



INDUSTRY INSIGHTS ISSUE 4

# Maritime Arbitration Report

May 2022  
A Report by Jus Mundi



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# Foreword

*This Report is part of a series of industry-focused arbitration reports edited by [Jus Mundi](#). Within each issue, we examine the extensive international arbitration data available on Jus Mundi to give you data-backed insights into arbitration in a specific economic sector.*

In this issue, we took a deep dive into our data available as of April 2022 to explore the maritime industry. Due to the prevalence of confidentiality in arbitration, we cannot be exhaustive and include every existing maritime arbitration case document in our analysis. Still, Jus Mundi is proud to have the most comprehensive database in international arbitration, both in investor-State and commercial arbitration. As of May 2022, **over 40,000 case documents** are freely available on our platform, which is continuously updated for the most thorough legal research possible.

We collect data using artificial intelligence through local public resources and open sources. We also have exclusive partnerships with major institutions — such as the [ICC](#), [HKIAC](#), and [VIAC](#) — and collaborative partnerships with leading organizations — such as the [IBA](#), which receives arbitral awards from various contributors globally, the [CEA](#), and the [UAA](#). These partnerships enable us to give you exclusive insights into the diverse commercial arbitration landscape.

In each Report, we present a unique overview of arbitral institutions, the key actors involved, and exclusive statistics in a specific industry. To bring you a range of perspectives, we have included contributions from leading professionals from around the world, including lawyers, arbitrators,



and in-house counsel, to showcase current trends and issues in the field. Finally, we provided a list of shipping arbitration cases filed in the last five years (*i.e.*, from 2017 onwards), which are available on our database and can be found in [Annex 1](#).

Jus Mundi would like to thank all the contributors for their assistance in producing this issue.

We hope you enjoy our complimentary Report and learn from the data available on our platform.

You may also download our previous reports on [Mining Arbitration](#), [Oil & Gas Arbitration](#), and [Construction Arbitration](#).

# Introduction

*Maritime arbitration, on a broad level, usually has as its subject matter or context something to do with goods carried by sea, or a ship carrying goods. Historically, it has been split into so-called “wet” (collision, salvage, wreck removal, etc.) and “dry” (disputes arising out of bills of lading, charter parties, and various other types of maritime contracts). Thanks to increasingly high standards of safety and seamanship at sea, thankfully, incidents giving rise to wet disputes are, in the long term, in decline. That said, accidents still happen and form the subject matter of disputes. Dry disputes, on the other hand, are in the long-term increasing, what with the ever-growing volumes of goods being carried by sea (even if fewer much bigger ships might be carrying those goods). In the modern context, maritime arbitration can encompass cross-over areas such as the building of ships or offshore installations. The numbers of those types of disputes also seem to be increasing over the long term.*



**[Ravi Aswani](#)**

Barrister  
36 Stone Chambers

Maritime arbitration has some differences from other types of commercial arbitration. First and foremost, perhaps, is the historical dominance of *ad hoc* arbitration. Whilst in other types of commercial arbitration, institutional arbitration is clearly dominant, the reverse is true in maritime arbitration. Institutions such as the [International Chamber of Commerce \(ICC\)](#), the [London Court of International Arbitration \(LCIA\)](#), and the [Singapore International Arbitration Centre \(SIAC\)](#) do have some cases which could broadly be described as maritime each year, but the numbers are relatively small compared to the diet of organisations, such as the London Maritime Arbitrators Association (LMAA). In addition, a number of specialised commodities bodies, such as The Grain and Feed Trade Association (GAFTA) and the Federation of Oils, Seeds, and Fats Associations (FOSFA), have their own internal systems of arbitration.

Second, it is fair to say that, historically, for international maritime arbitration, London — and to an extent, New York — have been preferred seats, with London being chosen as the seat for a very significant majority of the world’s maritime arbitration. However, with the gradual shift of the global economy towards Asia over the course of recent years, it is perhaps no surprise that Asian seats have enjoyed a growing number of international maritime arbitrations. [Hong Kong](#) has seen a rise in maritime arbitrations,

but probably to the same extent as [Singapore](#). The rise of Singapore first as a regional and, more latterly, truly global seat for international arbitration has not excluded maritime arbitration. The [Singapore Chamber of Maritime Arbitration \(SCMA\)](#), which started as an institution in 2009, has, over the course of a relatively short period of time, developed a reputation and a following, especially where arbitration might be necessary between two Asian parties in the maritime context. In common with other Singaporean organisations involved in dispute resolution, it has marketed itself very effectively and is really beginning to see traction, with around 40 maritime arbitrations being conducted in each of the last few years. Although today those numbers might seem small in comparison to London, the growth from zero is significant and likely to continue in the future, aided by innovative and regularly updated rules of arbitration.

Third, at least as far as London is concerned, the English Arbitration Act 1996 provides (on an opt-out basis) for the potential of appeals on points of law to the courts. Whilst almost all institutional rules validly opt-out of the right to appeal, *ad hoc* maritime arbitration has always been slightly unique by the LMAA rules (and the corresponding rules of commodities bodies) not containing any such opt-out. This explains why so many English commercial law decisions by the appellate courts arise out of maritime arbitration. This is perennially a topic of discussion between arbitration practitioners, especially in the non-maritime context. But, as far as users of maritime arbitration are concerned, there does not seem to be any widespread dissatisfaction with how the system works. Although the Law Commission is, at present, consulting on reform of the Arbitration Act, it seems unlikely that the maritime industry will make any representations complaining about the present law on appeals on points of law.

Fourth and finally, despite the recent controversy and consternation caused by the decision of the United Kingdom Supreme Court in [Halliburton Company v Chubb Bermuda Insurance Ltd.](#) (formerly known as Ace Bermuda Insurance Ltd.), the landscape remains that maritime law firms and Protection and Indemnity **P&I** Clubs (who are serial users and, in effect, third-party funders of maritime arbitration) continue to have their favourite few arbitrators whom they appoint for most or even all their maritime disputes.

The number of law firms practising in maritime law is significant but not huge. There are thirteen first class P&I Clubs in the International Group of P&I Clubs. This means that the number of law firms and P&I Clubs that are serially involved in maritime arbitration is, by comparison to equivalent law firms and insurers in other areas of commercial arbitration, relatively small. The unique role of P&I Clubs effectively involves them acting as third-party funders of almost all maritime arbitration.

As a relatively niche industry, by and large, most users appreciate such features, which might raise eyebrows in other contexts. There is generally no culture of statements of independence and impartiality, and arbitrators are frequently appointed hours before the expiry of a limitation period. It remains to be seen whether the position will, over time, develop to resemble something more familiar to non-maritime arbitration users and practitioners.



# Economic Landscape of Maritime Arbitration

*The past two years have seen unprecedented turmoil in the global economy, including, in particular, the strict lockdowns across [China](#), which remains the world's factory for many products. The closure of factories and other facilities, and equivalent lockdowns across the world, led almost overnight to a slump in both supply and demand of certain products, but paradoxically an increase in demand for consumer electronics and similar items as people worked from home and entertained themselves at home.*

At a time of constraints in shipping capacity, container and labour shortages, Covid-19 related restrictions at ports and congestion at ports, this situation caused various problems. As those transitory factors began to diminish and the position began to return to something like it was pre-pandemic, the crisis in [Ukraine](#) has caused further issues in the field, especially an increase in fuel costs at just the wrong time. Shipping freight



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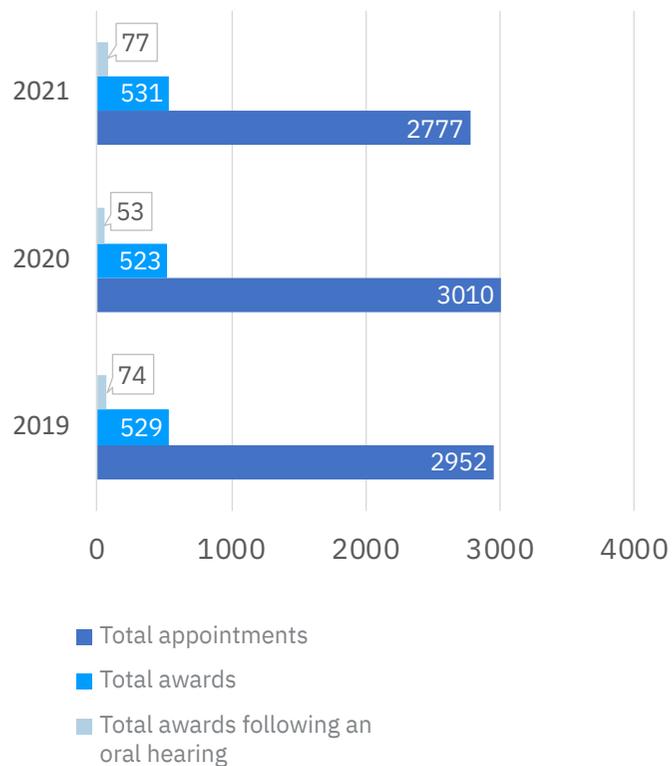
rates remain very high and consumer price inflation is at high levels across the world. After a dip during the pandemic, companies are again ordering new very large ships to be built with which to service the world's increasing appetite for both raw materials and manufactured goods.

Developments of this type, if not necessarily on this scale, are nothing new in the maritime arena. Equally, practitioners involved in maritime arbitration are used to having to deal with developments of this type and their impact on existing and new arbitrations.

In the very early days of the pandemic, when people genuinely thought it was possible that the disruption might only be in the order of 6 to 8 weeks, many existing maritime arbitrations were effectively just stayed, pending the envisaged quick return to normal. As it became clear that the pandemic would be with us for much longer, inventive ways had to be found to ensure that existing and new cases could be progressed. The image held by some maritime arbitrators as very conservative and stuck in their ways, ill at ease with modern technology, was demonstrated to be a fallacy, with many adapting to remote hearings and soft copy documents with admirable gusto. Even as in-person hearings now become practical again, remote hearings will be here to stay. Soft copy documents equally will continue to be used going forwards.

Such developments should serve to keep maritime arbitration relatively cost-effective compared to other types of commercial arbitration. It is also clear from the statistics recently published by the London Maritime Arbitrators Association (LMAA) that there has not been any huge or lasting effect on LMAA arbitration caused by the pandemic. The total appointments, the estimated total number of unique arbitrations, and the numbers of awards issued for 2019, 2020, and 2021 have remained remarkably consistent:

### London Maritime Arbitrators Association (LMAA) Statistics



### ABOUT THE AUTHOR

[Ravi Aswani](#) is a commercial dispute resolution barrister. He has a broad practice which covers a number of areas including in particular shipping and international trade, banking and finance, commodities, construction, energy, insurance and re-insurance, and various international consortia and joint venture agreements. Ravi has an extensive international arbitration practice, acting as both counsel and arbitrator. He has been instructed in arbitrations seated in a number of jurisdictions under a number of applicable laws, both ad hoc (in particular the LMAA), as well as, institutional arbitration (in particular ICC, LCIA, and SIAC).

# Maritime Arbitration Cases on Jus Mundi

For this Report, we only surveyed the data you can access, double-check, and monitor on Jus Mundi. Overall, we have found **318** arbitration cases available for maritime disputes in our multilingual search engine, of which **311** are **commercial arbitration cases** and 7 investment arbitration cases. Note that we excluded inter-state arbitration cases from our analysis.

We have categorized the cases into the Transportation & Storage sector and the Water Transport (Shipping) sub-sector according to the [Standard Industrial Classification of All Economic Activities \(ISIC\)](#) to seamlessly deliver precise search results in our search engine through our useful [Economic sector filter](#).



TOOLTIP

Try Jus Mundi's new **Monitoring & Alerts** feature to get updates on cases, arbitrators, or any searches or legal intelligence and business development.

Set alerts on [#Charterparty](#), [#BillofLading](#), or more generally [#Shipping](#) to stay up to date with new developments

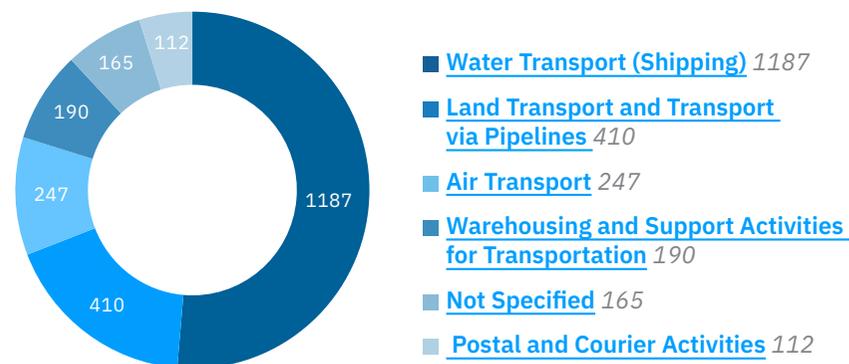
## Our Insights

### SOME NUGGETS OF DATA-BACKED INFORMATION FOR NOVICES AND EXPERTS ALIKE

- The Shipping sub-sector case documents alone account for **52% of all case documents** available on Jus Mundi in the Transportation & Storage sector.

### Proportion of case documents available on Jus Mundi in the Transportation & Storage economic sector

- according to our database -



This is explained by the fact that the shipping sector is one of the most significant industries worldwide. The United Nations Conference on Trade and Development (UNCTAD) estimates that **over 80% of the world's trade in goods** is being transported by sea. In 2019, prior to the Covid-19 pandemic, the **total value of the annual world shipping trade** reached **over USD 14 trillion**.

- Although Jus Mundi has the most comprehensive database in commercial arbitration, the **number of case documents** available in shipping arbitrations is **lower** than for most economic sectors with such a high impact on world trade.

This is due, to some extent, to the **confidentiality** surrounding arbitrations in the maritime industry.

Two intertwined factors come into play here:

1. Maritime arbitration cases are almost **exclusively commercial arbitrations**, but for a few negligible exceptions. In fact, our data show that **98%** are commercial arbitrations.

Indeed, shipping arbitrations tend to involve commercial disputes between highly specialized private operators, such as shipbuilders, shipbrokers, ports management & logistics, transportation companies, marine insurances, commodities traders, maritime construction & engineering companies, and maritime classification societies.

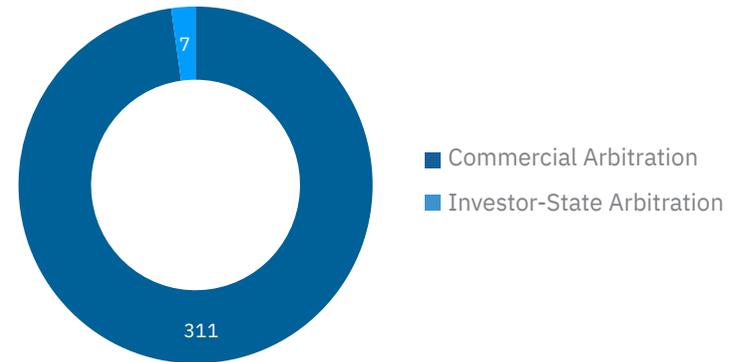
States and State entities may be involved in maritime disputes — *i.e.*, disputes involving the law of the sea and public international law, often boundary disputes —, but rarely in shipping arbitrations — *i.e.*, commercial disputes related to transportation by sea.



**TOOLTIP**

Find your community on [Jus Connect by Jus Mundi](#), the professional network tailored-made for the arbitration industry. [Join today for free!](#)

### Proportion of commercial and investor-State arbitrations in Maritime Arbitration - according to our database -



#### NOTA BENE

Note that, in this Report, we refer to maritime or shipping arbitration without distinction, excluding disputes under public international law, which are not the subject of this Report.

2. As in any other industry, commercial arbitration tends to be less transparent and more confidential. Adding to this sense of secrecy is the fact that a vast majority of maritime arbitrations are *ad hoc* arbitrations.

The lack of an administering body or arbitral institution in these disputes makes it unlikely — although not impossible as the cases and awards available on Jus Mundi demonstrate — that any case docu-

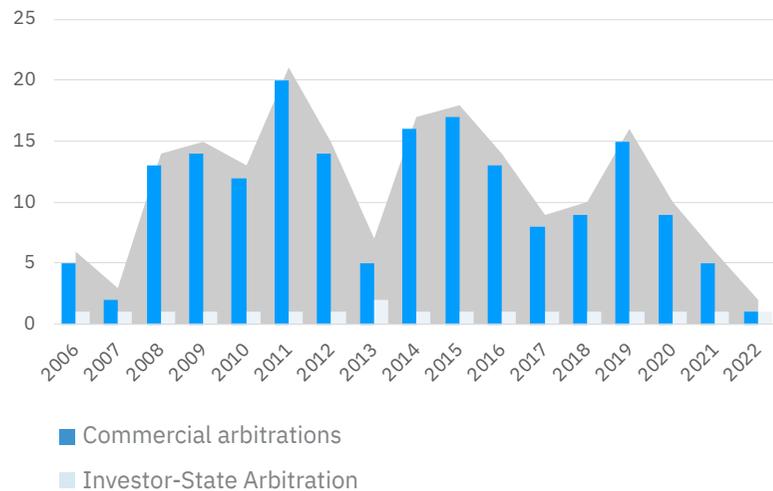
ments, let alone awards, will ever be made public.

Awards or details of some maritime arbitrations may sometimes get disclosed through local proceedings, for instance, to enforce an award in some jurisdictions.

While international arbitration practitioners are considered to be part of a rather exclusive arbitral community, practitioners and actors of maritime arbitration are part of an even more elusive and secretive sub-community.

The flow of information to the general public is therefore not optimal.

**Evolution of the number of Maritime Arbitration cases filed over the years**



# A Brief History of Maritime Arbitration

*Arbitration is particularly suited to the maritime industry. Parties involved in maritime business face complex, specialised, and international disputes, which they have chosen to resolve outside of state courts since ancient times. One of the first arbitration clauses in the maritime world dates back to 323 BC, in a case referred to as “Against Dionysodorus.”*

In that case, a dispute arose between the shipowner Dionysodorus and the charterer Darius, who had contracted for the use of the vessel for a specific journey. The parties amicably settled the dispute and then drew up a settlement agreement, referring to any dispute arising out of the settlement agreement to “one or more merchants of the port.” They chose arbitration because of the same good commercial reasons that arbitration is chosen today in the maritime industry.

The maritime business uses clauses that have hardly changed in their essence. The Baltic and International Maritime Council (BIMCO) published a wide variety (over 300) of widely adopted industry standard contracts such as charterparties, bills of lading, ocean towage contracts, contracts for shipbuilding, and ship management, among others. BIMCO contracts



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are the industry standard. Its direct membership represents approximately 60 percent of the world’s merchant shipping tonnage and it has members in more than 130 countries. All BIMCO standard form contracts refer to arbitration. The latest BIMCO Law and Arbitration Clause 2020 states that:

*“any dispute arising out of or in connection with this contract shall be referred exclusively to arbitration” and that “the reference shall be to three (3) arbitrators unless the parties agree otherwise.”*

Just as in the days of Dionysodorus, dispute resolution by arbitrators with a commercial background is highly valued. Judges, academics, and even lawyers who often serve as arbitrators in other forms of commercial arbitration have, historically, in the maritime world, not necessarily been sought after to resolve the types of issues which arise at sea. Former ship captains, engineers, and shipbrokers are often considered well suited to decide maritime disputes because of their deep knowledge of the industry and its practice. One of the most common standard contractual documents in the industry used widely for time charter parties, the New York Produce Exchange Form 1946 (the “**NYPE 46**”), expressly stipulates that the arbitrators “shall be commercial men.”

## The birth of the London Maritime Arbitrators Association from the Baltic Exchange

“The port” in the case *“Against Dionysodorus”* was the port of Piraeus, which was, as it continues to be today, one of the great centres of the maritime business. But long since 323 BC, the centre of maritime arbitration has shifted to London.

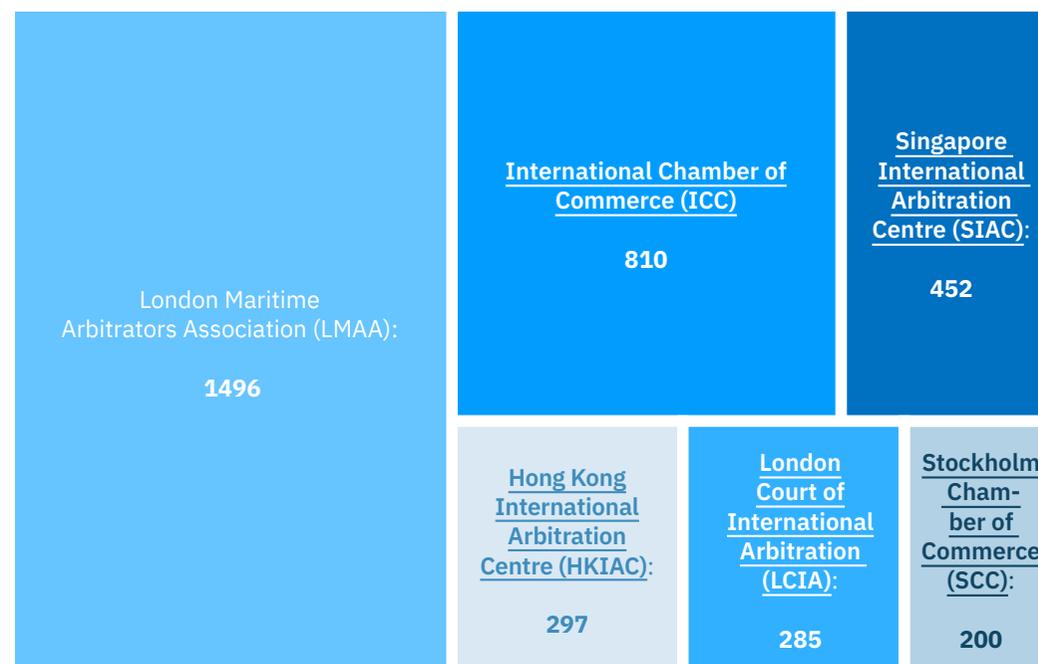
One long-lasting legacy of the British Empire’s rule of the seas is the prevalence of English as the dominant law governing maritime commercial contracts today. English is also the most commonly-used language in the maritime business. The Common Law system, which builds upon legal precedents, has resulted in a body of law going back hundreds of years, in large part built on international maritime disputes. Institutions, such as Lloyds insurance market and the Baltic Exchange, are icons not only of the international maritime business, but of London itself. Both the Baltic and Lloyds started in the 18th century as coffee houses where merchants would trade. At Lloyds, merchants traded in maritime risk; at the Baltic, contracts for international trade and shipping were concluded. Today, the Baltic Exchange’s international community of over 600 member companies encompasses the majority of world shipping interests, and its members are responsible for a large proportion of all dry cargo and tanker deals, as well as the sale and purchase of merchant vessels.

As the international trading centre for the maritime business, brokers who manned the floor of the Baltic Exchange were inevitably involved in the resolution of maritime disputes. According to those who were involved in this dispute resolution process, it is said that, until the 1950s, it was not uncommon for disputes to be resolved informally over cocktails between experienced shipbrokers, with reference to a third experienced shipbroker if the two shipbrokers could not agree. The third shipbroker would

recommend a solution to the two “advocate arbitrators.” The Baltic Exchange maintained a list of brokers willing to act as arbitrators. In 1960, senior Baltic Exchange brokers who acted as arbitrators among peers formed an Association to offer a more structured arbitration offering to the London maritime cluster of services. It was essentially that list of broker arbitrators which was transformed into the London Maritime Arbitrators Association (LMAA). Even by the 1960s, lawyers were very rarely involved in resolving maritime disputes. In 1981, the first step away from operating on a pure ad hoc basis was taken when the LMAA published its first set of procedural rules.

The statistics helpfully illustrate the extent to which London dominates maritime arbitration:

### Disputes referred to arbitral institutions/associations in 2017



In 2016 and 2017 alone, a total of 1,015 awards were issued in LMAA arbitrations. The number of maritime disputes referred to the LMAA but not resulting in an award in 2016-2017 was 3,216. Even that number is an underestimate because the figures are taken only from tribunals where one sitting member is a Full Member of the LMAA. If a dispute is referred to arbitration under the LMAA rules, but no member of the tribunal is a Full Member of the LMAA, then it might not be included in those statistics. There is no requirement that an arbitrator under the LMAA terms be a Full Member, and barristers and others who are not Full Members are increasingly appointed as arbitrators under the LMAA terms. In 2014, the LMAA included, for the first time, barrister appointments in addition to Full Member appointments when compiling its figures.

Recent statistics confirm London's continuing dominance in maritime arbitration. According to the LMAA's statistics published in 2022, LMAA arbitrators reported 2,777 new appointments under the LMAA Terms and Procedures in an estimated 1,657 references, while an estimated 531 awards were published in 2021, the highest number since 2016.

In contrast to general commercial arbitration, the overwhelming majority of LMAA arbitrations in 2021 were conducted on a documents-only basis, but the pandemic did not prevent progress with hearings (in-person, virtual, and hybrid) after some interruptions in 2020. As evidence of the quick adoption of virtual hearings, 77 awards were made after hearings in 2021 in comparison to 53 in 2020.



Maritime arbitration has a long and illustrious history of resolving disputes in a manner which is efficient and cost-effective. The future looks bright! Other maritime arbitration centres, such as the [Singapore Chamber of Maritime Arbitration \(SCMA\)](#), offer excellent service, expertise, and efficiency. There are hopes that the new [Dubai International Arbitration Center \(DIAC\)](#), which has just merged with the Emirates Maritime Arbitration Center (EMAC), will provide a good service. No matter where, in the future, maritime arbitrations will take place, there is little doubt that in the maritime world, the preferred method of resolving commercial disputes will continue to be to refer the matter to “*three merchants of the port.*”

#### ABOUT THE AUTHOR

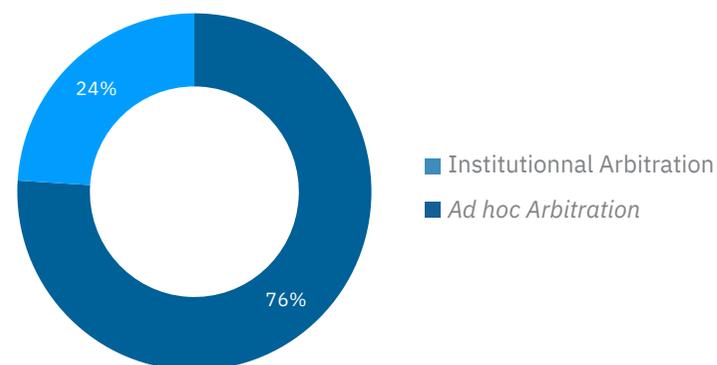
[George Lambrou](#) has been resolving maritime disputes for over 20 years and regularly sits as arbitrator in maritime and commercial disputes under a wide range of rules, ad hoc, and institutional, including LMAA, ICC, SCC, ICSID, and LCIA. He is currently the Director of the Chartered Institute of Arbitrators' Maritime Arbitration Diploma course. Native in English, he also works in Greek and Russian.

# Most Selected Arbitration Institutions

We looked at all the maritime arbitration cases available on Jus Mundi and the chosen arbitral institutions. We then gathered the data to show the popularity of each arbitral institution in maritime arbitration.

Our survey revealed **20 main arbitral institutions** that have administered maritime arbitrations over the years. Parties opted for various local and international arbitration institutions for their maritime disputes. But in the vast majority of cases, they chose **ad hoc arbitration**.

**Proportion of ad hoc and institutional arbitration in Maritime Arbitration** - according to our database -



## Key Takeaways

- **Ad hoc arbitration** is largely favored over institutional arbitration in shipping disputes. This figure seems stable: in the last five years, 71% of the maritime arbitrations filed were *ad hoc* arbitrations. See [Annex 1](#). Some mention that it is an even more “**à la carte**” arbitration, which means it can be conducted more efficiently and faster, should the parties decide so. For instance, parties or their arbitral tribunal can choose to forego oral hearings. In fact, many shipping disputes are resolved solely by exchange of written pleadings. This is not a common fixture in arbitration in other industries.

Another main argument often referred to is its **cost-efficiency**. Arbitral



TOOLTIP

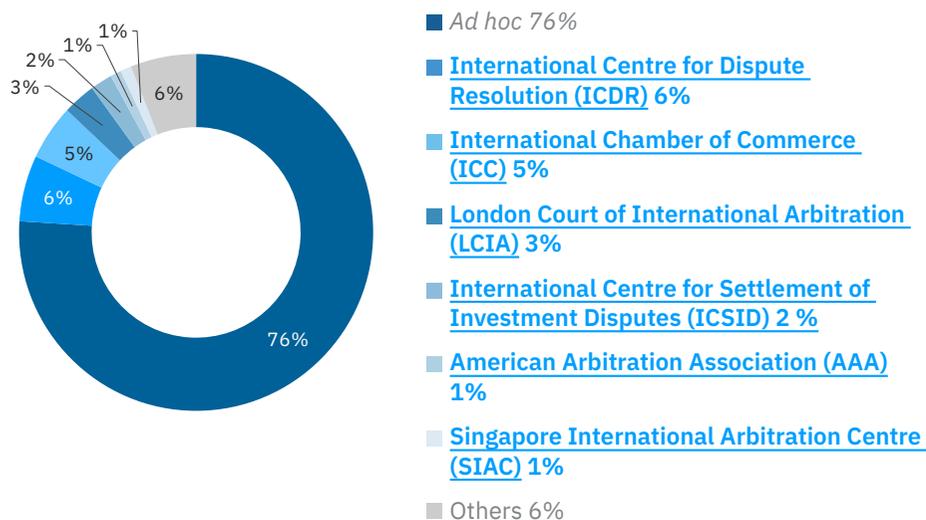
Try our institutions and arbitration rules filters. Use [CiteMap](#) for rules of arbitration to find related jurisprudence.

institutions would certainly disagree. But in maritime arbitration, the possibility to continue settlement negotiations while arbitral proceedings are ongoing is attractive to the parties for the sole fact that, should they end up settling, they would not lose any administrative fees paid to the arbitral institution.

Finally, without the oversight of an institution, rules such as regarding arbitrators' independence and conflict of interest are left to the discretion of the parties.

### Most selected arbitral institutions overall in Maritime Arbitration

- according to our database -



- The **top 3 arbitral institutions** — namely the [ICDR](#), [ICC](#) & [LCIA](#) — administered **14%** of all maritime arbitration cases.
- [SIAC](#) and [HKIAC](#) are arbitral institutions on the rise in maritime arbitration.
- A survey of maritime arbitration cases filed over the last five years showcases a similar trend to the historical choice of arbitration rules in shipping arbitration, *i.e.*, the [London Maritime Arbitrators Association \(LMAA\) Terms](#) remain the **preferred rules of arbitration** for maritime disputes, closely followed by the [Society of Maritime Arbitrators \(SMA\) Arbitration Rules](#). Together, they have been **used in 50% of shipping arbitrations in the last five years**. See [Annex 1](#).



**TOOLTIP**

Discover all the data you need about each arbitral institution through our [Arbitral Institution Profiles](#).



# Most Popular Arbitration Seats

*The selection of a seat in arbitration is an important strategic choice, as its law applies to the arbitral procedure. Selecting an improper seat can result in several procedural and practical difficulties.*

Our survey indicated **29 distinct seats** in maritime arbitration, some of which are well-established seats of arbitration, and others are growing in popularity as of late.

## Top 3 most selected seats in Maritime Arbitration

- according to our database -



## Key Takeaways

- The stark difference between the first two most selected seats and the third is astonishing but not surprising. Indeed, **London and New York** have historically been major hubs in the shipping industry and the first to establish specialized arbitration associations. Together, they are selected as arbitral seats in **82%** of maritime arbitration cases (for which we have information about the seat selected).
- **London** is, by far, **the seat of arbitration the most chosen** in shipping arbitration. It has long been referred to as the center of maritime arbitration.

In most cases, the choice of London as the seat of a maritime arbitration is paired with the choice of English and Welsh law as the law applicable to the dispute. The London Maritime Arbitrators Association (LMAA), established in London in 1960, is the most notorious maritime arbitration association in the world.

Due to its historic involvement in the development of the maritime industry, the shipping regulations & laws in England & Wales are specialized and well-established. The English Arbitration Act itself, which is under consultation this year to be reformed, is unlikely to receive criticism from shipping arbitration users.

- **New York** is a close second. Similar to London, the choice of New York as a seat of arbitration is often paired with the choice of New York/U.S. law as the law applicable to the dispute.

Shortly after the creation of the LMAA, the Society of Maritime Arbitrators (SMA) was established in New York in 1963 to rival its British counterpart.

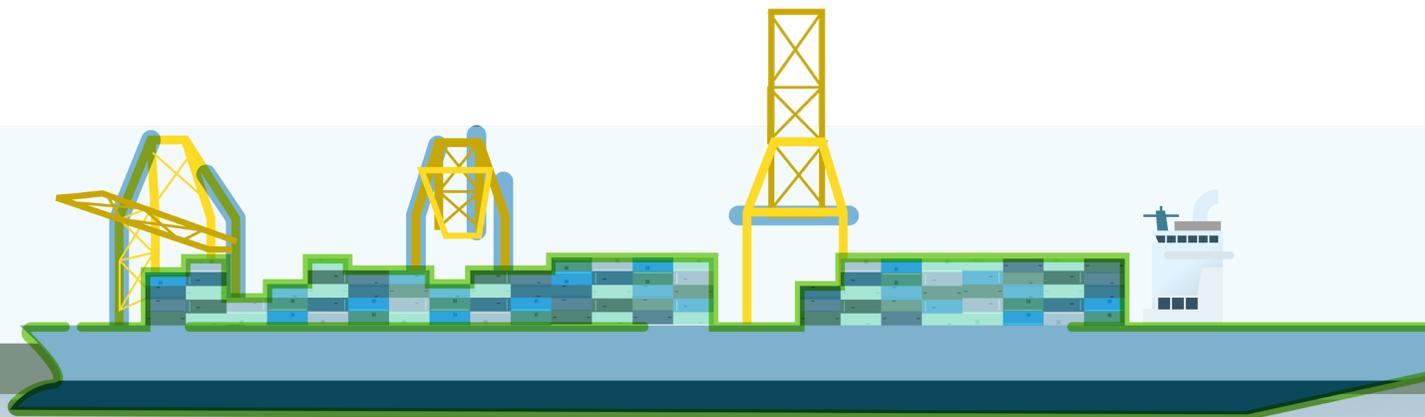
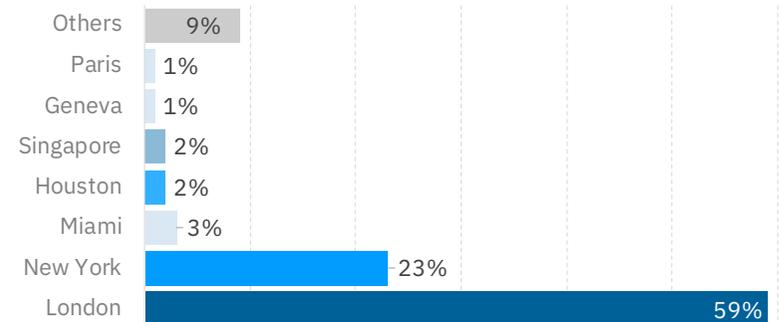
It is interesting to note that a **vast majority of the parties** involved in shipping arbitrations are **of U.S. nationality**. As an example, in the last five years, over 25 parties were from the U.S. out of 48 cases listed in [Annex 1](#).

- **Singapore** is an emerging seat of arbitration in shipping disputes. Singapore's changes to its arbitration law in the last few years has no doubt played a positive role in its new position as a maritime arbitration hub.

[SIAC](#), a major arbitral institution in the region and worldwide, created the [Singapore Chamber of Maritime Arbitration \(SCMA\)](#) in 2004, understanding the need for a specialized institution in the region. Following users' feedback, the SCMA was reformed to become an independent institution in its own right in 2009.

### Most selected seats in Maritime Arbitration

- according to our database -



# Oral Hearings in Maritime Arbitration: A New Era for Virtual Hearings

*International arbitration hearings usually take place in different countries and even continents than the parties' place of residence/business or the place of the arbitral institution in order to create a neutral environment. Accordingly, it takes an effort for the parties, their counsel, arbitrators, and witnesses to participate in the hearings.*

On top of that, during the COVID-19 pandemic, it became dangerous to travel across the world or even the country in order to attend oral hearings. Therefore, international arbitration procedures, including in maritime arbitration, have evolved by way of introducing more digital and technical rules and regulations to provide a smooth transition from face-to-face arbitration proceedings into completely virtual or hybrid hearings.



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## Virtual Hearings in the Pre-Pandemic Era

A completely virtual hearing, from beginning to end, was not very common until the pandemic. By nature, international arbitration proceedings consist of attorneys from various jurisdictions and witnesses from across the world taking part in arbitration hearings. So, when a witness could not attend the hearing in person due to administrative reasons or health issues, such a witness could always participate in the hearing remotely. It is the entire hearing being virtual that is new for most attorneys, as it was more often for a witness to submit evidence by video conference instead of attending the hearing completely virtually. In other words, virtual hearings were rare before the pandemic but not unprecedented.

Until the Covid-19 outbreak, most hearings on jurisdiction or merits of the case were held in person, while procedural sessions of the arbitration (such as the first session of the tribunal) were often held by telephone or videoconference. These oral hearing procedures are regulated under some arbitration rules, such as the [London Court of International Arbi-](#)

[tration Rules](#) and the [International Chamber of Commerce Rules](#).

It is understood from both Rules that the format of the hearing is regulated as “in-person” by default.

The [London Maritime Arbitration Association Terms 2017](#) did not provide such a specific regulation with regards to the time and place for the oral hearings except for Clause 14, which indicated that the tribunal has the right to decide whether or not to have an oral hearing, or to proceed on documents alone. However, in 2021, revisions made to the LMAA Terms introduced quite a few updates in terms of digitalization of the arbitration proceedings, use of e-signatures on documents, and virtual and semi-virtual (hybrid) hearings.

## The Revision of the LMAA Terms in 2021 to Adapt to New Needs

On 1<sup>st</sup> May 2021, the LMAA published a revised version of its terms (the “LMAA Terms 2021”). Among many other key changes, the [LMAA Terms 2021](#) officially recognize and allow for completely remote or hybrid remote hearings. The Sixth Schedule of the LMAA Terms 2021 provides a set of protocols in order for the parties to conduct virtual or semi-virtual hearings more efficiently as there may be technical problems, such as a bad internet connection or lack of sufficient technical infrastructure, which require proper preparation before the hearings even start.

As much as the online hearings make life much easier for those attending them remotely, it goes without saying that a witness statement heard via videoconference is much more open to manipulation or direct guidance of the counsel, as you have no control over the environment of the witness during their testimony, or to know whether the questionnaire/statement have been sent to them beforehand. The Fourth Schedule of the LMAA Terms 2021 aims at ensuring that witness statements are, so far as possible, expressed in the witness’s own words, and confined to relevant issues of fact. Nevertheless, a witness statement provided virtually shall always raise a doubt in terms of authenticity and impartiality.

## Case Analysis: Witness's Oral Testimony Received Virtually Was Acceptable & Convincing, Even Before the Pandemic

As mentioned, virtual or hybrid hearings are not exactly new to international arbitration procedures. For instance, in a case involving parties from various continents, which took place in Geneva under the ICC Rules before the Covid-19 pandemic, the witness statement taken via video-conference played a key factor in explaining the Respondent’s arguments and was quite cost- and time-efficient for all the parties.

The subject of the case was a dispute regarding the compensation of the Claimant’s losses arising from the non-delivery of the goods subject to a Sales Contract signed between the Seller and the Buyer in mid-September. The Buyer/Claimant claimed that under the Sales Contract, the Parties agreed on a sale and purchase of 2.000 m/t chemicals to be delivered to Port A.

The Seller/Respondent failed to do so and the delivery date agreed under the Sales Contract was delayed to November. The Respondent claimed that at the delivery time agreed in the Sales Contract (*i.e.*, October), the draught of the port was 5.00 meters. However, as of November, due to the bad weather conditions and the tide, the draught decreased to 4.5 m., which makes a vessel of 2.000 tonner impossible to berth, as her draught is 4.8 m.

Under such circumstances, the Respondent offered another vessel suitable to the said draught, which was smaller than the originally nominated vessel but could only carry 1.500 m/t, and asked the Claimant to agree with the amendment of the Sales Contract. This offer was rejected by the Claimant based on the draught issue. The Respondent then offered another suitable vessel which was bigger but could only agree to deliver

4.000 m/t of cargo. This offer also was rejected by the Claimant on the grounds that “it is quite shocking and strange to note and record that if one cannot get a ship to deliver a 2.000 m/t quantity, how can one get to deliver 4.000 m/t quantity, considering the first offer was a delivery of 1.500 m/t quantity?”, which seemed logical at first.

The Respondent’s lawyers stated that both vessels were suitable but failed to explain the reasons. Thus, they submitted an affidavit signed by the broker of the Seller. However, this was not enough to support their arguments and convince the tribunal.

The sole arbitrator took an active role in the process and scheduled a hearing where the broker who presented an affidavit was to be heard as an “expert witness.” During the hearing held via videoconference, the witness explained that the draught of the bigger vessel would not make a big difference when she was loaded compared to the smaller vessel’s draught. In other words, the smaller vessel sinks more than the bigger vessel when she is loaded. This explanation of the witness convinced the sole arbitrator and the case was dismissed.

## Old Fashion vs. Virtual

Technology evolves more and more each day, and it is becoming more useful, practical, and efficient in ways that maybe we cannot begin to comprehend at this stage. Just like the Covid-19 pandemic could not have been foreseen, there can always be a new challenge requiring the convenience of getting things done remotely again. As much as digitalization has its own handicaps — such as experiencing infrastructural problems in the midst of a procedure or having to deal with enforceability problems due to e-signatures — such difficulties can and will be overcome in time, which would result in arbitration becoming more time- and cost-efficient, and accordingly more desirable for dispute resolution.

### ABOUT THE AUTHORS

**Moris Cem Kaspi** established AKT Law Firm together with his partners in the year 2000. As he is practicing in different areas of Law, he has wide experience in Dispute Resolution including Litigation and International Arbitration, Sale & Purchase of all kinds of Seagoing Vessels, Maritime Law, Contract Law, International Trade. He represents the Republic of the Marshall Islands in Turkey as Special Agent since 2009.

**Melek Başak Aldi** has notable experience in negotiating and finalizing ship purchase and sale transactions and charter parties. She is mainly involved in commercial litigation and arbitration of disputes arising from contracts of carriages, bills of lading, insurance policies as well as international trade conflicts. She regularly advises financial institutions, banks, P&I Clubs, shipowners, shipyards, agencies and freight forwarders.



# Most Appointed Arbitrators

The selection of arbitrators is a crucial step of the arbitration process. Maritime arbitration is a very specialized and technical field, which requires arbitrators to have specific expertise in the field. The selection of an arbitrator is therefore of paramount importance.

Finding the right arbitrator can be a cumbersome task, especially in such a specialized industry. At the time of writing, [Jus Connect by Jus Mundi](#) contains **over 6,000 arbitrator profiles**, of which 296 have appeared in shipping arbitration cases available on our platform. These **296 arbitrators** have been **appointed 559 times**.

[David W. Martowski](#)

[Alan Oakley](#)

[Michael Baker-Harber](#)

[Manfred W. Arnold](#)

[A. J. Siciliano](#)

[Patrick O'Donovan](#)

[Bruce Harris](#)

[Timothy Rayment](#)

[Louis P. Sheinbaum](#)

[Jack Berg](#)

[Christopher Moss](#)

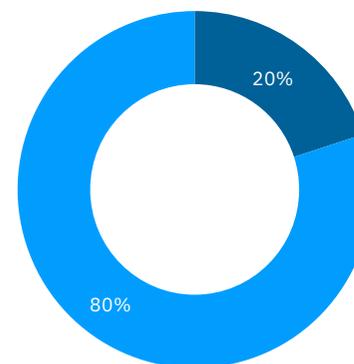
[Bruce Buchan](#)

[Mark William Hamsher](#)

[Simon Gault](#)

[David Farrington](#)

**Top 3 emerging arbitrators** in Maritime Arbitration in the past 5 years - according to our database -



**Top 10 most appointed arbitrators** in Maritime Arbitration represent **20% of all appointments** of arbitrators in Maritime Arbitration - according to our database -

## Key Takeaways

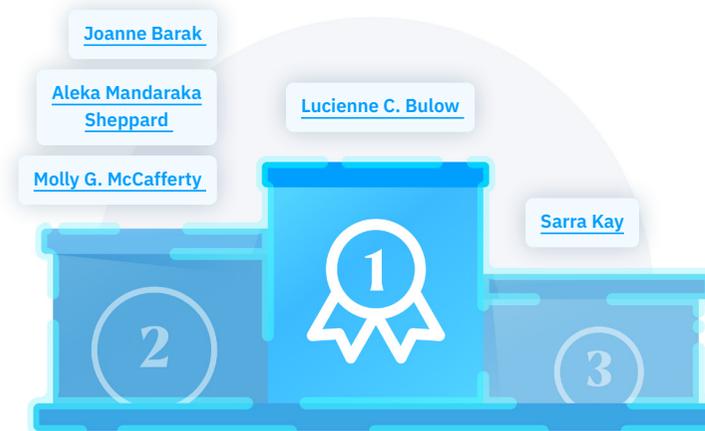
- Maritime arbitration is very specific in that it does not necessarily follow the traditional fixtures of international arbitration. In terms of **arbitrators' selection**, for instance, it is common for repeat users of shipping arbitration to appoint **the same few arbitrators** over and over again for all their disputes.  
While this tends to create issues in other types of arbitrations — notably in terms of independence and potential conflict of interest — it is a commonly accepted practice in shipping arbitration.
- **LeRoy Lambert** is **one of the most active arbitrators** in maritime arbitration **in the last decade** but also an **emerging arbitrator in the last five years**, with a growing number of appointments.

**Top 3 most active arbitrators** in Maritime Arbitration in the last decade - according to our database -



- Unfortunately, this practice of repeat appointments does not bode well for diversity in arbitration. For instance, **only 5 female arbitrators** appear in our **top 100 maritime arbitrators**. However, **Lucienne C. Bulow** is the **third most active arbitrator** in maritime arbitration **in the last decade**.

**Female arbitrators in the top 100** Maritime Arbitration - according to our database -



- It is uncommon to do proper **conflict checks of arbitrators** in maritime arbitration. In all transparency, parties in maritime arbitrations tend to tacitly agree that they can appoint arbitrators they have appointed several times in the past, regardless of potential conflicts of interest. This kind of trust in arbitrators' impartiality is quite rare in arbitration.

# Most Active Arbitration Teams

Our data survey revealed **394 active arbitration teams**, including law firms and chambers, with a shipping arbitration caseload.

**Top 10 most active arbitration teams** in Maritime Arbitration (inc. ex aequo) - according to our database -

[Quadrant Chambers](#) [20 Essex Street Chambers](#) [Blank Rome](#)

[Holman Fenwick Willan \(HFW\)](#) [7 King's Bench Walk](#) [Reed Smith](#)

[Essex Court Chambers](#) [Holland & Knight](#) [Freehill Hogan & Mahar LLP](#)

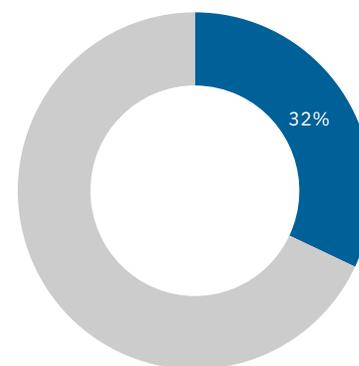
[Ince & Co](#) [Clyde & Co.](#) [Lennon Murphy & Phillips](#)

[Chalos & Co.](#) [Mahoney & Keane LLP](#) [Bentleys, Stokes and Lowless](#)

[Clifford Chance](#) [Simms Showers](#) [Hill Rivkins & Hayden LLP](#)

[Jackson Parton](#) [Brick Court Chambers](#)

[DLA Piper](#) [Stephenson Harwood](#)



**Top 10 arbitration teams** represent **32%** of all hires - according to our database -

## Key Takeaways

- Among the **top 3 most hired arbitration teams**, **2** are **chambers**. In the last five years alone, [Quadrant Chambers](#) was involved in **12 maritime arbitration cases**, according to our data. See [Annex 1](#).
- [20 Essex Street Chambers](#), [Holman Fenwick Willan \(HFW\)](#), and [Essex Court Chambers](#), which are all in our top 10 most hired arbitration teams in maritime arbitration, were involved, until very recently (*i.e.*, this last April), in a major shipping arbitration case, [CONTI v. Mediterranean Shipping Company](#).

In this ongoing case, an explosion occurred on an MSC ship caused by a chemical reaction in one of the containers. The subsequent fire



TOOLTIP

Efficiently select your arbitrators with [Jus Connect by Jus Mundi](#), the professional network tailored-made for the arbitration industry. Check in a few clicks whether they could possibly be conflicted with [Conflict Checker](#).

caused the death of three crew members and damage to the cargo and ship. The arbitral tribunal rendered several awards, which are all available on Jus Mundi. Litigation is now ongoing before English and several U.S. courts.

Set an Alert on the case to be updated of new developments.

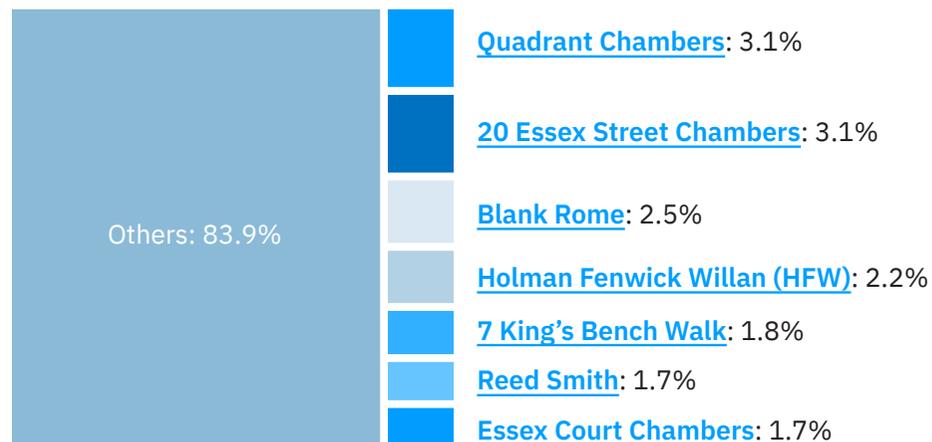
**Top 3 most active law firms** in Maritime Arbitration in the last decade - according to our database -



- **Holland & Knight** is **the most active law firm** in maritime arbitration **over the last decade**, with about **8 shipping arbitration cases**.
- Read our section on [Navigating Perspectives in Maritime Arbitration](#) to learn more about the challenges faced by counsel in different jurisdictions.

### Proportion of arbitration teams' hires in Maritime Arbitration

- according to our database -



TOOLTIP

Get a 360-degree overview of your external counsel's expertise using [Jus Mundi's firm profiles](#).

# Navigating Perspectives in Maritime Arbitration



**Thomas Karalis**

Counsel  
Ashurst



**Jenny Zhang**

Associate  
Ashurst

## CASE ANALYSIS

### JUS MUNDI PUBLICATION: DUCAT MARITIME V. LAVENDER SHIPMANAGEMENT - JUDGMENT OF THE HIGH COURT OF JUSTICE OF ENGLAND AND WALES, 14 MARCH 2022

## I. Introduction

1. In a maritime charterparty dispute, the [English Commercial Court has set aside part of an arbitral award](#) on the ground of failure of due process under [section 33 of the Arbitration Act 1996](#), constituting a

serious irregularity under [section 68 of the Arbitration Act 1996](#). This was on the basis that the tribunal reached a conclusion contrary to the parties' common positions, without giving an opportunity for the parties to make submissions on the issue.

2. This decision provides much-needed clarity on challenging an arbitral award where the parties are faced with an obvious mistake that the tribunal refuses to remedy.

## II. The Facts

3. Pursuant to an arbitration clause in the charterparty which provides for arbitration under the [London Maritime Arbitrators Association \(LMAA\) Small Claims Procedure 2017](#), the Owners (Lavender Shipmanagement) commenced arbitration proceedings against the Charterers (Ducat Maritime), in respect of disputes concerning the calculation of hire of the vessel, and damages for inadequate hull cleaning.

4. If the Owners had succeeded on all of their claims, they would have been awarded damages of US\$ 37,831.<sup>1</sup> If the Charterers were successful with each defence, and their counterclaim for setting off US\$ 15,070 against the hire payable because of the vessel's underperformance, they would have been entitled to US\$ 6,258.35.<sup>2</sup>
5. The arbitrator decided in favour of all of the Owners' claims except for the claim of damages for inadequate hull cleaning (US\$ 9,553.92). The arbitrator rejected the Charterers' defences as well as their counterclaim. However, in the arbitral award, instead of subtracting the Owners' unsuccessful claim (US\$ 9,553.92) from the total value of their claims (US\$ 37,831), the arbitrator added the Charterers' unsuccessful counterclaim (US\$ 15,070) to the calculation of the final amounts awarded to the Owners. Thus, instead of awarding US\$ 28,277.91, the arbitrator considered that the Owners were due US\$ 41,638.74. As this was more than the amount claimed, the arbitrator awarded the Owners their full claim, i.e. US\$ 37,831.<sup>3</sup>
6. The Charterers applied twice to the arbitrator to have the award corrected for a clerical mistake in the calculations under [section 57\(3\) of the Arbitration Act 1996](#), which were both rejected. In light of this, the Charterers applied to the English Commercial Court to challenge part of the award under section 68 of the Arbitration Act 1996.

### III. Reasoning and Decision

7. The judge found the Charterers' application on the basis of serious irregularity successful, and set aside part of the award.<sup>4</sup>
8. The Charterers' application was based on [section 68\(2\) of the Arbitration Act 1996](#), which requires the applicant to demonstrate (1) a serious irregularity of a kind listed in section 68(2), and which includes failure by the tribunal to comply with its general duty set out at section 33 of the Arbitration Act 1996 (section 68(2)(a)); and (2) that this irregularity caused substantial injustice. [Section 33 of the Arbitration Act 1996](#) requires the tribunal to act fairly and impartially between the parties and uphold due process during the arbitration proceedings.
9. The Charterers submitted that the tribunal failed to fulfil its general duty, which constituted a serious irregularity, on two grounds: (a) the arbitrator reached a conclusion that was contrary to the parties' common position, without providing an opportunity to the parties to address the arbitrator on the issue; and (b) the arbitrator had made an obvious accounting mistake. In either case, the Charterers claimed that such irregularity caused them substantial injustice.<sup>5</sup>

<sup>1</sup> [Lavender Shipmanagement Inc. v. Ducat Maritime Limited](#), Judgment of the High Court of Justice of England and Wales [2022] EWHC 766, 14 March 2022, para. 6.

<sup>2</sup> [Ibid.](#), para. 8.

<sup>3</sup> [Ibid.](#), paras. 9 and 10.

<sup>4</sup> [Ibid.](#), para. 51.

<sup>5</sup> [Ibid.](#), para. 24.

## A. GROUND (A) – FAILURE OF DUE PROCESS

10. The duty to act fairly under section 33 of the Arbitration Act 1996 requires the tribunal to allow the parties to deal with any issue forming the basis for the tribunal’s decision. Case law and commentary,<sup>6</sup> which were referred to in the judgement, elaborated on this uncontroversial principle. The parties are entitled to assume that the tribunal will base its decision solely on the evidence and argument contended by the parties. However, if the tribunal is minded to decide the dispute based on a ground not being contended by the parties, and derive an alternative case from the parties’ submissions, which is permissible, the tribunal must give notice to the parties, and allow the parties to be heard.
11. The Owners argued that both parties have actually been given an opportunity to comment on the issue of the vessel’s underperformance, and hence there was no irregularity or failure of due process. In this regard, the judge disagreed, and held that the common position of the parties was that the Charterers’ counterclaim did not constitute a part of the Owners’ claim, and the arbitrator departed from this common position. The parties did not have a chance to address this point, as they thought it was not necessary to do so (given it was a common position and therefore not in dispute).<sup>7</sup>
12. In finding the respondent’s (the Charterers’) counterclaim unsuccessful, the arbitrator added the respondent’s counterclaim, which was a sum the claimant never sought to claim, to the claimant’s (the Owners’) claim, instead of finding the respondent’s counterclaim could not be set off against the claimant’s claim. The arbitrator recognised in the award that the total sums that he considered to be due to the

Owners turned out to be greater than their claimed amounts, but, as the judge pointed out, the arbitrator left this issue unexplained and provided the parties with no opportunity of commenting on it. Had the arbitrator done so, the misunderstanding of the Owners’ claim and the Charterers’ counterclaim would have come to light, and this forms a sufficient basis to conclude that there was a failure of due process constituting an irregularity within section 68(2) of the Arbitration Act 1996.<sup>8</sup>

## B. GROUND (B) – AN OBVIOUS ACCOUNTING MISTAKE

13. The judge concluded that a “*glaringly obvious error*” in an award may fall under the ambit of serious irregularity within section 68(2), without undermining the focus of the section 68 enquiry being on the failure of due process, as it is not intended to be a substantive review of the merits of the tribunal’s reasoning.<sup>9</sup>
14. For example, a gross and obvious accounting mistake (i.e. “*an arithmetical mistake of the 2 + 2 = 5 variety*”) may amount to a serious irregularity. This is because neither party contended the mistake as a basis for the result arrived at by the tribunal, and the tribunal is likely to have departed from the common consensus between the parties as to how arithmetical processes work, without availing the parties of an opportunity to comment on the justifiability of such departure. This is not because the arithmetical mistake represents the tribunal’s illogicality or irrationality which does not constitute a serious irregu-

<sup>6</sup> [Ibid.](#), paras. 25 and 26, which referred to D. Sutton, J. Gill and M. Gearing, *Russell on Arbitration* (24th ed., 2015), para. 5-049, and [Grindrod Shipping PTE Limited v. Hyundai Merchant Marine Co. Ltd.](#), Judgment of the High Court of Justice of England and Wales [2018] EWHC 1284, 24 May 2018, paras. 38 and 39.

<sup>7</sup> [Ibid.](#), para. 29.

<sup>8</sup> [Ibid.](#), para. 30.

<sup>9</sup> [Ibid.](#), paras. 32 and 42.

larity *per se*.<sup>10</sup>

15. The judge did not directly express his opinion as to whether the arbitrator's mistake in the present case qualified as a "*glaringly obvious error*", as it would add little weight to the finding of the mistake already being an irregularity under the first ground.

### C. SUBSTANTIAL INJUSTICE

16. Having found that there was a serious irregularity, the judge had no issues with finding that the irregularity caused substantial injustice. The judge rejected the Owners' argument that the parties accepted the possibility of some injustices by agreeing to resort to the abridged small claim procedures.
17. The judge recognised that even though the absolute value of the sum involved is comparatively small by the standards of many commercial disputes (as the element of the award being challenged was only US\$ 9,553.92), its impact on the Charterers' was substantially unjust. The arbitrator's mistake had inflated the Owners' claim by almost 50%, and would have caused the Charterers to pay about 33% more than what was due by way of principal plus interests.<sup>11</sup>
18. The judge therefore set aside part of the award, namely the sum of US\$ 9,553.92. While the Court also has the power to remit the award back to the arbitrator, it decided that it was not appropriate to do so in this case, given that there had already been two unsuccessful applications to the arbitrator to correct the award, and also given that it would involve unnecessary costs.

<sup>10</sup> [Ibid.](#), paras. 40 and 41.

<sup>11</sup> [Ibid.](#), paras. 44 and 47.

<sup>12</sup> [Great Station Properties S.A. and Inter Growth Investments Limited v. UMS Holding Limited, Energy Standard Fund Limited, Energy Standard Industries Limited and Stremvol Holdings Limited](#), Judgment of the High Court of Justice of England and Wales [2017] EWHC 2398, 5 October 2017.

## IV. Comments

19. The decision provides useful guidance on the recourse available to a party under [section 68 of the Arbitration Act 1996](#) when faced with an obvious mistake in the arbitral award which the tribunal has refused to correct.
20. An implication that can be drawn from the decision is that even if the underlying facts and evidence of a claim have been addressed by the parties (e.g., the facts about the underperformance issue in the current case), there can still be a failure of due process if the tribunal departs from the parties' agreed position by mistaking with the nature or categorisation of the parties' claims.
21. The decision also reflects the English courts' supportive and friendly attitude towards arbitration, by stressing the focus of the section 68 resource being on the protection of due process in arbitration, rather than the court's intervention to conduct a substantive review of the merits and rationality of the tribunal's reasoning. This is consistent with previous case law on the point. The mere fact that the tribunal's reasoning is manifestly illogical or cannot rationally be sustained will not ordinarily amount to a serious irregularity if the tribunal has followed due process.<sup>12</sup>

22. However, the court added that a gross and obvious accounting mistake (i.e. “an arithmetical mistake of the 2 + 2 = 5 variety”) may amount to a serious irregularity. Again, this is not because the Court will consider illogicality or irrationality on the part of the tribunal as part of its assessment under section 68(2) of the Arbitration Act 1996. Rather, an obvious accounting mistake may well depart from the case put to the tribunal by the parties. Nonetheless, this does leave the door slightly ajar for future claims on the basis of “glaringly obvious errors”, though there can be no doubt that the threshold to succeed in setting aside an award on this basis will be high.

## V. Conclusion

23. This case clarifies that an arbitral award containing an obvious mistake can be challenged, under [section 68\(2\)\(a\) of the Arbitration Act 1996](#), on the basis that the tribunal deviates from the common grounds implicitly shared by the parties, without offering the parties an opportunity to make submissions on it. A challenge under section 68(2)(a) of the Arbitration Act 1996 will not succeed if what is complained about is essentially that the tribunal’s reasoning is irrational or illogical, i.e. a complaint that the tribunal “got it badly wrong.”

### ABOUT THE AUTHORS

[Thomas Karalis](#) specializes in international arbitration and commercial litigation. He is a skilled all-round disputes lawyer with broad experience running large, high-value and technically complex commercial disputes. Thomas also has extensive experience on injunctive relief measures through both the Courts and Emergency Arbitrator proceedings. Thomas is qualified in both England & Wales and Hong Kong (non-practising) and is also admitted to the Paris Bar.

[Jenny Zhang](#) is an associate in the international arbitration team of Ashurst’s London office. Her work involves commercial arbitrations in the energy, infrastructure and construction sectors. She has represented commercial entities in arbitrations proceedings under ICC Rules, DIFC-LCIA Rules, DIAC Rules which are seated in London, Dubai and Oman. She has also advised clients on pre-disputes strategies, and represented them in expert determinations.



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## A COMPARATIVE APPROACH FROM ENGLAND & WALES, THE UNITED STATES, & FRANCE

### THE EXTENSION OF THE ARBITRATION CLAUSE CONTAINED IN THE BILL OF LADING TO NON-SIGNATORIES

## Introduction

Common modes of shipping practised internationally include liner shipping and chartering. In liner shipping, the shipowner (or carrier) runs a regular service between more or less fixed ports and on a fixed time schedule. In chartering shipping, a charterer hires a ship from a shipowner with a view to transporting a certain quantity of commodities from one port to another (voyage charter party) or for a certain period of time (time charter party).

In liner shipping, the contract of carriage between the carrier and the non-chartering shipper is materialised in the bill of lading (liner bill of lading). In chartering shipping, the contract of carriage is the charter party signed between the shipowner and the charterer. The bill of lading eventually issued by the charterer (charter party bill of lading) in the hands of the non-chartering shipper is subject to the terms and conditions of the charter party.

Liner bills of lading generally contain no arbitration clause but rather directly reproduce the jurisdiction clause in favor of determined judicial courts contained in the terms for carriage of the carrier. *See*, for example, Clause 26 of Maersk Terms of Carriage, Clause 26 of Yang Ming's Bill of Lading Terms and Conditions, or Clause 10.3 MSC's Bill of Lading Terms



[Aksel Doruk](#)

Partner  
MELTEM Avocats

and Conditions providing that claims and actions shall be brought before the High Court of London or before the United States District Court for the Southern District of New York for carriage to or from the United States of America with various options offered to the sole carrier. *See also* Clause 31 of CMA CGM's Bill of Lading Terms and Conditions, providing that claims and actions shall be brought before the Commercial Court of Marseille (France).

Charter party bills of lading incorporate the terms of the underlying charter party, which almost systematically includes an arbitration clause (generally in favour of London-based arbitration). This is the case in particular for the widely-used Baltic and International Maritime Council (BIMCO) Congenbill Bill of Lading. Clause 1 of the Conditions of Carriage provides that;

*“all terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the law and arbitration clause/dispute resolution Clause, are herewith incorporated.”*

With respect to the incorporation of an arbitration clause in the bill of lading, two issues are regularly raised before judicial courts:

- whether the incorporation by way of reference is sufficient for the arbitration clause to be valid, and
- whether the said arbitration clause is binding against third-party holders.

## Validity of the Incorporation of the Arbitration Clause by Way of Reference to the Charter Party

### UNDER ENGLISH LAW

Under English law, the general rule is that an express reference in the bill of lading to the charter party arbitration clause specifically is required for the incorporation of the said clause to be valid (*TW Thomas & Co Ltd v. Portsea Steamship Co, Ltd* [1912] AC 1). Even a wide reference to “*all the terms whatsoever of the said charter*” is considered insufficient to ensure the incorporation of the arbitration clause (*Siboti K/S v BP France SA* [2003] 2 LLR 364).

However, the English Courts adopt a more flexible approach when it comes to assessing the existence of an express reference to the arbitration clause. In the *Merak* case, the bill of lading provided that:

*“all the terms, conditions, clauses and exceptions including Clause 30 contained in the said charterparty apply to this Bill of Lading and are deemed to be incorporated herein” (TB S. Batchelor Co., Ltd. (Owners of Cargo on the Merak) v. Owners of SS Merak, 1 All ER 230 (1965)).*

Although the arbitration clause was actually Clause 32, the Court of Appeal accepted the incorporation as valid in light of the presence of the express word “*clauses*” in the incorporation clause, and of the presence in the charter party of a clause specifying that “*all bills of lading under this Charterparty shall incorporate this exclusive dispute resolution clause.*”

In the *Channel Ranger* case, the bill of lading stated that:

*“all terms, and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration clause are herewith incorporated.” Yet the charterparty provided that “any dispute arising out of or in connection with this charter shall be submitted to the exclusive jurisdiction of the High Court of Justice of England and Wales” (Caresse Navigation Ltd. v Office National de l’Electricité & Ors, [2013] EWHC 3081).*

The Court of Appeal upheld the decision of the court of first instance which considered that, despite the mistake in the wording, the parties’ intention was to incorporate the jurisdiction clause. In similar circumstances, the solution is likely to be identical where the bill of lading refers to a jurisdiction clause whereas the charterparty contains an arbitration clause.

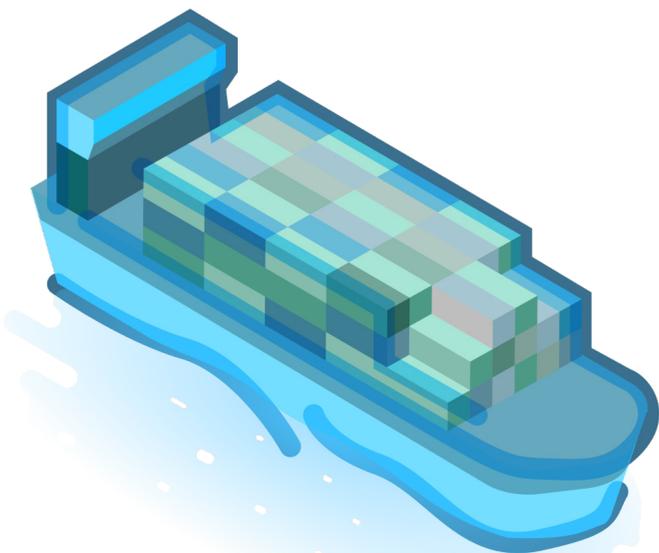
### UNDER U.S. LAW

Under U.S. law, an explicit reference in the bill of lading to the arbitration clause contained in the charter party is not required. A wide wording referring to “*all terms, conditions and exceptions of the charterparty*” is considered to be sufficient to incorporate the arbitration clause (*See, Continental UK Ltd. v. Anagel Confidence Compania Naviera*, 658 F. Supp. 809 (SDNY 1987)).

## UNDER FRENCH LAW

Under French law, the Cour de cassation has constantly affirmed its pro-arbitration stance and considered that the reference to general conditions containing an arbitration clause is sufficient to consider that a party gave its consent to said clause, provided that it had knowledge of the content of these general conditions (See, for instance, Cass. 1re civ., 11 may 2012, n° 10-25.620).

In any event, French courts are bound, in compliance with the principle *competence-compétence* embodied in Article 1448 of the French Civil Code of Procedure, to decline jurisdiction unless the arbitration clause is manifestly void or inapplicable. As a consequence, the reference to the provisions of a charter party containing a (non-pathological) arbitration clause is likely to lead the French judge to decline jurisdiction and give priority to the arbitral tribunal designated under said clause to rule on its own jurisdiction (See, CA Paris, 25 apr. 2017, n° 16/13793, *Rhenus Logisticks Alsace v. Emdena Chartering*).



## Enforceability of the Incorporated Arbitration Clause Against Third-Party Holders

Another issue regularly encountered is whether the arbitration clause of a charter party incorporated by way of reference in the bill of lading, without actually reproducing the arbitration clause itself, is binding upon the holder when the rights and obligations under a bill of lading are transferred. For liner bills of lading containing an arbitration clause, this would generally not represent an issue as the clause would typically be printed on the bill of lading itself, thus preventing a holder from arguing that it did not receive notice of the arbitration clause.

## UNDER ENGLISH LAW

English courts consider that an arbitration clause in a charter party is binding to the holder as long as the arbitration clause is expressly and specifically incorporated into the bill of lading. In *Kallang Shipping*, the Commercial Court considered the clause to be binding to a third-party (the subrogated cargo insurer) as long as it had “*sufficient knowledge*” which does not imply “*absolute certainty*” of the arbitration clause (including by making the necessary enquiries) (*Kallang Shipping S.A. Pan. v. Axa Assurances Sen. (The “Kallang” (No. 2))*, [2008] EWHC (Comm) 2761, [64], [2009] 1 Lloyd’s Rep. 124, 137 (Eng.)).

In the *Channel Ranger* case, the judge considered that in case of valid incorporation of the arbitration clause contained in the charterparty, “*the consignee would be bound by whatever the original parties to the bill of lading had agreed by their incorporation of the charterparty arbitration clause*” (*Cresse Navigation Ltd. v Office National de l’Electricité & Ors* [2013] EWHC 3081).

## UNDER U.S. LAW

U.S. courts have dismissed the enforceability against the consignee where the dispute falls outside the scope of the arbitration agreement. In *Siderius, Inc v. M/V Ida Prima*, the United States District Court for the Southern District of New York questioned “*whether the arbitration clause, by its terms, applies to disputes arising under the bill of lading*” (613 F. Supp. 916 (S.D.N.Y. 1985)). The judge noted that the arbitration clause referred to disputes “*arising under this Charter Party*” (as is the case of the Gencon Uniform General Charter). Yet:

*“as seen from the viewpoint of the consignee of freight, the dispute does not arise under the charter. He has no interest in the charter, which governs the business relationship between the vessel owner (or disponent owner) and the charterer. He would view the bill of lading as the document upon which his rights are founded. Thus, even in the unlikely event that the consignee were aware of the arbitration clause in the charter party, in my view he would not understand it to cover his claim for shortage or damage to the cargo covered by his bill of lading”* (See also, *Bunge Edible Oil Corp. v. M/V Torm Rask*, 756 F. Supp. 261, 268, 1991 AMC 1102, 1112 (E.D. La. 1991)).

However, in *Steel Warehouse Co. v. Abalone Shipping Ltd.*, the United States Court of Appeals for the Fifth Circuit held that a charter party’s arbitration clause stating that “*all disputes from time to time arising out of this contract shall [...] be referred to final arbitration,*” included disputes with the consignee, given the broad language of the clause and the fact that it was not limited “*merely to owners and charterers*” (141 F.3d 234, 238, 1998 AMC 2054, 2059 (5th Cir. 1998)).

## UNDER FRENCH LAW

The position of French Courts has evolved over time. Initially, the French Supreme Court considered that:

*“in order to be enforceable against the consignee, the arbitration clause inserted in a contract must have been brought to its knowledge, no later than the time at which, by receiving the goods, it acceded the carriage contract”* (Cass. com., 29 nov. 1994, n° 92-14.920).

However, the French Supreme Court, in the *Lindos* and *Pella* cases, in compliance with its general pro-arbitration stance, confirmed that the issue of enforceability of the incorporated arbitration clause contained in the charter party against the consignee was to be decided, by priority, by the designated arbitration tribunal under said clause ruling on its own jurisdiction, unless the clause is proven to be manifestly void or inapplicable (Cass. civ. 1re, 22 nov. 2005, n° 03-10.087; Cass. com., 21 febr. 2006, n° 04-11.030).



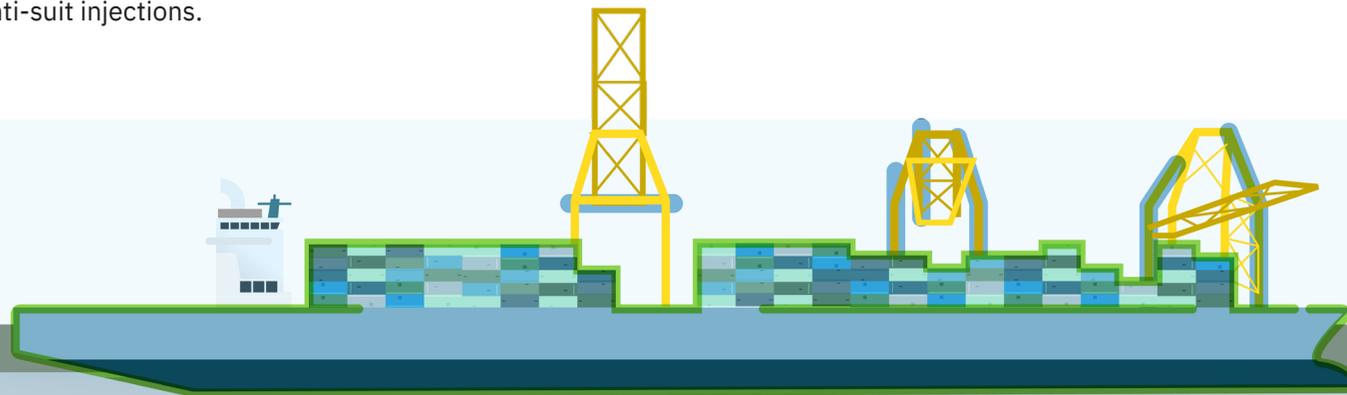
In compliance with this position, the Court of Appeal of Paris has declined jurisdiction based on the arbitration clause incorporated by reference to the charter party in the context of a dispute between a freight forwarder and a carrier (CA Paris, 25 apr. 2017, n° 16/13793, *Rhenus Logistics Alsace v. Emdena Chartering*). The Court considered that:

*“the circumstance that [...] the freight forwarder had not signed the bill of lading issued based on its instructions by the carrier” and “the fact that the arbitration clause contained in [the bill of lading] was stipulated by way of reference to a charterparty” did not entail the “manifest voidness or inapplicability of the arbitration clause.”*

As the Hague Rules and Hague-Visby Rules contain no provision relating to this specific issue, there is regretfully no harmonised solution, which may lead to forum-selection problems and complex procedural battles aggravated by the use of anti-suit injections.

## ABOUT THE AUTHOR

[Aksel Doruk](#) is a partner at MELTEM Avocats, a boutique law firm based in Marseille and Paris, dedicated to the prevention and resolution of commercial disputes. Aksel assists his clients in the context of arbitration proceedings as well as international commercial litigation, with a focus on the energy, construction, engineering, shipping and agri-food sectors. He also acts as an arbitrator. In addition, Aksel regularly advises his clients in relation to international sales and distribution and in the review and drafting of international contracts.



## SINGAPORE

### THE SINGAPORE CHAMBER OF MARITIME ARBITRATION RESPONDS TO INDUSTRY SHIFTS IN THE 4TH EDITION OF THE SCMA ARBITRATION RULES

The [Singapore Chamber of Maritime Arbitration \(SCMA\)](#) published the 4th edition of the Arbitration Rules on 1 December 2021. These Rules came into effect on 1 January 2022 and are applicable to all cases filed on and after 1 January 2022. The Rules were a product of public consultation and the SCMA has explained that the aim behind the new Rules is to foster a user-friendly, cost-effective, and efficient approach to dispute resolution.

This approach has held the SCMA in good stead. Over the years, the SCMA has seen steady and significant growth. The total claim amount from cases in 2014 was USD 73.9 million (SCMA Year In Review, 2018, p.2) and in 2021, the total claim amount rose to USD 163.5 million (SCMA Year In Review, 2021, p.6). The SCMA has also seen its membership expand. Currently, the SCMA boasts about 400 members and 127 panelled arbitrators (SCMA Year In Review, 2021, p.6). Much of this growth is due to the SCMA being responsive to changes in the maritime industry.

We turn now to explore some of the rules in the 4th edition of the [SCMA Arbitration Rules 2022](#).



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## Accommodating to the Virtual World

With the global lockdown caused by the pandemic, the legal world had to pivot to conducting hearings remotely. The new Rules 17.3 and 25.3 respectively provide that case management conferences and hearings can be held virtually. This will naturally save parties time and costs in attending hearings in person, whilst still allowing the dispute resolution process to move forward.

Further, the new Rules allow for the service of documents to be done by electronic means. Rule 3.1(c) states that notice or communication can be made to a designated electronic mailing address. Rule 3.3 further defines a designated electronic mailing address to be one that the parties have agreed to in their correspondence or one that is used habitually and effectively between the parties in the course of their business.

Also, under Rule 34.4, the members of the tribunal may sign the award electronically without needing to meet in person.

## Arbitrator Appointment

The appointment of the arbitral tribunal has also been simplified under the new Rules. Rule 8.4(c) provides that two party-appointed arbitrators can constitute a tribunal and may appoint a third arbitrator at their discretion “*so long as this is done before any substantive hearing or without delay if the two arbitrators cannot agree on any matter relating to the arbitration.*” Rule 33.2 specifies that where there is no third arbitrator, the remaining members of the tribunal will have the power to make decisions and pass orders and awards. This rule effectively codifies the existing custom in the maritime industry with respect to the appointment of arbitrators.

## Preventing Prejudicial Changes in Party Representation

Under the new Rule 4.4, once the tribunal has been constituted, if a party wishes to change its authorised representative, the same shall be done subject to the approval of the tribunal. The tribunal can reject such a request if it is satisfied that there is substantial risk that the change would prejudice the conduct of the proceedings or enforceability of the award. This is a welcome development in overcoming the tactical warfare that parties sometimes deploy in order to gain an advantage in the arbitration by, for example, changing representation at key junctures in the arbitration to purposefully cause delay.

## Optional Oral Hearings

In an effort to save time and costs of arbitration, documents only arbitration has also been introduced under the new Rules. Under Rule 25.1, the tribunal has the discretion to decide if there should be a hearing for the matter or if it must proceed on documents alone. However, if a party

requests an oral hearing, the tribunal is bound to schedule an oral hearing for the matter.

## Expedited Procedure

Under the new Rule 4.4, any case where the aggregate amount of claims and counterclaims is equal to or less than USD 300,000, the arbitration, unless otherwise agreed by the parties, shall be conducted in accordance with the SCMA Expedited Procedure. Expedited arbitration is conducted by a sole arbitrator as a document only arbitration unless the tribunal requires an oral hearing. Under the expedited procedure, the service of case statements is to be made within 14 days and the award must be made 21 days from the receipt of the case statements or, if an oral hearing is fixed, from the close of the oral hearing. This Expedited Procedure replaces the Small Claims Procedure that had a threshold value of USD 150,000, and is a quick and cost-effective means of resolving lower value disputes.

## Closure of Proceedings

Under the New Rule 27.1, “*after the lapse of three months from the date of any final written submission or final hearing*” proceedings are deemed closed. This provides greater certainty on the length of the arbitral process, especially since delays in the issuance of an award are a common frustration amongst users.

## Conclusion

With the help of the new Rules, the SCMA Arbitration Rules embrace the technology-driven world and make remote hearings more viable and effective. The Rules introduce a cost-effective framework centred around efficiency. Through these changes, the [Singapore Chamber of Maritime Arbitration](#) is set for continued success.

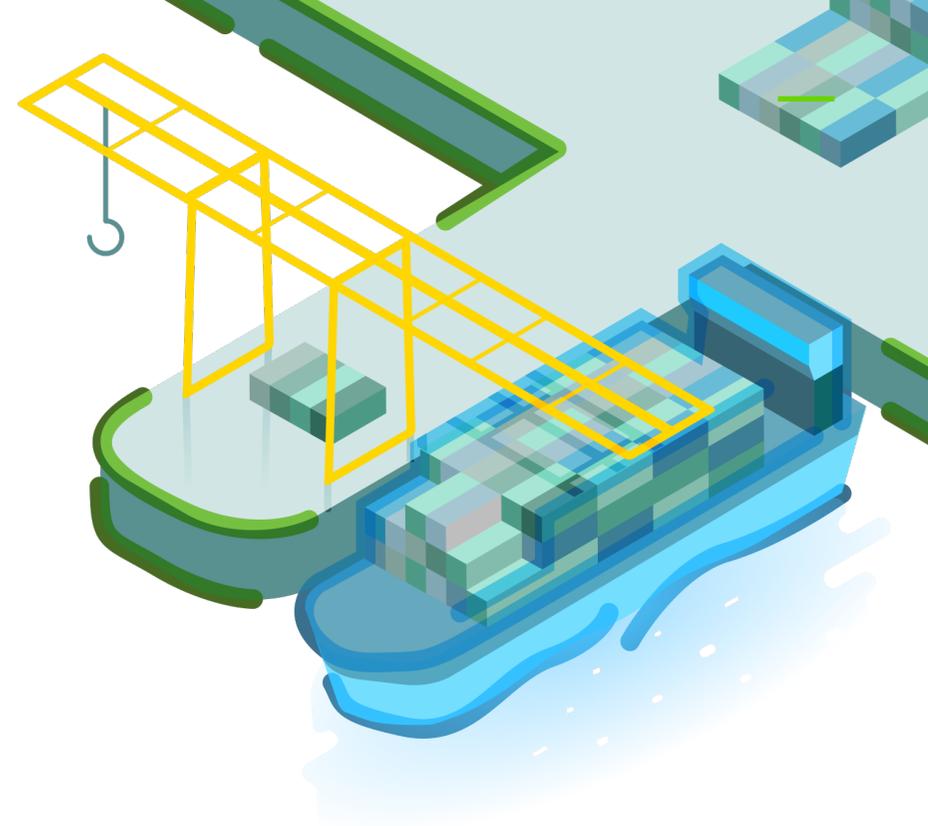
## ABOUT THE AUTHORS

**Bazul Ashhab** is the firm's Managing Partner and Head of Dispute Resolution, where he runs an active Litigation and International Arbitration practice. He is also recently appointed as Chairman of the Promotion Committee at The Singapore Chamber of Maritime Arbitration (SCMA).

In his practice, Bazul has acted in a range of shipping litigation and arbitration matters, cargo claims, ship arrests and sanctions-related shipping matters for both domestic and international banks, shipping companies and shipowners.

**Prakaash Silvam** specialises in commercial litigation and arbitration with a focus on international commodity trade, trade finance, marine insurance, and "dry" shipping work.

He has substantial expertise in handling disputes involving misdelivery claims and also the knock-on indemnity claims under letters of indemnity which are issued for the delivery of cargo without presentation of original bills of lading. He has advised trade financing banks based in Singapore and commodity trading houses on trade finance litigation. Prakaash also regularly advises clients on sanctions, including the impact of the US, EU and UN sanctions on businesses based in the region.



## MARITIME ARBITRATION TRENDS IN SINGAPORE

*Singapore is home to two local arbitral institutions that both cater to maritime arbitration disputes: [Singapore International Arbitration Centre \(“SIAC”\)](#) and [Singapore Chamber of Maritime Arbitration \(“SCMA”\)](#), which began its existence under the management of SIAC but subsequently became a separate and independent organisation.*

Both SIAC and SCMA publish annual reports with statistics including the type of disputes referred to arbitration, the quantum at stake, and the country of origin of the parties involved.

SIAC offers institutional arbitration and full case management, so the information in its annual reports is relatively robust and comprehensive. On the other hand, SCMA caters to self-administered arbitrations and there is no strict requirement for cases to be reported. As such, the cases reflected in its annual reports probably underrepresent the real numbers.

Despite the inequality of arms between SIAC and SCMA when it comes to case data, both sets of reports serve as a valuable source of information from which some relatively clear trends can be observed.

What, then, can be gleaned from a review of the reports published over the last few years?



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## Number of Cases & Sums in Dispute

Both SIAC and SCMA report case numbers, with a breakdown by sector/category.

SIAC caters to a wide range of disputes but includes both a “Maritime/Shipping” category and a “Trade” category of cases which also typically involve maritime elements.

SCMA’s cases are all shipping in nature, and the breakdowns provided split them into more granular categories such as charter party, bunkering, ship management, ship sale/building, and commercial sales/cargo disputes.

Adding up total cases falling under SIAC’s Maritime/Shipping and Trade categories, as well as SCMA’s cases, gives a total each year as follows:

Year	SIAC Maritime	SIAC Trade	SCMA	Total
2017	91	139	37	267
2018	72	110	56	238
2019	39	100	41	180
2020	72	734	43	849
2021	50	143	37	230
<b>Average:</b>	65	246	43	353*

*\*The average number of total cases each year is skewed by an exceptionally high number of cases in 2020, which saw an unprecedented 734 “Trade” disputes in SIAC arbitrations. This was likely spurred by the onset of the COVID-19 pandemic and the widespread supply chain disruptions which resulted. A more representative average for “normal” years can be obtained by excluding the bumper year in 2020 from the calculations – this results in an average of 228 cases each year.*

Case numbers are a useful metric, but of course do not tell the whole story. It is also relevant to consider the magnitude of the disputes that are being referred to arbitration. To assist with that, SIAC and SCMA both also publish the total and average quanta in dispute for their respective cases.

SIAC’s quantum statistics are not broken down by category, and are skewed by some individual large disputes which might be outside the “Maritime/Shipping” and “Trade” categories (unfortunately there are no quantum statistics by category), so it is probably a less accurate reflec-

tion of the real sums in dispute for maritime arbitrations. For instance, in 2021 the total sum in dispute for SIAC cases was USD 6.53 billion and the single largest sum in dispute that year was USD 1.95 billion, almost a third of the total; in 2020 the total sum was USD 8.49 billion and the single largest sum was USD 0.93 billion, more than 10% of the total; in 2019 the total sum was USD 6.69 billion and the single largest sum was USD 1.41 billion, more than 20% of the total. These large individual disputes result in a much higher average sum being reported overall. Regrettably, SIAC does not publish median sums in dispute which might be a more accurate reflection of the typical quantum in dispute.

SCMA’s statistics are straightforward as all the cases are maritime in nature and the total or average would not be disproportionately skewed by other factors.

Year	SIAC Total Sum (\$B)	SIAC Average Sum (\$M)	SCMA Total Sum (\$M)	SCMA Average Sum (\$M)
2017	4.07	14.47	53.00	1.46
2018	7.06	24.02	89.00	1.81
2019	8.09	30.99	120.00	3.60
2020	8.49	19.26	49.37	1.23
2021	6.54	21.81	163.50	5.30
<b>Average</b>	6.85	22.11	94.98	2.68

Overall, the total sums in dispute for both SIAC and SCMA have been trending upwards since 2017 (save for SIAC in 2021, and SCMA in 2020). The average sum in dispute for SIAC arbitrations has varied considerably from year to year but averages out to above USD 22 million. SCMA’s average sum has been trending upwards in tandem with the total sum.

## Geographical Origin of Parties in SIAC & SCMA Arbitrations

Parties from [Singapore](#) are consistently the single largest national group using both SIAC and SCMA. However, the total number of foreign users eclipses Singapore parties. The statistics show that foreign parties come predominantly from Asia, although increasingly there are significant numbers from the Americas, Europe, and the Middle East.

Year	2017	2018	2019	2020	2021	Total
<b>India</b>	176	103	485	690	187	1,647
<b>USA</b>	70	109	65	545	74	863
<b>China</b>	77	73	76	195	94	515
<b>Switzerland</b>	72	24	44	135	29	304
<b>Indonesia</b>	32	62	39	85	33	251
<b>Hong Kong</b>	38	38	33	60	80	249
<b>Malaysia</b>	25	82	38	33	56	234
<b>UAE</b>	34	51	49	21	34	189
<b>South Korea</b>	27	41	21	33	46	168
<b>Thailand</b>	10	10	39	101	12	172
<b>Vietnam</b>	24	24	17	52	55	172
<b>Philippines</b>	6	10	122	14	5	157
<b>Japan</b>	27	30	26	46	20	149
<b>Germany</b>	68	20	7	13	20	128
<b>UK</b>	25	11	34	19	31	120

India has been and remains a steadfast user of SIAC and has been the single largest foreign user every year since 2017 (except for 2018, when the USA came in first by a slim margin of 6 cases).

Behind [India](#), [China](#), [Indonesia](#), [Hong Kong](#), and [Malaysia](#) are consistently heavy users of SIAC. Other Asian countries such as [South Korea](#), [Thailand](#), [Vietnam](#), the [Philippines](#), and [Japan](#) have featured in the top 10 users for SIAC over the last five years.

Outside Asia, the most prolific user is the [USA](#). Offshore jurisdictions Cayman Islands and [British Virgin Islands](#) (not included in the table above) are also regular users of SIAC from the Americas.

The top European countries of origin include [Switzerland](#), [Germany](#), and the [UK](#), with Switzerland being by far the heaviest user from Europe.

From the Middle East, [UAE](#) is the most frequent, appearing in the top 10 users of SIAC in each of the last five years, except for 2019.

SCMA's statistics on countries of origin only date back to 2019, and contain less detail than SIAC. However, the overall trend is similar to what the SIAC's statistics show: Singapore is the largest single country of origin, but Singapore parties are exceeded by international parties overall.

In 2019, there were 15 Singapore parties, 17 Asian parties (from countries other than Singapore), and 2 European parties reported to SCMA.

2020 saw 38 Singapore parties, 26 parties from Asia (excluding Singapore), 9 from the UAE, and 15 from other countries.

2021 contained a more granular breakdown showing that Singapore parties numbered around 38, with China and India providing the second and third largest number of parties respectively. These were followed by a roughly equal number of parties from [Indonesia](#), [Iran](#), [South Korea](#), [Liberia](#), [Monaco](#), and [Thailand](#), with other jurisdictions contributing smaller numbers.

## The Russian Connection

An interesting new development to watch is the uptick in Russian parties making use of SIAC. SIAC was officially registered as a Permanent Arbitral Institution in Russia in May 2021 and was licensed to administer Russian arbitrations. This seems to have resulted in an almost immediate increase in Russian parties in 2021:

Year	2017	2018	2019	2020	2021	Total
Russia	0	5	2	3	15	25

It remains to be seen how the 2022 conflict between [Russia](#) and [Ukraine](#), and the raft of sanctions and other measures imposed as a result, will affect the number of cases moving forward.

### ABOUT THE AUTHORS

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## THE IN-HOUSE PERSPECTIVE

### DEFENDING THE APPLICATION OF AN ARBITRATION CLAUSE PROVIDED IN THE CONDITIONS & TERMS OF A CLASSIFICATION SOCIETY

This article will develop the mechanisms of contractual arbitration clause enforcement and application from the point of view of a classification society. Classification societies are key stakeholders of the maritime world and have followed the evolution of the international maritime trade since the early 19th century.

Maritime arbitration is a recognized legal practice of commercial dispute settlement mainly justified by the technicality of most maritime disputes, justifying the intervention of specialized arbitrators with a strong knowledge of shipping and maritime issues. Most of the classification societies are recognized in maritime arbitration, notably when organized in specialized maritime chambers (e.g., [London Court of International Arbitration \(LCIA\)](#), Maritime Arbitration Chamber of Paris (CAMP) etc), a key forum for addressing their disputes.

The private and confidential nature of maritime arbitration are also key factors, considering that a majority of disputes involving classification societies contain critical and sensitive information that parties prefer to keep confidential. Maritime arbitration is also commonly considered a faster and more effective procedure. This is why most classification societies include in their standard General Conditions an arbitration clause defining the agreement of the parties to arbitrate their potential disputes. The dispute resolution clause in Bureau Veritas' applicable General Conditions refers disputes to the Paris Maritime Arbitration Chamber (CAMP), with English law as the applicable law:



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*“Any dispute shall be finally settled under the Rules of Arbitration of the Maritime Arbitration Chamber of Paris (“CAMP”), which rules are deemed to be incorporated by reference into this clause. The number of arbitrators shall be three (3). The place of arbitration shall be Paris (France). The Parties agree to keep the arbitration proceedings confidential.”*

Some difficulties can appear with a duality of contract in the classification of ships. This occurs when a first classification contract has been made between a classification society and a shipyard during the construction of the vessel (classification survey of construction), and then, a new classification contract is made post-delivery (or to be made) between a classification society and the shipowner, buyer of the ship. In case of disputes notably started during ship in service phase but where causality is linked to the construction phase, some issues around the application of the arbitration clause can be raised.

This was the case in a recent dispute having involved Bureau Veritas and where contractual enforcement of the Arbitration forum clause was debated. In this case, French Courts, and lastly French Supreme Court (*i.e.*,

the *Cour de Cassation*) have clarified this issue and generated a strong precedent (*See*, Civ. 1re, 9 mars 2022, FS-B, n° 20-21.572).

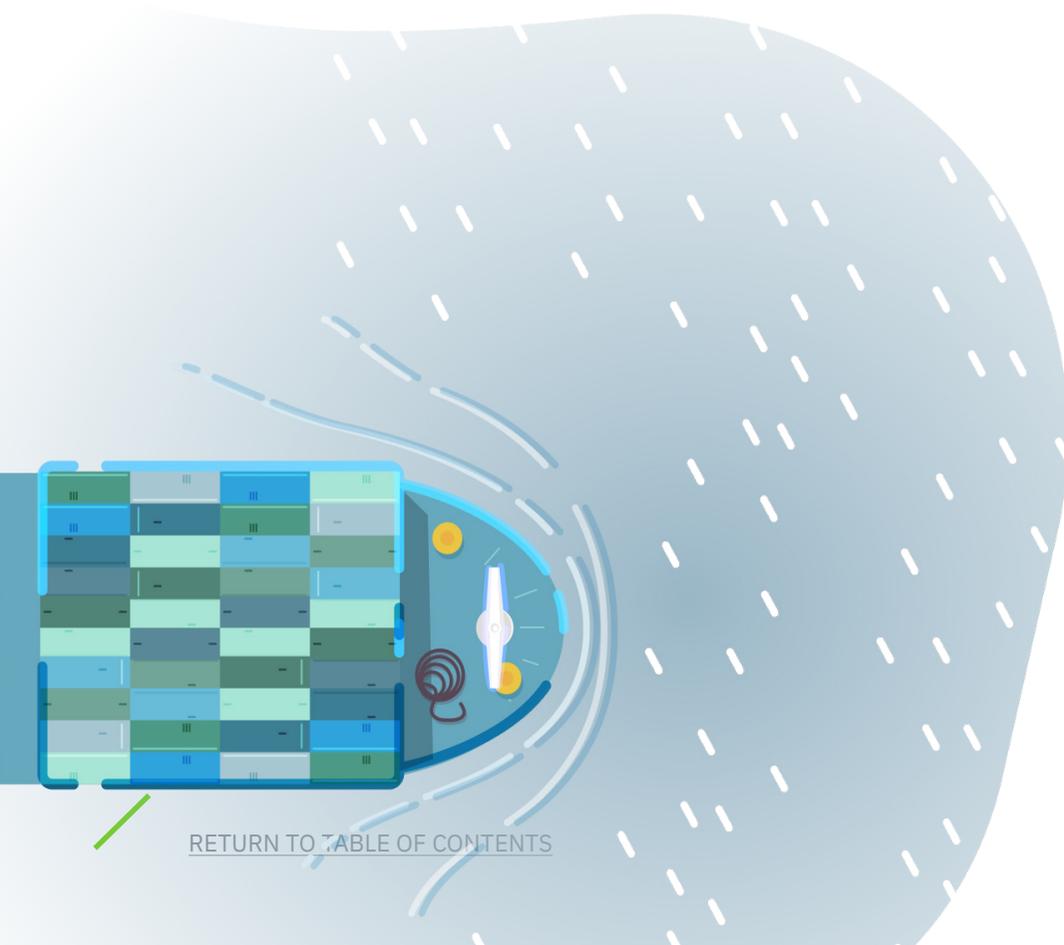
The French Supreme Court upheld the Court of Appeal of Noumea's decision (French Polynesia), which declared itself incompetent due to the application of the arbitration clause contained in the classification contract between the classification society and the shipyard. To extend the application to the shipowner, the French Courts:

- (1) established a link between the shipowner and the execution of the classification contract with the shipyard, and
- (2) confirmed the application of the competence-competence principle.

The French Courts decided that although the shipowner was not a party to the contract between the shipyard and the classification society, the arbitration clause present in the contract applied to the shipowner since it was interested in the execution of the contract. Indeed, by using a breach in the survey obligation as the basis of the claim, the shipowner acknowledged a link with the said contract. Hence, if the shipowner recognizes, on the one hand, the obligations of the classification society as the basis for its claim, it shall, on the other hand, recognize the application of the arbitration clause contained in the original contract. In addition, since the shipowner had already signed previous contracts with the classification society (*i.e.*, for classification in service containing the arbitration clause), the shipowner was not in a position to deny he had knowledge of the content of the clause. The particularity of the decision remains in the refusal to characterize as equivocal the absence of a formal agreement from the shipowner of its acceptance of the clause.

Once the above link was established, the French Courts confirmed the application of the competence-competence principle provided, under French law, in Article 1448 of the Civil Code. Such principle dictates that when a case is brought before local courts but an arbitration clause exists between the parties, the relevant judge shall declare himself incompetent and let the nominated arbitrators rule on their own competency.

However, the concerned clause shall not be manifestly void nor manifestly inapplicable. Such a clause would be declared void if it misses essential elements, such as applicable rules, place, and number of arbitrators. It would be declared inapplicable should the party concerned not be part of the contract or no link exist between the clause and the concerned party. In the present case, since the clause mentioned all the essential elements, and the Courts established a link for the application to the shipowner as a third-party, the competence-competence principle applied.



As a consequence, French Courts declared themselves incompetent to judge the case and referred the case to arbitrators in order to let them assess their own competency.

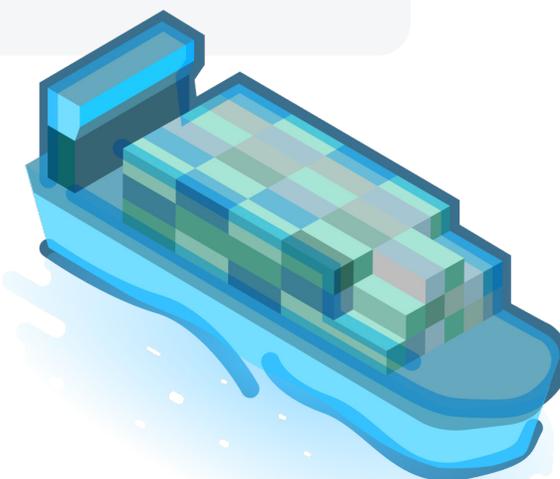
Such a decision upholds a strong precedent for competency cases since it acknowledges the application of a classification contract arbitration clause to a third-party. Additionally and more importantly, it confirms once again the primacy of maritime arbitration competency over the judiciary system even though no express stipulation exists as to the acceptance of an arbitration clause by the buyer and shipowner of the vessel.

However, this decision should be tempered as it only widens the application of the competence-competence principle under French law, but it does not ensure that the case will be finally judged on its merits by the arbitral tribunal. The existence of the link between the shipowner and the arbitration clause established by the French Courts for purposes of the competency-competency principle could still be ruled out by the arbitrators, hence uncertainty remains on the competency of arbitrators in this case.

## ABOUT THE AUTHORS

**Julien Raynaud** is General Counsel of Bureau Veritas Marine & Offshore and arbitrator at the Paris Marine Arbitration Chamber (CAMP). He has wide expertise in both Marine and Offshore Oil & Gas sector. He is currently General Counsel for Bureau Veritas Marine & Offshore, a classification society in which he manages wide variety of subjects including contractual negotiations, litigations, corporate restructuration, legal strategy and international sanctions. He is a member of the Board of Administrators of the French Maritime Law Association (AFDM).

**Pierre Hof** is Senior Legal Counsel at Bureau Veritas Marine & Offshore and member of French Maritime Law Association (AFDM). His work involves contract negotiations in marine sector and more specifically classification and marine engineering services, trade sanctions-related matters, and management of claims and litigations in marine classification and certification activities where he specialized in technical expertise cases.



## A QUANTUM PERSPECTIVE

### JUS MUNDI PUBLICATION: CASE COMMENT OF BOSKALIS V. FLUOR – FINAL AWARD, 12 NOVEMBER 2021



[Alexander J. Marcopoulos](#)

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## I. Introduction

1. [ICC Case No. 25148/MK/PDP](#) concerned a dispute arising from a seaborne carriage contract (the Contract) between Boskalis Offshore Heavy Marine Transport B.V. (Boskalis), a Dutch maritime services provider, and Fluor Limited (Fluor), a UK-incorporated construction company. The Contract contemplated Boskalis' transport of prefabricated modules according to an agreed schedule and in exchange for an agreed price.
2. The dispute centered on Boskalis' claims for approximately USD 41 million as compensation for additional costs it said to have incurred in performing the Contract, all of which it contended were attributable to Fluor under the Contract's terms. On Boskalis' case, these costs arose from (i) additional port calls; (ii) unpaid charter hire; (iii) an extension of the Contract's duration; (iv) additional typhoon avoidance measures; (v) additional inter-port shifting of barges; and (vi) additional mooring hardware.
3. In its Final Award dated 12 November 2021, the arbitral tribunal dismissed four of Boskalis' six claims in full and granted Boskalis partial relief amounting to USD 2,117,100 in relation to its claims for unpaid charter hire and extension of the Contract's duration.

4. Although the tribunal dismissed Boskalis' additional port call claim on the merits, it nonetheless evaluated the quantum of that claim. In doing so, the tribunal made a number of interesting findings, including about the relationship between Boskalis' alternative liquidated damages and actual cost valuations. It is those issues that are the focus of this Comment.

## II. The Facts

5. The dispute between Boskalis and Fluor concerns the transport of prefabricated modules from their place of manufacture in China to Al-Zour Kuwait, where they were intended for incorporation within the Al-Zour Refinery Project. Fluor, together with its joint venture partners Daewoo Engineering & Construction and Hyundai Heavy Industries, was among the contractors engaged to deliver this Project.<sup>1</sup>
6. It is in this connection that Fluor issued a Request for Proposal (RFP) inviting seven companies to bid for a contract to transport

<sup>1</sup> [Boskalis Offshore Heavy Marine Transport B.V. f/k/a Dockwise Shipping B.V. v. Fluor Limited](#), ICC Case No. 25148/MK/PDP, Final Award, 12 November 2021, paras. 9-10.

the modules.<sup>2</sup> The proposal that Boskalis tendered in this process was different from other bidders' in that it contemplated a float-on/float-off (or "Flo-Flo") approach. Flo-Flo involves loading cargo onto a barge at the loading port, towing it to a semi-submersible heavy transport vessel (HTV), and then "floating" the loaded barges atop the HTV in a piggyback arrangement.<sup>3</sup>

7. For its Flo-Flo proposal to work, Boskalis would need a suitable anchorage point at which its barges could link up with its HTVs to load the cargo for transport to the delivery point. To that end, Boskalis hired a local consultant and met with representatives of the local Maritime Safety Administration to explore usable anchorage points. Through these efforts, Boskalis identified two potential sites in Chinese waters: one in Zhuhai and one in Guangzhou. Based on further feasibility analyses, which confirmed that Wanshan anchorage point in Zhuhai "had suitable workability", Boskalis determined that it would use Wanshan for its Flo-Flo operations if awarded the Fluor contract.<sup>4</sup>
8. The RFP process ended in September 2017, when Fluor selected Boskalis as the highest scoring bidder. Accordingly, Fluor and Boskalis concluded their Contract on 22 December 2017, memorializing their agreement for Boskalis to transport 188 prefabricated modules from a fabrication yard in Zhuhai to Al-Zour Kuwait, on a schedule running to 15 April 2019, and in exchange for Fluor's payment of a contract price.<sup>5</sup>

9. Among other things, the Contract records Boskalis' representations that it "carefully examined the documentation, drawings and specifications for the Work" and "fully acquainted itself with all other conditions relevant to the Work", and its warranty that it "assume[d] the risk of such conditions."<sup>6</sup> The Contract also records Boskalis' undertaking to perform the Contract in accordance with "Applicable Law."<sup>7</sup>
10. The Contract is governed by Kuwaiti law and contains an arbitration clause requiring any disputes arising thereunder to be referred for final settlement to arbitration in Houston, Texas, by a panel of three arbitrators, and conducted pursuant to the ICC Arbitration Rules.<sup>8</sup>
11. Following the parties' conclusion of their Contract, it became apparent that Boskalis would not be able to conduct its Flo-Flo operations in Zhuhai waters as local regulations prevented foreign flagged vessels from operating there.<sup>9</sup> Boskalis thus decided to conduct its Flo-Flo operations in Guangzhou. However, because Boskalis' barges were already cleared for export in Zhuhai, the relevant local rules required that they first transit through international waters before being loaded aboard an HTV. This meant that Boskalis would have to tow its barges through Hong Kong waters.<sup>10</sup>

<sup>2</sup> [Ibid.](#), para. 33.

<sup>3</sup> [Ibid.](#), para. 34.

<sup>4</sup> [Ibid.](#), para. 37.

<sup>5</sup> [Ibid.](#), paras. 39, 45.

<sup>6</sup> [Ibid.](#), para. 40.

<sup>7</sup> [Ibid.](#), para. 43.

<sup>8</sup> [Ibid.](#), paras. 12-13.

<sup>9</sup> [Ibid.](#), para. 51.

<sup>10</sup> [Ibid.](#), para. 59.

**12.** As a result of these changes to Boskalis’ planned Flo-Flo operations, the first three voyages under the Contract suffered delay. According to Boskalis, Fluor bore responsibility for these changes and the attendant delays and costs for three alternative reasons: first, because the changes were made pursuant to an instruction by Fluor that arose from customs issues within Fluor’s responsibility; second, because they were due to a change in the applicable law or interpretation of the applicable law; and third, because they amounted to an unpredictable, exceptional circumstance that made Boskalis’ performance excessively onerous within the meaning of Article 198 of the Kuwaiti Civil Code.<sup>11</sup>

**13.** Boskalis thus filed arbitration claims against Fluor, seeking USD 31.2 million in compensation for costs it claimed to have incurred in calling at additional ports due to the change in Flo-Flo location. Boskalis calculated its claimed entitlements using the per unit rate of USD 150,000 that Schedule D of the Contract prescribed for additional port calls made due to changed circumstances (the “Schedule D Rate”). Boskalis also raised five other claims, not all of which were founded on the change in Flo-Flo location – namely, claims for (i) unpaid charter hire, and for compensation of additional costs incurred in respect of (ii) an extension of the Contract’s duration, (iii) additional typhoon avoidance measures, (iv) additional inter-port shifting of barges, and (v) the purchase of additional mooring hardware.<sup>12</sup> In the aggregate, Boskalis valued its six claims at USD 41,142,073.<sup>13</sup>

**14.** In respect of the additional ports claim, which comprised almost 80 percent of what Boskalis sought to recover, Boskalis relied exclusively on its position that its claim should be valued using the Schedule D Rate of USD 150,000 throughout the main written and oral proceedings. It was not until Boskalis submitted its post-hearing submission that it advanced an alternative valuation comprising its “actual costs”, which Boskalis valued at USD 38,461 per additional port call or USD 8 million in total.<sup>14</sup> This change featured prominently in the tribunal’s assessment of Boskalis’ case on quantum, which is addressed in further detail in the sections that follow.



<sup>11</sup> [Ibid.](#), para. 70.

<sup>12</sup> [Ibid.](#), para. 11.

<sup>13</sup> [Ibid.](#), para. 63.

<sup>14</sup> [Ibid.](#), para. 131.

### III. Tribunal's Reasoning and Decision on the Quantum of Boskalis' Additional Port Calls Claim

15. Following a final hearing and post-hearing submissions, an arbitral tribunal comprised of [Elliot Polebaum](#) (as Chair), [Keith W. Heard](#) and [Michael P. Lennon, Jr.](#) issued its Final Award on 12 November 2021. In its Award, the tribunal found that Boskalis had failed to establish four of its six claims (including the additional port calls claim) and accordingly dismissed those claims in full. The tribunal granted Boskalis partial relief in relation to its claims for unpaid charter hire and an extension of the Contract's duration, amounting to USD 2,117,100 of the USD 41 million claimed.<sup>15</sup>
16. As this Comment is focused on the tribunal's decision on the quantum of Boskalis' additional port calls claim, only the parts of the Final Award that are relevant to that issue are addressed below. With that said, it should be noted that it was not necessary for the tribunal to engage with this part of Boskalis' case, as it had already dismissed Boskalis' claim on the merits.
17. The tribunal began its assessment of the quantum by identifying Boskalis' two alternative positions – namely, Boskalis' primary valuation of USD 31.2 million based on the liquidated Schedule D Rate, and its alternative valuation of USD 8 million in “actual costs”, which it introduced in its post-hearing submissions.

<sup>15</sup> [Ibid.](#), paras. 285-294.



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## A. BOSKALIS' PRIMARY VALUATION BASED ON A CONTRACTUAL UNIT RATE

18. Regarding Boskalis' primary valuation, the tribunal's starting point was its observation that there was "no suggestion that Boskalis incurred actual additional costs anywhere close to the US\$ 31,200,000 it seeks [...]"<sup>16</sup> In the tribunal's assessment, this meant that Boskalis would obtain an unearned windfall if awarded its primary valuation.<sup>17</sup>
19. The tribunal went on to conclude that Boskalis' primary valuation would fail in any event because the Schedule D Rate was not intended to apply in the circumstances giving rise to Boskalis' claim.<sup>18</sup> The tribunal made three findings that led it to this conclusion.
20. First, it noted that Schedule D of the Contract applies to "Changes." In the Tribunal's reasoning, the need for Boskalis' barges to transit via Hong Kong waters and call at additional ports was not a change, but instead a measure necessary to comply with existing regulatory requirements.<sup>19</sup>
21. Second, noting that the Schedule D Rate was defined to apply to each "Additional call of vessel into port en route", the tribunal found that the additional port calls Boskalis claimed for were not made "en route" and therefore, that Schedule D did not apply. On this point, the tribunal found persuasive Fluor's explanation that the Schedule D Rate was intended to apply to more conventional direct-load shipments, where a cargo vessel may

need to make additional calls during the main voyage to retrieve additional cargo, and not for a Flo-Flo operation involving the intermediate step of loading barges atop an HTV mothership.<sup>20</sup>

22. Third, as further confirmation that the Schedule D Rate was not intended to apply in the circumstances Boskalis encountered, the tribunal cited the "enormous disparity" between that liquidated rate (USD 150,000 per port call) and the actual costs Boskalis claimed to have incurred (about USD 38,000 per port call). The tribunal explained that "[t]he unit price of US\$ 150,000 must bear some rational relationship to the anticipated cost of making an additional port call." With all the evidence tending to refute, rather than support, such a rational relationship, the tribunal considered Boskalis' primary valuation unjustified.<sup>21</sup>

## B. BOSKALIS' ALTERNATIVE VALUATION BASED ON ACTUAL COSTS

23. Turning to Boskalis' alternative, "actual costs" valuation, the tribunal began its analysis by recalling that Boskalis did not advance this position until after the final merits hearing, raising it for the first time in its post-hearing submissions.<sup>22</sup>
24. Prompted by Fluor's objection that Boskalis introduced its alternative valuation too late in the proceedings, the tribunal considered the procedural implications of Boskalis' approach.<sup>23</sup> In doing so, the tribunal recognized that "[...] it is unfair to Fluor to have to address a new quantification in the post-hearing pro-

<sup>16</sup> [Ibid.](#), para. 131.

<sup>17</sup> [Ibid.](#), para. 131.

<sup>18</sup> [Ibid.](#), para. 132.

<sup>19</sup> [Ibid.](#), para. 133.

<sup>20</sup> [Ibid.](#), para. 134.

<sup>21</sup> [Ibid.](#), para. 135.

<sup>22</sup> [Ibid.](#), para. 136.

<sup>23</sup> [Ibid.](#), para. 137.

ceedings [...] where Fluor has not had a full opportunity to confront such a position head-on.”<sup>24</sup> It went on to express the view that “Boskalis’ tardy assertion of its alternative quantification jeopardizes Fluor’s due process rights.”<sup>25</sup> However, the Tribunal stopped short of deciding whether the lateness of Boskalis’ alternative valuation made it procedurally impermissible, including as a new claim that falls outside the scope of the Terms of Reference in violation of Article 23 of the ICC Rules.<sup>26</sup>

**25.** Instead, the tribunal rejected Boskalis’ alternative, “actual costs” valuation as lacking in merit for want of sufficient (or any) substantiation. In arriving at this conclusion, the tribunal underscored that “[w]hile exactitude to the last dollar is not required to substantiate damages, actual evidence of costs incurred is essential. This is particularly the case where the evidence of costs incurred is necessarily within the hands of Boskalis.”<sup>27</sup> Applying these criteria, the tribunal noted that Boskalis’ alternative position was based on no more than “a scattering of what appear to be off-the-cuff estimates of what in Boskalis’ view would be a fair level of compensation to it as part of a negotiated agreement with Fluor.”<sup>28</sup> It found this to be a “complete failure of substantiation on the part of Boskalis with respect to its alternative quantification of costs incurred” and dismissed Boskalis’ alternative valuation accordingly.<sup>29</sup>

## IV. Comments

**26.** Despite being immaterial to the outcome of the case, the *Boskalis* tribunal’s decisions on quantum are noteworthy because they bring into focus some of the different approaches that can be taken in assessing alternative claims for liquidated and actual damages, as well as the strategic considerations those may entail for disputing parties.

**27.** As an initial matter, it bears noting that the tribunal does not appear to have applied any specific legal standard in its assessment of Boskalis’ primary valuation. The closest it came to doing so was in stating its view that “[t]he unit price of US\$ 150,000 must bear some rational relationship to the anticipated cost of making an additional port call.”<sup>30</sup>

**28.** It is unclear whether this “rational relationship” criterion carries the force of any law (let alone applicable Kuwaiti law), as no legal authority is cited for the proposition in the tribunal’s Award. However, the language the tribunal used does evoke elements of the standards that certain US jurisdictions apply in assessing the enforceability of liquidated damages provisions. Those standards fall into two broad categories, both of which entail a binary approach, according to which liquidated damages are either enforceable or not.

<sup>24</sup> [Ibid.](#), para. 137.

<sup>25</sup> [Ibid.](#), para. 138.

<sup>26</sup> [Ibid.](#), para. 138.

<sup>27</sup> [Ibid.](#), para. 140.

<sup>28</sup> [Ibid.](#), para. 139.

<sup>29</sup> [Ibid.](#), para. 140.

<sup>30</sup> [Ibid.](#), para. 135.

29. Some US jurisdictions employ a backward-looking test, which considers whether the liquidated damages were a reasonable estimate of damages at the time of contract. An example of this approach can be found in Section 1671(b) of the California Civil Code, which states: “[...] a provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contact was made.”<sup>31</sup>
30. Other US jurisdictions apply a broader test which considers the reasonableness of liquidated damages with respect to both anticipated losses at the time of contract and actual losses incurred at the time of breach. This is the approach reflected in the Restatement Second of Contracts, Section 356(1) of which states: “Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.”<sup>32</sup>
31. In contrast, the position under applicable Kuwaiti law is more fluid in that it allows for liquidated damages to be adjusted rather than just accepted or rejected. In Kuwait, as in certain other MENA jurisdictions, courts have discretion to exclude liquidated damages where no actual harm was suffered, or to reduce their amount if it is found to be grossly exaggerated in comparison to the actual loss suffered.<sup>33</sup> The *Boskalis* tribunal was aware of

this principle by way of Fluor’s request that it “adjust or refuse to order the claimed amount of liquidated damages in light of the actual harm suffered by [Boskalis].”<sup>34</sup>

32. Yet, the Kuwaiti law approach to liquidated damages does not appear to have factored into the tribunal’s decisions on quantum. Instead, the tribunal took what can fairly be characterized as a binary approach to evaluating Boskalis’ primary valuation. It seemed to consider only whether Boskalis could sustain its primary or alternative valuations, and not whether it may be appropriate to adjust either valuation in light of the other.
33. Moreover, while the tribunal’s reference to a “rational relationship to the anticipated cost” criterion suggests a backward-looking approach, the tribunal evidently considered Boskalis’ statement of its “actual costs.” This is reflected, for example, in the tribunal’s finding that the “enormous disparity” between Boskalis’ liquidated damages and actual cost valuations “further persuades us that the [liquidated] unit prices do not apply here.”<sup>35</sup> It is difficult to see how the tribunal could have arrived at the same conclusion if it had evaluated Boskalis’ primary claim only with reference to “anticipated costs.”

31 CA Civ Code § 1671 (2017) [<https://law.justia.com/codes/california/2017/code-civ/division-3/part-2/title-4.5/chapter-1/section-1671/>].

32 Restatement (Second) of Contracts § 356(1) (1979) [<https://instituteoflaw.com/Preview/Law101-1b/Restatement2ndContracts-DONOTPRINT-week1b.pdf>].

33 J. Chedrawe, “Liquidated Damages for Delay in the Middle East: Not Etched in Stone”, BCDR International Arbitration Review 4, no. 1 (2017), pp. 99-100 [<https://media.velaw.com/wp-content/uploads/2020/01/28175917/49482e8e-9cff-4ac4-8265-47e74f49d0ab.pdf>].

34 *Ibid.*, para. 93 (internal quotation marks omitted).

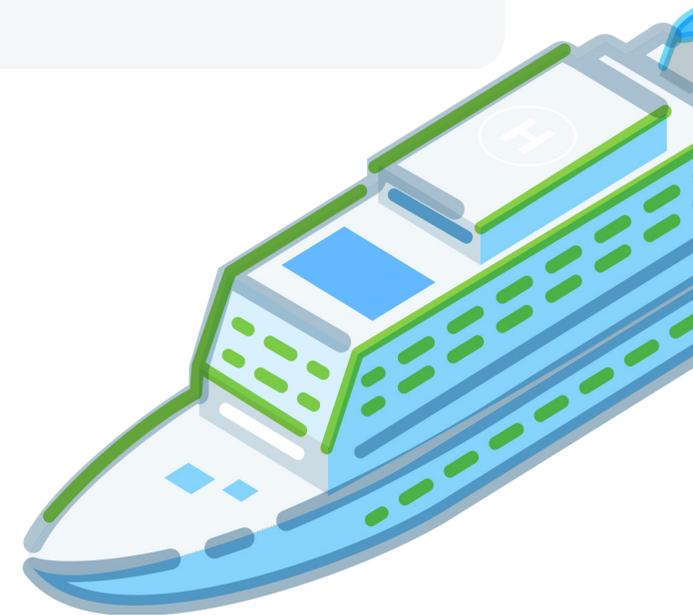
35 *Ibid.*, para. 135.

## V. Conclusion

34. There are a number of lessons to be taken from the *Boskalis* tribunal's decisions on quantum. Foremost among these is the importance – to both parties – of obtaining as much certainty as possible as to the standards the tribunal may apply in assessing a liquidated damages claim, especially where actual damages are being claimed in the alternative. As even the cursory discussion above makes plain, a liquidated damages claim can be evaluated in a variety of ways and the standard applied can significantly influence which facts are considered relevant as well as the range of possible outcomes.
35. More generally, any claimant advancing a liquidated damages claim should carefully consider the extent to which a tribunal may consider actual costs in its evaluation of the liquidated damages position and should adapt its strategy accordingly. Of course, hindsight is 20/20, but one cannot help but wonder whether better insight into the tribunal's approach may have led *Boskalis* to decide to advance a different “actual costs” valuation earlier on, or even to refrain from advancing one at all.

### ABOUT THE AUTHOR

[Alexander Marcopoulos](#) is a counsel in Shearman & Sterling's International Arbitration practice. He represents companies and States in commercial, maritime and investor/State arbitrations carried out under the auspices of a variety of ad hoc and institutional rules, including those of the ICC, ICSID, UNCITRAL, SCC and the LMAA. His practice focuses particularly on disputes in the construction, energy and maritime sectors. He also spearheads the Shearman & Sterling's innovative project on Human Rights at Sea Arbitration, a collaboration with the UK-based charity Human Rights at Sea for the establishment of a new arbitration-based system to address human rights abuses arising in the maritime space.



## HOT BUTTON ISSUE ANALYSIS

### THE CORAL-ATION BETWEEN ENVIRONMENTAL DAMAGE AND THE RECOVERY OF DAMAGES: CHALLENGES IN MARITIME DISPUTES RELATING TO DAMAGE OF CORAL REEF

The protection and maintenance of marine biodiversity has always been a challenge. Incidents such as oil discharge and vessel grounding pose environmental threats to vulnerable marine life and cause irreparable damage to the environment. While maritime nations recognize the “polluter must pay” principle, damage to marine life such as coral reef impacts not just its immediate environment, but have also resulted in claims relating to a State or region’s economic potential, reliance on, subsistence, and even cultural value of the coral reef.

Under private law, the remedies for compensation for damage to coral reefs in maritime disputes may not be comprehensive. They tend to be jurisdiction-specific, are subject to an assortment of common law and legislative remedies, and measures may range widely based on the objectives of restoration and rehabilitation. To make it even more challenging, the methods in which such damages are calculated vary widely and are highly environment and context dependent. In this article, we briefly examine some issues relating to damage of coral reef.



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## Costs of Assessment Alone Does Not Lower the Burden of Proof

The survey and assessment of reef damage is costly given that expeditions have to be organised with appropriate equipment and experts engaged. However, if such evidence exists, the claiming party is expected to produce such evidence. The cost of carrying out an assessment alone should not be used as a reason not to put forth evidence.

In *The Sevilla Knutsen* [2022] SGHC 20 (“**The Sevilla Knutsen**”), a Liquefied Natural Gas carrier struck parts of the outer reef in the island state of Yap of the Federated States of Micronesia (FSM). The plaintiffs were the traditional leaders of Eauripik, an island part of the FSM, representing its people to seek compensation against the vessel for damage caused to the reef. The plaintiffs had argued that it was difficult and expensive to organize an expedition to the reef location. However, the Singapore High Court observed that costs alone could not justify the lowering of the legal and evidential burden of proof. If evidence can be obtained, the court expects such evidence to be produced, especially in cases where there is “actual physical damage.” This approach is consistent with the general common law approach that the Plaintiff must prove his/her case (of damage) on the balance of probabilities with evidence.

## Claims for Cultural Damages

Plaintiffs have claimed compensation for physical injury to the reef structure and resources as well as compensation for the inability to use resources for subsistence activities such as fishing. Apart from such usual damages sought, plaintiffs have sought claims based on cultural damages.

In the FSM Supreme Court decision *People of Rull ex rel Ruepong v M/V Kyowa Violet*, 14 FSM Intrm 403 (Yap 2006) (“**Kyowa Violet**”), a general cargo vessel struck bottom on the reef causing varying degrees of damage to the coral reef and fuel oil escaping into the water. The state governor implemented a ban on swimming, fishing, shelling, and other open water activities. The plaintiffs sued for maritime negligence as well as for public and private nuisance. On top of seeking damages for physical injury to the reef, the plaintiffs also sought “cultural damages.” They contended that loss of access to water meant that, under Yapese culture, fathers and grandfathers were unable to teach their children how to swim and other water skills (*i.e.*, the delay in the transfer of knowledge of swimming and water skills). However, the court found that there was no cultural injury for which recovery might be sought and commented that, “*if the Yapese custom and tradition could survive German and Japanese imperial rule, World War II and the Trust Territory*”, it will survive the incident of vessel grounding unscathed.

In *People of Eauripik ex rel. Sarongelfeg v. F/V Teraka No. 168*, 18 FSM Intrm. 623 (Yap 2013), the plaintiffs sought the inclusion of cultural damages on the basis that, under international law, the rights of indigenous people (*i.e.*, the Eauripik people) to their own culture must be protected. However, the FSM Supreme Court found that there was no statutory language to “*require or encourage the inclusion of cultural damages.*”

While the FSM Supreme Court did not completely rule out the viability of such claims, it appears that the threshold would be very high if such a claim is allowed. It therefore remains to be seen if similar claims are recoverable in other jurisdictions on such a basis.

## Approach to the Valuation of the Reef

Unfortunately, there is no fixed formula upon which damage to a reef can be valued. Experts have put forward valuations based on commodity value, cost of restoration of the reef, the economic value of the marine resources lost as a result, and even the tourism value based on how much visitors would spend to visit the reef.

In *The Sevilla Knutsen*, the Singapore High Court explored the relevance of the “more reef and fewer people” principle. In short, similar to the concept of supply and demand, the principle considers that, all things being equal, the value of the reef is lower where a smaller island population relies on the natural reef resources available. Whilst the Singapore High Court acknowledged that the principle is not binding when considering the valuation of reef, it found that population was a factor for the court to consider when exercising its discretion on valuation.

Finally, whilst there is a range of remedies which private commercial parties may seek in individual courts, it would be beneficial for commercial parties to be appraised of the bigger picture under international law. Broadly, the [United National Convention on the Law of the Sea \(UNCLOS\)](#) requires States to ensure that their legal systems allow quick and sufficient compensation for damage caused by marine pollution. In particular, Article 235(1) of the United National Convention on the Law of the Sea provides that:

“States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment.”

Article 235(2) provides that:

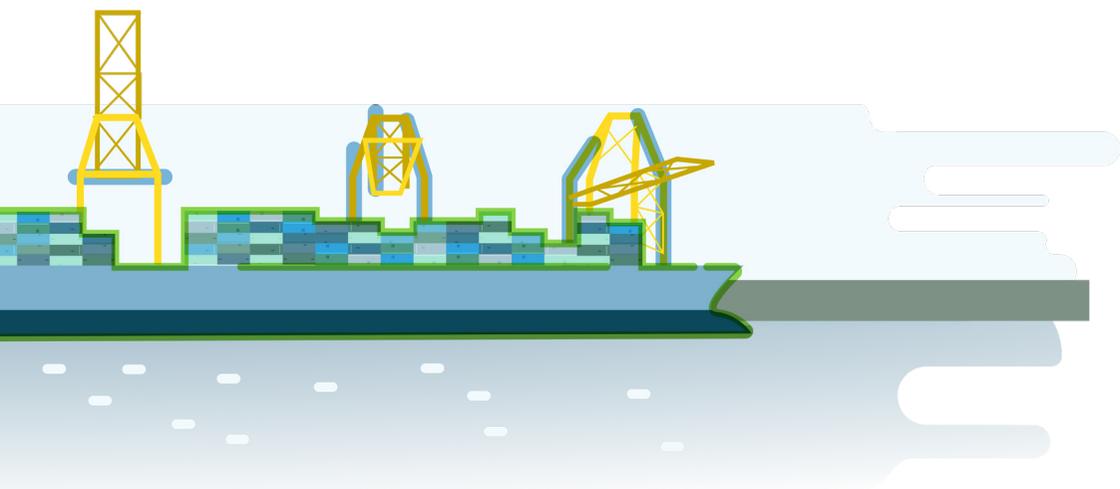
“States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by

natural or juridical persons under their jurisdictions.”

As a result of this, regimes for civil liability and compensation such as the International Convention on Civil Liability for Oil Pollution Damage (1992) (the “**1992 Civil Liability Convention**”) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992) (the “**1992 Fund Convention**”) have been created. Shipowners are subject to strict liability for any pollution caused by the ship as a result of a pollution incident and are required in certain circumstances to maintain compulsory liability insurance to cover their liabilities.

In [Singapore](#), the Prevention of Pollution of the Sea Act (Cap 243) was enacted to impose strict liability for pollution matters. It allows local authorities to take preventive measures, detain, and even arrest ships which cause pollution, amongst other things.

While coral reefs remain rare in the region, shipowners should remain aware of their obligations both locally and internationally, and take steps to implement measures not to cause irreparable harm and damage to the environment.



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# Annex 1: 2017–2022 Maritime/Shipping Arbitration Cases Available on Jus Mundi

Case Title	Institution	Date	Type
<a href="#">Defuria v. Vane Line Bunkering, Inc. and others</a>	Ad hoc Arbitration	2021-11-22	Commercial Arbitration
<a href="#">Mainline Shipping Limited v. Michigan Salt Products, LLC</a>	Ad hoc Arbitration	2021-07-12	Commercial Arbitration
<a href="#">Overcomers Energy &amp; Logistics Ltd. v. Best Class Shipping and Logistics Ltd.</a>	Ad hoc Arbitration	2021-06-01	Commercial Arbitration
<a href="#">Nereus Shipping SA v. Seariver Maritime, LLC</a>	Ad hoc Arbitration	2021-03-26	Commercial Arbitration
<a href="#">BBC Chartering Carriers GmbH &amp; Co. KG v. WLSC Incopro, LLC</a>	Ad hoc Arbitration	2020-11-04	Commercial Arbitration
<a href="#">CLDN Cobelfret Pte Ltd, as Owner of the M/V Lowlands Green v. Trorient LLC, as Charterer</a>	Ad hoc Arbitration	2020-08-05	Commercial Arbitration
<a href="#">Cargill Incorporated, Ocean Transportation, as Owner v. Trorient LLC, as Charterer</a>	Ad hoc Arbitration	2020-08-04	Commercial Arbitration
<a href="#">Coöperatieve Rabobank U.A. v. United Mexican States</a>	ICSID	2020-07-14	Investor-State
<a href="#">Kondot S.A. v. Duron LLC</a>	Ad hoc Arbitration	2020-07-02	Commercial Arbitration

ICSID: International Centre for Settlement of Investment Disputes

Case Title	Institution	Date	Type
<a href="#">CVLC Three Carrier Corp and CVLC Four Carrier Corp v. Arab Maritime Petroleum Transport Company</a>	Ad hoc Arbitration	2020-06-01	Commercial Arbitration
<a href="#">Armada Ship Management (S) Pte Ltd v. Schiste Oil and Gas Nigeria Ltd</a>	Ad hoc Arbitration	2020-04-20	Commercial Arbitration
<a href="#">Third Eye Capital Corporation v. (1) Pretty Urban Shipping S.A. and (2) Parakou Tankers, Inc.</a>	Ad hoc Arbitration	2020-04-01	Commercial Arbitration
<a href="#">Third Eye Capital Corporation v. (1) Pretty View Shipping S.A. and (2) Parakoou Tankers, Inc.</a>	Ad hoc Arbitration	2020-04-01	Commercial Arbitration
<a href="#">Boskalis Offshore Heavy Marine Transport B.V. f/k/a/ Dockwise Shipping B.V. v. Fluor Limited</a>	ICC	2020-02-20	Commercial Arbitration
<a href="#">PCL (Shipping) Pte. Ltd. v. Trorient LLC</a>	Ad hoc Arbitration	2020-01-03	Commercial Arbitration
<a href="#">Wellard Ships Pte. Ltd v. Croatian Bank for Reconstruction and Development (HBOR)</a>	Ad hoc Arbitration	2020-01-01	Commercial Arbitration
<a href="#">Landmark Line Co., Ltd. v. Sai Wan Shipping Ltd.</a>	Ad hoc Arbitration	2020-01-01	Commercial Arbitration
<a href="#">Logistics International SAL (Offshore) and Logistics International Investments LLC v. The Republic of Mozambique, Proindicus SA and Empresa Mocambicana de Atum SA (EMATUM)</a>	ICC	2019-12-18	Commercial Arbitration
<a href="#">Prinvest Shipbuilding S.A.L. (Holding) v. The Republic of Mozambique</a>	ICC	2019-12-18	Commercial Arbitration

ICC: International Chamber of Commerce

Case Title	Institution	Date	Type
<a href="#">Absolute Nevada LLC v. Grand Majestic Riverboat Company, LLC</a>	Ad hoc Arbitration	2019-12-05	Commercial Arbitration
<a href="#">New York State Marine Highway Transportation, LLC v. Intercounty Paving Associates LLC</a>	Ad hoc Arbitration	2019-12-02	Commercial Arbitration
<a href="#">STC Shipping PTE Limited v. Chemland International INC</a>	Ad hoc Arbitration	2019-09-17	Commercial Arbitration
<a href="#">Agribusiness United DMCC v. Fandy-Copragni S.A.</a>	Ad hoc Arbitration	2019-09-07	Commercial Arbitration
<a href="#">Daelim Corporation v. Bonita Company Limited</a>	Ad hoc Arbitration	2019-06-25	Commercial Arbitration
<a href="#">National Bank of Fujairah (Dubai Branch) v. Rosalind Maritime LLC</a>	Ad hoc Arbitration	2019-06-04	Commercial Arbitration
<a href="#">Louis Dreyfus Company Suisse S.A. v. Lavender Shipmanagement Inc.</a>	Ad hoc Arbitration	2019-04-29	Commercial Arbitration
<a href="#">Esther Marguerita Lima Suarez de VDA de Yang, individually and as personal representative of the estate of Chang Cheol Yang, deceased, and on behalf Ji Hea Yang Lima, minor child, joined by Brandon Cheol Young Lima and Camila Romina Yang Lima, children and former dependent of deceased v. Majestic Blue Fisheries, LLC</a>	KCAB	2019-03-25	Commercial Arbitration
<a href="#">Seacape Shipping and Trading, LLC as Disponent Owner v. Metalex 2000 S.A. as Charterer</a>	Ad hoc Arbitration	2019-03-20	Commercial Arbitration
<a href="#">Abu Dhabi Mar Investments LLC and Privinvest Shipbuilding Investments LLC v. The Republic of Mozambique, Proindicus SA and Empresa Mocambicana de Atum SA (EMATUM)</a>	ICC	2019-03-11	Commercial Arbitration

KCAB : Korean Commercial Arbitration Board / ICC: International Chamber of Commerce

Case Title	Institution	Date	Type
<a href="#">CMSA B.V. v. United Mexican States</a>	NULL	2019-01-08	Investor-State
<a href="#">Evergreen Shipping Agency (America) Corporation v. Global Shipping Agencies, S.A. and Global Shipping Agencies, S.A.S.</a>	Ad hoc Arbitration	2018-12-28	Commercial Arbitration
<a href="#">Caytrans BBC LLC v. Cal-Ixa Aggregates LLC</a>	Ad hoc Arbitration	2018-12-01	Commercial Arbitration
<a href="#">Tradiverse Corporation v. Luzar Trading S.A.</a>	ICDR	2018-10-01	Commercial Arbitration
<a href="#">Helena Chartering Inc. v. Cronus Maritime Inc.</a>	Ad hoc Arbitration	2018-09-14	Commercial Arbitration
<a href="#">Claimant and Navitrans SA v. Advance Maritime Transports (Cameroon), Advance Maritime Transports (Switzerland) SA and Prinvest</a>	ICC	2018-08-17	Commercial Arbitration
<a href="#">Luzar Trading, S.A. v. Tradiverse Corporation</a>	ICDR	2018-08-10	Commercial Arbitration
<a href="#">Lachesis v. Lacrosse</a>	DIFC-LCIA	2018-08-09	Commercial Arbitration
<a href="#">Mirkovich v. Carnival Corporation</a>	Ad hoc Arbitration	2018-07-30	Commercial Arbitration
<a href="#">Dorick Navigation, S.A. ./ Schuyler Line Navigation, LLC ./ KPI Bridge Oil, Inc.</a>	Ad hoc Arbitration	2018-06-08	Commercial Arbitration
<a href="#">SOCAR, SOCAR Trading SA and SOCAR Overseas Ltd v. Palmali International Holding Company Limited and Mübariz Mansimov</a>	Ad hoc Arbitration	2018-01-01	Commercial Arbitration

ICDR : International Centre for Dispute Resolution / ICC: International Chamber of Commerce

DIFC-LCIA : Arbitration Centre of the Dubai International Financial Centre-London Court of International Arbitration

<b>Case Title</b>	<b>Institution</b>	<b>Date</b>	<b>Type</b>
<a href="#">Wellard Limited v. Uljanik d.d</a>	Ad hoc Arbitration	2018-01-01	Commercial Arbitration
<a href="#">SOCAR Overseas Ltd. v. Palmali International Holding Company Limited</a>	LCIA	2018-01-01	Commercial Arbitration
<a href="#">Claimants v. Respondents</a>	Ad hoc Arbitration	2017-10-06	Commercial Arbitration
<a href="#">HHL Lisbon Trust as Owner of the NORFOLK v. Teras Breakbulk Ocean Navigation Enterprises LLC as Bareboat Charterer</a>	Ad hoc Arbitration	2017-07-28	Commercial Arbitration
<a href="#">Seaco Global Limited and Seaco America LLC v. Transatlantic Lines LLC</a>	Ad hoc Arbitration	2017-07-01	Commercial Arbitration
<a href="#">MTM Trading LLC v. Tricon Energy Ltd</a>	Ad hoc Arbitration	2017-06-09	Commercial Arbitration
<a href="#">Craft Multimodal Ltda. v. Elof Hansson USA Inc.</a>	ICC	2017-03-27	Commercial Arbitration
<a href="#">Claimant X. v. Respondent Y.</a>	LCIA	2017-01-05	Commercial Arbitration

LCIA : London Court of International Arbitration



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