

# Maritime Arbitration in Australia

## A Cracked Holy Grail?

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## **Maritime Arbitration in Australia – A Cracked Holy Grail?**

We have recently heard a great deal of comment on the potential of commercial arbitration in Australia, and maritime arbitration in particular. We have 2 professional bodies, AMTAC and MLAANZ making great efforts to create a local maritime arbitration culture. However the amount of effort, and volume of comment does not seem, from where I stand at least, to be reflected in any noticeable increase in local maritime arbitration activity.

Will we continue to be victims of history, perception and prejudice in the form of the ubiquitous “exclusive London arbitration” clause? Can this tide be turned?

The purpose of this paper is to reflect on the merits of marine arbitration in general and in Australia in particular, and consider some new and perhaps innovative ways in which that culture can be fostered.

For almost as long as I can recall, there has been an almost evangelical movement within the local legal profession directed at the encouragement and promotion of Australian-based maritime arbitration. I am one of those evangelists. While I have heard some private reservations expressed, I have never heard anyone openly question whether the promotion of local marine arbitration is necessarily “a good thing” and worthy of the amount of heat and light the on-going discussion generates.

And why would they? As a member of the local profession it seems taken for granted that by fostering a local marine arbitration culture we will produce a net increase in the amount of maritime legal work in Australia. The sub-text is that we may capture legal work which would otherwise go to London. Indeed it seems to be assumed that there is a competition between jurisdictions for a finite amount of maritime legal work.

The fact that Singapore, Hong Kong and New York, to name but three reasonably “heavy weight” jurisdictions seem to have the same idea (that is, fostering local maritime arbitration), must be testament to the fact that promotion of local marine arbitration is, by definition, “a good thing”.

But for whom is it “a good thing”? And if it is so self-evidently “a good thing”, why is it so hard to achieve and why haven’t we made more ground in the last 20 years?

It is appropriate that the local profession should critically examine our focus on creating an arbitration culture; if we are wasting our time we should not be afraid to draw that conclusion and move onto more rewarding pursuits; the Emperor may not be wearing new clothes. It is only through critical reassessment that we can find out what works, what doesn’t, and how the system might be improved to the benefit of all.

## Why maritime arbitration?

In order to understand the appeal of arbitration as a means of resolving maritime disputes, one needs to consider the advantages generally of arbitration as a dispute resolution mechanism over its main rival, litigation.

The English common law courts of the 19<sup>th</sup> and early 20<sup>th</sup> centuries were by all accounts not great places to resolve commercial disputes. Court lists were crowded; delays common; judges not especially “commercial”, and the involvement of (expensive, uncommercial) lawyers mandated. Commercial dirty laundry was hung out to dry in full public gaze.

Charles Dickens mocked the court system of his day in his novel *Bleak House*; the case *Jarndyce v Jarndyce* has become synonymous with defects in the legal system.

From the first chapter:

*Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least, but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth perhaps since old Tom Jarndyce in despair blew his brains out at a coffee-house in Chancery Lane; but Jarndyce and Jarndyce still drags its dreary length before the court, perennially hopeless.*

While arbitration has been practiced in various forms for centuries, with the advent of the New York Convention in 1958, international commercial arbitration came of age. Arbitration was informal, fast, relatively cheap, and private; every thing litigation was not. Specialist arbitrators could be appointed who were familiar with the commercial context of the dispute. Awards could be enforced globally and often more readily than judgments.

And the London Maritime Arbitrators Association became dominant in the resolution of international commercial maritime disputes.

## The LMAA Paradox

*The London Maritime Arbitrators Association (the LMAA) was founded on 12th February 1960 at a "meeting of the Arbitrators on the Baltic Exchange Approved List" but its roots and traditions stretch back more than 300 years over the history of The Baltic Exchange. Arbitrations were then (and indeed still are) conducted, often informally, before members of the shipbroking fraternity.<sup>1</sup>*

As Australian practitioners we are envious of the volume of interesting shipping work syphoned off to London arbitration, and the LMAA.

However the London maritime arbitration market is now a mature one and not above re-examination. It may surprise some of you to know that there is an open debate in London now about the merits of the LMAA system.

LMAA arbitration is considered expensive, even by London standards. The LMAA panel is viewed by some as a "closed-shop" in need of new-blood.

LMAA awards are not published beyond the parties. Some feel that this lack of publication is starving the law of interesting and relevant maritime precedents. This is a perennial bone of contention with the rival New York system which does publish awards.

The use of maritime arbitration is not self-evidently good. Leaving to one-side coercive arbitration agreements in shipping contracts, parties in the market for dispute resolution services have a choice and if they are to choose arbitration it must be because it is better than the alternative, namely the court system.

The rise of maritime and commodity arbitration in London (and elsewhere) was driven principally by the fact that arbitration was more attractive than the common law courts.

Arbitration, harkening back to its "scratch and sniff" origins, was informal, fast and (to flag one of the themes of this paper) arbitrary. It leant itself to the resolution of commonplace contractual disputes over significant, but not necessarily substantial, amounts of money.

While there are exceptions, commercial people do not enjoy protracted disputes. Above all, they want disputes resolved quickly so they can get on with their businesses. They accept that, as in any two-sided contest, the result can go either way and are content with a system that "gets it right more often than it gets it wrong." Preferably that result will be handed down by a panel of peers who understand the commercial background to the dispute. Even better if the submissions can be prepared without need to recourse to lawyers and the fees for accessing the system are readily ascertainable in advance.

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<sup>1</sup> LMAA Website – accessed 26 October 2009

It is doubtful whether LMAA arbitration now has any of those advantages. The steady and continual reform of court administration in the UK means that the courts are now faster and cheaper, and the dedicated Admiralty and Commercial lists mean that disputes are dealt with by highly experienced eminent commercial jurists elevated to the bench after long experience at the commercial bar.

Increasingly, international commercial disputes require the intervention of technology in the form of electronic discovery, “real-time” transcript and video-links. The courts have invested heavily in technology and provide access for a reasonable (tax-payer subsidised) fee. Unsubsidised arbitration facilities put all the costs on the parties.

Arbitration has become quasi-judicial, while the Commercial Court has become more commercial.

Senior practitioners in London are now openly advocating that disputes be kept in London (of course) but referred to the High Court.

### **Other Arbitration Alternatives?**

While most of you will be familiar with maritime arbitration, you will also be familiar with commodity arbitration through GAFTA and FOSFA in London, and perhaps NACMA/GTA in Australia. It is a common element of those systems that they are predominantly member-driven and utilised. By keeping close to their memberships they have I believe kept closer to the traditions of arbitration than maritime arbitration has.

By way of background, GTA publishes contracts commonly used in domestic grain trading. It also publishes a set of “Trade Rules”. Both the contracts and Trade Rules (which are often incorporated into contracts) require disputes arising under the contracts to be referred to arbitration administered by GTA.

The GTA arbitration system has been in operation for some 20 years. For most of those years activity was low, with no more than one or two arbitrations per year, if that.

In the last 5 years, however, volumes have increased significantly, averaging 1 or 2 referrals per month. The NACMA/GTA process and awards have been challenged in the courts.<sup>2</sup>To date it has been endorsed.

It is not the purpose of this paper to consider the GTA dispute resolution process in any great detail however I would like to extract some key elements.

GTA arbitration relies on volunteer arbitrators from within the GTA membership. It is in that sense a true trade arbitration system. This has a number of benefits. Each dispute becomes like a “case-study” or tutorial for

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<sup>2</sup> See for example [Premium Grain Handlers Pty Ltd v Elite Grains Pty Ltd \[2005\] WASC 103 \(27 May 2005\)](#)

the arbitrators who take the lessons back to their businesses. They feel enriched by the experience and often encourage their colleagues to become arbitrators.

They take their roles very seriously; it is an honour to be invited to arbitrate.

From my observation these traders have a deep familiarity with the commercial context of the disputes but never prejudge matters or appear in any way partial. It also allows the arbitrators to be “arbitrary”. As the Victoria Courts have made clear in the *Oil Basins* cases<sup>3</sup>, the parties are entitled to expect a different standard of process and reasoning from non-legal, or trade arbitrators. At first instance, in that case, Hargrave J said

*21 In my view, the standard to be applied in considering the sufficiency of an arbitrator’s reasons depends upon the circumstances of the case including the facts of the arbitration, the procedures adopted in the arbitration, the conduct of the parties to the arbitration and the qualifications and experience of the arbitrator or arbitrators. For example, in a straightforward trade arbitration before a trade expert, a less exacting standard than would be expected of a judge’s reasons should be applied in considering the adequacy of the reasons for the making of an award. On the other hand, in a large-scale commercial arbitration, where the parties engage in the exchange of detailed pleadings and witness statements prior to a formal hearing before a legally qualified arbitrator, a higher standard of reasons is to be expected. This is especially so where the arbitrator is a retired judicial officer.*

It is worth noting that both Courts in that case cited with approval the decision of Byrne J in *Schwartz v Morton*<sup>4</sup>, another case in which the GTA (formerly NACMA) process was upheld.

The parties choose trade arbitrators because of their experience in the commercial background to the dispute. They are not expected to write a quasi-judicial award with detailed reasons. They are permitted (perhaps required), to be arbitrary and this in my view is one of the real advantages of arbitration which is lost as soon as the arbitration becomes a surrogate court.

That is not to say that arbitration should be a “kangaroo court”. Procedural fairness and natural justice are not negotiable in any arbitration system. In my experience non-legal arbitrators need sometimes to be reminded to confine their deliberations to the matters raised in the submissions. On the occasions that there is clearly some relevant matter not addressed adequately, or at all, the arbitrators are encouraged to seek clarification from the parties, even if that results in delays to the process.

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<sup>3</sup> [BHP Billiton Ltd v Oil Basins Ltd \[2006\] VSC 402 \(1 November 2006\)](#)  
[Oil Basins Ltd v BHP Billiton Ltd & Ors \[2007\] VSCA 255 \(16 November 2007\)](#)

<sup>4</sup> Peter Schwartz (Overseas) Pty Ltd v Morton [2003] VSC 144 (16 May 2003)

The GTA process does not require that submissions be prepared by solicitors. As a result submissions (even sometimes those prepared by solicitors) sometimes leave many questions to be asked.

The GTA Dispute Resolution Rules require the parties to exchange submissions within a reasonably tight time frame. While the parties have the right to an oral hearing should they so choose, to date there has only been one oral hearing (ironically, perhaps, in *Schwartz v Moreton*).

Fees are fixed according to the amount in issue in the dispute (though GTA does reserve the right to recover other expenses incurred in the administration of the dispute). The amount in issue ranges from a few thousand dollars, to a few hundred thousand dollars. But for the GTA arbitration clause, the large majority of disputes based on GTA contracts would end up spread around the country, in the Local or District/County court system in the State of the aggrieved party's choosing.

I have little doubt that the GTA system is at least as good as that offered by the "inferior" Courts.

### **Lessons for domestic maritime arbitration?**

To the extent that any domestic maritime arbitration system seeks to emulate or duplicate the Court system I suspect it will have little success.

As I believe is the case in London, there is nothing inherently "good" about maritime arbitration unless it is better than the alternative.

We should not be distracted by London arbitration clauses in contracts. The enduring prevalence of such clauses is largely historical, and no longer driven by any genuine or meaningful preference of the parties to London arbitration over any other realistic alternative.

The lesson for the local profession is that if we want to create an arbitration culture, we must create a system that is better than the alternative. In this regard the work done by AMTAC and MLAANZ has been essential but to get to then next level, I believe we need to start small, but aim high.

Rather than wait like a "cargo cult" for the planes to land carrying million dollar demurrage disputes, we should get about developing our expertise through an innovative approach to dispute resolution.

The first class of disputes we may wish to consider are those that don't currently come to light at all. These are bill of lading disputes which would generally be below the P&I deductible (say < A\$10,000) and which marine insurers and other claimants might consider "uneconomical" to run through traditional litigation.

Such disputes could be administered by AMTAC or MLAANZ or whomever. They would require an "ad hoc" agreement by the parties to arbitrate. I note

that AMTAC lists among its Foundation Members a number of marine insurers, and at least one association representing carrier interests.

The intention of such a system should be that submissions and supporting documents be kept to a minimum so that the arbitrator's task (I am assuming a sole arbitrator) in reviewing the papers and issuing an award should take no more than (say) 3-5 hours.

Would it be too much to expect the arbitrators to be (at least initially) volunteers or perhaps accept nominal fee?

How such a system is costed would be a matter for some discussion but it is unlikely that any fortunes would be made. It is not "sexy" but it should be seen by the profession as both a service to industry and the first positive steps towards creating an arbitration culture in Australia.

The other broad class of case are those which may end up otherwise in the Local or District Court, neither of which jurisdiction maintains a specialist maritime expertise.

From my own experience I know that container detention cases are routinely commenced in the Local and District Courts. Once again these matters are not especially "sexy" but they are high in volume and require some specialisation. It seems to me that this could be a joint initiative between MLAANZ, SAL, CBFCA and AFIF.

Once we have some volume of matters (albeit over relatively small sums) being referred to local arbitration and the system has been "road tested" it may become easier for solicitors and their clients to see the benefit of agreeing to make "ad hoc" references of larger cargo claims and commercial disputes to local arbitration.

We will then have a solid foundation and "track record" on which to seek to seek to attract more international maritime dispute and perhaps finally win back some work from London.

The superior courts can then be left as the appropriate domain for resolution of larger scale and more complex commercial maritime disputes, for which they are best suited.

## **Conclusion**

I have no doubt that our cause is not perennially hopeless and that there is a need and great opportunities for local maritime arbitration.

I think we need to think laterally as to how we go about building on the excellent foundation already laid for our arbitration system.