

**To Litigate or to Arbitrate:  
*advantages and disadvantages in  
shipping and energy disputes***

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# DISPUTE RESOLUTION OPTIONS

1. Court Litigation
2. Arbitration
3. Mediation



# STATISTICAL COMPARISON

2015

- ❖ 674 Proceedings commenced in the Commercial Court in London
- ❖ 69 Trials and 930 applications heard



# STATISTICAL COMPARISON



## ARBITRATION LMAA 2015 FIGURES

- i. 3001 Arbitration Appointments (129 SCP)
- ii. 438 Arbitration Awards Published (93 oral hearings)
- iii. 221 Mediations (179 Successful)

# HIGH COURT LITIGATION

**Available in any case where the English Courts have jurisdiction**

- Specific Choice of Court Clause
- Contract governed by English law and no contrary jurisdiction clause
- The contract was made within England
- England is the place of performance of the Contract
- An alleged breach occurred within England
- A tort was committed within England



# HIGH COURT LITIGATION – ADVANTAGES

- Certainty
- Experienced Commercial Court Judges
- Lack of bias – international focus
- Specific procedure to be followed (CPR)
- Sanctions for Procedural delays (e.g. Unless orders)
- Incentives to settle are included in the CPR (e.g. Part 36 offers)



# HIGH COURT LITIGATION (CONTD) - DISADVANTAGES



- Cost – an expensive process
- Needs to take place in London
- Time (e.g. approximately 2 – 3 years before hearing for significant matters)
- Court relies on expert evidence – Judges not necessarily technical
- Public hearing

# ARBITRATION

## Arbitration only available by Agreement

- Either through an arbitration agreement in the contract
- Agreement to arbitrate after dispute
- London Arbitration procedure available even where different legal system applies to dispute





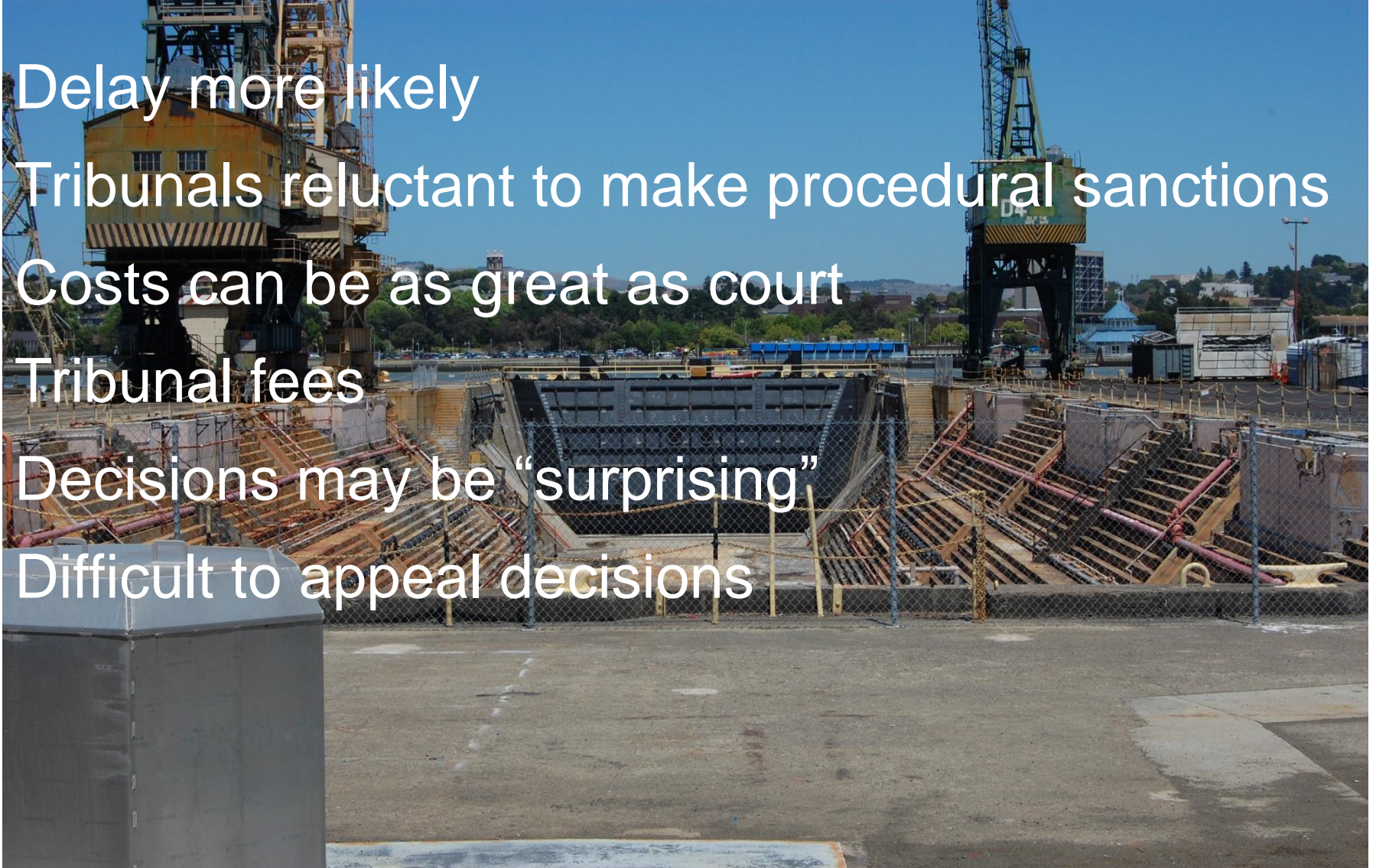
# ARBITRATION - ADVANTAGES

- Private – hearing is not open to the public
- Arbitrators chosen by parties – can be an expert in the field
- Procedural flexibility – parties are free to agree procedure
- Case may be determined on documents alone
- Parties can agree location of hearing
- Costs – cheaper?



# ARBITRATION - DISADVANTAGES

- Delay more likely
- Tribunals reluctant to make procedural sanctions
- Costs can be as great as court
- Tribunal fees
- Decisions may be “surprising”
- Difficult to appeal decisions



## Example of a Choice of Court Clause

*The High Court in London shall have exclusive jurisdiction over any dispute which may arise out of **or in connection with this Charter***

(Clause 49 of the BPVOY4 1998)



## Example of an Arbitration Clause (LMAA clause)

- *This Contract shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Contract shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause.*

.....

- *The reference shall be to three arbitrators. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator within 14 calendar days of that notice and stating that it will appoint its arbitrator as sole arbitrator unless the other party appoints its own arbitrator and gives notice that it has done so within the 14 days specified. If the other party does not appoint its own arbitrator and give notice that it has done so within the 14 days specified, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly. The award of a sole arbitrator shall be binding on both parties as if he had been appointed by agreement.*

# HYBRID ARBITRATION-COURT CLAUSE (CONTD)

## - Court Option

*Notwithstanding the Arbitration clause (a) above, either party shall have the option of referring any dispute to the High Court of Justice in London, England (the “Court”).*

*Such option must be declared when a party wishes to commence proceedings (for the claiming party) or within 14 days of receipt of an Arbitration Notice (for the respondent) and, upon such declaration, the parties shall procure that the arbitration (if commenced) be discontinued (without an arbitral award being given).*

*The Parties waive any objection now or later to any proceedings being brought in the Court and the parties hereby irrevocably submit to the exclusive jurisdiction of the Court.*

# RELATIVE COMMENCEMENT COSTS

## COURT

- Claim between £5,000 - £10,000      => £455
- Claim between £10,000 - £200,000   => 5% (upto £10,000)
- Claim over £200,000                      => £10,000

## ARBITRATION

- Arbitrator's Appointment Fee – LMAA £250
- Hourly rates thereafter (average of £300 per hour)



# LMAA SMALL CLAIMS PROCEDURE (SCP)

- Available for claims less than a certain amount
  - e.g. claims less than US \$100,000
- Streamlined procedure
  - claim, defence and reply - no further submissions
- No general disclosure
- No hearing
- Costs capped
  - Small claim fee - £3,000
  - Administration fee – £250
  - Successful party may recover a maximum of £4,000 (£4,500 where there is a counterclaim)



# LMAA SCP CLAUSE

- BIMCO NEWBUILDCON clause 42(c):
  - *“... The arbitration shall be conducted in accordance with the London Maritime Arbitrators Association (LMAA) Terms current at the time when the arbitration proceedings are commenced ...*
  - *... In cases where neither the claim nor any counterclaim exceeds the sum of US \$100,000 (or such other sum as the Parties may agree) the arbitration shall be conducted in accordance with the LMAA Small Claims Procedure current at the time when the arbitration proceedings are commenced.”*



# SECURITY FOR COSTS



- Where a claimant brings a claim against a defendant, the defendant is often entitled to security in respect of its legal costs of defending the claim
- Similarly, security for costs may also be sought by a Claimant where the defendant has bought a counter-claim.
- Security is often given in the form of a bank guarantee or P&I Club LOU

# SECURITY FOR COSTS - COURT



## 1. *Basis for Security*

- *Where Claimant is resident outside of the jurisdiction and not within an EU or EFTA state*

### *Conditions to be satisfied*

- CPR 25.13 (2)
  - (a) the claimant is –
    - (i) resident out of the jurisdiction; but
    - (ii) not resident in a Brussels Contracting State, a Lugano Contracting State or a Regulation State ....
  - (c) the claimant is a company or other body... and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so;
  - (d) the claimant has changed his address since the claim was commenced with a view to evading the consequences of the litigation;
  - (e) the claimant has failed to give his address in the claim form, or gave an incorrect address;
  - (f) the claimant is acting as a nominal claimant;
  - (g) the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him.

# SECURITY FOR COSTS - COURT (Cont)



## 1. *Amount of Security?*

- Discretion of the Court
- Will include the costs incurred to date and the costs likely to be incurred in the future
- In some instances the Court may factor in the extra burden or risk in seeking to enforce orders for costs subsequently obtained

## 2. *Time of Application?*

- May be made at any time in the proceedings

## 3. *Manner and form of Security*

- Court often orders for a specified sum to be paid in court by a specified date
- Bank guarantee or undertaking in form of P&I Club LOU

# SECURITY FOR COSTS - ARBITRATION



## 1. **When?**

*Pursuant to the LMAA terms this is to occur after submissions/formal pleadings have closed.*

## 2. **Basis for Security**

Section 38(3) of the Arbitration Act 1996 provides:

The tribunal may order a claimant to provide security for the costs of the arbitration.

*This power shall not be exercised on the ground that the claimant is –*

*(a) an individual ordinarily resident outside the United Kingdom, or*

*(b) a corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom.*

- The Defendant cannot rely on the fact that that the Claimant is resident outside of the UK
- The Defendant will have to show something else, for example, that the Claimant does not have sufficient assets to satisfy an award as to costs or that there are serious questions as to the Claimant's solvency

# SECURITY FOR COSTS - DEFAULT



## COURT

- The Claim may be struck out and judgment can be entered for the defendant with costs of the claim to be the subject of an assessment

## ARBITRATION

s.41(6) Arbitration Act

*If a claimant fails to comply with a peremptory order of the tribunal to provide security for costs, the tribunal may make an award dismissing his claim.*

- Therefore draconian consequences in the event that the claimant fails to comply with an order to provide security for costs.

# CONCLUSION



- Court or Arbitration are comparable processes.
- Both involve significant investment of time and costs.
- Flexibility of Arbitration and the privacy of the dispute are its main advantage.
- Consequence of a Court judgment its main advantage



The business of relationships.™

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