures suitable to the circumstances of the particular*

case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined".

The parties are free to agree on the number of arbitrators to form the tribunal and on whether there is to be a chairman or umpire. In the event of an arbitration clause not specifying the number of arbitrators to take part in adjudicating the dispute, section 15(3) of the 1996 Act provides that "*the tribunal shall consist of a sole arbitrator*". The attraction of a single arbitrator lies in the reduced costs and the more speedy process resulting from the absence of any need to reach agreement with fellow arbitrators on procedural matters or the ultimate arbitration award.

A serious problem can, however, arise where the two sides are not prepared to agree on the appointment. In such an event, application can be made to the High Court to appoint an arbitrator but experience has shown that such a process can be both time-consuming and expensive. One accepted method of avoiding this problem is to include a provision in the arbitration clause for the arbitrator to be appointed by a named third party, for example the chairman of a commodity association (such as GAFTA or FOSFA). Alternatively, the parties may provide for the reference of their dispute to "*three persons*", in which case each party would appoint his own arbitrator and the two so appointed would appoint a third as chairman of the tribunal. In the event of any disagreement between the arbitrators as to the award, and in the absence of any agreement of the parties to the contrary, the decision of the majority will be binding.

It is, however, more common in the United Kingdom for the arbitration agreement to provide for each party to appoint his own arbitrator and then for the two arbitrators themselves to appoint an umpire in the event of any disagreement between them. The 1996 Act provides that the two arbitrators once appointed "*may appoint an umpire at any time after they themselves are appointed and shall do so before any substantive hearing or forthwith if they cannot agree on a matter relating to the arbitration*". In the event of any disagreement between the arbitrators, the umpire is free to make an independent award as if he were a sole arbitrator. Should either party refuse to cooperate by

nominating his arbitrator then, after giving the appropriate notice, the other party may designate his nominee as the sole arbitrator and proceed with the hearing and award.

Occasionally the contract may require the appointed arbitrator to be a “*commercial man*”, i.e. a person normally engaged in the relevant trade. It would appear that the category includes a full time arbitrator, but not a lawyer practicing in a particular commercial field.

Section 14(1) of the 1996 Act provides that the parties are free to agree when arbitration proceedings are to be regarded as commenced for the purposes of the limitation acts. In the absence of such agreement, however, “*where the arbitrator or arbitrators are to be appointed by the parties, arbitration proceedings are commenced in respect of a matter when one party serves on the other party or parties notice in writing requiring him or them to appoint an arbitrator in respect of that matter. The parties are free to agree on the manner of service of such notice but, in the absence of agreement, it may be served “by any effective means”.*”

Under the 1996 Act, an appeal will lie to the High Court on a question of law arising out of an arbitration award, but only if the appeal is brought either with the consent of all the parties to the arbitration or with the leave of the court. Any application for leave to appeal must be brought within 28 days of the date of the award (the signed last page of an arbitration award is always dated) and will only be granted if the court is satisfied –

“(a) that the determination of the question will substantially affect the rights of one or more of the parties,

(b) that the question is one which the tribunal was asked to determine,

(c) that, on the basis of the findings of facts in the award –

(i) the decision of the tribunal on the question is obviously wrong, or

(ii) *the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and*

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.”

In granting leave, the court is empowered to impose such conditions as it thinks fit, including the power to make an order in respect of security for costs.

On determining the appeal, the High Court may “confirm”, “vary” or “set aside” the arbitration award, or may remit it for consideration by the arbitration tribunal in the light of the court’s opinion on the point of law involved.

No appeal will lie from the decision of a court of first instance except with the leave of that court, which shall not be given “unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the court of appeal”.

No appeal is possible from an arbitration tribunal in the absence of a “reasoned award” by the arbitrator(s) and the 1996 Act requires an arbitrator to give reasons for his award “unless it is an agreed award, or the parties have agreed to dispense with reasons”.

The courts have taken the view, in construing previous legislation on this subject, that “All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is.”

Should the arbitrator(s) give no reasons for his/their award, or reasons which the court considers insufficient, the court may require the arbitrator(s) to state his/their reasons in sufficient detail to enable it to consider any question of law in the award which may arise on appeal.

As the decision of the High Court to reject an application for leave to appeal is final, the question arises as to whether in the circumstances the court is still required to give reasons for its decision.

This issue arose in *The Western Triumph* in which the Claimant argued that the lack of adequate reasons for the rejection of his application amounted to a breach of his entitlement to a “*fair hearing*” under Section 6 of the Human Rights Act 1998. The Court of Appeal took the view that in the case of an appeal under Section 69(3) of the 1996 Act, it would generally only be necessary to identify the particular ground of appeal which the applicant had failed to establish without the need to say more. Only where the Claimant contended that the tribunal’s decision was *obviously wrong in law*, or *open to serious doubt*, may reasons be required. Such reasons, however, need only be brief, so as to show the losing party why it had lost and it may be sufficient merely to indicate that the court agreed with the reasons given by the arbitrators.

Provision is made in the legislation for the parties to enter into an agreement excluding the right of appeal to the High Court from an arbitration award, and such agreement is presumed where the parties agree to dispense with reasons for the tribunal’s award. This right to exclude the court’s jurisdiction in advance now extends to maritime contracts, reversing the position under the previous legislation.

There is scope to apply for leave to appeal an arbitrators’ award on a question of law under Section 69 of the 1996 Act and also, under Section 68 of the 1996 Act, on the ground of “serious irregularity” in the arbitration proceedings.

In *The Nema*, Mr. Justice Colman held that Section 69, “*distinguishes between cases where the material question of law is one of general public interest and cases where it is not. A different threshold test is to be applied in the serious doubt test from the obviously wrong test, but in both cases the test is to be applied to the question of law “on the basis of the findings of fact in the award.” In other words, the court takes the findings of facts,*

if adequately expressed in the award, as an immutable basis for testing the correctness of the arbitrators' decision on the question of law...".

Colman J. was of the opinion that in reaching a decision as to whether the requirements of Section 69 had been satisfied, the Court should look exclusively to the award and disregard the circumstances in which the award was made, including allegations of irregularity.

In addition to the right of appeal on a point of law, the parties are permitted to challenge an arbitration award on grounds of lack of substantive jurisdiction (Section 67) or serious irregularity affecting the tribunal, the proceedings or the award (Section 68).

In the case of Section 68, the 1996 Act lists a series of specific irregularities, one or more of which might constitute a “*serious irregularity*” provided that in the circumstances, and in the opinion of the court, they will cause substantial injustice to the applicant.

Where a party to an arbitration agreement institutes an action in court in contravention of that agreement, the other party may request the court to stay such proceedings. In such circumstances, the court is required to grant a stay “*unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed*”.

Under the 1996 Act, the parties are free to specify in their arbitration agreement the circumstances in which the authority of the arbitrator may be revoked, in whole or in part. In the absence of such an agreement, his authority can only be withdrawn by the parties acting jointly or by an arbitral or other institution or person vested by the parties with authority to take such action.

So far as intervention by the court is concerned, its powers are restricted to the removal of the arbitrator rather than the revocation of his authority. Section 24(1) of the 1996 Act provides that application to remove an arbitrator may be made to the court on any of the following grounds –

“(a) that circumstances exist that give rise to justifiable doubts as to his impartiality;

(b) that he does not possess the qualifications required by the arbitration agreement;

(c) that he is physically or mentally incapable of conducting the proceedings or that there are justifiable doubts as to his capacity to do so;

(d) that he has refused or failed –

(i) properly to conduct the proceedings, or

(ii) to use all reasonable dispatch in conducting the proceedings or making an award,

and that substantial injustice has been or will be caused to the applicant.”

Section 41(3) of the 1996 Act invests the arbitral tribunal (note rather than the *High Court*) with the power to dismiss any claim referred to it, provided that two requirements are satisfied. There must be inordinate and inexcusable delay by the Claimant in pursuing the claim, and such delay must either create a substantial risk that it will not be possible to have a fair trial of the issues or result in serious prejudice to the respondent. Despite Section 41(3), however, the parties can exclude such power by an appropriate clause in the arbitration agreement.

Limitation of Liability – The Current Limits:

The following limits now apply to claims arising out of accidents occurring after 13 May 2004:

LOSS OF LIFE OR PERSONAL INJURY

GROSS TONNAGE	SDR*	
	Now	Before
Less than 300	1,000,000	166,667
301 - 2,000 (previously 500)	2,000,000	330,000
2,001 - 30,000	+ 800 per ton	500 SDR up to 3,000 tons and up from 333 SDR thereafter
30,001 - 70,000	+ 600 per ton	250 per ton
More than 70,0000	+ 400 per ton	167 per ton

OTHER/PROPERTY

GROSS TONNAGE	SDR	
	Now	Before
Less than 300	500,000	83,333
301 - 2000 (previously 500)	1,000,000	167,000
2,001 - 30,000	+ 400 per ton	167 per ton
30,001 - 70,000	+ 300 per ton	125 per ton
More than 70,0000	+ 200 per ton	83 per ton

*In June 2004, 1 SDR = approximately US\$1.5 (but this rate varies with currency fluctuations).