

# **RICHARD FAINT** LLM MBA FCIA RB MIE X.

**Chartered Arbitrator**

**Maritime & trade arbitrator and consultant**

**9<sup>th</sup> Shiparrested.com conference in New York City**

## **Weighing up the Options: Arbitration v. Litigation**

It was always considered that Arbitration was the cheaper, faster alternative to litigation.

However, Arbitration is still something that the English courts support [under CPR Rules a judge will firstly ask the parties whether they have considered ADR - and arbitration is of course part of ADR].

Against that it could be said that as the judicial system becomes more flexible and more cases reach amicable settlements - and the cost of Arbitration mounts - the gap between the two is closing. It has been said that the rising costs of going to Arbitration are turning people towards litigation.

International Arbitration should have a clear advantage over litigation but, to be realistic, Arbitration should not be considered a universal remedy. There is much to take into account - as always a quick settlement in Court [if possible] could assist in restoring or maintaining the reputation of a company.

It does depend on the parties. Companies trading in international markets do tend to consider arbitration to be, more or less, a normal part of trading life, with the privacy element of arbitration allowing them to continue trading while the Arbitration Award works its way through the system.

It can be a difficult choice to decide on whether to use Arbitration or Litigation. Making the right decision - and executing it properly - is not that easy. The cases themselves are becoming more difficult and the choice is driven by that oldest of all commodities - money.

The disputes have to be looked at in total. There are various elements to consider risk assessment, damage and reputational control, prevential value, cost, possible liability at the end of the process and, indeed, in certain circumstances, what could amount to the financial survival of that party, all need to be considered.

### **Confidentiality**

Arbitration is, generally, a private matter between the parties to the dispute. If there is an oral hearing then it will be attended by the parties and their witnesses.

**C/O CHARTER WISE LTD.  
21A HIGH STREET • LYNDHURST • HANTS, • S043 7BB • GB.  
TEL: +44(0)23 80284459 • FAX: +44 (0)23 80283888  
E-MAIL: richard@charterwise.co.uk**

Trade arbitrations actively discourage the presence of lawyers in the arbitration room. The public are generally not present and there is no "open" publishing of the parties' pleadings i.e. the statement of case and defence and counterclaim, or for that matter the Arbitration Award.

The parties themselves have an implied duty not to disclose what went on at the Tribunal, [there are some exceptions to this - the parties may agree to disclose documents or a Court may order documents to be disclosed]. The duty of confidentiality also extends to the Arbitrator.

By contrast in a court of law, every man and his dog - including the press and even trade competitors), could attend court and hear all the evidence relating to the dispute.

Commercial companies do not, as a general rule, want to see their problems being aired in public. Such publicity will have a significant bearing on decisions of where the dispute is to be heard.

London arbitrations are private unless the parties have agreed to publication (which rarely happens). In New York certain arbitration institutions publish Arbitration Awards. You pays-your-money-and-you-make-your-choice.

If confidentiality is a high priority, then Arbitration is more attractive and litigation less so.

### **Why so?**

Under CPR rule 5.4, a member of the public can request and obtain from the Court Service copies of the parties pleadings. So, if the matter proceeds to litigation it would appear that, in general, anyone can obtain a claimant's Particulars of Claim or a defendant's Defence, including the Counterclaim [if any]. These pleadings may contain sensitive trade information which could be of interest to a competitor or, simply, embarrassing to the parties.

If I understand it correctly witness statements and expert reports are not made accessible, but the opportunity to obtain copies of the parties pleadings may itself be damaging.

### **Should I care?**

Here is the main question. The decision, whether to go for Arbitration or Litigation, can only be made after looking at the question of confidentiality, or the lack of it, but that should be only one of the various factors to be taken into consideration.

This decision comes at the time of making the contract and should be a decision as to whether to incorporate an arbitration clause into the agreement. Under the

English system there must be a written agreement to proceed to arbitration [and reference to an arbitration clause in a standard form contract would suffice].

So, to assist clients in taking the right decision, you must take into account what type of business clients are in, including the likely or actual nature of the matter in dispute, and in particular the details which will come before the Judge or Arbitrator.

The decision, Arbitration or Litigation, has to be made on a case-by-case basis and, it is suggested, can only be made with a thorough understanding of the individual client's needs; that will have to include an understanding of his position in the trading marketplace

### **Which forum?**

This is also a part of the equation which has to be factored into making the right decision.

For example if the contract is subject to English jurisdiction there are a number of possible forums.

Perhaps the most famous is the LMAA [for maritime matters] – there are rumours that arbitrations under LMAA Rules can be slow and expensive. The LMAA can and does produce “quick” Awards and I make no comment on these rumours.

There are other forums that may be considered. For example GAFTA allows the possibility of running maritime arbitrations using experienced trade arbitrators.

There is also “THE INTERNATIONAL COMMODITY AND SHIPPING ARBITRATION SERVICE” (ICSAS) [www.icsas.org](http://www.icsas.org) which has lists of experienced Arbitrators from both the commodity and maritime fields and keeps an eye on costs and Arbitrators fees.

### **We should not forget about the LCIA [The London Court of International Arbitration]**

This is one of the leading international institutions for commercial dispute resolution and offers worldwide services, in the fields of arbitration, mediation and other forms of ADR.

This organisation also has access to experienced arbitrators, mediators and experts from many jurisdictions, with a widest range of expertise. You do not have to be a member of the LCIA to use their services. A registration fee is payable when you make a “Request for Arbitration” and hourly rates are charged by both the arbitrators and by the LCIA.

There are other forums and costs of each will be different.

Not an easy decision but one that you have to get right.

R. Faint © April 2012