

## Maritime Arbitration Among Past, Present and Future\*

### Abstract

Maritime arbitration has been a practiced method of dispute resolution since remote times, particularly in Ancient Greece. During the Middle Ages the application of the *lex maritima* among seaborne traders resulted in a wide use of arbitration, as demonstrated by the provisions contained in the statutes of some Italian communes. In the following centuries arbitration remained quite popular until its definitive achievement in parallel with the rise of international uniform law.

Maritime arbitration belongs to the *genus* of international commercial arbitration but it differs from the general model for a number of reasons, which make it somehow “special”: from the sources of law, to the kind of arbitrated disputes, to the characteristics of the maritime arbitral proceedings. Nowadays arbitration is widely used among international shipping operators to solve almost every kind of dispute and, consequently, arbitral clauses are included in many maritime contract forms. This is due to its remarkable advantages over litigation, such as flexibility, specialization, confidentiality and, more generally, possibility for the parties to determine every aspect of the procedure according to their needs.

However, despite such benefits, there are some drawbacks and issues which affect contemporary arbitration and whose consequence is the increasing popularity of other mechanisms of dispute resolution, such as negotiation and mediation. In order to successfully defend its leading role in the next decades, maritime arbitration (and in particular London maritime arbitration) will necessarily have to make some changing, overcoming the proverbial reluctance to innovation of the maritime industry.

SUMMARY: 1. The historical origins of maritime arbitration. – 2. Maritime arbitration today. – 3. Arbitration clauses in charter-parties. – 4. Advantages of maritime arbitration over litigation. – 5. Current issues of maritime arbitration. – 6. Future perspectives of maritime arbitration. – Bibliography.

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\* This article has been submitted to double blind peer review.

### 1. *The historical origins of maritime arbitration*

Arbitration has been an extra-judicial method of dispute resolution since its origin. It is probable that in the beginning some form of sacredness was attached to it, hence the arbitrator (initially the sovereign) acted as representative of the gods on earth.

The most ancient evidence of the use of arbitration as a procedure for settling disputes dates back as far as the third and second millennium B.C. and has been found in Egypt and in Mesopotamia, where archeological excavations have uncovered ancient records some of which document court as well as arbitration procedures<sup>(1)</sup>.

However, the prime known example of an arbitration in maritime matters shall be located in Ancient Athens and, as reported by Demosthenes in his speech *Against Formio*, it dealt with a dispute raised over a contract of carriage of goods following the wreck of the ship occurred during the voyage<sup>(2)</sup>. This demonstrates that, as a consequence of the expansion of maritime commerce in the eastern Mediterranean, arbitration has been widely used by Greek traders, and in particular by Athenians, as an alternative to litigation in order to settle maritime disputes.

Similarly, historians believe that also in ancient Rome, since the origins, it had to be common for private people to entrust arbitrators with the power to decide juridical questions<sup>(3)</sup>: there is lack of data to support this conviction, possibly due to the fact that the characteristics of concreteness of the disputes referred to arbitration did not draw the attention of Roman jurists, who, instead, directed their consideration principally to litigation<sup>(4)</sup>.

At a later stage, the development of the economic relations and maritime trade in the Mediterranean Sea as well as the establishment of a customary law (*ius gentium*) founded on *bona fides* must have supported the use of some form of arbitration to settle disputes between Roman and non-Roman merchants.

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<sup>(1)</sup> M. MANTICA, *Arbitration in Ancient Egypt*, in *The Arbitration Journal, A quarterly of the American Arbitration Association*, 1957, p. 158; M. DOMKE, *Domke on Commercial Arbitration (The Law and Practice of Commercial Arbitration)*, Wilmette, 1984, p. 8.

<sup>(2)</sup> The works of Demosthenes accurately describe many substantial and procedural aspects of Athenian arbitration, including the relevant role of party autonomy, the possibility to refer the dispute to arbitration even after commencing litigation before the court and the power of the arbitrator to refer the parties back to the court.

<sup>(3)</sup> G. BORN, *International Commercial Arbitration*, I, Alphen aan den Rijn, 2009, p. 11; M. MARRONE, *Sull'arbitrato privato nell'esperienza giuridica romana*, in *Rivista dell'Arbitrato*, 1996, p. 1 ff.

<sup>(4)</sup> F. D'OTTAVI, C. MASTROCOLA, E. MELE, M. RACCO, *Manuale teorico-pratico dell'arbitrato*, Padua, 2007, pp. 6 - 7.

During the Middle Ages the recourse to maritime arbitration derived mainly from the application, among merchants, of the *lex maritima*, which has been defined as a *ius commune*, part of the *lex mercatoria*, and composed of the maritime customs, codes, conventions and practices from earliest times, which have no international boundaries and exist in any particular jurisdiction unless limited or excluded by a particular statute <sup>(5)</sup>.

Any dispute arisen between the members of the guilds was quickly settled *secundum legem maritimam*, according to custom, equity and internal regulations by mercantile courts (*curiae mercatorum*) or by arbitrators. Arbitrators were “peers”, in other words merchants of the same city or state generally chosen because of their knowledge of local rules and customs <sup>(6)</sup>.

The growing importance of Italian Medieval communes sustained the spread of arbitration: in particular the statutes of some municipalities included provisions that allowed or, in certain cases, obliged parties to solve maritime disputes before arbitrators.

In fact the *Statuta* of the Maritime Republic of Venice promulgated in 1229 by Doge Tiepolo and in 1255 by Doge Rainieri Zeno, included provisions according to which any dispute arisen between maritime people (“*inter euntes in navibus*”) had to be referred to the judgment of three arbitrators (“*tres ydonei homines*”) <sup>(7)</sup>.

Similarly the statutes of the Ligurian communes of Varazze (1345) and Celle (1414) established a compulsory maritime arbitration for the settlement of any maritime controversy (“*que pertineat ad usum vel factum maris*”) according to the judgment of arbitrators expert in maritime matters (“*per bonas personas ydoneas et expertas in factis usumaris*”) <sup>(8)</sup>.

In the following centuries, with the rise of the nation-states, arbitration remained a practiced method of dispute resolution.

<sup>(5)</sup> W. TETLEY, *The general maritime law – the lex maritima*, in *Syracuse Journal of International Law and Commerce*, 1994, p. 109.

<sup>(6)</sup> E. KADENS, *The Myth of the Customary Law Merchant*, in *Texas Law Review*, 2012, p. 1202; G. ZEKOS, *International Commercial and Marine Arbitration*, Abingdon, 2008, pp. 10 - 11.

<sup>(7)</sup> Chapter 45 of the *Statuta* of 1229 and Chapter 86 of the *Statuta* “*super navibus et lignis*” (1255), whose texts are published in the volume R. PREDELLI e A. SACERDOTI, *Gli statuti marittimi veneziani fino al 1255*, Venice, 1903, p. 66 and p. 147; for an in-depth analysis of the arbitration in Venice in the Middle Ages see F. MARRELLA e A. MOZZATO, *Alle origini dell’arbitrato commerciale internazionale – L’arbitrato a Venezia tra medioevo ed età moderna*, Padua, 2001.

<sup>(8)</sup> Chapter 66 of the Statute of the commune of Varazze, published in the volume A. ROCCATAGLIATA, *Gli Statuti di Varazze*, Genoa, 2001, pp. 60 - 61 and Chapter 67 of the Statute of the commune of Celle, published in the volume M. CERISOLA, *Gli statuti di Celle Ligure (1414)*, Genoa, 1971, pp. 69 - 70.

To propose an example, in England, in parallel with the progressive assimilation of the *lex maritima* in the *common law* system, arbitration was a common mode of settling controversies in shipping cases among *commercial men*, in particular where questions of nautical skills were involved and where, frequently, two or more private or experts acted as “*aimables compositeurs*”<sup>(9)</sup>.

Also in France commercial arbitration remained deep-seated, specially in occasion of the Revolution of 1789, when it was legally defined as “le moyen le plus raisonnable de terminer les contestations entre les citoyens”<sup>(10)</sup>.

During XVIII and XIX centuries arbitration fell progressively out of favor of the states and of their judicial elites, as it was considered a possible threat to state monopoly on jurisdiction<sup>(11)</sup>. However, because of the increase in international trade, any national perspective of regulation appeared a consistent barrier to the development of commerce, thus maritime traders continued to make use of their own transnational rules and customs to compensate for the lack of uniformity and juridical certainty<sup>(12)</sup>.

The birth of modern maritime arbitration can be traced conventionally to the American Civil War (1861-1865) when contract claims followed to the naval blockade of the South created a congestion before the English courts, which convinced the *Liverpool Cotton Association*, whose members handled most of the cotton trade, to commence inserting arbitration clauses in their contracts: the affirmation of arbitration in Liverpool led shortly to its adoption in London and, progressively, to its worldwide expansion<sup>(13)</sup>.

## 2. *Maritime arbitration today*

The arising of commercial disputes is something inherent to international trade, thus it is a circumstance *per se* unavoidable.

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<sup>(9)</sup> R.G. MARSDEN, *Select Pleas in the Court of Admiralty*, I, London, 1894, p. LXIX and p. 90 - 91 where is reported an excerpt from an award relative to a dispute arisen following a collision between vessels and originally published in the Admiralty Court Act Book, No. 128, 8 June 1599.

<sup>(10)</sup> As defined by art. 1 of the *Loi sur l'organisation judiciaire des 16-24 aout 1790*.

<sup>(11)</sup> F. D'OTTAVI, C. MASTROCOLA, E. MELE, M. RACCO, *op. cit.*, p. 10.

<sup>(12)</sup> G.W. PAULSEN, *An Historical Overview of the Development of Uniformity in International Maritime Law*, in *Tulane Law Review*, 1983, p. 1065 ff.

<sup>(13)</sup> B.L. BENSON, *The Spontaneous Evolution of Commercial Law*, in *Southern Economic Journal*, 1989, p. 656.

For that reason contracting parties usually provide to choose *ex ante* the methods for the resolution of any future difference in a way considered the most suitable to their interests.

In fact adequate dispute settlement mechanisms contribute to the development of international trade, while procedural inefficiency may affect the relations and trust between the parties, increasing the costs of future negotiation.

Arbitration is one of the ways to compose differences but undoubtedly the most popular in maritime world. In general terms, it can be defined as the method of dispute resolution by which the parties submit the controversies arisen among them to the judgment of one or more impartial persons appointed by mutual consent, by way of derogation from the ordinary state jurisdiction<sup>(14)</sup>.

An arbitration may be defined as “maritime” when it involves maritime commercial disputes, namely when there is a connection between the *res litigiosa* and maritime navigation, industry or trade<sup>(15) (16)</sup>.

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<sup>(14)</sup> P. SANDERS, entry Arbitrato, in *Enciclopedia delle scienze sociali*, I, Roma, 1991, p. 276 ff.

<sup>(15)</sup> According to W. TETLEY “maritime arbitration is therefore the arbitration of maritime commercial disputes” (W. TETLEY, *Marine Cargo Claims*, Cowansville, 2008, p. 1417).

<sup>(16)</sup> On maritime arbitration see J. ALLSOP, *International maritime arbitration: legal and policy issues*, in *Journal of International Maritime Law*, 2007, pp. 397 - 415; C. AMBROSE, K. MAXWELL, A. PARRY, *London Maritime Arbitration*, London, 2009; F. BERLINGIERI, *International Maritime Arbitration*, in *Journal of Maritime Law and Commerce*, 1979, pp. 199 - 247; F. BERLINGIERI, *The Effect on Arbitration of Recent International Maritime Law Conventions*, in *Rassegna dell'arbitrato*, 1982, pp. 265 - 271; F. BERLINGIERI, *Trasporto marittimo e arbitrato*, in *Il Diritto Marittimo*, 2004, pp. 423 - 434; S.M. CARBONE, M. LOPEZ DE GONZALO, *L'arbitrato marittimo*, in *Alpa e Vigoriti* (edited by) *Arbitrato: profili di diritto sostanziale e di diritto processuale*, Milan, 2013, pp. 1293 - 1313; M. COHEN, *A New Yorker looks at London Maritime Arbitration*, in *Lloyd's Maritime and Commercial Law Quarterly*, 1986, pp. 57 - 79; M. COHEN, *Current law and practice of maritime arbitration in New York*, in *Droit Maritime Français*, 1996, pp. 589 - 595; R. FORCE, A. MAVRONICOLAS, *Two models of maritime dispute resolution: litigation and arbitration*, in *Tulane Law Review*, 1991, pp. 1461 - 1518; B. HARRIS, *Maritime Arbitrations*, in J. Tackaberry, A. Marriot (edited by) *Bernstein's Handbook of Arbitration and Dispute Resolution Practice*, I, London, 2003, pp. 741 - 778; B. HARRIS, M. SUMMERSKILL, S. COCKERILL, *London Maritime Arbitration*, in *Arbitration International*, 1993, pp. 275 - 288; A. LA MATTINA, *L'arbitrato marittimo e i principi del commercio internazionale*, Milan, 2012; F. MARRELLA, *Unity and Diversity in International Arbitration: The Case of Maritime Arbitration*, in *American University International Law Review*, 2005, pp. 1055 - 1100; A. MAURER, *Lex Maritima: Grundzüge eines transnationalen Seehandelsrechts*, Tübingen, 2012; M. MUSTILL, *Maritime Arbitration: The Call for a Wider Perspective*, in *Journal of International Arbitration*, 9, 1992, pp. 5 - 30; M. RICCOMAGNO, *L'arbitrato marittimo*, in *Trasporti*, 1999, pp. 135 - 151; F. SPARKA, *Jurisdiction and Arbitration Clauses in Maritime Transport Documents: A Comparative Analysis*, Berlin, 2010; P.N. TASSIOS, *Choosing the Appropriate Venue: Maritime Arbitration in London or New York?*, in *Journal of International Arbitration*, 2004, pp. 355 - 365; W. TETLEY, *Marine Cargo Claims*, *cit.*; W. TETLEY, entry *Maritime Transportation*, in U. Drobnig (edited by) *International Encyclopedia of Comparative Law*, IV-12, Nijhoff, 1981, pp. 33 - 44; G. ZEKOS, *op. cit.*; D. ZUBROD, *Maritime Arbitration in New York*, in

Frequently, in a sort of metonymy, the sea is represented by the “vessel”, whence the well-known definition according to which “an arbitration is usually described as a maritime arbitration if in some way it involves a ship”<sup>(17)</sup>.

Anyway, despite the undeniable effectiveness of such classification, it must be observed that maritime trade is increasingly part of multimodal shipping performed with different means of transport, which gives rise to legal uncertainty on the traditional function of the vessel as exclusive and essential mode of operating of maritime transport<sup>(18)</sup>.

Maritime arbitration in some way is a *species* belonging to the *genus* of international commercial arbitration. In fact, due to the lack of specific sources of law except for some provision included in international conventions on uniform maritime law, general treaties on international commercial arbitration such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the “New York Convention”) and the Convention on the Execution of Foreign Arbitral Awards (1961) (the “Geneva Convention”) are applicable.

However, on the other hand, maritime arbitration shows several peculiarities.

Firstly, it has some form of distinctiveness as far as sources of law are concerned; the arbitration agreement is usually included in contracts based on uniform forms drafted and periodically updated by maritime organizations such as the Baltic and International Maritime Council (BIMCO), the Association of Ship Brokers & Agents (ASBA) and the Japan Shipping Exchange (JSE): these are, among others, time and voyage charter-parties and other kind contract for transport of goods (e.g. bareboat charter agreements, contracts of affreightment), shipbuilding, ship repairing and ship scraping contracts, salvage agreements.

An additional element of speciality is represented by the existence of international arbitral centres specialized in the resolution of maritime disputes, such as the London Maritime Arbitrators Associations (LMAA) based in London, the Society of Maritime Arbitrators of New York (SMA), the Chambre Arbitrale Maritime de Paris (CAMP), the Tokyo Maritime Arbitration Commission (TOMAC), the Singapore Chamber of Maritime Arbitration

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*The Arbitration Journal*, 1984, pp. 16 - 21; S. ZUNARELLI, C. ZOURNATZI, *Arbitrato nelle controversie marittime internazionali*, in A. Buonfrate e C. Giovannucci Orlandi (edited by) *Codice degli arbitrati, delle conciliazioni e di altre ADR*, Turin, 2006, pp. 422 - 434; C. ZOURNATZI, *Arbitrato e contratti di trasporto marittimo*, Padua, 2014.

<sup>(17)</sup> B. HARRIS, M. SUMMERSKILL, S. COCKERILL, *op. cit.*, p. 275.

<sup>(18)</sup> S.M. CARBONE, *Contratto di trasporto marittimo di cose*, Milan, 2010, p. 39.

(SCMA) and China Maritime Arbitration Commission (CMAC), whose rules or terms constitute a source of maritime arbitration in presence of a reference in the contract.

Furthermore arbitrators may base their decisions, at least in part, on the *lex maritima*, a collection of rules and principles deriving their binding force from the constant use by the international maritime community, which represent an alternative to national and international sources of law and provide the shipping world with a juridical instrument endowed with a higher amount of flexibility<sup>(19)</sup>. The *lex maritima* may be qualified as soft law, since it has not formally any direct binding effect; however since usages and customs of maritime trade have a role and a regulatory function internationally recognized by the operators, they achieve a *de facto* binding character, insomuch that it is hard for the parties to avoid their application. This is mainly due to implicit sanctions directed to whom does not intend to comply to such principles: these penalties are the reproach of the business community, the negotiation under tougher conditions, the exclusion from business networks<sup>(20)</sup>.

Moreover, a distinctiveness of maritime arbitration is the object of the dispute itself, which may refer to typical maritime institutions: most of the differences arise from charter-parties involving the transfer of goods because of non-fulfillment of obligations by the seller or by the carrier (e.g. damage to transported goods or to the ship, laytime and demurrage issues, non-payment of hire); disputes may also deal with ship building, repairing and demolishing, bareboat chartering, insurance claims, salvage or liability in tort (e.g. collision at sea)<sup>(21)</sup>.

Traditionally controversies involve factual or technical questions whose solution requires a deep knowledge of maritime trade rather than legal questions which need the intervention of acute jurists; this had an influence also on the choice of arbitrators, that for a long time were selected rather among experienced commercial men than among lawyers<sup>(22)</sup>.

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<sup>(19)</sup> On the *lex maritima* see W. TETLEY, *The general maritime law – the lex maritima*, *cit.*; R.J. CORTAZZO, *Development and Trends of the Lex Maritima from International Arbitration Jurisprudence*, in *Journal of Maritime Law and Commerce*, 2012, pp. 255 - 277; A. FALL, *Defence and Illustration of Lex Mercatoria in Maritime Arbitration*, in *Journal of International Arbitration*, 1998, pp. 83 - 94; S. CAMPANALE, *La lex mercatoria maritima (il diritto marittimo vivente)*, in *Trasporti*, 2010, pp. 17 - 102.

<sup>(20)</sup> F. MARRELLA, *La nuova Lex Mercatoria – Principi UNIDROIT ed usi dei contratti del commercio internazionale*, Padua, 2003, pp. 653 - 654.

<sup>(21)</sup> F. MARRELLA, *Unity and Diversity in International Arbitration*, *cit.*, p. 1059.

<sup>(22)</sup> Still today some charter-party standard forms, such as NYPE (New York Produce Exchange Form), NORGRAIN 89 (North American Grain Charterparty), OREVOY (BIMCO Standard Ore Charter Party), ASBATIME Time Charter - New York Produce Exchange Form

The consistent degree of autonomy in the maritime sector shows also by the prevalent use of *ad hoc* arbitration in which the rules to govern the procedure are set by the parties in the arbitration convention, unlike institutional arbitration which, instead, is conducted according to the binding rules of an arbitral institution<sup>(23)</sup>. *Ad hoc* arbitrations are more flexible as well as generally considered faster (less bureaucracy), cheaper (less administrative fees) and more confidential than institutional proceedings. On the other hand, a distinct disadvantage is that the effectiveness of this kind of arbitration is somehow dependent on the will of the parties, which may be reluctant to cooperate causing a procedural breakdown that can result in additional time spent resolving issues or in the necessity of recurring to the court (e.g. for the appointment of arbitrators)<sup>(24) (25)</sup>.

Lastly, maritime arbitration is characterized by an immanent character of internationality, considering both the subjective criterium, based on the nationality and place of residence of the parties and the objective criterium founded on the nature of the dispute and of the underlying commercial transaction and, particularly, on the involvement of international trade interests<sup>(26)</sup>.

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or VOLCOA (BIMCO Standard Volume Contract of Affreightment for the Transportation of Bulk Dry Cargoes), require arbitrators to be “commercial men”.

<sup>(23)</sup> The rejection of administered arbitration by the shipping world is a cause of the failure of the ICC/CMI International Maritime Arbitration Organisation Rules (1978), as well as of the failure of the pre-2009 reform arbitration of the Singapore Chamber of Maritime Arbitration.

<sup>(24)</sup> G. BORN, *International Commercial Arbitration: Commentary and Materials*, The Hague, 2001, p. 12.

<sup>(25)</sup> It must be noted that arbitral procedures conducted according to the terms of the London Maritime Arbitrators Association, as well as according to the rules of the Society of Maritime Arbitrators of New York and of the Singapore Chamber of Maritime Arbitration - which currently represent the three major maritime arbitrators institutions - are all *ad hoc* arbitrations. This is because the reference to such terms or rules in the arbitration convention does not imply the choice of the named organization as a supervising institution for the arbitral proceeding so that the institution itself is merely coordinating the procedure, without being directly involved in its management. On the contrary, arbitration procedures conducted according the rules of the *Chambre Maritime Arbitrale de Paris* (CAMP), of the Tokyo Maritime Arbitration Commission (TOMAC) and of the China Maritime Arbitration Commission (CMAC) are administered arbitrations.

<sup>(26)</sup> S.M. CARBONE, *L'internazionalità e la specialità delle fonti del diritto della navigazione nel terzo millennio*, in *Rivista di diritto internazionale privato e processuale*, 2005, p. 896.



### 3. *Arbitration clauses in charter-parties*

Charter-parties have a special relevance for maritime arbitration, because of their number and recurring insertion in them of arbitration clauses<sup>(27)</sup>. This kind of contracts relates to non-liner shipping services (known also as “tramp”), where service does not follow a fixed schedule and the vessel is normally chartered for a period of time (time charter) or for a single voyage (voyage charter). This modality for the carriage by sea is normally used to transport one kind of good in large quantity; according to the type of cargo, ships are distinguished in dry bulk carriers (e. bg. for cereals, ore), tankers (for the transport of oil, gas, chemical products), combined carriers (capable of carrying both wet or dry cargoes) and specialized bulk vessels (e.g. reefer ships, roll-on/roll-off cargoes)<sup>(28)</sup>.

Nonlinear transports are regarded as being highly competitive; the bargaining power of the parties is equal and the amount of freight and every other condition of carriage, including the arbitration clause, may be object of free negotiation among contractors.

The same may not apply on liner shipping in which, instead, vessels sail according to a given frequency of calls at predetermined ports along a given route: this kind of transport is generally performed by container vessels, capable of carrying a large variety of goods in small parcels, usually quite valuable (e.g. manufactured or semi-manufactured goods) and owned by many different parties<sup>(29)</sup>.

The agreement in liner shipping is usually concluded through the issuance of a bill of lading, negotiable document of title representing the goods which contains details of the transport and gives title of the shipment to a specified party<sup>(30)</sup>.

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<sup>(27)</sup> G. GILMORE, C.L. BLACK, *The Law of Admiralty*, New York, 1975, p. 196; B. HARRIS, *op. cit.*, p. 745; S. ZUNARELLI, C. ZOURNATZI, *op. cit.*, p. 428. For further information on charter-parties, see B. EDER, H. BENNETT, S. BERRY, D. FOXTON, C. SMITH, *Scrutton on Charterparties and Bills of Lading*, London, 2011.

<sup>(28)</sup> In the last decades the number of ships in nonliner trade has progressively diminished, although the overall tramp world cargo tonnage has remained more or less the same, because of the increase of capacity of new vessels. For a recent statistical analysis on tramp shipping see R. SCOTT, *Tramp Shipping - its profile in today's markets*, in *Hellenic Shipping News Worldwide*, 22 April 2015.

<sup>(29)</sup> F. MUNARI, *Competition in Liner Shipping*, in J. Basedow, U. Magnus, R. Wolfrum (edited by) *The Hamburg Lectures on Maritime Affairs 2009 & 2010*, Heidelberg, 2012, p. 3 ff.

<sup>(30)</sup> For further information on bill of ladings, see N. GASKELL, R. ASARIOTIS, Y. BAATZ, *op. cit.*

In this kind of transport, which requires a more complex management and evidences a lesser degree of competition given the existence of conference agreements among carriers and service contracts between carriers and transport users, the insertion of arbitration clauses in contracts is rather infrequent; this is mainly due to the high number of controversies which originate from liner shipping and, at the same time, to the modest nominal value of the single disputes, which are usually decided before ordinary courts of law<sup>(31)</sup>.

With the significant exception of liner shipping where the presence of a weak contractual party (the transport users) justified the creation of some form of international regulation in order to equilibrate the bargaining power<sup>(32)</sup>, the specialty of the maritime sector and the overall lack of international prescriptive rules have made possible a wider party autonomy in the draft and negotiation of international maritime contracts.

Such autonomy shows in the negotiation phase where the parties may freely agree to insert an arbitration clause - in maritime matters there is not any form of compulsory arbitration - as well as to determine the content of such agreement, providing a regulation for every aspect of the arbitration procedure according to their needs: e.g. the choice of the arbitration seat and of the arbitral centre (also implicitly, through a reference to the arbitral rules in force), the rule of appointment of arbitrators, the choice of applicable law and, more generally, the regulation of every other kind of substantive and procedural matter.

The will of the parties represents as well a hermeneutic rule of the arbitration clauses, whose interpretation must comply as much as possible with the express and implied provisions of the contract<sup>(33)</sup>.

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<sup>(31)</sup> F. BERLINGIERI, *Arbitrato marittimo e Regole di Rotterdam*, in *Il Diritto Marittimo*, 2011, pp. 390 - 391.

<sup>(32)</sup> There are currently three international agreements on the topic: the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (1924) (the "Hague Rules"), subsequently amended by the 1968 and 1979 Protocols (the "Hague-Visby Rules"), the United Nations Convention on the Carriage of Goods by Sea (1978) (the "Hamburg Rules") and, more recently, the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (2008) (the "Rotterdam Rules"), the latter not yet in force.

<sup>(33)</sup> A. LA MATTINA, *op. cit.*, pp. 61 - 62.

#### 4. *Advantages of maritime arbitration over litigation*

There are many reasons for which arbitration is the most prominent of maritime dispute settlement mechanisms.

Firstly it allows parties to avoid the undesirable effects of some structural characteristics of litigation, in so far that it has been emphasized that the popularity of arbitration should be considered the symbol of the failures or inadequacies of court system<sup>(34)</sup>.

Most of the states have not specialized judges to deal with maritime cases, therefore it may happen that magistrates, lacking a specific knowledge of maritime law, are more willing to found their decisions on national laws or general principle of law of the state then to apply maritime usages and customs which are internationally recognized, but that judges may be not familiar with. On the contrary, arbitration allows parties to choose arbitrators among people who are not only esteemed for their wisdom and good sense, but who have also specialized skills and experience in the seaborne shipping sector<sup>(35)</sup>.

Furthermore, referring the dispute to the judgment of the national court located in the place of business of one of the parties may result in an advantage for one of the contractors (familiarity with national rules and legislation); if arbitration is considered a neutral forum, in some cases the effective impartiality of a national court may be compromised because of some kind of cultural prejudice, external conditioning and, in the most extreme cases, corruptive practices<sup>(36)</sup>; in countries in which the judicial system is perceived as inadequate, arbitration will not be considered as an alternative, but the only reasonable choice.

However, it must be noticed that any deficiency of the judicial system can affect arbitration every time an intervention of the court is requested during the arbitral procedure (appointment of arbitrators, interim measures, recognition and enforcement of awards). It is no accident that the legislation of the states where major arbitral institutions are located (England, United States, Singapore) has a prominent role in supporting arbitration with adequate law provisions<sup>(37)</sup>.

The use of arbitration prevents also conflicts of jurisdictions which in some cases could result in difficulty in determining the competent court and the applicable law; in fact parties may agree in advance the most suitable place where

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<sup>(34)</sup> J. ALLSOP, *op. cit.*, p. 405.

<sup>(35)</sup> A. FRIGNANI, *L'arbitrato commerciale internazionale*, Padua, 2004, p. 281; F. MARRELLA, *La nuova Lex Mercatoria*, *cit.*, p. 7.

<sup>(36)</sup> S.M. CARBONE, M. LOPEZ DE GONZALO, *op. cit.*, p. 168.

<sup>(37)</sup> R.J. CORTAZZO, *op. cit.*, p. 257.

arbitration should be held, the language of the procedure, the applicable law (included a-state law and principles of *lex maritima*) and all other rules of the procedure, avoiding the recourse to ordinary connecting factors of the law of the forum.

Another relevant advantage of arbitration over litigation is the higher level of confidentiality of the arbitral procedure, whose existence and final decision cannot be disclosed without the consent of the parties: such confidentiality allows to keep differences private, maintaining business relationships, facilitating negotiation and preventing competitors from obtaining and using information or sensitive data which may be commercially valuable. However, on the other hand, the absence of publication of awards represents an issue, having the effect of preventing the circulation of arbitral decisions and the creation of a uniform and consistent transnational arbitral jurisprudence <sup>(38)</sup>.

Moreover, another benefit of arbitration is the finality of the award, which implies the preclusion of judicial redetermination of arbitrated disputes and a general limitation of the right to judicial review granted by national regulations. Likewise, arbitral awards are easier to recognize and enforce than court judgments thanks to the uniform rules of the New York Convention, which currently has been ratified by 149 countries.

More generally, it may be noted that ordinary judicial process is based on stringent procedural rules which on the one hand are directed to guarantee the right to a “fair trial”, but on the other hand may result in a prejudice for the parties, increasing the length and the complexity of the procedure. Arbitration instead has a more flexible nature, allowing parties to balance their need of justice with the efficiency of the proceeding, excluding any unessential formality <sup>(39)</sup>.

##### 5. *Current issues of maritime arbitration*

Despite its indubitable advantages, maritime arbitration has a number of general limitations, which are consequence of its own nature.

Apart from some specific procedural problems, such as the lack of coercive powers of arbitrators, who may not be able to solve procedural breakdowns without an intervention from the court (e.g. enforcing of interim measures, taking of evidence, examination of witnesses), as well as difficulties in

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<sup>(38)</sup> S.M. CARBONE, M. LOPEZ DE GONZALO, *op. cit.*, p. 169.

<sup>(39)</sup> R. FORCE, A. MAVRONICOLAS, *op. cit.*, pp. 1469 - 1471.

dealing with multi-party proceedings or third-party interventions, the major issues of maritime arbitration are speed and economy. Among all its characteristics, these has been always considered main advantages of arbitration over litigation; however at present they have lost their original positive content, representing instead a debated problem.

A recent survey on the use of international commercial arbitration conducted among a number of major corporations, across different industry sectors (including shipping and commodities trading), shows that while, overall, arbitration remains the preferred dispute resolution mechanism for transnational disputes, many respondents express concern over the issues of costs and delays of international arbitration proceedings, as well as fear of “judicialisation” which results in a procedure more and more sophisticated and “regulated”, with control over the process moving towards law firms and away from the actual users of this process <sup>(40)</sup>.

In maritime law both phenomena (increase of costs and procedural delays) are determined by a certain number of interrelated factors: drafting of arbitration clauses, which sometimes are incomplete or confused, poor choice of procedural rules and of criteria for the appointment of arbitrators. This is also the result of a general change in shipping practices, not anymore governed by independent ship owners and by a pool of companies based in London whose relations were founded on mutual consideration and confidence, but by multinational corporations; inevitably also arbitration from an informal procedure where the differences between parties were “amicably” composed has become a method of dispute settlement governed by formal rules increasingly modeled on court proceedings <sup>(41)</sup>.

In some cases procedural delays are even caused by maritime arbitrators: in fact the major maritime corporations tend to refer every dispute to the same small number of professional arbitrators, highly qualified, experienced and trustworthy (ad of course, sumptuously paid) which find themselves to direct an overabundant number of cases.

Disputes referred to arbitration have also become technically and legally so complex to imply extensive legal research, analysis of copious documentation, as wells as intervention of experts and specialized lawyers <sup>(42)</sup>.

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<sup>(40)</sup> R. GERBAY, L. MISTELIS, *Corporate choices in International Arbitration: Industry perspectives – 2013 International Arbitration Survey* (School of International Arbitration, Queen Mary University of London).

<sup>(41)</sup> M. MUSTILL, *op. cit.*, p. 6 ff.

<sup>(42)</sup> With regard to London maritime arbitration, where single arbitrator proceedings prevail, costs are mainly a consequence of the high fees of lawyers and of the structure of the

At this regard “judicialisation” is ascribed to the role of lawyers who give bigger relevance to legal question whereas in the past, when “commercial men” were appointed, maritime arbitration had been mainly directed to solve factual or technical issues; furthermore lawyers, lacking more convincing arguments or even when such arguments exist, in their defensive tactics are used to raise a number of questions not necessarily related to the merits of the dispute, or procedural objections to slow down the process (e.g. objections to jurisdiction, on the validity of the arbitration convention, requests for interim measures, for security action or for proof): if in some cases the use of the aforementioned legal instruments may be necessary and due for an effective defense, other times the recourse to such procedural remedies is abused.

The most effective remedy against such abuse is the intervention of the arbitrator which can use its powers of direction to ensure the expeditiousness of the proceeding, promoting voluntary agreement by the parties, limiting dilatory tactics and keeping the focus on the merits of the dispute.

#### 6. *Future perspectives of maritime arbitration*

Delays and costs can progressively damage the attractiveness of arbitration: besides commencing an arbitration proceeding, parties increasingly use other dispute settlement mechanisms, such as direct negotiation which allow them to reach a mutually beneficial solution, maintaining business relations and, at the same time, saving money.

Parties could as well appoint a professional mediator to assist them to negotiate a settlement: mediation is a relatively new phenomenon in the maritime sector: although in some cases a contractual clause may exist, in maritime forms such provisions are still quite rare and the majority of the mediation procedures derives from agreements subsequent to the rising of the dispute<sup>(43)</sup>.

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British legal system in which the distinction between solicitors and barristers may result in a duplication of charges. As far as New York maritime arbitration is concerned, instead, a relevant part of the costs is due to pay the fee of the three arbitrators.

<sup>(43)</sup> There are anyway some maritime forms which include a mediation clause, such as the Euromed Charter Party (1992) and the Standard Law and Arbitration Clause of the Baltic and International Maritime Conference (BIMCO) (2002) which has been transposed in many other forms such as Bimchemtime 2005, Gasvoy 2005, Barecon 2001 e Graincon. These are all “ibrid” clauses because they set that, should mediation be unsuccessful, the dispute must be referred to arbitration.

Some solutions have been proposed in order to reverse the current trend and increase the efficiency of arbitration proceedings.

A relevant, but not decisive, support may derive from information technology, which allows to shorten procedural times through online hearings and examination of witnesses. Although such innovation does not seem to comply with the conservative nature of the shipping industry, sooner or later the entire procedure will have to be dematerialized.

Some structural remedies are directed to foster the development of a more consistent body of substantive maritime law as well as to improve the existent body of uniform transnational rules, both reducing the divergence of interpretation of international conventions on commercial arbitration in force (especially of New York Convention), and harmonizing procedural aspects which are currently governed by national laws (e.g. uniform approach to curial supervision, enforcement and collateral assistance based on international conventions) removing the fragmentation of approach by individual countries<sup>(44)</sup>.

Maritime arbitration would be able to take full advantage of such harmonization because of its belonging to the genus on international commercial arbitration: on the contrary, overemphasizing the “specialty” of maritime law would limit the advantages of a possible greater uniformity of regulation.

Also publication of awards, as already mentioned, may help the creation of a consistent maritime arbitral jurisprudence, as well as contribute to avoid future controversies (whose outcome would be quite predictable), allowing parties to choose arbitrators having in mind their previous decisions; however the publication of awards is in contrast with the need for privacy which is one of the major reasons of existence of arbitration, based still today on the assumption that, unless both parties authorize publication, awards must remain confidential<sup>(45)</sup>. The remarkable advantages of publication suggest the opportunity of overcoming, at least in part, the principle of confidentiality through an update of arbitral rules of the arbitral centres which should strongly support the publication of awards or, at least, of the principle of law of every decision<sup>(46)</sup>.

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<sup>(44)</sup> J. ALLSOP, *op. cit.*, p. 398 ff.

<sup>(45)</sup> M. COHEN, *op. cit.*, pp. 76 - 77.

<sup>(46)</sup> The prevalence of the principle of confidentiality appears quite clearly in London maritime arbitration where, according to paragraph 26 of the London Maritime Arbitrators Association Terms, disclosure of awards is possible only if none of the parties communicate its objection following the given notice given by the Association of its intention to release the award; thus publication on Lloyd’s Maritime Law Newsletter or on BIMCO Bulletin is occasional and

Furthermore it is widely recognised the need of a better cooperation among arbitral institutions.

At this regard some authors have theorized a coadjuvancy in the appointment of arbitrators through the creation of a permanent panel of international arbitrators operating also outside the organization to which they belong<sup>(47)</sup>; another proposed solution is the creation an International Court of Maritime Arbitration within the International Maritime Organisation (“IMO”) in order to solve particular questions of transnational maritime law handed over by the maritime arbitrators within the framework of *ad hoc* or administered arbitration procedures around the world. The progressive stratification of persuasive precedents that would be published might contribute significantly to the unification of maritime law and arbitration<sup>(48)</sup>.

It is undoubtedly that the seaborne shipping industry on the one hand shows a need for homogeneity and harmonization, given the large use of standardized form of contracts, general principles and trade customs, on the other hand it is reluctant towards any innovation which might imply forms of centralization or a limitation of powers of the parties and of the arbitrators in the proceedings: according to a conviction which is still prevailing uniform rules, national and international authorities and even maritime arbitral centres should not overlap or substitute the will of the parties, which is and must remain the essence of arbitration<sup>(49)</sup>.

Maritime arbitral centres are therefore cautious about promoting any innovation: if from the one hand they are in favor of the creation of international list of arbitration and of an informal exchange of information among arbitral institutions, recognizing the need of making arbitral procedure more possible

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limited to some abridged awards. The Society of Maritime Arbitrators of New York, on the contrary, has published its awards through its SMA Award Service “as a matter of course” since 1963, because according to the Section I of the SMA Rules, unless otherwise stipulated at the beginning of the arbitration proceeding, the parties, by consenting to the Rules, agree that the award issued may be published. Also the *Chambre Arbitrale Maritime de Paris* reserves the right to publish or diffuse the awards through its own service called *Gazette de la Chambre*, without any right for the parties to oppose to the disclosure. This seems to comply with the nature of the arbitration of the *Chambre*, which is an administered procedure.

<sup>(47)</sup> J.M. ALCANTARA, *An International panel of maritime arbitrators*, in *Journal of International Arbitration*, 1994, pp. 118, 126.

<sup>(48)</sup> F. MARRELLA, *Unity and Diversity in International Arbitration*, *cit.*, p. 1099.

<sup>(49)</sup> The predominance of *ad hoc* arbitration is a consequence of the unwillingness of maritime industry to recur to administered proceedings, to delegate greater power to arbitral centres, to entrust the management of the proceeding to institutional procedural rules and, more generally, to renounce to control directly the procedure.



free from national influence, on the other hand they strongly oppose the idea of harmonizing the arbitral rules or creating an international court of maritime arbitration, whether established through intergovernmental convention or private agreement<sup>(50)</sup>.

However, in order to reduce the costs of the proceeding, arbitral institutions have created simplified, quicker and less expensive procedures which apply to disputes where neither the claim nor any counterclaim exceeds a certain monetary value, such the *Small Claims Procedure* of the *London Maritime Arbitrators Association* or the *Rules for Shortened Arbitration Procedure* of the *Society of Maritime Arbitrators* of New York, a reference to which has been inserted in many maritime contractual forms<sup>(51)</sup>.

It is true that still today about 70% of world maritime arbitrations is conducted in London under the auspices of *London Maritime Arbitrators Association*, centre which at the moment is maintaining its leading role due both to historical reasons and to the consideration and reliability that London maritime arbitration indubitably follows to guarantee among the world shipping industry.

However, in order to preserve the attractiveness and primacy of European maritime arbitration in the next decades, new forms of synergy among regional arbitral centres will be requested: competition of Asian arbitral institutions (mainly the Singapore Chamber of Maritime Arbitration and the China Maritime Arbitration Commission) and, more recently, the creation of Emirates Maritime Arbitration Centre (EMAC) in Dubai impose to look beyond the mere conservation of existing system.

A possible solution might be the creation of a European private arbitral centre managed by the existing regional arbitral organizations whose functions could initially be limited to the holding of a list of specialized maritime arbitrators; gradually, once overcome the resistance of the shipping industry, such new institution could be equipped with its own arbitral rules and body of arbitrators, starting a slow process of unification.

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<sup>(50)</sup> This is the conclusion of some surveys on the perception of maritime arbitration conducted among shipping operators and maritime arbitral centres, as the one proposed by Prof. Marrella and Prof. Fouchard (see F. MARRELLA, *Unity and Diversity in International Arbitration*, cit., p. 1085) as well as the *Comparative Review of the Arbitration Schemes Available in the Main Maritime Arbitration Centres*, presented at the XIII International Congress of Maritime Arbitrators (see M. RICCOMAGNO, cit., p. 144 ff.).

<sup>(51)</sup> Among these see, *ex multis*, *Saleform 2012*, *Shipman 2009*, *Barecon 2001*, *Gencon 1994*, *NYPE 93*, *Ammvelsb 93*, *Norgrain 89*, *Graincon*.

It is essential for such organization to be provided with a research, training and certification institute for maritime arbitrators to promote an European “culture of arbitration” towards national legislators and courts, which must recognize the essential role of arbitration, towards lawyers, called to counsel and represent the will of the parties, and even towards arbitrators, on whose work depends the efficiency and the success of the whole procedure.

More generally, the future of maritime arbitration will depend on the aptitude to innovation of its various components, as well on their ability to adapt to keep satisfying the needs of the shipping industry. Many of the admittedly understandable nostalgic instincts will have to succumb in front of the inexorable changes of the contemporary society. In other words, paraphrasing a well-known dictum, for things to remain the same, everything must change.

Marco Gregori  
Ph.D. Candidate  
Ca' Foscari University of Venice

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