

First Class: Litigation and Arbitration in London

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PRACTICES International, Shipping, Litigation, Europe, Middle East and Africa, International Arbitration, Offshore Oil and Gas

Recent statistics from London's Commercial Court and major arbitration institutions confirm London's reputation as an international hub for dispute resolution, with English law remaining the most popular choice for the resolution of international disputes. In this piece, we will look at the current status of international arbitration and litigation in London, and consider the steps taken in recent months by the key organisations in London to ensure that, notwithstanding the global pandemic, parties can continue to resolve their disputes in London.

Why English law and London?

English law is commonly preferred for governing law clauses in international contracts because it is based on well-founded principles, is transparent and provides predictability of outcome, legal certainty and fairness. English law respects parties' freedom to contract and is supportive of commerce.

Parties also chose to have their disputes heard in the English courts or through arbitration which has its seat in London. English judges in the Commercial Court are experienced in dealing with international disputes, independent, are world class legal minds and benefit from comprehensive court rules. The same can be said of London seated arbitrations, which are subject to a clear legislative framework, receive judicial support, and remain a neutral forum. London is home to well-established arbitral institutions and organisations such as the London Court of International Arbitration (**LCIA**) and the London Maritime Arbitration Association (**LMAA**) and continues to be the most selected seat for International Chamber of Commerce (**ICC**) arbitrations.

Commercial Court in London

The Commercial Court deals with complex cases arising out of national and international business disputes commonly relating to insurance and reinsurance, bank and financial markets, commodities, shipping and arbitration. Dating back to 1895, it is now part of the Business and Property Court of the High Court of Justice in London. The Court's international appeal was confirmed in a recent report on the Court.¹

Between April 2019 and March 2020, the Commercial Court heard 198 cases, involving parties from 72 countries. After the UK, the top nationalities were Kazakhstan, Russia, USA, Cyprus and Singapore, with a 50 percent increase in cases involving US parties since last year.²

London Court of International Arbitration (LCIA)

The LCIA, headquartered in London, is one of the oldest and leading arbitral institutions in the world. It administers arbitrations pursuant to its own Rules,³ and in 2019, a record 406 cases were referred to the LCIA, with parties, generally international businesses, coming from 138 different countries.⁴

These new disputes cover all aspects of international commerce, with banking and finance, energy and resources, and transport and commodities sectors accounting for almost 70 percent of cases. Over 80 percent of these new cases had a governing law clause providing for English law and/or England as the arbitral seat, reflecting the predominance of London as a preferred seat of arbitration and the importance of English law in international trade. That said, certain disputes referred to the LCIA were governed by the laws of Texas, New York and Delaware with one dispute also having its seat in Texas.

ICC Arbitration

The ICC's International Court of Arbitration ("ICC Court") located in Paris, France is another leading international arbitration institution, which resolves international business disputes under its set of arbitration rules (the "Rules").⁵ 2019 saw the 25,000th case being registered with the ICC Court, with 869 new cases being registered last year.⁶ The nature of disputes heard by the ICC come from a wide range of categories ranging from leisure and entertainment to transportation with disputes in the construction, engineering and energy sectors generating nearly 40 percent of the ICC Court's workload. The parties to these disputes originated from 147 countries, the highest number in the ICC's history. While 30 percent of the parties came from North and West Europe, it's popularity for American parties continued to increase, with the USA alone being the origin of 196 parties.⁷ While ICC arbitrations were hosted in 116 cities in 62 different countries, London was the most popular location. New York also appeared in the top five cities, while the USA was the fourth most popular country. Nearly 80 percent of awards were given in English. As to the choice of law clauses, while these covered 124 nations, states, provinces and territories, English law was the most popular choice of law and used in 16 percent of cases registered with ICC. The laws of 12 US states were used in 10 percent of cases, placing it behind Swiss law and equal to French law.

London Maritime Arbitration Association (LMAA) Arbitration

The LMAA is an association of maritime arbitrators based in London, which govern the vast majority of London maritime arbitrations, with 2,952 appointments in 2019.⁸ The LMAA does not administer or supervise the conduct of its arbitrations but exists to promote and support London maritime arbitrations. Arbitrators, who do not have to be LMAA members, accept appointments under the LMAA Terms, and it is the arbitrators who administer these ad hoc arbitrations.⁹ LMAA arbitration is suitable for most types of commercial shipping and shipbuilding disputes as well as disputes related to the offshore and oil gas sectors.

Response to COVID-19

The recent reports from the Commercial Court and the arbitral institutions reflect the position in 2019 and early 2020. While there are no formal statistics covering recent months for these organisations, there is some information about the impact of COVID-19 on London arbitration and litigation and how it has responded to the pandemic.

Commercial Court

The English Courts, particularly in the commercial sector, responded promptly to the impact of the pandemic on its work, with steps being taken in mid-March, before the lockdown was introduced in the UK, to address the impact of COVID-19. The Lord Chief Justice encouraged parties to embrace technology to avoid backlogs and delays and new legislation and guidance was rapidly introduced to reflect this. The approach wherever possible has been "business as usual". This has not been

the case in all jurisdictions, as other commercial courts chose, at least initially, to move cases to later in 2020, rather than adopt alternative measures.

The English Commercial Court has long had the power to hold hearings remotely, but prior to March, this was mostly limited to the giving of video evidence by witnesses who were abroad, using electronic bundles, and for some interlocutory matters. The impact that the pandemic had on logistics worldwide, led to the quick transition to remote hearings, which has generally been smooth. Almost all of the Commercial Court's work has been conducted on time, with only limited significant adjournments.¹⁰ The first virtual hearing took place in the Commercial Court the same week as the lockdown started in the UK. One impact noticed by the Commercial Court has been an increase in the settlement rate, up 10-15 percent, although this may have been caused by uncertainties globally rather than the situation in the UK.

Arbitration

It is common for certain arbitrations to be determined on the documents only (i.e. without a hearing) and such arbitrations (said to be 80 percent of LMAA arbitrations) were generally unaffected by the pandemic.¹¹ The use of video conferencing was also not new in international arbitration proceedings, but like the Commercial Court, arbitral proceedings were not typically conducted with each participant in a separate location. Although there are suggestions that as a result of the pandemic, more arbitrations were postponed than court hearings, this is thought to be due to the consensual nature of arbitration. It may also be the case that while arbitrations were initially put back in March or April to the Autumn, with a view to them being held in person at this later date, they may now proceed virtually in view of the number of successful remote hearings that have since taken place. The ICC and LMAA have both now issued guidance to address some of the unique challenges of virtual hearings including their own checklists and guidelines for such hearings.¹² There is also a wealth of guidance from those here and abroad, who like us, have been involved in a virtual hearing this year.

Future

The Commercial Court and LMAA have both indicated that they expect that, given how well users have adapted to virtual hearings, there will not be a complete return to conventional style hearings in the future. There is no doubt that some, if not all, aspects of virtual hearings will be considered going forward and it may be beneficial to have hybrid hearings that retain certain aspects of the virtual hearing to make hearings more streamlined, efficient and cost-effective, although at the expense of not seeing all witnesses in person. While the future remains uncertain in these unprecedented times, parties will hopefully benefit from these new ways to resolve their disputes here in London.

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1. Commercial Courts Report 2020 produced by Portland for the period April 2019 to March 2020.
 2. UK litigants accounted for just under half of the parties involved in cases before the Commercial Court.
 3. LCIA Arbitration Rules 2014. It may also administer arbitrations under the UNCITRAL Rules and other international rules of arbitration which do not expressly provide for an administering body.

4. LCIA 2019 Annual Casework Report recorded 406 cases which included 346 arbitrations pursuant to the LCIA Rules.
5. The current Rules were updated in 2017.
6. ICC Dispute Resolution 2019 Statistics.
7. There were also 19 domestic US arbitrations registered with the ICC.
8. LMAA 2019 Statistics. The number of arbitrations is less as these statistics do not distinguish between sole arbitrators and two or three-member tribunals and includes 255 arbitrations commenced on its Small Claims Procedure, Fast and Low-Cost Arbitration Scheme and the Intermediate Claims Procedure.
9. The current terms are the LMAA Terms 2019.
10. Commercial Court Users Group Meeting Minutes – June 2020.
11. Mr Ian Gaunt, President of the LMAA (2017-2020) at “How English Shipping Law has Responded to the Covid-19 Crisis webinar”.
12. “ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic” and “LMAA Guidelines for Virtual Hearings”. See also “Seoul Protocol on Video Conference in International Arbitration” and “The Vienna Protocol – A Practical Checklist for Remote Hearings”.