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# Development and Trends of the Lex Maritime from International Arbitration Jurisprudence

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# Development and Trends of the *Lex Maritima* from International Arbitration Jurisprudence

Russell J. Cortazzo, Jr.\*

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Herman Melville captured the character of the maritime industry in his dusty tome when he described two vessels meeting in the open ocean. “[S]ome merchant ships crossing each other's wake in the mid-Atlantic, will oftentimes pass on without so much as a single word of recognition, mutually cutting each other on the high seas, like a brace of dandies in Broadway; and all the time indulging, perhaps, in finical criticism upon each other's rig.”<sup>1</sup> Long before Melville, and ever since, the maritime industry has been, and remains, remains a paradox of international cooperation and isolation, intense competition and camaraderie. Innovations within the industry are slow to be adopted, but spread rapidly when their commercial benefit is proven. The international maritime arbitration forum is one of those innovations that has taken root and is shifting the balance of maritime power across the globe.

The popularity of international maritime arbitration is indicative of the quiet success of the alternative dispute resolution forum. Three factors are frequently attributed to the growth of the maritime arbitration market; the parties respect the proceeding, the judicial system encourages it, and the vast majority of seafaring nations enforce the awards. We are currently experiencing a golden age for the maritime arbitration market, but along with its rapid growth

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<sup>1</sup> HERMAN MELVILLE, *MOBY DICK* 238, (Harper and Brothers, 1851).

and popularity, unwise legislation may undo all the good. We are at a crossroads of market and government forces, and it is unclear if the market will be allowed to flourish or if competitive governmental forces will consume the goodwill that has been generated over the last fifty years.

### **I. Why is International Maritime Arbitration So Popular?**

Despite lacking the drama of big court battles and political wars, the arbitration forum has quietly developed into a very effective and accepted tool to resolve international commercial disputes. Its advantages over traditional national judicial systems are well known; that it is fast, cheap, flexible, and confidential. Although these are compelling reasons to pursue arbitration, large corporations will not sacrifice speed for injustice; therefore many forums and individual arbitrators make extra efforts to promote their neutrality and skill. Another positive factor is the arbitrator and the forum's traditional independence from the national judicial system, but this last factor is subject to debate because each country has ultimate control over the awards created in their territory. Countries of the leading arbitration forums typically temper their judicial system's oversight because hosting arbitration tribunals is itself a business and indirectly leads to

influencing international contractual legal doctrines, but the temptation to exert more judicial or political pressure on the arbitrators may prove to be too tempting for some.

Ancient Roman law provided the roots of the arbitration process by allowing the parties of a contractual dispute to select the judge.<sup>2</sup> Although the substantive law was a fuzzy mixture of the contract, local traditions, and imperial decrees, the parties, backed by imperial force, were bound by the judge's decision.<sup>3</sup> The modern arbitration process, likewise, has its substantive roots in contract law since it generally derives its authority to hear a case from the arbitration agreement and the substantive laws of the land, while its procedure comes from a mix of contractual or post-dispute agreements and host tribunal rules. In any case, the parties have more freedom to influence the process and venue than they would in traditional litigation. This is an enormous change in perspective from the party participating in a federal trial where he must request every motion from a judge who may not be knowledgeable in the challenges of the commercial maritime industry or even care what the parties are seeking beyond a dollar figure.

The international maritime arbitration process is a unique subset of international arbitration with some very unique aspects. It is distinctly distinguished from general arbitration

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<sup>2</sup> PETER STEIN, *ROMAN LAW IN EUROPEAN HISTORY* 4, Cambridge University Press 2005) (1999).

<sup>3</sup> *Id* at 5.

imposed on individual natural persons and it does not generally decide cases that require protection of due process or personal rights.<sup>4</sup> The bulk of maritime arbitration cases are high dollar contractual disputes between shipping companies and experienced traders who are highly integrated into the maritime industry. The very nature of long-range transportation requires exceptional cooperation and coordination with foreign parties. Shipping companies are driven by the unyielding rule to keep the ships sailing or they don't make money. So when the inevitable disputes arise, they must be handled quickly and efficiently while maintaining the commercial relationship between the parties in order to perform future business together. For these experienced parties, the speed and confidentiality of arbitration significantly outweighs the lack of formal procedural protection that a national judicial system ensures.

The nature of modern maritime disputes is one of dynamic changes in legal status.

Consider the arbitration of *M/V PUNICA & Ocean Wide Shipping Corp. v. Canadian Forest Navigation & and Duferco S A Lugano* in January, 1995.<sup>5</sup> A vessel was loaded with steel slabs in Taranto, Italy by Duferco, destined for Baltimore. While off the coast of Tunisia, the ship encountered heavy seas and listed 12° to port. The cargo was damaged when it shifted its

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<sup>4</sup> The Court in *Gilmer v. Interstate* summarily stripped all constitutional rights from an individual when a contract of adhesion mandated arbitration on a statutory offense. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

<sup>5</sup> SMA Award Service, Ref. 3513.

position and thus prevented the ship from righting itself. The crew used ballast to correct the list to 5°, but the ship pulled into port for repairs and to restow the cargo. The case was arbitrated in New York and an award of \$435,047 plus \$150,000 in attorney's fees and costs was entered for the ship owner, Ocean Wide, and against Duferco. The arbitration centered on the duty of the ship's Captain versus the negligence of Duferco who stowed the cargo. The panel of New York arbitrators ultimately, and simply, relied on *Nichimen v. The Farland*, which held that the charterer is liable for the improper stowage of cargo.<sup>6</sup> If this case had gone to federal court, it may have been mired in issues of jurisdiction and choice of law for years before being heard on the merits. By going to arbitration in New York, as per the contract, these issues were avoided and the panel was able to focus on the facts of the case. Duferco did appeal the award in federal court and it was reviewed by the district court in New York who affirmed the result using the analysis of the Second Circuit.<sup>7</sup>

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<sup>6</sup> *Nichimen v. The Farland*, 462 F. 2nd 319 (2nd Cir. 1972).

<sup>7</sup> *Infra see* note 8. *Duferco v. Ocean Wide Shipping Corp.*, 210 F.Supp.2d 256, 262 (S.D. N.Y. 2000).

## A. Status of Arbitration Awards in Federal Court

An attractive benefit of arbitration in commercial cases is the finality of awards.

Although many awards are appealed, few meet the high standard required to vacate. The U.S. Second Circuit, home of American maritime arbitration and the district courts of New York, affirmed the test to review arbitration awards in *Halligan v. Piper Jaffray, Inc.*<sup>8</sup> The court held that an award may be vacated if made in “manifest disregard of the law.”<sup>9</sup> “Manifest disregard” is a higher standard than error or misunderstanding, and to make this determination “a court must find both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.”<sup>10</sup> Other implications are that the courts have limited powers of review, that even district courts will not reanalyze facts of the case that the arbitrator has already heard.

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<sup>8</sup> *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 202 (2nd Cir.1998) (held the award should be vacated when the arbitrator decides a case in manifest disregard for the law) citing *Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Int'l, Ltd.*, 888 F.2d 260, 265 (2nd Cir.1989) and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2nd Cir.1986)

<sup>9</sup> *Halligan*, 148 F.3d 197, 202 (2nd Cir. 1998) citing *Dirussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 821 (2nd Cir. 1997)

<sup>10</sup> *Halligan*, 148 F.3d 197, 202 (2nd Cir. 1998).

It would be unreasonable to renegotiate contracts with every stakeholder each time the status of men or property changes. In a traditional judicial proceeding, a clearly negligent party may attempt to delay a judgment against him by challenging choice of law, venue, and jurisdiction on any number of issues, but shipping companies need to resolve their disputes quickly and keep their ships sailing. The threat or chance of placing a ship under arrest while a trial proceeds in a foreign port means lost revenue and mounting expenses. The flexible nature of arbitration accomplishes the needs of the ship owners and the other charterers who rely on the ship's schedule. Most U.S. maritime cases go to an overburdened federal court, although if a state court hears a maritime case they must apply federal law, a reversal of the *Erie* doctrine.<sup>11</sup>

In the last two decades, the federal caseload has consistently risen with no indication that it will reverse course.<sup>12</sup> Thus, it is not surprising that the federal courts encourage arbitration over litigation.

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<sup>11</sup> *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), (A watershed decision where the Supreme Court held that federal courts could not create general federal common law when hearing state law claims under diversity jurisdiction, but rather they must use existing state statutory and common law).

<sup>12</sup> STEPHEN C. YEAZELL, *CIVIL PROCEDURE* 261 (Aspen Publishers, 6<sup>th</sup> ed., 2004) (civil filings in federal court rose 24.2% between 1985 and 2000).

## **B. The New York Convention Makes International Arbitration a Viable Alternative**

What makes international arbitration a viable option for the maritime industry is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958,<sup>13</sup> commonly referred to as the New York Convention. The New York Convention has been a very successful agreement, and it is the single most significant reason for the proliferation and success of international maritime arbitrations. Its simple premise is that each signatory nation will enforce the arbitral award made in another signatory nation. Its signatories include 141 of the 192 UN member states,<sup>14</sup> while the remaining non-members include only small, developing or politically isolated nations such as Libya, North Korea and Yemen.<sup>15</sup> The convention has survived in its basic structure, despite the changes in commercial technology and shift in

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<sup>13</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997.[hereinafter the New York Convention]. The New York Convention replaced the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927. *Id.* at art VII. The most significant change from the Geneva Convention was that it limited reciprocity to signatory states, whereas the New York Convention includes a ‘reciprocity reservation’ that allows signatory nations to voluntarily declare that they will enforce awards from non-signatory states. Jian Zhou, *Judicial Intervention in International Arbitration: A Comparative Study of the Scope of the New York Convention in U.S. and Chinese Courts*, 15 Pac. Rim L. & Pol’y J. 403, 425-26 (2006).

<sup>14</sup> United Nations Commission on International Trade Law (UNCITRAL), “Status 1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards,” available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html), last visited on Oct 24, 2007.

<sup>15</sup> Although the New York Convention is the most popular reciprocal enforcement treaty, there are other international arbitration agreements such as European Convention on the International Recognition and Enforcement of Arbitral Awards in Commercial Matters of April 21st 1961 and the Inter-American Convention on International Commercial Arbitration (O.A.S.T.S.) No. 42, 14 I.L.M. 336 (1975). For example, several non-New York Convention countries have signed the O.A.S.T.S. such as Brazil, El Salvador, Honduras, and Paraguay, but it would be hard to predict the enforcement outcome of an award between a New York signatory and a O.A.S.T.S. signatory. *Id.*

geographic focus of maritime transportation to Southeast Asia. To accommodate technological and economic changes since 1958, recent signatories have altered the scope and interpretation of some of its provisions, but have retained as its foundation the encouragement and enforcement of international arbitration in the furtherance of international commerce.

The first seven articles of the convention are substantive with the last nine articles dealing with a nation's ratification and internal U.N. administrative procedures. Since the Convention does not apply to domestic arbitration awards, Article I defines the applicability of enforceable foreign and non-domestic arbitral awards. A foreign award is one that is "made in the territory of a State other than the State where recognition and enforcement of such awards are sought..."<sup>16</sup> In other words, the Convention applies to awards made by a tribunal in state 'A' and enforcement is sought in state 'B'.

The applicability of non-domestic awards is more troublesome. The Convention states that it will also apply to "arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."<sup>17</sup> Therefore, purely domestic awards made within a state, between its own citizens, not involving any foreign factors and enforced in the same

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<sup>16</sup> New York Convention art I.

<sup>17</sup> *Id.*

nation are exempt and local or national laws apply. However, there are cases where an award is made in state 'A' and enforcement is sought in state 'A' still comes under the New York Convention because the parties are not citizens or foreign factors are involved. Some countries have specific rules to identify the distinction between domestic and non-domestic awards and these can have significant consequences on a party.<sup>18</sup> Since domestic awards involve more judicial and governmental oversight they are less attractive to business, and companies involved in those countries need to be aware of those provisions before they sign a contract that may subject them to a domestic forum.

Although a participating member of the 1958 U.N. conference, the United States did not ratify the convention until 1970 because of concerns over the conflict between the convention and the various states' arbitration laws.<sup>19</sup> As a condition of ratification,<sup>20</sup> the Senate added Chapter 2 of the Federal Arbitration Act (FAA), which includes 9 U.S.C. §§ 201-208, detailing

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<sup>18</sup> The dual criteria represent a compromise between common law countries that favored a territory criterion and civil law countries that favored a domestic law criterion. Civil law countries objected to the territory-only criterion because under civil law citizenship, subject, rules, and other foreign factors could make a seemingly foreign award domestic, or a seemingly domestic award foreign. The civil law countries eventually accepted the 'territory' and 'non-domestic' criteria as a compromise that, in practice, allows civil law countries to apply the Convention to awards that would normally fall under their domestic law. *Zhou*, 15 Pac. Rim L. & Pol'y J. at 423. Under the non-domestic criteria, "a locally entered award is considered non-domestic if, as a result of the parties' choice of law, it is governed by the arbitration law of another country." *Id.* at 427.

<sup>19</sup> *Zhou*, 15 Pac. Rim L. & Pol'y J. at 419.

<sup>20</sup> *Id.* at 420.

when U.S. courts will enforce the Convention.<sup>21</sup> The Convention will apply when an arbitral award arising out of commercial relationship between U.S. citizens “involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.”<sup>22</sup>

### **1. Case Law Benefits the U.S. Arbitration Business**

A significant benefit of the New York Convention is that it relieves the increasing burden on the federal courts of volumes of commercial claims and complex questions of jurisdiction, with the bulk of arbitral awards being adjudicated quietly and quickly. Although awards are frequently challenged in the federal courts, they are rarely vacated. But there are several distinct situations that threaten the permanence of awards; where both parties are aliens, where both parties are U.S. citizens with foreign factors, and cases where one party is an alien with foreign factors.

An obvious point of confusion in the Convention is the distinction between foreign and domestic awards. The non-domestic term was a compromise between the common law and civil

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<sup>21</sup> Federal Arbitration Act , 9 U.S.C. § 201 (et. al.) (1970).

<sup>22</sup> 9 U.S.C. § 202.

law countries, but it only added vagueness within a country.<sup>23</sup> The U.S. 2nd Circuit in *Bergesen v. Joseph Muller Corp.* was the first case to distinguish whether or not an arbitral award was non-domestic such that it can be enforced in U.S. courts under the New York Convention.<sup>24</sup> Muller argued that the arbitration award was improperly granted in New York because the award failed both the foreign and non-domestic tests.<sup>25</sup> The 2nd Circuit interpreted the Convention Act broadly and held that “awards ‘not considered as domestic’ denotes awards which are subject to the Convention not because [they are] made abroad, but because [they are] made within the legal framework of another country.”<sup>26</sup> In the well known case of *Saadeh v. Farouki*,<sup>27</sup> the D.C. Circuit interpreted 28 USC § 1332 by holding that U.S. courts do not have jurisdiction over two aliens. *Bergesen* managed to distinguish itself from *Saadeh* and allowed U.S. courts to enforce arbitration awards made in the U.S. between two foreign parties.

[*Bergesen*] “makes the United States a more hospitable forum for foreign parties intending to arbitrate within the United States. Applying the Convention to an award between two foreign parties grants federal jurisdiction to U.S. courts in

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<sup>23</sup> *Supra see* note 18.

<sup>24</sup> *Bergesen v. Joseph Muller Corp*, 710 F.2d 928 (2nd Cir. 1983) (held that arbitration in New York is valid under U.S. law when both parties are aliens). The parties were a Norwegian ship owner and a Swiss company involved in a contract dispute with an arbitration clause that set the forum in New York. *Id.*

<sup>25</sup> *Id.* at 932.

<sup>26</sup> *Id.*

<sup>27</sup> *Saadeh v. Farouki*, F.2d 52 (D.C. Cir. 1997).

enforcing the award which they would not otherwise have due to a lack of the required diversity elements.”<sup>28</sup>

The implications of the *Bergesen* decision are huge for U.S. maritime arbitrators. Had the 2nd Circuit determined that U.S. courts had no right to enforce awards between aliens, the U.S. maritime arbitration market would significantly evaporate.

Likewise, an award between parties who are both U.S. citizens shall be considered domestic *unless* the dispute “involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.”<sup>29</sup>

The 7th Circuit in *Lander Co. v. MMP Investments* addressed this situation by interpreting FAA § 202 literally, finding that the Convention applies to awards that fall within the inclusion of commercial relationships and are not excluded by those made between two U.S. parties with no foreign connection.<sup>30</sup> The court acknowledged their holding conformed with the reasoning of *Bergesen* although the facts were reversed and that Congress may have been contemplating

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<sup>28</sup> *Zhou*, 15 Pac. Rim L. & Pol'y J. at 433.

<sup>29</sup> *Bergesen*, 710 F.2d at 933.

<sup>30</sup> *Lander Co. v. MMP Investments*, 107 F.3d 476, 482 (7th Cir. 1997).

future arbitration business by broadly authorizing the Convention's reach.<sup>31</sup> This discovery makes it foreseeable that the countries of leading arbitration forums will also enact the Convention in a way to obtain a home field advantage.

Finally, the 2nd Circuit held in *Jones v. Sea Tow Services* that in disputes between two U.S. citizens with no foreign factors, an arbitration clause requiring a foreign forum would be invalid.<sup>32</sup> Jones, an American whose boat went aground in U.S. waters, contracted with Sea Tow Services, another American party, for salvage.<sup>33</sup> The Lloyd's Open Form contract had an arbitration clause designating London as the forum and England as the choice of law.<sup>34</sup> The 2nd Circuit reversed the District Court and held that the lack of a *reasonable* foreign factor made the arbitration clause invalid, and denied application of the New York Convention.<sup>35</sup> This holding, although limited to where both parties are American, has notably drawn negative reciprocity from China in their own non-domestic evaluation.<sup>36</sup>

The United States and the state of New York in particular, will still benefit from

*Bergesen* where the parties are foreign or foreign factors are involved. However, confusion and

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<sup>31</sup> *Id.* at 482.

<sup>32</sup> *Jones v. Sea Tow Services*, 30 F.3d 360 (2nd Cir. 1994).

<sup>33</sup> *Id.* at 361.

<sup>34</sup> *Id.* at 362.

<sup>35</sup> *Id.* at 366. As in *Lander*, the court relied on the wording of 9 U.S.C. § 202 which required that when both parties are U.S. citizens that a reasonable foreign factor be found to designate the agreement as non-domestic. *Id.*

<sup>36</sup> *Infra see* section III A.

controversy will inevitably result in cases similar to *Bergesen* when the parties initially agree to arbitrate in New York and later challenge the validity of the contract based on a *Jones* argument and reciprocity.

## 2. Protection to Nation Signatories

As a voluntary U.N. treaty, the Convention provides some protection and flexibility to potential nation signatories. A country may enable the “reciprocity reservation,” whereby the country does not need to enforce an arbitral award from a country that does not reciprocate, whether or not the other country is a signatory. Many countries also limit their acceptance of the Convention as subordinate to their own law, or to their own statutory or constitutional interpretation.<sup>37</sup>

A signatory nation’s judiciary typically has limited ability to challenge enforcement of an award made in another country, and these bases include: incapacity, invalidity under governing law, party not given proper notice, awards or tribunal not within terms of arbitration agreement, award not yet binding on party, arbitration not appropriate for subject matter, and finally on the

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<sup>37</sup> *Supra see* note 13.

limited basis of public policy.<sup>38</sup> In the U.S., the 2<sup>nd</sup> Circuit set a high standard with the “manifest disregard of the law” test.<sup>39</sup> The reason to limit the host nation judiciary is to provide some finality in the award for the parties, yet still allow the host nation to vacate an award if it is clearly unjust or unfair under their laws.

Procedurally, the U.N. has also established a set of rules standardizing international arbitration called the UNCITRAL Arbitration Rules<sup>40</sup> (adopted by the General Assembly on December 15, 1976) and the UNCITRAL Model Law on International Commercial Arbitration<sup>41</sup> (adopted by the United Nations Commission on International Trade Law on 21 June 1985), but the parties retain a degree of freedom to mutually alter the procedural rules, such as to ensure confidentiality, speed the process, ease discovery, or alter the choice of law. In fact, international tribunals typically promote their willingness to negotiate the rules in order to attract

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<sup>38</sup> New York Convention, Art 5, § 1-2. Obviously the “public policy” exception is one that can be invoked to deny enforcement for almost any reason, so it must be used sparingly. Two potential definitions limit the term to “the violation of a state’s “international public policy or order public international.” *Zhou*, 15 Pac. Rim L. & Pol’y J. at 448 citing French NCPC Articles 1498 and 1502, and where “enforcement would violate the forum state’s most basic notions of morality and justice.” *Id.* citing *Parsons & Whittemore Overseas Co. v. Société Générale de l’Industrie du Papier*, 508 F.2d 969, 974 (2nd Cir. 1974).

<sup>39</sup> *Supra see* section IA.

<sup>40</sup> United Nations Commission on International Trade Law (UNCITRAL), UNCITRAL Arbitration Rules, General Assembly Resolution 31/98 (1976), available at <http://www.uncitral.org/uncitral/index.html> search for “arbitration rules.”

<sup>41</sup> United Nations Commission on International Trade Law (UNCITRAL), UNCITRAL Model Law on International Commercial Arbitration (1985), available at <http://www.uncitral.org/uncitral/index.html> search for “Model Law on International Commercial Arbitration.”

business. While some regional maritime arbitration associations accept these model rules as their own, the large associations typically publish their own customized rules.<sup>42</sup>

## **II. Maritime Arbitration as a Global Business**

### **A. The Boys Club**

The maritime industry is, by tradition and intent, distinctly isolated from all other commerce. When a vessel leaves the pier and enters international waters, it is subject to a mixture of laws, treaties, U.N. codes, and international law principles, but most significantly, it is subject to forces of nature and the unquestioned authority of the Master or Captain. The industry is also isolated by gender.<sup>43</sup> Until recently, women were not allowed to serve in the U.S. Navy aboard combatant vessels, and today they are still prohibited from submarine service.<sup>44</sup> These natural, cultural and industrial factors discourage gender integration at higher levels of the industry and limit the influence of outside interests.

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<sup>42</sup> *Infra see* section IIC.

<sup>43</sup> *Supra see* note 1. No women served aboard the Pequod, Herman Melville's whaling ship.

<sup>44</sup> Sheree Callahan, Military Sealift Command, *Navy Celebrates 25 Years of Women at Sea*, Dec 2003, available at <http://www.msc.navy.mil/sealift/2003/December/women.htm>.

The concentration of maritime operations in a very small number of coastal areas also leads to a similar concentration of maritime jurisprudence. Therefore, the knowledge of maritime operations and law are contained in a small number of people within a limited geographic area. The officers of the ships, who subsequently become officers in shipping companies, come from a small number of dedicated Maritime Academies, with the companies endorsing graduates of specific schools. This fraternal community breeds an aversion of outsiders who attempt to direct their operations, such as judges and arbitrators who have no maritime credentials. “[A] spokesman from the powerful London Maritime Arbitration Association confirmed, with a certain degree of sarcasm, that arbitrators must be specialists on maritime matters and not specialists of arbitration law! He added that the world of shipping is a club and that very few arbitrators are lawyers.”<sup>45</sup> They justify this belief by asserting that maritime arbitration is distinct from international arbitration and that the disputes revolve around “factual questions rather than legal questions.”<sup>46</sup> The common request for “commercial men” in model contracts as the arbitrator demonstrates the industry desire for a person with a business background, and with the skill and knowledge of the shipping industry being more highly prized

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<sup>45</sup> Fabrizio Marrella, *Unity and Diversity in International Arbitration: The Case of Maritime Arbitration*, 20 Am. U. Int'l L. Rev. 1055, 1086 (2005).

<sup>46</sup> *Id.* at 1087.

than legal skills. As an example, China is relatively new to the international arbitration arena and maintains two international arbitration bodies that meet international standards, one for general commerce (CIETAC) and one for strictly maritime related commerce (CMAC).<sup>47</sup>

Although shipping executives desire a maritime distinction be maintained in the international arbitration process, they also admit that the current treaties enforcing foreign arbitral awards and the preferred practice of ad hoc tribunals is sufficient for the industry.<sup>48</sup>

By now, it comes as no surprise that it is also a traditionally male dominated industry and its isolation has caused gender integration to advance at a very slow pace. The U.S. Maritime Administration (MARAD) recently held their first conference dedicated to women in the industry,<sup>49</sup> but the most convincing evidence of the industry's desire for gender isolation is evident in the preference for male arbitrators who predominantly come from the commercial ranks of the shipping industry. Whether due to lack of female interest or conscious partiality for male maritime arbitrators, few organizations manage to operate with such a gender discrepancy.

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<sup>47</sup> Christopher Kidd, JSE Bulletin, No. 41, *Enforcement of International Arbitration Awards in Hong Kong*, 32 (September 2000).

<sup>48</sup> The GMAA only conducts ad hoc tribunals. German Maritime Arbitration Association available at [http://www.gmaa.de/englisch/ge\\_gmaa.htm](http://www.gmaa.de/englisch/ge_gmaa.htm), last visited Oct 26, 2007.

<sup>49</sup> Maritime Administration Office of Congressional and Public Affairs, *WOW! The First "Women on the Water" Conference a Success* (October 23, 2007).

A survey of the arbitrator profiles of several leading maritime arbitration associations reveals the following:

Table 1

<u>Association</u>	<u>Male</u>	<u>Female</u>	<u>(Ratio)</u>	<u>Avg. Age</u>	<u>Rules</u>
SMA (New York) <sup>50</sup>	74	3	(96% / 4%)	68	Custom
LMAA (London) <sup>51</sup>	33	0	(100% / 0%)	65	Custom
GMAA (Germany) <sup>52</sup>	117	5	(96% / 4%)	54	Custom
SCMA (Singapore) <sup>53</sup>	44	0	(100% / 0%)	59	UNCRITAL
TOMAC (Japan) <sup>54</sup>	n/a	n/a		62	Custom
CAMP (France) <sup>55</sup>	n/a	n/a		n/a	Custom
MAC (Moscow) <sup>56</sup>	n/a	n/a		n/a	unk

<sup>50</sup> Society of Maritime Arbitrators (New York), available at <http://www.smany.org/sma/memberRoster.html>, last visited on Oct 25, 2007.

<sup>51</sup> London Maritime Arbitrators Association, available at <http://www.lmaa.org.uk/members.asp>, last visited on Oct 25, 2007. 13 members did not disclose their ages.

<sup>52</sup> German Maritime Arbitration Association, available at [http://www.gmaa.de/englisch/ge\\_gmaa.htm](http://www.gmaa.de/englisch/ge_gmaa.htm), last visited Oct 26, 2007. Only 36 of the 122 members disclosed their profiles.

<sup>53</sup> Singapore Chamber of Maritime Arbitrators, available at <http://www.scma.org.sg/pan/pan42.asp>, last visited on Oct 25, 2007.

<sup>54</sup> Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange, Inc., Details of the Arbitrator, available at [http://www.jseinc.org/search/meibo\\_result.php](http://www.jseinc.org/search/meibo_result.php), last visited Oct 26, 2007. List a total of 205 arbitrators from industries including shipping companies, shippers and financing companies, shipyards and steel mills, marine underwriters and P&I clubs, brokers and agents, and professors and lawyers. Gender of arbitrators is not disclosed. *Id.*

<sup>55</sup> Chambre Arbitrale Maritime de Paris does not disclose the identity of its arbitrators, available at [http://www.arbitrage-maritime.org/us/1\\_administration.php?page=arbitres](http://www.arbitrage-maritime.org/us/1_administration.php?page=arbitres) last visited at Oct 26, 2007.

CMAC (China) <sup>57</sup>	170	13	(93% / 7%)	57	Custom
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A comparison to other notable non-maritime organizations reveals the following:

GAMA (U.S.) <sup>58</sup>	36	8	(82% / 18%)	n/a	
U.S. Supreme Court <sup>59</sup>	7	2	(78% / 22%)	68	

This is not meant to criticize the shipping companies nor the arbitration industry. It is only meant to highlight the industry's desire for independence. Other professional communities, most notably the medical and legal fields, also self-regulate and prefer those in an adjudicatory or qualifying position be an experienced and ranking member of their community. The question here is, can these shipping businessmen effectively solve fundamentally legal disputes without interfering with international commerce and the national judicial systems.

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<sup>56</sup> The Maritime Arbitration Commission of Moscow does not disclose the identity of its arbitrators.

<sup>57</sup> China Maritime Arbitration Commission, Arbitrators, available at <http://www.cmac-sh.org/en/arbitrators.asp>, last visited Nov 8, 2007.

<sup>58</sup> Global Arbitration Mediation Association, available at <http://www.gama.com/>, last visited 26 Oct, 2007. I reviewed only a sample of 50 arbitrators in all fields. The gender of 6 of the 50 could not be determined from their profile.

<sup>59</sup> United States Supreme Court, available at <http://www.supremecourtus.gov/about/biographiescurrent.pdf>, last visited Oct 25, 2007.

## **B. International Maritime Arbitration Associations**

International maritime arbitration is separate and distinct from standard international commercial arbitration. Among lawyers practicing within national law, admiralty is an accepted specialty just as criminal defense, employment law, and tax law. The difference in arbitration is that the parties expect the arbitrators to be experts not only in the law of admiralty but especially in the practice of maritime operations. The maritime industry uses a language that is not only unique to maritime operations, but is also unique from any other trade. While issues of contract make up the bulk of maritime arbitration claims, fluency in the dialect of the sea is required to apply the facts to the law.

A market for tribunal venue has also grown along with the maritime arbitration process. Several leading maritime countries are home to arbitration associations who publish their procedural rules and actively promote their country as the best forum for a party's alternative dispute resolution. Unlike the traditional judicial proceeding where the parties must request an audience with a judge, the arbitration proceeding is a business trying to attract clients. To do this, they make the rules more favorable to foreign parties, regarding issues such as choice of

law, procedure, confidentiality, limits on arbitrators, qualifications of arbitrators, and the method of selecting arbitrators.

It is nearly globally recognized that arbitration is not acceptable for family law and criminal matters, but in the commercial realm, it is not only adequate, but it is ideal in many circumstances. Under the New York Convention, a state retains the limited right to refuse enforcement an award based on public policy.<sup>60</sup> This may be a fair right to protect a country's sovereignty, but the country's government is also aware that abuse of this right will result in fewer clients choosing their forum. Thus, the market will drive disputes to be resolved where the parties can expect fair and enforceable agreements. This may be an alien concept to the judiciary, but it is standard operating procedures for an elected legislative official.

The principle, non-governmental or quasi-governmental maritime arbitration associations that promote world-wide service include those from Table 1, but there are many more regional associations who address smaller cases where they have geographic ties and expertise. The regional groups generally adopt the U.N. model rules whereas the larger associations frequently

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<sup>60</sup> *Supra see* note 38.

create their own rules.<sup>61</sup> It probably doesn't come as a surprise that the associations from New York and London lead the market since both cities have strong maritime traditions. Both cities are also leading financial capitals of the world. All of the major maritime arbitration associations share many similarities, but it is the differences that demonstrate their appropriateness to a dispute.

- The French CAMP claims to apply the “lex mercatoria,” mutually accepted substantive law, and French procedural law.<sup>62</sup> The CAMP also allows a “second degree examination” to ensure objective justice.<sup>63</sup> They publicly admit they are not professional arbitrators, but state that they are professionals from the international maritime industry; including industry executives, lawyers, and technicians.<sup>64</sup>
- The German GMAA is trying to exploit a perceived weakness with the old guard associations such as the SMA and LMAA. “In 1983 members of the shipping trade and lawyers specialized in maritime law from Hamburg and Bremen set up GMAA. They

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<sup>61</sup> United Nations Commission on International Trade Law (UNCITRAL), UNCITRAL Arbitration Rules, General Assembly Resolution 31/98 (1976), available at <http://www.uncitral.org/uncitral/index.html> search for “arbitration rules.”

<sup>62</sup> Interestingly, the CAMP does not claim to apply the *lex maritime*.

<sup>63</sup> Chambre Arbitrale Maritime de Paris, Arbitration Rules & Annexe n°1, Article 15, available at [http://www.arbitrage-maritime.org/us/1\\_administration.php?page=arbitres](http://www.arbitrage-maritime.org/us/1_administration.php?page=arbitres) last visited at Oct 26, 2007.

<sup>64</sup> *Supra see* note 55.

were motivated by the then strong criticism of the effectiveness and the costs of arbitration proceedings in London.”<sup>65</sup>

- In precise Japanese fashion, the TOMAC claims expertise in 16 maritime arbitration specialties: voyage charter, time charter, bareboat charter, bills of lading, operation contract, ship sale, ship building and repair contract, salvage contract, towage contract, insurance contract, combined transport contract, manning contract, casualty (collision), ship management, engine, and ship finance.<sup>66</sup>

Notably absent from the list of large associations is one from Greece. With an ancient tradition in law and the largest current ownership of commercial vessels in the world, Greece only has a regional maritime arbitration association, the Piraeus Association for Maritime Arbitration, and it has adopted the U.N. model rules rather than a custom set.<sup>67</sup> Flag of registry also lacks any correlation to a nation’s influence in arbitration forums or its arbitration associations.<sup>68</sup>

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<sup>65</sup> *Supra see* note 52.

<sup>66</sup> *Supra see* note 54.

<sup>67</sup> Greek ownership by tonnage exceeds Japan by 14%, China by 95%, U.S. by 332%, and U.K. by 381%. MARAD, Top 25 World Merchant Fleet by Country of Owner and Type, 2006, citing Clarkson Research Studies, Vessel Registers, London.

<sup>68</sup> Panamanian vessel flagging leads Liberia by 120%, Greece by 302%, China by 666%, U.S. by 1,703%, and U.K. by 2,222%. MARAD, World Oceangoing Merchant Fleet, by Top 25 Flag and Type, 2006, citing Clarkson Research Studies, Vessel Registers, London.

### C. Association Rules

While traditional disputes over jurisdiction may be solved in a judicial setting, it is the rules of that association and the underlying laws of the country that still encourage forum shopping. Examination of the various associations rules is necessary for a party to determine the most advantageous forum. The rules of the various associations are very similar, but the subtle details may have significant consequences. The rules share commonalities for selection of arbitrators, challenges, procedures, and rules of evidence. They typically follow the host country laws or the laws of the country specified in the agreement, but default to traditions of the trade or the laws of other highly developed jurisprudence when the choice of law is indeterminable.<sup>69</sup>

The SMA Rules rely upon the Federal Arbitration Act §§ 4-5 and the U.S. District Courts to resolve disputes regarding disqualification of arbitrators and challenges to the award,<sup>70</sup> whereas the UNCITRAL Rules states that the UNCITRAL Secretariat or the Appointing Authority will decide these matters.<sup>71</sup> The SMA Rules require New York as the arbitral venue

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<sup>69</sup> In a TOMAC case between Korean and Japanese parties, the tribunal and parties admitted Japanese law applied, but as is TOMAC practice, referenced U.S. and U.K. law because it was more advanced in this case. JSE Bulletin, No. 41, *Arbitral Award in re Disputes Over the Time Charter for the M/V "GII"*, 7-8, (September 2000).

<sup>70</sup> SMA Rules §§ 9, 10, 35.

<sup>71</sup> UNCITRAL Rules art 12.

and U.S. law to be applied,<sup>72</sup> and in the absence of prior agreement the LMAA stipulates London as the venue and applies English law.<sup>73</sup> By contrast, the UNCITRAL Rules, being more generic, must have more flexible choice of law provisions. Article 33 of the UNCITRAL Rules states that the first law applied will be that agreed upon by the parties.<sup>74</sup> If there is no agreement, the tribunal will use their discretion to determine the appropriate conflict of law rules.<sup>75</sup> Finally, if the parties give express authority, the tribunal may use theories of *amiable compositeur*<sup>76</sup> or *ex aequo et bono*.<sup>77</sup> The GMAA, in the absence of prior agreement will apply German law, current trade habits, and tradition, and then decide in equity only.<sup>78</sup> Finally, with the most formal sounding rules, the French CAMP applies French law, in particular the New Code of Civil

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<sup>72</sup> SMA Rules § 7.

<sup>73</sup> LMAA Terms, § 6(a), 2007.

<sup>74</sup> UNCITRAL Rules art 33.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* “Clauses in arbitration agreements allowing the arbitrators to act as “*amiables compositeurs*”, permit the arbitrators to decide the dispute according to the legal principles they believe to be just, without being limited to any particular national law. The resulting arbitral awards are frequently based on equity or on the *lex mercatoria*. The arbitrators are authorized, as “*amiables compositeurs*”, to disregard legal technicalities and strict constructions which they would be required to apply in their decisions if the arbitration agreement contained no “*amiable compositeur*” clause.” Prof. William Tetley, McGill University Law Faculty, Montreal, Canada available at <http://www.mcgill.ca/maritimelaw/glossaries/conflictlaws/>.

<sup>77</sup> *Id.* “The concept, *ex aequo et bono*, is often negatively stereotyped, misunderstood, or both. It is supposed that an adjudicator, in deciding according to that which is “fair” and “good” acts “outside of the law” or more pejoratively, “acts notwithstanding the law.” It is in part for these reasons that both public and private parties to international agreements often avoid resorting to *ex aequo et bono* in resolving their differences.” Leon Trakman, *Ex Aequo Et Bono: De-Mystifying An Ancient Concept 1*, Chicago Journal of International Law (Winter, 2008) (forthcoming). “Despite its influence, however, there is limited evidence of adjudication that relies extensively on the UNCITRAL model of *ex aequo et bono* decision-making.” *Id.* at § II ii.

<sup>78</sup> GMAA Rules § 12 Applicable Law, Jan 2007.

Procedure, as well as custom and trade practice.<sup>79</sup> The CAMP also allows for an in-house, second-degree examination, an appeal *on the merits* within the rules of the CAMP.<sup>80</sup>

Most large associations also have different rules for different monetary levels of dispute. For example, Japan's TOMAC has SCAP Rules for small claims up to ¥5 million, Simplified Rules for claims up to ¥ 20 million, and Ordinary Rules for the largest claims.<sup>81</sup> The number of levels of rules is interesting considering TOMAC hears only 15 arbitration cases per year.<sup>82</sup> Likewise, London's LMAA has Small Claims Procedures (SCP), Fast and Low Cost Arbitration (FALCA), Mediation Terms, and its standard LMAA Terms.<sup>83</sup> The differences between the rules are typically less formality and lower cost as the damages sought in the dispute decreases.

Of more importance to the non-lawyer parties is the mechanism for choosing the panel of arbitrators. While most associations allow the parties to choose an arbitrator not affiliated with the association, the associations of France, Japan, and China do not allow the selection of arbitrators who are not on the associations approved list.

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<sup>79</sup> CAMP Arbitration Rules & Annexe n°1, art XII, June 2007.

<sup>80</sup> *Id.* at art XV, June 2007.

<sup>81</sup> TOMAC Arbitration Rules, March 1, 2004, available at [http://www.jseinc.org/en/tomac/arbitration/rules\\_index.html](http://www.jseinc.org/en/tomac/arbitration/rules_index.html), last visited Nov 8, 2007.

<sup>82</sup> Juris International, *Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange, Inc.*, available at <http://www.jurisint.org/en/ctr/69.html>, last visited Nov 12, 2007.

<sup>83</sup> LMAA, *Introduction*, available at <http://www.lmaa.org.uk/intro.asp>, last visited Nov 8, 2007.

Most associations also publish their awards with written reasoning, and in cases where the parties want anonymity, the association will change the names of the parties. The 2nd Circuit in *Halligan* reminded the industry that U.S. arbitrators are not obligated to give a reason with their award, but we have seen that publicized reasons for the awards add credibility when challenged in court.<sup>84</sup> However, being for-profit organizations, the associations who publish their awards with reasons are sometimes published in trade newsletters.<sup>85</sup> This performs the function of advertising and adds credibility when a company is seeking a forum.

Table 2

<u>Association</u>	<u>Location</u>	<u>Laws</u>	<u>Lvl</u>	<u>Arbitrator Immunity<sup>86</sup></u>	<u>Arb. Select</u>	<u>Award Reason</u>
SMA	New York	U.S.	2	unk	Y/N	Yes
LMAA	London	England	3	unk	Yes	Y/N
GMAA	Hamb'g/Brem.	German	1	Limited	Yes	Yes
CAMP	France	French	2	unk	No	unk
TOMAC	Tokyo/Kobe	Japan	3	Yes <sup>87</sup>	No	Yes

<sup>84</sup> *Halligan*, 148 F.3d at 204.

<sup>85</sup> See e.g. The Maritime Advocate; International Commercial Arbitration, Clout: UNCITRAL Model Law Abstracts

<sup>86</sup> Although the arbitrators may very well have significant civil immunity for their actions within their official capacity, the rules generally don't discuss this.

CMAC      Beijing      Chinese      2      unk      No      Yes

#### **D. Model Contracts**

To ensure consistent and predictable results, the industry has created model contracts.

These are standard contracts that have been tested and accepted by ship owner and customer alike. Model contracts for the transportation of all manner of goods and containing arbitration clauses are offered by a variety of institutions. The arbitration clauses serve two main purposes, to drum up arbitration business for the inevitable dispute and aid the parties in quick dispute resolution. While many of the contracts have blank spaces in the terms to be filled in by the parties, the arbitration clause typically specifies the forum and rules.<sup>88</sup> In the event of a challenge over the arbitration forum in a model contract, it may be argued that the contract is one of adhesion since the arbitration clause does not include any options for negotiation. However, the very nature of arbitration is its flexibility in choosing the forum and law. The model contract may look undemanding with its flexible terms and generality, but when put in the hands of

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<sup>87</sup> TOMAC claims its arbitrators have complete civil immunity from liability but they do not cite their authority. The Rules of Arbitration of Tokyo Maritime Arbitration Commission (TOMAC) of the Japan Shipping Exchange, Inc. [Ordinary Rules], art 29, March 1, 2004.

<sup>88</sup> See *e.g.* Juris International, available at <http://www.jurisint.org/en/index.html> (model contracts for cocoa beans and grain offered by Juris International).

parties who make their living out of negotiating terms, it demonstrates its strength. The U.S. maritime fleet currently ranks 15<sup>th</sup> worldwide in country of registry, and 5<sup>th</sup> in country of ownership.<sup>89</sup> With such a high American interest in shipping contracts, the inclusion of choice of forum clauses in the model contracts is sure to lean toward the New York forum and the SMA.

The popular model contract code-named NORGRAIN 89 (North American Grain Charterparty) is 13 pages long with terms covering subjects such as cargo, ports, responsibility for loading fees, tolls, and collision. Its arbitration clause specifies that the arbitrators shall be “commercial men,” engaged in “Shipping and/or Grain Trades, or members of the ‘Baltic Mercantile & Shipping Exchange.’”<sup>90</sup> It also gives the parties the limited choice of arbitration forums in New York under the SMA or London under the LMAA, with the final instruction to delete the forum not desired. But what happens when the parties neglect this simple action? When each party in a dispute desires a different forum, who decides the correct one? The contract states that “[w]here no figure is supplied in the blank space this provision only shall be

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<sup>89</sup> Maritime Administration statistics. Available at [http://www.marad.dot.gov/MARAD\\_statistics/index.html](http://www.marad.dot.gov/MARAD_statistics/index.html) last visited Oct 25, 2007.

<sup>90</sup> Association of Ship Brokers and Agents (U.S.A.) Inc., *NORGRAIN 89*, art 45, (May 1989).

void but the other provisions of this clause shall have full force and remain in effect.”<sup>91</sup> The question may go to the court that has the best jurisdiction or receives the question first. Since the holding of that unknown court may be very unpredictable, we see the importance of a seemingly minor instruction to a very powerful clause.<sup>92</sup>

To hold an arbitration agreement as valid, the New York Convention requires an agreement in writing with a signature but in an era of e-commerce, it is still unclear if an email, instant message, or electronic signature will suffice in all circumstances. “It is clear that only a valid and effective arbitration clause provides the necessary foundation for all types of arbitration and that the principle of the autonomy of the arbitration clause--a general principle of the law of international arbitration--calls for the survival of the clause in the fate of the main contract.”<sup>93</sup>

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<sup>91</sup> *Id.* The model contracts VOLCOA (Volume Contract of Affreightment) and SUPPLYTIME 89 (Charterparty for Offshore Service Vessels) published by The Baltic and International Maritime Council (1989) and NYPE 93 (New York Produce Exchange) published by the Association of Ship Brokers and Agents (U.S.A.) Inc. likewise give a choice between New York and London and require the arbitrators be “commercial men” or engaged in the shipping business (read as ‘no lawyers please!’).

<sup>92</sup> Compared to the western model contracts, the contracts offered by China through the CMAC contain a self-serving arbitration clause specifying Beijing as the location and the CMAC as the tribunal. China Maritime Arbitration Commission, available at <http://www.cmac-sh.org/en/home.asp>.

<sup>93</sup> *Marrella*, 20 Am. U. Int'l L. Rev. at 1091.

### **III. Trends**

The maritime industry moves very slowly compared to others. At one end of the scale, it is impossible to predict the direction and weight of the technology industry. In the middle would be industries such as automotive, aviation, and utilities. But the maritime industry requires long lead times to build ships, infrastructure, and customers. This lead time allows those in the industry to more time to predict the future. To this end I will attempt to predict the future with regard to international maritime arbitration.

#### **A. The Chinese Expansion**

China has recently become one of the world leaders in the shipping and transportation industry as they have moved to gain power and influence in many other areas as well. They have reignited the space race, are modernizing their Navy, and taken possession of Spratly Islands in the South China Sea presumably to make it *China's South Sea*. Likewise, in order to influence the economics of the region, China accepted the New York Convention in 1987, while enabling the "reciprocity reservation" and stating that the Convention will only apply to foreign-related

awards.<sup>94</sup> They also created the China Maritime Arbitration Commission (CMAC), which until 1984 had exclusive jurisdiction in China over foreign-related maritime arbitration. Since then, the restriction has been loosened, but the CMAC is still their leading maritime organization.

To be listed as an arbitrator with CMAC, one must be appointed by the China Council for the Promotion of International Trade (CCPIT) or the China Chamber of International Commerce (CCOIC).<sup>95</sup> At first glance this may smack of intrusive central government control over commercial business, but a closer look at their published qualifications leads us to another possible conclusion. The CMAC has the largest number of arbitrators who claim a maritime specialty, 173, and of those, 162 speak English.<sup>96</sup> They also have the youngest average age at 56, with the highest percentage of females at 7%.<sup>97</sup> The bulk of their arbitrators are Chinese or Asian, but 10 are British, 2 Canadian, and 1 each come from the U.S., Spain, Germany, Holland, Switzerland, Belgium, Italy, and Greece.<sup>98</sup> The citizenship and gender diversity of China's approved arbitrators seems to demonstrate a more liberal attitude than the Western nations and

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<sup>94</sup> *Supra see* note 13.

<sup>95</sup> *Supra see* note 57.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Supra see* note 57.

illustrate their aspiration to compete for international business by putting economics ahead of race and gender.

When China accepted the New York Convention in 1987, they enabled several self-protection measures including the “reciprocity reservation” and the “public interest challenge.”

The reciprocity reservation states that the Convention will not apply to awards made within the territory of China itself. The Convention is “limited to the recognition and enforcement of arbitral awards rendered within the territory of another contracting party, not including China.”<sup>99</sup>

The effect of this is to entice foreign business to come to China, yet keep full government control over domestic arbitral awards. China also deliberately chose to allow judicial challenges to awards under “public interest” rather than “public policy.” “Public interest” has a broader meaning than “public policy,” and includes factors such as culture, finance, and economics.<sup>100</sup>

This simple change is a new tool that a control-oriented government can wield as it sees fit under the guise of protecting their sovereignty in order to direct the outcome that they want. However, if it is used too frequently, foreign companies will simply avoid arbitration clauses that require a Chinese forum. Finally, to encourage foreign participation and improve their reputation for

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<sup>99</sup> *Zhou*, 15 *Pac. Rim L. & Pol'y J.* at 443. This clarifies the situations that the U.S. courts dealt with when trying to determine if reciprocity included awards made in their own country.

<sup>100</sup> *Id.* at 448-49. The New York Convention allows the narrower challenge of “public policy.” *Supra see* note 39.

consistency and fairness, they have implemented limits on lower Chinese courts from interfering in foreign-related awards, requiring the Supreme People's Court to approve all foreign-related awards.<sup>101</sup>

The trick for the foreign company is to ensure the award is designated "foreign-related." If a party to a contract has no connections to a Chinese entity this won't be a problem. But if a company is registered in China as a joint venture company ("JVCs") or wholly foreign owned enterprise ("WFOE"), it will be subject to the less favorable domestic arbitration process which includes higher judicial scrutiny and broader (and more unpredictable) substantive review in the lower Chinese courts, rather than just the procedural review of foreign-related awards.<sup>102</sup>

Therefore, a company engaged in business in or near China must ask themselves if their activities constitute a constructive joint venture by design or by action. It is not farfetched to imagine a situation where a foreign company by its mere cooperation with a Chinese company will automatically be designated a JVC for arbitration purposes. It is also hard to foresee how far the Chinese courts would look to find a reasonable connection. If a non-Chinese company's non-Chinese partner engages in a formal or constructive joint venture with a Chinese company,

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<sup>101</sup> *Zhou*, 15 Pac. Rim L. & Pol'y J. at 449-50.

<sup>102</sup> *Zhou*, 15 Pac. Rim L. & Pol'y J. at 452.

the Chinese court may be able to find a reasonable relationship between the first non-Chinese company and the distant Chinese company and then apply domestic law.

We have seen that the Chinese forum has a number of advantages and disadvantages of which the maritime company must be fully aware. We have also seen that China has ownership of one of the largest fleets in the world.<sup>103</sup> They have a young and diverse association of arbitrators, and are demonstrating a desire to expand and compete in areas where they have traditionally lagged. With a growing economy, and few threats to their regional power, the Chinese age has arrived.

### **B. Will Nationalism Damage the Market?**

Thus far, the U.N. has offered model rules and laws on international arbitration without mandating their use and the New York Convention says nothing about what rules should be applied. With the U.N. gaining greater influence, and the number and size of international disputes rising such as Microsoft's alleged unfair trade practices in Europe, farming subsidies, and airplane manufacturing to name a few, it is not hard to see the U.N. attempting to direct the use of the International Chamber of Commerce, the International Court, or the International

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<sup>103</sup> *Supra see* note 67.

Maritime Organization in international maritime disputes.<sup>104</sup> It also does not help that the UNCITRAL rules allow the unpredictable principles of *amiable compositeur* and *ex aequo et bono*.<sup>105</sup> While it may be argued that since these principles are not always legal or equitable, that ‘fairness’ is an attractive source, they are also vague and subject to arbitrariness. The fact that a modern international arbitration under UNCITRAL has not been decided exclusively on these sources is indicative of its low acceptance.<sup>106</sup>

Similar to the moves of U.N. influence is the temptation of the leading nations to write the rules such that their judicial system or legislature dictates the law of seaborne commerce in their region of the world. China would be of the greatest concern. With one of the largest maritime fleets, and increasing military and political influence in the region, they will be very tempted to bring neighboring maritime countries under their control. The close proximity and disparity in sizes of nations in the South China Sea region also makes it more likely that a small country’s company will partner with a Chinese company, thereby designating them as a JVC and relegating their disputes indirectly to the Chinese judiciary as a domestic issue.

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<sup>104</sup> “One solution [to the lack of an international maritime arbitration standard], although negatively perceived by shipping operators and private arbitration centers, could be to create an International Court of Maritime Arbitration within the International Maritime Organization (“IMO”).” *Marrella*, 20 Am. U. Int’l L. Rev. at 1099.

<sup>105</sup> *Supra see* notes 76-77.

<sup>106</sup> *Supra see* note 77.

### C. The Modern *Lex Maritima*

On a more optimistic note, the days of the old guard arbitration associations may be facing legitimate competition. The GMAA has publicly stated their intent to compete directly with the LMAA over perceived weaknesses in their system.<sup>107</sup> As part of an oligopoly, the LMAA is formal, rigid, and expensive. As in every free market, this creates an opportunity for competition. Newer groups are simplifying rules and reducing fees. Evidence of their success can be seen in the LMAA creating a new path to resolution in their Small Claims Procedures (SCP), Fast and Low Cost Arbitration (FALCA), and Mediation Terms.<sup>108</sup> Although the GMAA is still male dominated, they also possess the youngest group of arbitrators.<sup>109</sup>

The proliferation of arbitration associations at all levels is indicative of the popularity of the forum and the opportunity to profit. The largest associations may have to develop specializations within the maritime industry in order to corner a worldwide niche, while regional associations will have to defend their region against neighboring associations or local up-and-comers by being experts in the specialty or their region. Procedurally, expanded use of deposits, interim and interlocutory awards has become an integral tool of the arbitration tribunal. When a

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<sup>107</sup> *Supra* see note 65.

<sup>108</sup> *Supra* see note 83.

<sup>109</sup> *Supra* see note 52.

party pays a refundable security deposit prior to an award, it encourages the party to remain engaged in the process and makes enforcement of an award immediate.

Finally, expanding acceptance of the New York Convention will bring more predictability to the parties and give arbitrators in foreign forums a growing maritime jurisprudence to apply. In addition to the local law, most arbitration associations apply trade customs and tradition as valid authorities. These customs may be local or international, but with trade being a fundamentally international endeavor, the companies are familiar with, and accepting of, a country's local customs and tradition. This understanding is no more of a problem than a New York company accepting the laws of California when he engages in business there. As long as the applied law is known and consistent, the maritime company has acceptable legal notice. And when the arbitral award reason is published, it adds to the maritime arbitral jurisprudence. In this case, rather than wading through verbose legal texts in a foreign language, an arbitrator will be happy to find a body of focused, well reasoned, maritime arbitral jurisprudence. Of course the published analysis will need to be 'well reasoned' both commercially and legally, and this will take time for 'commercial men' to develop. As the

earlier TOMAC case illustrated,<sup>110</sup> the good law will rise to the top and the bad law will effectively be overruled by non-use. The forces of the market will encourage the arbitration associations to apply the good law over the bad law that favors self-serving nationalism. A new international body of common law will evolve, a modern *lex maritime*.

#### **IV. Conclusion**

The combination of unique maritime interests and international arbitration is a perfect match. While the lack of due process protection and minimal appeals may occasionally manifest as an injustice against an individual party, it becomes an advantage in the international commercial arena. A shipping company will recover from a bad arbitral decision and market forces will drive other companies to fair forums. When allowed to work without interference, arbitration can advance its traditional benefits in the international arena; fast, cheap, and confidential. And if the market is allowed to function naturally, the system will continue to improve. Only the threat of nationalism can interfere to the extent that the arbitration proceeding becomes an awkward manipulation to obtain unjust results.

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<sup>110</sup> *Supra see* note 69.