



# Newsletter

Jan 2011

Dear Members

I am delighted to send you greetings and well wishes for 2011 through this, our inaugural e-newsletter. Through this journal, I hope that we can keep in regular contact and you can be kept abreast of what is happening at SCMA from now on.

Much has happened since I took over the post from my predecessor Nick Sansom. Nick has moved on to Charles Taylor but not before he did an excellent job of laying a very solid foundation for me to build on.

First off, a snapshot summary of events since August 2009 to bring you up to date of the calendar of events

### Arbitration cases under SCMA since May 2009

This now stands at 20

Although small in actual number, it is nevertheless a relatively significant rise over the total of 5 cases registered with SCMA between 2004 till May 2009 (when SCMA was re-organized). However, please continue with the support.

### Membership Update

Memberships

	Corporate	Individual	Total
2010	29	70	99

### Meetings held in 2010 :

Aug 20<sup>th</sup> : Annual General Meeting  
Sept 30<sup>th</sup> : General Committee Meeting  
Nov and Dec : Promotional Committee

All the meetings were well attended but with more events due in 2011, I am looking forward to seeing more of you turning up.

### Events Calendar for 2011 :

2 x Conferences for Maritime Community  
(see e-brochure for 1<sup>st</sup> conference below)  
1 x Golf Day – Scheduled for May  
6 x Member nights  
1 x AGM  
2 x General Committee Meeting  
6 x Executive Committee Meeting  
6 x Promotional Committee Meeting  
2 x Procedure Committee Meeting

### What has been done since August 2010

Visits to both existing and potential members have been stepped up. The net for potential members has also been cast wider and apart from the obvious now includes

- Shipyards
- Banks
- Marine equipment & services providers
- Classification societies
- Professional maritime societies & unions

Those of you who can exercise influence over your close friends / business counterparts in these areas to join as members, I appreciate your assistance in roping them in.

An average of 25 visits / month was achieved. Many parties were brought into Maxwell Chambers itself where briefings on arbitration were conducted by myself, in concert with participating law firms. This enabled participants to gain firsthand experience of the ambience of arbitration proceedings.

#### **Some interesting observations from these meetings**

1. Quite a few companies could use help to draft their arbitration clause to accurately

reflect how they wish to manage their dispute resolution. There is often an over reliance on boiler plate clauses which on closer inspection do not match their expectations.

2. Many front line negotiators have vague ideas of what arbitration is about and they welcome briefings on the subject to increase their awareness.
3. There is tremendous diversity in terms of industry representation due to the large maritime cluster here. We can look forward to our membership reflecting this diversity in the months ahead.

So there you have it. After meeting quite a wide cross section of the maritime community here, I can summarize that there is more than anecdotal evidence of the large potential to raise awareness of this topic and with it to crystallize business potential for you as counsel and arbitrators. The need to reach out to them has never been higher as the maritime cluster in Singapore continues to grow and I hope we can work closer together in 2011 to realize this potential and bring more arbitrations which are either on adhoc basis or verging on going to adhoc or undecided as to swinging towards administered arbitration or not, all into the fold of SCMA.

#### **January Essay**

In this and all subsequent newsletters, an essay on arbitration or other related topic will be featured. I am pleased to inform you that our inaugural essay titled **Maritime Arbitration in Singapore** is contributed by Mr Chan Leng Sun, SC of Ang&Partners, a corporate member of SCMA. As many of us in Singapore know very well by now, Leng Sun has just been named Senior Counsel by the Chief Justice in 2011's legal year opening ceremony. As only 1 of 2 counsel named, it is a rare honor indeed. Congratulations Leng Sun from all of us at SCMA – Directors, staff and members!

Enjoy the essay and do keep them coming for the next newsletter.

#### **March Conference**

Do read up on the e-brochure at the end for details of the conference which will be held on 25<sup>th</sup> March at Supreme Court. I have shrunk it to fit onto the page but you can enlarge it if you have trouble reading some of the small print. It was rolled out yesterday, a rather unique (dare I say auspicious?) date, it being 11/1/11!

I hope to see many of you there, supporting the event as delegates. The Guest-of-Honour is on the verge of being confirmed so I cannot say more at this stage. What I can tell you is that it will be someone very senior from a ministry and Permanent Secretary, Ministry of Law and some of his staff will also be at the opening so it will be a good time to meet up at a rather unique venue.

Till then, I wish all of you a meaningful and rewarding 2011 and for our Chinese readers, a happy and prosperous Year of the Rabbit.

**Wai-Pong**

## MARITIME ARBITRATION IN SINGAPORE

### I. A Pro-Arbitration Jurisdiction

The 2010 Queen Mary International Arbitration Survey recently concluded that Singapore has emerged as a regional leader in Asia. That Singapore is a pro-arbitration forum does not make it unique. Perhaps what is unique is the concerted and wholehearted support from all branches of government, cooperating with a growing body of arbitration practitioners, both local and foreign qualified, who serve the needs of disputants.

Singapore demonstrates its support for arbitration in several ways, as illustrated by the tests developed on arbitration-related applications:-

1. Stay of court actions for arbitration. Stay is compulsory for international arbitration. It is discretionary for domestic arbitration but the burden is on the one resisting arbitration to demonstrate sufficient cause to disregard the arbitration agreement.
2. Singapore recognizes the concept of *kompetenz-kompetenz*, i.e. the tribunal can rule on its own jurisdiction. If it is arguable whether a dispute is within the scope of the arbitration agreement, the court will leave it for the tribunal to decide. Even if one party argues that the case is clear cut and there is no defence to it, the court will let the tribunal decide the case as long as the claim is disputed.
3. Finality of the award. There is no right of appeal for international arbitration. There is a limited right of appeal in domestic arbitrations on a question of law, but the tribunal's decision must be obviously wrong or, on a point of general public importance, at least open to serious doubt. Setting aside or resisting enforcement is allowed on only specific grounds, consistent with international standards laid down in the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").

4. Limited judicial intervention. The court will not usurp the role of the tribunal. The Court of Appeal put its philosophy across succinctly in *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] SGCA 5:

“[R]egardless of whether the court’s jurisdiction is exercised under the AA or the IAA, the same general principle of limited and cautious curial assistance applies. The court will intervene only sparingly and in very narrow circumstances, such as where the arbitral tribunal cannot be constituted expeditiously enough, where the court’s coercive enforcement powers are required or where the arbitral tribunal has no jurisdiction to grant the relief sought in the matter at hand.”

5. Enforcement of awards. The courts are faithful to the spirit and wording of the New York Convention, and apply, for instance, a restricted meaning of “public policy”. The Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank CA* [2007] 1 SLR 597, at 621-622 held that errors of law *per se* do not engage the public policy ground. Public policy can be invoked only in instances where the upholding of an arbitral award would “shock the conscience” or is “clearly injurious to the public good or ... wholly offensive to the ordinary reasonable and fully informed member of the public” or where it violates the forum’s most basic notion of morality and justice.
6. Where the claim is an admiralty claim within the the High Court (Admiralty Jurisdiction) Act, ship arrest is permitted for the purpose of obtaining security for an arbitration, wherever the arbitration is seated. The plaintiff is entitled to such an amount as security that would cover his reasonably best arguable case: *The Arktis Fighter* [2001] 3 SLR 394.

## II. The Arbitration Statutes

There are three arbitration regimes in Singapore.

### a) ICSID

There is the Arbitration (International Investment Disputes) Act which gives effect to the United Nations Convention on the Settlement of Disputes between States and Nationals of Other States. This regime is specifically tailored to Investor-State arbitrations administered by the International Centre for Settlement of Investment Disputes (ICSID), an institution of the World Bank. It is not relevant to maritime arbitration.

### *b) International Arbitration Act*

The international regime is governed by the International Arbitration Act (“IAA”). The IAA gives the force of law to the UNCITRAL Model Law on International Commercial Arbitration (“the Model Law”), with some modifications. It also gives effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (“the New York Convention”).

The IAA is the most relevant to maritime arbitration because most maritime arbitrations are “international” within the meaning of section 5(2) IAA which is derived from, if not identical to, the definition of “international arbitration” in art. 11(3) of the Model Law. The IAA will also apply if the parties so agree in writing. Conversely, the parties may agree to opt out of the IAA even if the arbitration is international in character.

Due to some details of the Model Law that have been modified in the IAA, care must be taken to read the Model Law with Part II of the IAA. For example, the default number of arbitrators where the parties do not specify the composition of the tribunal is one, instead of three under the Model Law. If parties do not agree, the arbitrator will be appointed by the Chairman of the Singapore International Arbitration Centre.

There is no right of appeal against a final award of the arbitrator, although the court may set aside an award on grounds of fraud or breach of natural justice, apart from the grounds provided in Article 34 of the Model Law. Examples under Article 34 are where the applicant was under some incapacity, the arbitration agreement was invalid, the applicant was unable to present his case, the tribunal acted outside its jurisdiction or contrary to agreed arbitral procedure, the subject matter was not arbitrable or the award was contrary to public policy. Article 34 provides that any application to set aside an award must be made within three months from receipt of that award.

### *c) Arbitration Act*

The domestic arbitration regime comes under the Arbitration Act (“AA”). It was completely revised in 2002 to harmonise the laws relating to domestic arbitration to those governing international arbitration. The AA operates as the default regime whenever an arbitration in Singapore falls outside the reach of the IAA or if parties opt out of the IAA.

A major difference between the AA and the IAA is the right of appeal on a question of law from an arbitral award, subject to threshold conditions being satisfied. The thresholds found in section 49(5)(c) AA are evolved from the common law *Nema* guidelines and are similar to those found in section 69(3)(c) of the English Arbitration Act 1996.

Another difference from the IAA is that section 45 AA permits referral of a question of law to be determined by the court, instead of the tribunal, in the course of the arbitration, much like section 45 of the English Arbitration Act 1996.

The AA can apply to maritime arbitration of a domestic character, e.g. where both parties are in Singapore and the subject matter is within Singapore. It can also apply if parties to a transnational dispute opt out of the IAA.

### **III. Maritime Arbitrations**

Maritime arbitrations in Singapore may take several forms. Some are *ad hoc*, where parties and the tribunal use the loose default framework provided by statutes as a starting point for the conduct of the arbitration.

Others utilize institutional rules of arbitration. The key institutes for this purpose are the Singapore International Arbitration Centre (“SIAC”) and the Singapore Chamber of Maritime Arbitration (“SCMA”). The main difference between an SIAC arbitration and a SCMA arbitration is that SIAC is an administered arbitration (comparable to that of an ICC arbitration) and SCMA is a non-administered arbitration (comparable to that of a LMAA arbitration).

#### a) SIAC ([www.siac.org.sg](http://www.siac.org.sg))

SIAC is an independent, not-for-profit organization that was established in 1991. It now comprises of a Secretariat, a Board of Directors and a Council of Advisors. The Queen Mary survey has identified a shift in preference towards SIAC over other international institutions. As an institution administering arbitrations, SIAC helps parties in the following ways:

- Appointment of arbitrators when they cannot agree on an appointment
- Management of the financial and other practical aspects of arbitration
- Facilitation of the smooth progress of arbitration

The Chairman of SIAC is the default appointing authority in Singapore when parties cannot agree on their arbitrator or arbitrators. In managing the financial aspects of the arbitration, the SIAC will take deposits in tranches to cover its administration fees as well as the fees of the arbitrators. The fees are fixed on a scale based on the sums in dispute. If the arbitration is settled or disposed of without a hearing, the Registrar of SIAC shall determine the fees payable by the parties. SIAC will also scrutinize drafts of awards although the tribunal has full liberty of decision on the case.

The latest edition of its rules is the SIAC Rules 2010. The former requirement of Terms of Reference has been discarded. Significant new features include an expedited procedure under Rule 5 where the award shall be made within six months from constitution of the tribunal and a procedure under Schedule 1 for an Emergency Arbitrator to decide on emergency relief prior to the constitution of the tribunal. The default number of arbitrators under the SIAC Rules 2010 is one, unless the Registrar decides that the dispute warrants three arbitrators.

Parties are free to choose the substantive law governing their dispute (in most cases, this would be the proper law of their contract) and even the juridical seat of the arbitration. The juridical seat of the arbitration often determines the curial law or *lex arbitri*, meaning the law governing the arbitration. In the absence of agreement, the default seat is Singapore. The current SIAC Rules 2010 no longer incorporates the IAA by default, so an arbitration held under the SIAC Rules 2010 in Singapore may be governed by either the IAA or the AA.

b) SCMA ([www.scma.org.sg](http://www.scma.org.sg))

The Singapore Chamber of Maritime Arbitration (“SCMA”) was originally established in 2004. Initially, it followed the model of an institute that administered arbitration. After feedback from the maritime industry, SCMA was completely re-structured in 2009, coinciding with a change in approach to one that facilitates rather than manage the arbitral process. SCMA is now a company limited by guarantee comprising members from local and international maritime community. Thus, all who are involved in the maritime business or academia such as shipowners, cargo owners, service providers like P&I Clubs, lawyers and arbitrators play an active and important role in formulating and implementing its policies and rules.

The SCMA does not manage the arbitration, so there is no management fee payable to SCMA. Parties are free to appoint whoever they want to be arbitrators but if they cannot agree, the Chairman of SCMA will appoint one from its Panel of Arbitrators for a small fee. The default number of arbitrators is three although parties are free to agree on one. Arbitrators on the SCMA Panel must meet certain criteria relevant to the shipping industry and maritime arbitration. SCMA does not fix the fees of the arbitrators. That is a matter to be agreed between parties and the tribunal. However, in an expedited procedure for claims not more than USD75,000 where claims can be determined summarily without an oral hearing, there is a cap on the fees of the tribunal as well as the costs that may be awarded.

While the SCMA Rules 2009 may be compared to the LMAA Rules in that both are non-administered, the SCMA Rules 2009 are simpler and shorter in form. It does not have the detailed provisions on tribunal's fees found in the LMAA First Schedule or the special section on arbitration procedure in the LMAA Second Schedule. It was considered that the text of the SCMA Rules 2009 contains sufficient core provisions on all aspects of a maritime arbitration: commencement, applicable laws, the appointment, powers and fees of the tribunal, the procedure and the award. The framework of the SCMA Rules 2009 emphasizes simplicity, flexibility and party autonomy. As with other arbitrations in Singapore, parties are free to choose the law governing the substance of the dispute and the seat of the arbitration. SCMA can be used, for example, for arbitrations seated in any country outside Singapore. If parties do not stipulate a seat, the default seat is Singapore and the default curial law is the IAA.

SCMA does assist in another type of maritime disputes with a different set of rules. This is bunkering disputes for which a separate arbitration procedure managed by SCMA is provided under Singapore's SS600:2008 Code of Practice for Bunkering. Parties who agree to this procedure will benefit from an even quicker resolution of their disputes over the supply of bunkers.

#### **IV. Supporting Infrastructure**

With the support and encouragement of both the public and private sector, a dedicated arbitration building was opened in 2010. Maxwell Chambers is an integrated dispute resolution complex, housing all the major ADR institutions in Singapore as well as fully equipped hearing facilities. The Singapore International Arbitration Centre (SIAC), the World Intellectual Property Organization (WIPO), the International Chamber of Commerce (ICC), the International Centre for Dispute Resolution (ICDR), the Singapore Chamber of Maritime Arbitration (SCMA), the Singapore Institute of Arbitrators (SIArb) and the Chartered Institute of Arbitrators (CIArb) can now be found under one roof. Other tenants include arbitrators and counsel from Singapore and London.

Foreign arbitrators can arbitrate in Singapore without the need for a work permit. As a further incentive to the development of international arbitration in Singapore, there is no withholding tax imposed on them. The restriction on legal representation in arbitrations has been removed long ago. Parties have freedom to choose who will represent them in a Singapore arbitration, regardless of paper qualifications.

*This article also appears in "The Charterer", published by The Charterers P&I Club.*

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# Conference 2011

## Unraveling Multiple Maritime Casualties

SCMA is pleased to present its inaugural conference in 2011 to the maritime community. It will be held at the Supreme Court of Singapore, in the auditorium which just witnessed the opening of the legal year by the Chief Justice. The conference will examine ways and means to unravel the risks and problems faced by owners, charterers, operators, managers, cargo interests, crew and insurers when their vessels are involved in multiple casualties.

In a first of its kind format, expert practitioners from SCMA's membership base & industry will be gathering collectively for a day to share their expertise and experiences as presenters. Through their presentations, delegates will be taken through multiple scenarios involving:

- Cargo: Damage by collision + water ingress. Necessity to unload and transship.
- Vessels: Damage to hull, necessitating temporary and permanent repairs.
- General average and adjustments
- Substitution of performing vessel to continue carriage of cargo and related c/p & B/L issues
- Effect on short and long term charters attached to the ships because of the accidents
- Collision - Determination of jurisdiction
- Pollution - Oil spill, liability issues, clean up, dealing with port state control and P+I club involvement
- Evidence and witness preservation – Expert advice on what & what not to do in the immediate aftermath
- Arbitration arising out of various issues

The presenters will address the issues in a chronological way and with a view to

- Restore seaworthiness of the vessels, involving liaison with class and selection of ship repair yards
- Restore commercial employment of the vessels
- Manage the dispatch of the cargoes to their eventual destinations
- Manage direct and cross liabilities to contractual parties and to port state
- Preserve evidence / witnesses necessary to deal with future settlement of claims

The presentations will be fully recorded on video and compiled DVD will be presented to all participants so that they can save time on taking notes.

**Who should attend: Senior management of Ship Owners, Senior management of Charterers/Operators, Ship Brokers, Ship Managers, In-house Counsel, Ship Agents, Lawyers, Arbitrators, Average Adjusters, Insurance Underwriters, Shipyards & all other Stakeholders in the shipping industry**

**Date : 25th March 2011**  
**Venue : The Auditorium, Supreme Court, Singapore**  
**Time : 8:30am to 6.15pm (Registration starts at 8:30am)**  
**Fee : SGD 500 per participant for SCMA Members and SGD 650 per participant for non members**

**What is included :**

- Delegate Fees
- 2 Tea breaks & Lunch
- Cocktails & Dinner at Singapore Cricket Club at 6:15pm - 9:30pm
- Info pack
- DVD of entire conference presentations

Kindly make reservation by faxing a copy of the completed registration form (attached) to us at + 65 62344556 or replying to this email with a copy of the completed registration form.

To find out more about the conference, please call + 65 6226 1502 or email : [info@maritimeresource.com](mailto:info@maritimeresource.com)

Looking forward to your participation.

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Holman Fenwick Willan
- 2. Captain Lee Fook Choon**  
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- 3. Dato' Jude Philomen Benny**  
JTJB LLP
- 4. Nick Sansom**  
The Standard Club

**Speakers Line Up :**

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SPICA Services
- 2. James Moran**  
North of England P & I Association Limited
- 3. Tan Hui Tsing**  
Shipowners Asia
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