

***International Maritime
Arbitration: Legal and Policy
Issues***

Paper Presented to World Maritime University

Malmö 14 May 2007

and

to the Australian Maritime and Transport

Arbitration Commission

Sydney 4 December 2007

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International Maritime Arbitration: Legal and Policy Issues.¹

Abstract

This paper seeks to deal with some important underlying policy questions faced by legislatures, governments and courts in dealing with the issues thrown up by international commerce and dispute resolution, and, in particular, maritime commerce and dispute resolution. The growth and popularity of international commercial arbitration exposes policy issues for both developed and developing countries, such issues having their origin, at least in part, in questions of sovereignty. These issues are best understood in a wider context of international commercial law.

Introduction – the essential nature of arbitration and its advantages

Arbitration is one method (but only one method) of resolving disputes. It is based on the agreement between the parties to the dispute. This contractual foundation is essential to the understanding of the character and importance of arbitration. Though arbitration is founded on contract, it is affected both by national legislation and international convention. It is wise to state at the outset, and to recall at all times, that sanctity of contract, or *pacta sunt servanda*, or party autonomy is a basal principle of law and an accepted international legal norm, though not one without appropriate qualification. It informs the relations of all participants in international commerce.

In its essential form, arbitration involves two or more parties, often from different legal systems, who anticipate the possibility of disputes about their relationship, agreeing to give a third party their authority to resolve the dispute. They may be merchants buying and selling goods, parties dealing with the use of a ship or any other agreement dealing with a commercial subject matter.

¹ The paper is an edited version of a paper delivered at the World Maritime University at an International Seminar on Maritime Law and Policy on 14-16 May 2007 and to the Australian Maritime and Transport Arbitration Commission on 4 December 2007. The early part of the paper is based on the author's FS Dethridge Memorial Address at the Annual Conference of the Maritime Law Association of Australia and New Zealand in September 2006.

Disputes are part of commerce. They are immanent within the activity. So how are they to be resolved? There are various possibilities: First, the stronger commercial party may insist on an outcome favourable to it. Secondly, the parties may abandon the arrangement at the point of breakdown, leaving the loss to lie where it falls. Thirdly, the parties may seek recourse to their national courts independently of each other. Fourthly, the parties may agree on one of their national courts. Fifthly, the parties may agree upon a neutral national court. Sixthly, the parties may agree upon arbitration. Seventhly, the parties may agree to mediate or conciliate the dispute. There may be other possibilities, including expert determination.

There are obvious disadvantages to various of these alternatives: arbitrary force is antithetical to the free commercial bargain and the constructive commercial relationship; the abandonment of the commercial enterprise reflects nothing more than failure; national courts of the parties may have defects, as minor as perceived association with one party and a foreignness to the other, at worst, they may be perceived (whether or not they are) to be incompetent or corrupt; national courts of a neutral third country may be worthwhile, but they may represent a form of foreign governmental process outside the control of the parties; mediation and conciliation may have no final result – they are forms of further agreement. Leaving aside other possibilities, this leaves arbitration.

What is arbitration and what are its perceived advantages?

Arbitration is the process of resolving (by deciding) a dispute by someone to whom the parties have entrusted that task by agreement. The agreement will therefore need to specify, at the very least, the subject of the resolution (the scope of that which is submitted to arbitration), who is to hear the dispute and the relevant law and procedure by reference to which the dispute is to be decided. If there is a means of recognising and enforcing the decision of the arbitrator, a compulsory resolution of a defined range of disputes between parties can be achieved (the compulsion being

derived from earlier free agreement to arbitrate together with the willingness of courts or other governmental agencies to enforce the bargain).²

There are potentially great advantages for the parties in using arbitration. The ability of the parties to choose the identity of the arbitrator, or the mechanism of choosing the arbitrator, the place of the arbitration, the procedure of the arbitration (including the degree of confidentiality involved), the law to govern the dispute, the law to govern the procedure of the arbitration and the court to supervise the arbitration are all important benefits, important **commercial** benefits, which are, at least intuitively, built into the relationship and the price of the relevant contract.

International acceptance

International commercial arbitration as a recognised institution or process has been cemented by widespread international acceptance of some of the most successful of international conventions. The most notable, and most relevant for present purposes, are the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention) and the UNCITRAL³ Model Law on International Commercial Arbitration 1985 (the Model Law).

Arbitration awards made conformably with these conventions are far more widely enforceable than judgments of national courts. For instance, the New York Convention is recognised by well over 100 countries. Thus, an otherwise valid arbitral award is more easily enforced worldwide than the judgment of a court. So, an arbitration award can give wider access to a party's assets than does a court judgment.

An historical perspective and the development of harmonised commercial law

Regimes for dispute resolution cannot be divorced from the activity that gives rise to the need for them – here commerce, commercial law and maritime law. A striking contemporary phenomenon is the globalisation of commerce brought about by

² Expressed in this way one can already begin to appreciate the symbiotic relationship between courts and the arbitration process.

³ United Nations Commission on International Trade Law

astonishing changes in communications and the integrated global and regional markets created or fostered thereby.⁴ The supranational forces impinging on municipal states have influenced virtually all economies of the world, creating linkages, dependencies and opportunities quite unrelated to sovereign nation states and their borders. To a degree, however, this is nothing new. Only new are the tools of communication of bringing about and effectuating commercial intercourse. Commerce and maritime affairs are universal and timeless activities.

History tells us to expect rules for human commercial and maritime activity that transcend the political structures of the day and that reflect the timelessness of the activity involved. Important to the development and maintenance of a coherent law merchant in the past were four elements: a degree of unifying commonality of the laws of the places of exchange, such as market places and fairs, a degree of unifying commonality in the laws and customs of the sea, a unifying role of specialised courts dealing with commercial disputes and a unifying role of standard forms of contracts⁵. These elements are recognisable aspects of international commercial life today.

Maritime law has always revealed a striking degree of uniformity. This is hardly surprising. Shipping is a universal activity. It has a history as long as mankind. It has been known across all littoral and riparian parts of the earth. Ample reference to maritime activity and attendant commercial law can be found in many sources⁶

⁴ See Galgano, F “The New *Lex Mercatoria*” (1995) 2 *Annual Survey of International and Comparative Law* 99; and Bonell, MJ *An International Restatement of Contract Law* (Transnational Publishers 3rd Ed 2004) at 11-13.

⁵ See Schmitthoff, CM “International Business: A New Law Merchant” (1961) II *Current Law and Social Problems* 129 in Cheng, C-J *Clive M Schmitthoff’s Select Essays on International Trade* (Martinus Nijhoff 1988) ch 3.

⁶ See generally Tetley, W *International Maritime and Admiralty Law* (Editions Yvon Blais 2002) pp 5-30; Sanborn, FR *Origins of the Early English Maritime and Commercial Law* (William Hein & Co rep 2002) chs 1, 2 and 4; McFee, W *The Law of the Sea* (J B Lippincott Company 1950) chs 3-6; Gold, E *Maritime Transport: The Evolution of International Marine Policy and Shipping Law* (Lexington Books 1981) ch 1; *Benedict on Admiralty* (7th Ed) vol 1 chs 1 and 2; Gilmore, G and Black, CL *The Law of Admiralty* (2nd Ed, The Foundation Press 1975) pp 1-11; Schoenbaum, TJ *Admiralty and Maritime Law* (West Publishing) ch 1; Beutel, FK *Brannan’s Negotiable Instruments Law* (7th Ed, The WH Anderson Company 1948) Part 1 ch 1; Day, C A *History of Commerce* (Longmans, Green & Co 1922, Garland Publishing facsimile edition 1983); Hourani, GF *Arab Seafaring in the Indian Ocean* (Princeton University Press 1951); Laing “Historic Origins of Admiralty Jurisdiction in England” (1946) 45 *Michigan Law Review* 163; Marsden, RG *Select Pleas in the Court of Admiralty* (Selden Society 1897, 1953 Reprint) Vol 1; Selfridge, HG *The Romance of Commerce* (Bodley Head 1918); Mangone *United States Admiralty Law* (Kluwer International, 1997) ch 1; Mears “The History of Admiralty Jurisdiction” 2 *Select Essays in Anglo-American Legal History* 312; Mookerji, R *Indian Shipping: A History of the Sea-Borne Trade and Maritime Activity of the Indians from the Earliest*

concerning the conduct of maritime commerce in all parts of the world: the Persian Gulf, the Arabian Sea, the Tigris-Euphrates Basin, the Mediterranean Sea, Africa and its coast, the Black Sea, India, and the Indian Ocean, South-East Asia, the Pacific, China and North Asia, the North Sea and the Baltic, the great rivers of Europe and Eurasia, and the Americas. The great commercial centres of the Middle East – Baghdad, Damascus, Alexandria and others supported a cosmopolitan commercial society from ancient to modern times. The Indian Ocean has nurtured commercial and maritime activity for millennia. The monsoons enabled trade from the Red Sea to Asia, with seasonal winds to China, the Philippines and North Asia. Malabar teak, coconut fibre, flax, cotton and metals made India a flourishing site of shipbuilding. Ibn Battuta, the Tangiers-born lawyer, merchant and geographer of the 14th century described Calicut in South West India as one of the largest harbours in the world visited by merchants and seafarers from China, Sumatra, Ceylon, the Maldives, Yemen, Persia and “all quarters”; and he described “Zayton”⁷ in China as the very largest harbour in the world with hundreds of vessels.

One can see in the past the same forces and elements underpinning international or transnational commercial law today:

- the freedom and mobility of commerce in times of peace
- the international character of commerce and maritime activity
- a degree of uniformity in approach to common and elemental activity – the promise, the bargain, payment, security, insurance, transport and the role of the agent
- dispute resolution closely suited to, and knowledgeable of, commercial and maritime affairs of the merchants involved
- a degree of uniformity in transactional documents

Times (Longmans, Green & Co 1912); Oakeshott, WF *Commerce and Society* (Oxford 1936); Anand, RP *Origin and Development of the Law of the Sea* (Martinus Nijhoff, 1983); Abu-Lughod, JL. *Before European Hegemony; The World System AD 1250-1350* (Oxford 1989); Charlesworth, MP *Trade Routes and Commerce of the Roman Empire* (Ares Publishing Inc 1974); Mathew, KS *Shipbuilding and Navigation in the Indian Ocean Region. AD 1400-1800* (Munshiram Manoharlal Publishers 1997); Chaudhury, KN *Trade and Civilisation in the Indian Ocean – An Economic History from the Rise of Islam to 1750* (Munshiram Manoharlal Publishers 1985); Milburn, W *Oriental Commerce Vols 1 & 2* (Munshiram Manoharlal Publishers 1999 facsimile of 1813 Edition).

The 20th century saw the development of attempts at the international harmonisation of commercial and maritime law. In the first half of that century, the attempts at unification or harmonisation of commercial law were dominated by maritime law and maritime lawyers. Carriage of goods under bills of lading was an excellent example. The recognition from the 1870s of the fragmentation caused by national legislation⁸ counteracting the abuses produced by unbridled freedom of contract practised by shipowners led to the Brussels Conferences in the early 1920s and the establishment of a workable compromise of minimum rights and obligations in the carriage of goods by sea under bills of lading in the Hague Rules. This long and exacting process took over 50 years. At its foundation was the need to qualify unbridled freedom of contract to bring about a fair balance in bill of lading carriage. It illustrated the recognised need for a balance to be struck in the (sometimes competing) demands of commerce: certainty, predictability, party autonomy, despatch and fairness.

Attempts at harmonisation have spawned important, private and public bodies. Until the formation of the Intergovernmental Maritime Consultative Council (IMCO)⁹ later to become the International Maritime Organisation (IMO) and other United Nations bodies whose activities touch on maritime affairs,¹⁰ the Comité Maritime International (CMI) played the leading role in the development of international conventions and rules concerning maritime law.¹¹ After *The 'Torey Canyon'* disaster, the IMO began to undertake the primary burden of promulgation of maritime treaties, conventions and standards at least of a character dealing with safety, the environment and technical matters.¹² The CMI remains significantly influential. Its role has been

⁷ A port on the coast of China described by one writer, Oakeshott, in 1936, as “modern Chiian-Chau”.

⁸ See for example the *Harter Act 1893* in the United States; the *Sea-Carriage of Goods Act 1904* (Cth) in Australia; the *Shipping and Seamen Act 1903* (NZ); and the Canadian *Water Carriage of Goods Act 1910*.

⁹ Established by convention in 1948 which came into effect in 1958.

¹⁰ The United Nations Conference on Trade and Development (UNCTAD); UNCITRAL: The United Nations Commission on Uniform Trade Law created by unanimous resolution of the General Assembly of the United Nations on 20 December, 1966; UNIDROIT: The International Institute for the Unification of Private Law was established by multilateral treaty in 1926.

¹¹ Covering transport of goods, carriage of passengers and luggage, collision and navigation, salvage and general average, limitation of liability, pollution liability and compensation therefor, maritime liens and claims, registration of ships, mortgages, arrest, classification societies, off-shore mobile craft and stowaways. See *CMI Handbook of Maritime Conventions* (Lexis Nexis 2001).

¹² The following is a list of IMO sponsored Conventions:

Maritime Safety: International Convention for the Safety of Life at Sea, 1974; International Convention on Load Lines, 1966; Special Trade Passenger Ships Agreement, 1971; Protocol on Space Requirements for Special Trade Passenger Ships, 1973; Convention on the International Regulations for Preventing Collisions at Sea, 1972; International Convention for Safe Containers, 1972; Convention

somewhat redefined to co-operation with intergovernmental organisations seeking to harmonise maritime law.¹³

The formation and development of UNIDROIT (in 1926) and UNCITRAL (in 1966) have fostered the development of conventions, model codes and model laws dealing with private law, especially commercial law, generally.

The pace of development of international commercial law has been remarkable in the last 20 to 30 years. There are international restatements, model laws, principles, conventions, directives and other instruments on many aspects of law related to maritime commerce – contract law,¹⁴ electronic commerce,¹⁵ international sale of

on the International Maritime Satellite Organization, 1976 ; The Torremolinos International Convention for the Safety of Fishing Vessels, 1977 ; International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978; International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel, 1995; International Convention on Maritime Search and Rescue, 1979.

Marine pollution: International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto; International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969; Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972; International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990; Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances, 2000; International Convention on the Control of Harmful Anti-fouling Systems on Ships, 2001; International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004.

Liability and compensation: International Convention on Civil Liability for Oil Pollution Damage, 1969; International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971; Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, 1971; Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974; Convention on Limitation of Liability for Maritime Claims, 1976; International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996; International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001.

Other subjects: Convention on Facilitation of International Maritime Traffic 1965; International Convention on Tonnage Measurement of Ships 1969; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988; International Convention on Salvage, 1989.

¹³ CMI's contribution to the work of the Legal Committee of the IMO has been huge, in particular in drafting conventions on carriage, limitation of liability, maritime assistance and salvage and arrest, harmful and noxious substances, places of refuge, fair treatment of seafarers and wreck removal.

¹⁴ As to international private law, see generally Goode, R et al *Transnational Commercial Law: International Instruments and Commentary* (Oxford 2004). The UNIDROIT Principles of International Commercial Contracts 2004, produced by a group of international scholars and practitioners under the direction of Prof Joachim Bonell (Part I of which was published in 1994); the Principles of European Contract Law completed in 2003 prepared by scholars from all member states of the European Community.

¹⁵ UNCITRAL Model Laws on Electronic Commerce (1996) and on Electronic Signatures (2001); EC Directives on Electronic Commerce (2000) and on Electronic Signatures (1999); CMI Rules for Electronic Bills of Lading 1990; the Bolero (an acronym from Bill of Lading Registration Organisation) bill of lading prepared through the co-operation of the Through Transport Mutual Insurance Association (the TT Club) and the Society for Worldwide Inter Bank Financial Telecommunications (SWIFT) which operates through a joint venture company; and the ICC rules as to electronic presentation of documents.

goods,¹⁶ agency and distribution,¹⁷ international credit transfers and bank payment undertakings,¹⁸ international secured transactions,¹⁹ cross-border insolvency,²⁰ securities settlement and securities collateral,²¹ conflict of laws,²² international civil procedure,²³ and international commercial arbitration.²⁴

¹⁶ The United Nations Convention on Contracts for the International Sale of Goods done at Vienna 11 April 1980 (“CISG”) which superseded the Uniform Law on the Formation of Contracts for the International Sale of Goods, 1964 and the Uniform Law on the International Sale of Goods, 1964; and the ICC Official Rules for the Interpretation of Trade Terms (Incoterms 2000), replacing earlier versions.

¹⁷ The First Company Directive (EEC) (1968); the EEC Directive on Commercial Agents (1986); the UNIDROIT Convention on Agency in the International Sale of Goods done at Geneva 17 February 1983; and the UNIDROIT Model Franchise Disclosure Law (2002).

¹⁸ UNCITRAL Model Law on International Credit Transfers (1992); ICC Uniform Customs and Practice for Documentary Credits (1993) (UCP 500) and electronic supplement (EUCP); ICC Uniform Rules for Demand Guarantees (1992); International Standby Practices (ISP 98) by the Institute of International Banking Law & Practice Inc; UN Convention on Independent Guarantees and Stand-by Letters of Credit done at New York 11 December 1995; ICC Uniform Rules for Contract Bonds (1993).

¹⁹ The European Bank for Reconstruction and Development (ERBD) Model Law on Secured Transactions (1994); the Model Inter-American Law on Secured Transactions (2002); the various maritime conventions dealing with security: on Maritime Liens and Mortgages (1926 and 1993) and on Arrest (1952 and 1999); the Convention on the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft done at Rome on 29 May 1933; the Convention on the International Recognition of rights in Aircraft done at Geneva on 19 June 1948; the UNIDROIT Convention on International Financial Leasing done at Ottawa 28 May 1988; the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment and Protocol done at Cape Town on 16 November 2001; the UNIDROIT Convention on International Factoring done at Ottawa 28 May 1988; the UN Convention on the Assignment of Receivables in International Trade done at New York 12 December 2001.

²⁰ The UNCITRAL Model Law on Cross-Border Insolvency (1997); the European Union Convention on Insolvency Proceedings; and the EC Council Regulation NO 1346/2000 on Insolvency Proceedings.

²¹ The EC Settlement Finality Directive (1998), 98/26/EC; and the EC Directive on Financial Collateral Arrangements (2002), 2002/47/EC.

²² The Convention on the Law Applicable to Agency done at the Hague on 14 March 1978; the Convention on the Law Applicable to Contracts for the International Sale of goods done at the Hague on 22 December 1986; the Convention on the Law Applicable to Contractual Obligations done at Rome on 19 June 1980; the Inter-American Convention on the Law Applicable to International Contracts done at Mexico on 17 March 1994; and the Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary done at the Hague in 2002.

²³ The European Convention on State Immunity done at Basle on 16 July 1972; European Community Council Regulation No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters; a MERCOSUR Convention and Protocol on jurisdiction in civil and commercial matters; the Buenos Aires Protocol to the Treaty of Asuncion signed on 26 March 1991, on International Jurisdiction in Contractual Matters done at Buenos Aires on 5 August 1944; the Convention on the Service Abroad of Judicial or Extra-judicial documents in Civil or Commercial Matters done at the Hague on 15 November 1965; the European Community Council Regulation No 1348/2000 of 29 May 2000 on the service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters; the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters done at the Hague on 18 November 1970; European Community Council Regulation No 1206/2001 of 28 May 2001 on Cooperation of Courts of Member States in the Taking of Evidence in Civil or Commercial Matters; and the American Law Institute and UNIDROIT jointly developed Principles of Transnational Civil Procedure.

²⁴ The Convention on the Recognition and Enforcement of Foreign Arbitral Award adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its 24th meeting (the New York Convention); the Inter-American Convention on International Commercial Arbitration done at panama City on 30 January 1975; the UNCITRAL Model Law on International Commercial Arbitration (1985); the UNCITRAL Arbitration Rules (1976); the ICC Rules of Arbitration (1998); and the London

Some of these instruments are not legally operative, whether at the level of public international law, or municipal law. So, such model laws or principles are sometimes referred to as “soft” law. Even if they are “soft”, they provide rules and principles of a greater or lesser degree of international acceptance in respect of important elements of commercial life: contracts (and their formation, interpretation and performance), the sale of goods, payment and credit, arbitration and civil procedure. These can be used by arbitrators, including maritime arbitrators, as aspects of accepted international approaches to common international transactions, providing protocols and procedures for the conduct of maritime arbitration as well as a framework of substantive law.

Importantly, these international principles include principles of procedure for the conduct of international litigation. One example of these is the American Law Institute and UNIDROIT Principles of Transnational Civil Procedure. This was no less than the harmonisation of the civil law and the common law dispute resolution procedures. The Principles are an attempt to approximate, in a flexible way, important issues common to the two dominant legal systems. They are available for adoption and adaption by courts and arbitral bodies. They form a bridge between two very different legal cultures and provide a common and fair basis for hearing international disputes. Importantly, they provide a procedural foundation that can give confidence to parties in litigation including arbitration who come from different legal cultures. It was a major achievement.²⁵

Harmonisation and its effect on arbitration

The relevance of these kinds of transnational principles as a form non-national law, or *lex mercatoria* is a matter of some debate.²⁶ This debate has proceeded between

Court of International Arbitration Rules; UNCITRAL Notes on Organising Arbitral Proceedings; International Bar Association Rules on the Taking of Evidence; International Bar Association Guidelines on Conflicts of Interest; the International Centre for Dispute Resolution Arbitration Rules; International Centre for the Settlement of Investment Disputes Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings; the London Maritime Arbitrators’ Terms 1997, 2002; the London Maritime Arbitrators Association Small Claims procedure.

²⁵ *ALI/UNIDROIT Principles of Transnational Civil Procedure* (Cambridge University Press 2006).

²⁶ For reference to the literature, see van Houtte, N *The Law of International Trade* (Sweet & Maxwell 2002) pp 24-28; Pryles, M “Application of the *lex mercatoria* in international arbitration” (2004) 78

proponents and opponents of the view as to whether a *lex mercatoria* exists, and if it does, of its perceived advantages or disadvantages.

Most maritime disputes concerning established markets, such as chartering, insurance, shipbuilding, are based in well-known contracts, with identified law to govern, very often English. So, not surprisingly the strongest opponents of the utility and even the existence of the *lex mercatoria* often come from established legal systems.²⁷ But maritime disputes sometimes arise from circumstances not limited by standard form contracts with London arbitration applying English law. What cannot be denied is the utility to parties and arbitrators of understanding how the respected authors and proponents of model laws and principles, and how state parties in coming to agreement in international conventions, have addressed issues of relevance. For instance, the availability of relevant rules and principles may enable an arbitrator to choose an available body of rules about substance or procedure when the parties have failed to identify the relevant law. This choice might be made by reference to available unattached “soft” law, rather than by recourse to conflict rules to choose one particular municipal law.

It is important to recognise that the maritime affairs to which consensually agreed dispute resolution may apply are wide. They arise from the rich diversity of activity concerning the affairs of the sea: the financing, building, sale and acquisition of ships, the deployment of ships, the carriage of goods by sea (the primary use of the working commercial vessel), fishing, the insurance of ships, cargo and other marine adventures and the other *ad hoc* contractual relationships arising from the use of ships, for example salvage.

Many of the contracts about these subject matters are made between relatively equal commercial partners. Others can be better characterised as contracts of adhesion. The

Australian Law Journal 396; and Petrochilos, G *Procedural Law in International Arbitration* (Oxford University Press 2004) at 36 [2.04] ftnt 79.

²⁷ See in particular, Mustill, M “*The New Lex Mercatoria*” in Bos, M and Brownlie, I (Eds) *Liber Amicorum for Lord Wilberforce*; and Mustill, M (1988) 4 *Arb Int'l* 86.

difference is demonstrated by the different approach the law takes to charterparties and bills of lading.²⁸

In maritime commercial contracts, given the stability of markets such as those for the chartering of working ships and the frequency of usual transactions, such as shipbuilding or the sale of goods, it is usual to have a definite legal system and proper law governing the relationship. However, the development of fundamental common legal principles of contract, sale of goods, agency, international credit, bank undertakings and the like will, in all likelihood, have a harmonising effect on international maritime and commercial contracts and also provide for the arbitrator a norm of international principles that can guide him or her. Also, internationally recognised standards of procedure are invaluable to any arbitrator, however experienced he or she may be.

The scale and scope of international commercial arbitration

The last 40 to 50 years, in particular the last 20 to 30 years, have seen changes to dispute resolution that reflect the growth of international commerce and the transnational principles governing it. There has been a significant shift away from municipal courts towards commercial arbitration. This is particularly so in the resolution of international commercial and maritime disputes. This shift, in what might be referred to as the consumption patterns of parties to commercial litigation, and the public policy now recognising the legitimacy of such choice, has occurred for many reasons, the majority of which have been already mentioned – flexibility, expertise, party autonomy, control or a sense of control, confidentiality, perceived greater speed, perceived or real lower cost and better or wider enforcement of the arbitral system. In part, but only in part, the shift is explained by the failures or inadequacies of court systems. The reality of any advantage in speed, skill and cost of arbitration over courts may, in many cases, be debatable. Nevertheless, the arbitral process remains significantly dominant.

²⁸ Bill of lading carriage or carriage under similar documents has been regulated by international convention since the 1920s. Charterparty carriage has been subjected to no international convention.

It is important to recognise that this growth and development of commercial arbitration is no more or less than the setting up, in the field of international commerce (including maritime commerce) of a world-wide delocalised private (or semi-public) dispute resolution system (a surrogate worldwide private court-system) made up of a large number of self-created and self-administered, largely non-governmental, organisations. There are now numerous arbitral institutions worldwide catering for international commercial arbitration, including maritime arbitration.²⁹

In many countries, the legislatures and the courts themselves have recognised the need for efficient skilled commercial and maritime courts.³⁰ In some countries, it must be said, the quality of the national legal systems is less than internationally acceptable. Commerce, however, will not wait for the antecedent development of skilled, unbiased and efficient commercial courts. In countries where the national courts are not seen as adequate, arbitration is not seen as a better alternative than a local commercial court, but as the only viable alternative. In such places, the availability of commercial arbitration is essential to underpin investor confidence and economic development. These issues of quality of dispute resolution raise important policy questions. It is possible that countries at various levels of development display a disconformity between the skill of participants in commercial arbitration and national court systems. The two systems are, however, closely related.

The court system can be vital for the health and well being of arbitration in any country. Skill and efficiency of the courts in supervision, enforcement and collateral assistance to the arbitration process taking place on the territory in question can

²⁹ For example, the International Court of Arbitration, the London Court of International Arbitration, the Inter-American Arbitration Commission, the Singapore International Arbitration Centre, the Australian Chamber of International Commercial Arbitration, the Chartered Institute of Arbitrators, the American Arbitration Association, the London Maritime Arbitration Association, various national associations of maritime arbitration, the Paris Chambre Arbitrale Maritime, the Regional Centre for Arbitration Kuala Lumpur, the Association of Maritime Arbitrators Canada, Vancouver Maritime Arbitrators Association, the Society of the Maritime Arbitrators Inc, the Houston Maritime Arbitrators, the Japan Shipping Exchange, the Tokyo Maritime Arbitration Centre, the China Maritime Arbitration Commission, the Australian Maritime and Transport Arbitration Commission. The list can go on, and on.

³⁰ The National Arrangement used by the Federal Court of Australia in which nominated judges (13 in all) undertake the first instance and appeal work in maritime matters is, in effect, a working maritime court. China has a system of dedicated maritime courts. England has an Admiralty Court and a Commercial Court. Malaysia is to set up a maritime court. Many other courts have specialist maritime judges.

substantially assist the arbitration process. In that sense, arbitration and the court system have, to a degree, a symbiotic relationship.

Policy

What does this all mean for policy?

Legislative and government policy

One important policy area concerns the relationship between courts and arbitration, the basis of supervision and the scope for independent existence of the arbitral process.

As can be seen from the relationship between the arbitral award and national recognition mediated through international agreement in the New York Convention and the Model Law, arbitration obtains much of its efficacy from national recognition. The New York Convention and the Model Law require national courts to enforce arbitration clauses in effect by staying their own proceedings if brought in contravention of the agreement,³¹

The method by which the result of a determination of a dispute under contract is translated into enforcement of a monetary judgment where a defendant has assets, necessarily relies on the court and governmental systems of different states:

- the state where the arbitration took place if an attack on the arbitration process or award is made
- the states where the awards will be recognised and enforced against the assets of the defendant

The New York Convention and the Model Law set out the circumstances in which states and their courts can operate in these areas.³² Significant place is given to local public policy.³³

³¹ See the New York Convention Art II and Model Law Ch II.

³² The New York Convention Arts IV and V and the Model Law Ch VIII.

³³ The New York Convention Art V r 2(b); the Model Law Art 36(1)(b)(ii).

This control framework of national court systems can act as an enhancement of arbitration by ensuring its fairness and honesty.³⁴ The use of the court system can also act as a mechanism to disrupt the resolution of the dispute by the arbitral forum. The tendency, however, of modern national arbitration legislation is to lessen the grounds of available curial supervision. This leads to an increasing independence or autonomy of the arbitration process itself and the consequent award. Merely because the arbitrator makes an error of law may not be sufficient to justify redress.

This independence or autonomy of the arbitration process may lead to a lessening or weakening of legal doctrine, if, without appeal, arbitrators reach conclusions based on the law of X country, but are in part free to make mistakes about that law, or interpret that law without strict supervision of the courts of X country. If X country wants its law applied in contracts and wants arbitration business within its borders using its law, there is a tension – keep a light hand on arbitration and risk fraying of the chosen national law, or tighten supervision to maintain purity of legal doctrine at the risk of overly interfering with the freedom of the parties to choose their own method of dispute resolution. These are not straightforward issues. To the extent that supervision and control remain light, one can see the increasing role for the *lex mercatoria* to supplement or complement any chosen national law, as interpreted by an arbitrator.

These issues involve subtle questions of sovereignty and of the value any particular country may place on maintaining the international public clarity of its own law. They also involve the subtle questions as to how much control or supervision by courts is best for the long term stability of, and the world commercial community's confidence in, the process of arbitration, as a transnational institution or structure.

Issues of national sovereignty can arise from the operation of the contracting autonomy of the parties in other ways. The ability of a State to resolve or assist in the resolution of disputes that affect its citizens' rights is, or can be seen to be, an

³⁴ See for example the discussion of the enhancing role of the court in respect of international arbitration Park, W (1980) 12 *Brooklyn J Int'l Law* 629; (1989) 5 *Arb Int'l* 230; and (1989) 63 *Tulane Law Rev* 647.

important aspect of government. This is especially so if the so-called free contractual will of the parties can be seen to be manifested in contracts of adhesion under the control of powerful foreign interests.

For instance, liner bills of lading may contain arbitration clauses requiring any disputed cargo claim (however small) to be resolved by arbitration or court process in the country of the carrier. This may be thousands of miles from the trade carried on by the carrier and from the place of out-turn or delivery. The liner trade may well be part of a recognised cartel of carriers, sharing capacity on a route. In these circumstances, cargo interests may be, effectively, denied a remedy if they have to circle the globe to vindicate a modest claim. To the contrary, obviously, is the position of the commercial charterer who time charters a vessel agreeing to New York or London arbitration.

The different considerations that affect, or might affect, national policy about these two circumstances are not difficult to appreciate. Some of them are considerations of a not dissimilar kind that led to the need for an international convention in the 1920s on bill of lading, but not charterparty, carriage of goods: the need for a fair balance of interests between those with, and those without, bargaining power.

An insight into differences of view can be seen in some United States cases as to how foreign jurisdictional and arbitration clauses in maritime contracts have been viewed. The discussions of the relevant elements in these cases reflects the clear policy issues involved, though here enunciated in the development of legal doctrine as opposed to legislation or government policy.

In 1971, in *The Bremen v Zapata Off-Shore Co*³⁵, the United States Supreme Court discussed forum selection clauses. The contract was an international towage contract for a drilling rig to be towed from Louisiana to Italy. The contract contained a London jurisdiction clause (the High Court of Justice in London). The Court discussed forum selection clauses and developed a policy reflecting a mid-way position between the protection of domestic judicial authority in all cases, on the one

³⁵ 407 US 1 (1971)

hand, and enforcement of contractual autonomy as a matter of policy, on the other. The approach was based on the prima facie validity of the arbitration clause unless it was shown to be “unreasonable” in the circumstances.³⁶ This approach would give to the court power of review over the reasonableness of the circumstances of entry into the contract and, in particular, it was thought, whether it was a contract of adhesion or a contract freely entered between the parties. It represented a loosening, but not a complete release, of a mistrustful and parochial view about arbitration that had hitherto prevailed.

Twenty years later, in *Carnival Cruise Lines Inc v Shute*³⁷ a contract for a cruise designated the courts of Florida for the resolution of disputes. It was not a negotiated contract. The Supreme Court refined the *Bremen* doctrine and rejected the view of the Court of Appeals for the Ninth Circuit that a non-negotiated forum selection clause in a so-called “form ticket” is never enforceable simply because it was not the subject of bargaining. The considerations as to reasonableness were diverse and included the

³⁶ See in particular, 407 US at 9-10 and 12-13 as follows:

*Forum-selection clauses have historically not been favored by American courts. Many courts, federal and state, have declined to enforce such clauses on the ground that they were “contrary to public policy,” or that their effect was to “oust the jurisdiction” of the court. Although this view apparently still has considerable acceptance, other courts are tending to adopt a more hospitable attitude toward form-selection clauses. This view, advanced in the well-reasoned dissenting opinion in the instant case, is that **such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be “unreasonable” under the circumstances.***

[citations omitted and emphasis added]

...

The argument that such clauses are improper because they tend to “oust” a court of jurisdiction is hardly more than a vestigial legal fiction. It appears to rest at core on historical judicial resistance to any attempt to reduce the power and business of a particular court and has little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets. It reflects something of a provincial attitude regarding the fairness of other tribunals. No one seriously contends in this case that the forum-selection clause “ousted” the District Court of jurisdiction over Zapata’s action. The threshold question is whether that court should have exercised its jurisdiction to do more that give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause.

There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect.

[footnotes omitted and emphasis added]

³⁷ 499 US 585 (1991)

interests of both sides to the bargain. It was recognised that there might be good reason for non-negotiated terms and for channelling litigation into one place.³⁸

Four years later, in *The 'Sky Reefer'*,³⁹ the Supreme Court dealt with foreign arbitration clauses in a bill of lading. A fruit distributor's produce was damaged in transit from Morocco to Massachusetts aboard a Panamanian owned vessel, chartered to a Japanese carrier. There was a Tokyo arbitration clause. The argument was that the inconvenience and costs of proceeding in Japan would lessen the liability of the carrier under the United States *Carriage of Goods by Sea Act 1936*⁴⁰ (COGSA) and so the clause, it was said, was void. This was rejected. The majority of the Supreme Court rejected this and expressed itself in strong terms in favour of international comity and party autonomy. Justice Stevens, in dissent, had a different view about the width of the relevant provision of COGSA equivalent to Art 3 r 8 of the Hague/Hague-Visby Rules.⁴¹ Justice Stevens made clear his strong view that in practical reality foreign arbitration clauses can provide such a cost barrier as to deny a remedy to a claimant, and so cut down the claimant's rights under COGSA, thereby being made void by the equivalent of Art 3 r 8 of the Hague/Hague-Visby Rules.⁴²

³⁸ At 499 US at 593-94

First, a cruise line has a special interest in limiting the fora in which it potentially could be subject to suit. Because a cruise ship typically carries passengers from many locales, it is not unlikely that a mishap on a cruise could subject the cruise line to litigation in several different fora. ... Additionally, a clause establishing ex ante the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions. ... Finally, it stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the for a in which it may be sued.

[citations omitted]

³⁹ 515 US 528 (1995)

⁴⁰ 46 US Code 1300

⁴¹ Art 3 r 8 reads:

Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connexion with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in this convention, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

⁴² At 515 US 550-551

[T]his view [that Art 3 r 8 and the equivalent provision in COGSA should be construed to refer only to substantive rule to define a carrier's legal obligations] is flatly inconsistent with the purpose of [the provision]. That section responds to the inequality of bargaining power inherent in bills of lading and to carriers' historic tendency to exploit that inequality whenever possible to immunize themselves from liability for their own fault. A bill of lading is a form document prepared by the carrier, who presents it to the shipper on a take-it-or-leave-it basis. ... Characteristically, there is

Neither the Hague or Hague-Visby Rules deal expressly with jurisdiction or dispute resolution of cargo claims. Thus, the topic may be seen to be left to national law. Though the Rules do not expressly deal with the subject, on one view (and it was that of the dissenting justice in *The 'Sky Reefer'*, Justice Stevens) Art 3 r 8 of the Hague/Hague-Visby Rules should be read broadly and so can be seen, indirectly, to deal with it.

The Hamburg Rules provide the cargo claimant with a choice of places to sue. Art 21⁴³ of those Rules provides that the cargo interest may sue at the place of the

no arm's-length negotiation over the bill's terms; the shipper must agree to carrier's standard-form language, or else refrain from using the carrier's services. ... COGSA represents Congress' most recent attempt to respond to this problem. By its terms, it invalidates any clause in a bill of lading "relieving" or "lessening" the "liability" of the carrier for negligence, fault, or dereliction of duty.

When one reads the statutory language in light of the policies behind COGSA's enactment, it is perfectly clear that a foreign forum selection or arbitration clause "relieves" or "lessens" the carrier's liability. The transaction costs associated with an arbitration in Japan will obviously exceed the potential recovery in a great many cargo disputes. As a practical matter, therefore, in such a case no matter how clear the carrier's formal legal liability may be, it would make no sense for the consignee or its subrogee to enforce that liability. It seems to me that a contractual provision that entirely protects the shipper from being held liable for anything should be construed either to have "lessened" its liability or to have "relieved" it of liability.

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Article 21. Jurisdiction

1. *In judicial proceedings relating to carriage of goods under this Convention the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:
 - (a) *the principal place of business or, in the absence thereof, the habitual residence of the defendant; or*
 - (b) *the place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or*
 - (c) *the port of loading or the port of discharge; or*
 - (d) *any additional place designated for that purpose in the contract of carriage by sea.**
- 2.(a) *Notwithstanding the preceding provisions of this article, an action may be instituted in the courts of any port or place in a Contracting State at which the carrying vessel or any other vessel of the same ownership may have been arrested in accordance with applicable rules of the law of that State and of international law. However, in such a case, at the petition of the defendant, the claimant must remove the action, at his choice, to one of the jurisdictions referred to in paragraph 1 of this article for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgement that may subsequently be awarded to the claimant in the action.*
 - (b) *All questions relating to the sufficiency or otherwise of the security shall be determined by the court of the port or place of the arrest.*
3. *No judicial proceedings relating to carriage of goods under this Convention may be instituted in a place not specified in paragraph 1 or 2 of this article. The provisions of this paragraph do not constitute an obstacle to the jurisdiction of the Contracting States for provisional or protective measures.*

defendant, where the contract was made, the port of loading or discharge any other place mentioned in the contract. It may also arrest the ship anywhere else, but only for security.

Article 22 of the Hamburg Rules deals with arbitration.⁴⁴ The Rules recognise arbitration, but provide for a regime of arbitration whereby the cargo interest may seek arbitration in the same places as mentioned in Art 21.

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- 4.(a) *Where an action has been instituted in a court competent under paragraph 1 or 2 of this article or where judgement has been delivered by such a court, no new action may be started between the same parties on the same grounds unless the judgement of the court before which the first action was instituted is not enforceable in the country in which the new proceedings are instituted;*
- (b) *for the purpose of this article the institution of measures with a view to obtaining enforcement of a judgement is not to be considered as the starting of a new action;*
- (c) *for the purpose of this article, the removal of an action to a different court within the same country, or to a court in another country, in accordance with paragraph 2(a) of this article, is not to be considered as the starting of a new action.*
5. *Notwithstanding the provisions of the preceding paragraphs, an agreement made by the parties, after a claim under the contract of carriage by sea has arisen, which designates the place where the claimant may institute an action, is effective*

⁴⁴ Article 22 Arbitration

1. *Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to carriage of goods under this Convention shall be referred to arbitration.*
2. *Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and a bill of lading issued pursuant to the charter-party does not contain a special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier may not invoke such provision as against a holder having acquired the bill of lading in good faith.*
3. *The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:*
 - (a) *a place in a State within whose territory is situated:*
 - (i) *the principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or*
 - (ii) *the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or*
 - (iii) *the port of loading or the port of discharge; or*
 - (b) *any place designated for that purpose in the arbitration clause or agreement.*
4. *The arbitrator or arbitration tribunal shall apply the rules of this Convention.*
5. *The provisions of paragraphs 3 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith is null and void.*
6. *Nothing in this article affects the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage by sea has arisen.*

In both regimes provided for by Arts 21 and 22 a choice is given to the cargo claimant, who is not finally constrained by the terms of the arbitration agreement. Party autonomy is thereby modified.

The national legislation of a number of countries deals with exclusive jurisdiction clauses in bill of lading carriage. An example is the Australian *Carriage of Goods by Sea Act 1991*, s 11⁴⁵ which strikes down clauses (other than Australian arbitration clauses) which preclude or limit the jurisdiction of Australian Courts.

Similar provisions exist in national legislation in New Zealand, South Africa, the Nordic countries and Canada.⁴⁶ These might be said to be a species of “jurisdictional cabotage”, but for the kind of reasons that are entirely understandable, and which were expressed by Justice Stevens in *The ‘Sky Reefer’*. They protect a country’s cargo interests by providing a forum where their complaints can be resolved. It might be said that it is not a hardship on the liner trade involved, which does business carrying goods on a regular basis to a particular country. They also reflect the recognition in the Hamburg Rules of the need to give cargo claimants a choice. Effectively, they entrench the availability of the place of delivery as a place for suit.

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- ⁴⁵ (1) *All parties to:*
- (a) *a sea carriage document relating to the carriage of goods from any place in Australia to any place outside Australia; or*
 - (b) *a non-negotiable document of a kind mentioned in subparagraph 10(1)(b)(iii), relating to such a carriage of goods;*
are taken to have intended to contract according to the laws in force at the place of shipment.
- (2). *An agreement (whether made in Australia or elsewhere) has no effect so far as it purports to:*
- (a) *preclude or limit the effect of subsection (1) in respect of a bill of lading or a document mentioned in that subsection; or*
 - (b) *preclude or limit the jurisdiction of a court of the Commonwealth or of a State or Territory in respect of a bill of lading or a document mentioned in subsection (1); or*
 - (c) *preclude or limit the jurisdiction of a court of the Commonwealth or of a State or Territory in respect of:*
 - (i) *a sea carriage document relating to the carriage of goods from any place outside Australia to any place in Australia; or*
 - (ii) *a non-negotiable document of a kind mentioned in subparagraph 10(1)(b)(iii) relating to such a carriage of goods.*
- (3) *An agreement, or a provision of an agreement, that provides for the resolution of a dispute by arbitration is not made ineffective by subsection (2) (despite the fact that it may preclude or limit the jurisdiction of a court) if, under the agreement or provision, the arbitration must be conducted in Australia.*

⁴⁶ New Zealand; *Maritime Transport Act 1994*, 210(1); South Africa: *Carriage of Goods by Sea Act 1986*, s 3(1); and the Nordic countries: the *Swedish Maritime Code* c 13 ss 60 and 61; and see also the Canadian position under the *Marine Liability Act 2001* c 6 s 46.

Such statutes will not, however, necessarily be recognised in other jurisdictions. Recently, in *OT Africa Line Ltd v Magic Sportswear*⁴⁷ the English Courts deployed the tool of the anti-suit injunction to enforce an English arbitration clause in a bill of lading with an English choice of law clause in circumstances where Canadian legislation gave the claimant a right to sue in Canada. The Australian provision would probably be treated similarly. Provisions like it in other contexts have been ignored by English Courts.⁴⁸

These issues represent important policy questions involving the weighing up of competing interests, including the weight to be given to party autonomy, the particular interests in protecting local cargo claimants and their insurers in countries relying on foreign liner shipping, which might well be undertaken by (legally sanctioned) cartels and the importance of developing local skills in dispute resolution.

The principle of party autonomy is fundamental to this discussion. It is an underlying norm of any *lex mercatoria*. It is reflected in one of the basic obligations on parties to the New York Convention, Article II, which provides for the basic recognition and enforcement of the parties' autonomous bargain. The terms of Article II contain within them the fundamental architectural framework of the New York Convention: party autonomy, arbitrability and court enforcement.⁴⁹

The notion of "capable of settlement by arbitration" or "arbitrability" found in Art II is also found in Art V dealing with recognition and enforcement of an award. Likewise,

⁴⁷ [2005] 1 Lloyd's rep 252; and [2005] 2 Lloyd's Rep 170

⁴⁸ For example *Akai Pty Ltd v People's Insurance* [1998] 1 Lloyd's Rep 90; though importantly of Sheen J in *The 'Al Battani'* [1993] 2 Lloyd's Rep 210 who suggested at (224) that an English Court might recognise the effect of foreign legislation on a contract governed by English law because of comity of nations.

⁴⁹ 1. *Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a **subject matter capable of settlement by arbitration.***

2. *The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.*

3. *The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.*
[emphasis added]

Arts 34 and 36 of the Model Law dealing with setting aside, and recognition and enforcement of, awards pick up this notion. It is a central balancing conception in the Convention's limiting of the reach of party autonomy.

The decision as to what is "capable of settlement by arbitration" or "arbitrable" has been left by both the New York Convention and the Model Law to Contracting States. These words are to be understood in both the New York Convention and the Model Law as dealing with the question whether the dispute is of the type that comes properly within the domain of arbitration (as judged by national law). Article II of the New York Convention is directed to disputes that are capable of settlement by arbitration. If there is an award in respect of a dispute that is not capable of settlement by arbitration the award may be set aside or will not be enforced.⁵⁰

The types of disputes which national laws may see as not arbitrable and which were the subject of discussion leading up to both the Convention and the Model Law are disputes such as those concerning intellectual property, anti-trust and competition disputes, securities transactions and insolvency. This is not the place to discuss the concept in detail.⁵¹ It is sufficient to say two things at this point. First, the common element to the notion of non-arbitrability is that there is a sufficient element of legitimate public interest in these subject matters making the enforceable private resolution of disputes concerning them outside the national court system inappropriate. Secondly, the identification and control of these subjects is the legitimate domain of national legislatures and courts.

Thus, there are within these conventions dealing with arbitration both a recognition of the common good in promoting international arbitration and party autonomy, on the one hand, and a recognition of legitimate national interests, on the other. The former is given effect to by national legislation which provides for a stay of court proceedings commenced in contravention of the arbitration clause and courts of other jurisdictions, in particular the place where it is agreed that the arbitration would take place, issuing

⁵⁰ Article V sub-article 2(a) of the New York Convention and Articles 34(2)(b)(i) and 36(1)(b)(i) of the Model Law.

⁵¹ See generally Redfern, A and Hunter, M *Law and Practice of Commercial Arbitration* (Thomson/Sweet and Maxwell 2004) at 138 *et seq*; Mustill, M and Boyd, S *Commercial Arbitration*

anti-suit injunctions, restraining a party from commencing or continuing with court proceedings in contravention of the arbitration clause.

The legitimacy of particular national policy inhibiting arbitration, is encompassed within the notions of arbitrability and public policy. An example of such national policy in the maritime field is a provision such as s 2C of the Australian *International Arbitration Act 1974* which Act incorporates into Australian domestic law Australia's international obligations under the New York Convention and the Model Law. By s 2C, however, the Act is stated not to affect, amongst other things, s 11 of the *Carriage of Goods by Sea Act 1991* to which reference has been made. So, foreign arbitration clauses in bills of lading are ineffective in Australia to prevent cargo claims being brought in Australia.

The policy questions inherent within these issues are being discussed at an international level at the UNCITRAL Working Group Meetings on Transport Law and the Draft Convention on the carriage of goods [wholly or partly] [by sea], and on Arbitration.⁵²

There are other policy questions for national governments. What priority, if any, in the organisation and development of the national judiciary should be given to developing judicial skill in maritime law? Should this be left to the courts themselves? Should policy be developed to encourage the growth of skilled professional arbitration? Such policies may have their roots in educational reform of the legal profession and judiciary and may extend to encouraging overseas practitioners appearing in local arbitrations (as an advocate or an arbitrator).

These are questions of policy for the legislative and executive branches of government. They should be addressed not only by reference to perceived national needs, but also by reference to the recognition of the importance of international arbitration to international commerce and thus domestic well-being.

2001 Companion at 70-76; Sutton, D St. J and Gill, *J Russell on Arbitration* (Sweet and Maxwell 2003) at 12-15.

Judicial policy

There are also important questions for the judiciary to address. For instance, should, and if so how far, legal doctrine be developed by courts to reflect the advancement of national public policy? We have already seen in the three United States Supreme Court cases how the different strands of national interest (differently perceived) affected the US case law. Of course, if legislation requires that approach it will be obeyed. But what if no such valid legislation exists?

An illustration of the importance of this question can be seen in the questions posed by Justice Stephen in the High Court of Australia in 1978 in *The 'New York Star'*.⁵³ Justice Stephen there asked whether it was in Australia's interests to take a generous approach to enforcing so-called *Himalaya* clauses, giving the benefit of exemptions in the contract of carriage to non-party actors in the carriage activity, such as stevedores – that is, whether it was in Australia's interests to permit carriers to widen the protected circle to all its agents and sub-contractors, when Australia relied on foreign carriers to bring in, and take out, its imports and exports.⁵⁴

⁵² See UNCITRAL website <http://www.uncitral.org> for the papers of Working Group II on Arbitration and Working Group III on Transport.

⁵³ (1978) 139 CLR 231

⁵⁴ 139 CLR at 258-59:

There is a further public policy consideration which at one and the same time bears upon the question of international commercial comity. While it is in the interests of great fleet-owning nations that their ocean carriers, and the servants and independent contractors which they employ, should be as fully protected as possible from liability at the suit of shippers and consignees, the interests of those nations which rely upon those fleets for their import and export trade is to the contrary. It was in response to such national interests that the United States of America and Australia, which both fell into the latter category, enacted the Harter Act of 1893 and our own Sea Carriage of Goods Act 1904, measures which circumscribed the carrier's freedom to contract out of liability. Each was more stringent than were the subsequent Hague Rules. Many nations, particularly developing nations, have come to regard those Rules as unduly favouring carriers at the expense of cargo owners, especially because of the quite restricted duration of the carrier's compulsory period of responsibility which they impose, ending as it does immediately upon discharge. It is not clear to me that Australian courts should regard it as in any way in the public interest that carriers' exemption clauses, effective before loading and after discharge, should be accorded any benevolent interpretation, either so as to benefit carriers or so as to benefit independent contractors by extending the scope of such clauses to include such contractors. If public policy does not dictate such a course, neither do considerations of comity. To read the transactions of the seminars on International Trade organized by the Attorney-General's Department is to appreciate the powerful movement among trading nations in a contrary direction, towards extension of the period during which both the ocean carrier and its land-based agents are to be denied the ability freely to exclude themselves from liability for damage to or loss of cargo. The draft Convention on carriage of goods by sea

In the context of arbitration, this kind of question can also arise for the courts in the choice of an approach to the construction of the arbitration clauses. Should such clauses be interpreted broadly and liberally, thereby increasing the scope of the dispute which may be removed to the chosen (perhaps foreign) arbitral forum? If that chosen foreign arbitral forum is overseas and if one of the contracting parties is local, there may be a temptation upon the local court to allow the local party to litigate before it as the chosen local forum, in preference to the foreign arbitral forum. This temptation will be heightened if there is a local statute relevant to the claim which may not be recognised by the foreign arbitral tribunal giving effect to a relevant choice of law rule governing the arbitration.

There is much to be said for the proposition that the courts should resist both these tendencies and for similar reasons, unless, of course, the contrary is required by local statute. The first tendency, the desire of courts to intrude national or chauvinistic public policy into the maritime law, may reflect a failure to understand the essential character of maritime law. Maritime law is a body of law with its roots in public international law, civil law, international commerce, international agreement and the law of nations. This international foundation of an otherwise municipal law in each nation was clearly expressed by the United States Supreme Court in 1875 in *The 'Lottawanna'* as follows:⁵⁵

...Each state adopts the maritime law, not as a code having any independent or inherent force, proprio vigore, but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it. And without such voluntary adoption it would not be law. And thus it happens, that, from the general practice of commercial nations in making the same general law the basis and groundwork of their respective maritime systems, the great mass of maritime law which is thus received by these nations in common, comes to be the common maritime law of the world.

This account of the maritime law, if correct, plainly shows that in particular matters, especially such as approach a merely municipal character, the received maritime law may differ in different countries without affecting the general integrity of the system as a harmonious whole.

adopted at the ninth session of the United Nations Commission on International Trade Law (UNCITRAL) in 1976 provides evidence of this.

⁵⁵ 88 US 558 (1875) at 573

Across the Atlantic, in 1946, Lord Justice Scott said in the *'Tolten'*⁵⁶:

The language of Lord Watson there echoes many previous judicial opinions that British maritime law derives originally, and continues to get inspiration from the general law of the sea prevailing amongst maritime nations; e.g., of Lord Mansfield who in 1759 said in Luke v. Lyde (1759) 2 Burr. 882, 887 “the maritime” law is not the law of a particular country, but the general “law of nations,” meaning that admiralty judges should still look for inspiration to the parent source.

This recognition of the immanent international character of maritime law (albeit ultimately municipal⁵⁷) is important to remember. It is too often ignored. Naturally, a degree of national diversity is to be expected – it is in the order of things one might say. However, if maritime law disintegrates into a multitude of conflicting commercial laws no one who regularly engages in international commerce will ultimately gain. In the end such fragmentation increases costs of transactions, mistrust and uncertainty, and increase the need for lengthy and costly negotiation of international agreements.

⁵⁶ [1946] P 135 at 155-156. A 19th century Scottish advocate and scholar James Reddie put it as follows in *Researches Historical and Critical in Maritime International Law* vol 1 (Elibron Classics) at pp 18-19 and 19-20:

In considering, in a separate work, the private law of Maritime commerce, which, though common, and very similar among most civilized states, forms a part of the private internal law of each state or jurisprudence, we found that its principal doctrines might be arranged under the following heads. In the first place, property in vessels, as the instruments by which Maritime commerce is carried on; the right and duties of the persons by whom the vessel is put in motion, or navigated; the rights and obligations of the persons by whom the vessel is converted to use, under the contracts of affreightment and charter party; and the rights and obligations arising out of the arrangements by which the Maritime exchange of commodities is effected. In the second place, those contracts and arrangements among individuals, by which Maritime commerce is rendered more safe for the individual, by the diffusion of the risk under the contract of insurance; by which it is enlarged or extended, under the contract or copartnership; and by which it is facilitated, through bills of exchange.

...

In this amicable and pacific intercourse, questions as to property in vessels – disputes between the owner, part owner, masters, and crew, or persons employed in the navigation of the vessel – questions between the owner or master of the vessel, and the charterer or freighter of the vessel, or owner of the cargo shipped for conveyance – the reciprocal rights of the merchants who order or purchase, or who sell, or consign for sale, the goods shipped and conveyed – the reciprocal rights and obligations of copartners, of the insurers and insured, and of the parties to bills of exchange, drawn or granted for the value of the goods conveyed, are all judged of and settled, although between parties who stand in the relation of foreigners to each other, according to very similar principles and rules, by the judicial tribunals of their respective nations. And in such questions of private right, between the individuals of separate independent states, the judgments of the courts of law of civilized states, have, in peace, in general, been satisfactory, notwithstanding national bias; and have not required, or, at least, have not led to the establishment of regular, international courts, for the decision, during peace, of such questions between the members of different nations.

⁵⁷ *The 'Tojo Maru'* [1972] AC 242

The second tendency, that of courts to give in to the temptation to keep part of the case within the chosen local jurisdiction, fails to pay sufficient respect to the importance of the efficient disposition of international commerce. The New York Convention and the Model Law deal with one of the most important aspects of international commerce – the resolution of disputes between commercial parties in an international or multinational context, where those parties, in the formation of their contract or legal relationship, have, by their own bargain, chosen arbitration as their agreed method of dispute resolution. The chosen arbitral method or forum may or may not be the optimally preferred method or forum for each party; but it is the contractually bargained method or forum, often between parties who come from very different legal systems. An ordered efficient dispute resolution mechanism leading to an enforceable award or judgment by the adjudicator, is an essential underpinning of commerce. Disputes arising from commercial bargains are unavoidable. They are part of the activity of commerce itself. Parties therefore often deal with the possibility of their occurrence in advance by the terms of their bargain. Unreliable or otherwise unsatisfactory decision making, or the fear of such, distorts commerce and makes markets less efficient, raising the cost of commerce. Similar effects can occur if parties can be forced to submit to fora of which they may have no or little knowledge, in circumstances where they have agreed to enter the overall bargain on an entirely different basis of anticipated dispute resolution. It may be of no, or little, comfort for such parties to be assured that any particular forum is reliable and otherwise satisfactory (as may be the case). It was not what was agreed. If parties can be forced to submit to fora different to those which they have chosen, a significant unstable variable is introduced into the performance of the international bargain – the uncertainty as to the legal system and the law to govern an international dispute, including doubts about venue and departure from what may be familiar procedures, or at least procedures in which they have sufficient confidence to agree as those to govern the resolution of any dispute. These considerations are especially important in well-understood and stable markets, such as the chartering of working commercial ships as in the present case. It is another illustration of the importance of consistency in the working of international commerce illuminated so clearly by Lord Diplock in *The 'Maratha Envoy'*⁵⁸ in his discussion of the role and place of well-known or usual

⁵⁸ [1978] AC 1 at 8

forms of contract in international commerce and the place of courts in their consistent interpretation. This approach can be seen to be part of the law of international commerce.⁵⁹

The above considerations ground the importance to be given to party autonomy and holding parties to their bargains in international commerce. Yet, balanced against these considerations are the entirely legitimate considerations of nations for their own citizens and their own commerce in areas such as bill of lading carriage especially in liner trade.

Within boundaries that are recognised internationally as reasonable, legislatures may legitimately protect national interests in the way earlier described.

All policy, however, should recognise that commercial law, maritime law and dispute resolution between parties from different countries require an international perspective based on underlying commonality of principle and approach.

International and regional policy

One particular area of policy that may assist countries to develop their skill and expertise in arbitral dispute resolution, is the development of regional or multi-national structures to harmonise the arbitral framework. Commerce is de-localised. Commercial law is becoming de-localised. Arbitration is capable of de-localising the method of resolution. In this context, there is no reason why countries cannot pool resources to create a virtual or synthetic network of arbitration law and structures, of arbitrators and of skilled professionals.

On a regional basis, with uniform rules as to the law of the arbitration, as to rules of procedure, with available transnational principles of contract and contractual interpretation, and with a uniform approach to curial supervision, enforcement and collateral assistance based on international conventions, a regional or multi-national

⁵⁹ *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40; *Threlkeld & Co Inc v Metallgesellschaft Ltd (London)* 923 F 2d 245 (2d Cir 1991); and *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45.

organisation could call upon the combined maritime skill of a region or the group of participating countries – arbitral, judicial, scholarly and professional for the resolution of disputes. Hearings could take place at the most convenient place. Video link facilities could be used. Parties could be given the choice of language and identity of arbitrator. A uniform approach to the *lex arbitri* and law of procedure would enable the development of a truly transnational arbitration structure to deal with maritime disputes in the region. A generous right of appearance could be given to lawyers of the litigants' choice who would not necessarily be admitted in the place where the arbitration takes place.

Whatever skill was possessed in the various countries it could be harnessed or pooled in the formation of such a regional body. Maritime scholars and maritime lawyers, arbitrators and judges could be brought together throughout any given region.

The advantage of such a structure would be the harmonisation of the laws and rules of the arbitration, the harmonisation of the place of courts in support of the arbitration process, the deepening of the available pool of arbitrators for any particular dispute, the strengthening of the reputation of the region or group of countries in the provision of maritime dispute resolution, the removal or amelioration of apparent fragmentation of approach by individual countries, the harmonisation of procedural law and the fostering of the development of a more consistent body of substantive maritime law.

In order to ensure harmony and comity it would be necessary to have a clear regime dealing with the law of the seat of the arbitration⁶⁰ and a clear regime of inter-jurisdictional curial supervision.

The topics of dispute resolution, international commercial arbitration and maritime arbitration throw up important questions for national policy development (legislative, executive and judicial) for all trading countries and countries engaged in maritime affairs. There are few universal answers. Though, perhaps, one theme should be kept close by – the international character of the general maritime law and the danger to it

⁶⁰ Involved in that is the question whether to make it central or peripheral.

of chauvinistic municipal policy, which is not based on considerations reasonably reflected in international norms and expectations.

A coming challenge for all countries is the development of reliable skilled arbitral structures outside the established centres to serve a rapidly developing world commercial community and in which all countries feel they have some part to play.