DELOCALIZATION OF MARITIME DISPUTE RESOLUTION: CHANGES, CHALLENGES AND NEW INITIATIVES AFFECTING ACCESS TO JUSTICE

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Abstract

Maritime transport is the backbone of international trade and the global economy. Arbitration plays a significant role in resolving maritime disputes and in the development of transnational shipping law. In recent times, dispute resolution in the maritime field has largely been delocalized from the jurisdictions of the parties in dispute to places that have acquired a reputation as international arbitration centres. Unfortunately, these places happen to be few and far between even though shipping is a global industry and arbitration is well-recognized as a viable dispute resolution mechanism. Maritime arbitration centres that are well-known at present include those situated in London, New York, Singapore, Paris and Hong Kong. This chapter examines the past, present and prospects of delocalization of maritime dispute resolution and the impact of delocalization on the parties involved in shipping contracts.

1. INTRODUCTION

Maritime transport is the backbone of international trade and the global economy. Today, over 80% of global trade by volume and over 70% of it in terms of value are seaborne and handled by ports worldwide.[1] More importantly, shipping is closely intertwined with numerous ancillary services, including shore-based sectors such as transport operations and management, financial services and insurance. As such, the shipping industry makes a highly significant contribution to the global GDP and employs millions of people around the world.

Arbitration plays a significant role in the resolution of maritime disputes and the development of transnational shipping law. It is remarkable that shipping law worldwide is based mainly on the English laws of contract and tort, and in the context of the present work, the law relating to carriage of goods by sea in particular. One commentator has pointed to three critical paths to justice, arbitration being one of them.[2] It is postulated in this regard that arbitration is the

1 UNCTAD, *Review of Maritime Transport*, Geneva, (2018), 1-5.
2 Neil Andrew, *Three Paths to Justice: Court Proceedings, Arbitration, and Mediation in England*, Springer, (2012).

primary path preferred by the global shipping industry. It is increasingly evident that court proceedings are being used less frequently in shipping disputes and in many instances, domestic maritime commercial trails are vanishing.[3] Arbitration is indubitably the growing norm in maritime dispute resolution but it is conspicuous that only a few seats of arbitration are universally popular. These are London, New York, Singapore, Paris and Hong Kong.[4]

In this chapter, the delocalization of maritime dispute resolution in terms of its past and present and its prospects for the future, is critically examined together with the impact of such delocalization on the parties involved in shipping contracts, particularly with respect to their access to justice. Following this introduction, a brief overview of the notions of "justice", "maritime disputes" and "seat of arbitration are provided. Further to that, the past, present and future prospects of delocalization are presented in perspective with particular reference to the law and market reality of the global shipping industry and maritime arbitration in London.

2. ESSENTIALITIES OF METHODOLOGY EMPLOYED IN CONTEXT

Apart from brief discussions on the intended conceptualizations of the expressions "justice", "delocalization" (also referred to as "denationalization"), "maritime disputes" and "maritime arbitration" as used in this work, the term "seat of arbitration" depicting the legal authority of the delocalized venue, are explained.

2.1 Rationale and Methodology

Arbitration awards are usually not published; the proceedings are confidential and only the parties and their legal counsel are privy to them.[5] In the maritime arbitration field, one way to obtain information on arbitral awards is to peruse relevant case law. Incidentally, with the exception of Paris, the remaining arbitration centres identified above are common law jurisdictions that follow the practice of reporting decided cases in law reports. As mentioned earlier, the English common law is from where transnational maritime law originated which is the rationale for the present author choosing this jurisdiction for discussion relating to maritime arbitration.[6] Under the Arbitration Act 1996[7], English courts can review issues of law in arbitral awards in certain circumstances which are stipulated in sections 67 to 69 of the Act. In this chapter, selected cases decided by the Senior Courts, namely, the English Court of Appeal and the Supreme Court of the United Kingdom, and House of Lords decisions are perused.

3 See Miriam Goldby & Loukas Mistelis, *The Role of Arbitration in Shipping Law*, (2016), Oxford: OUP, 1, 89-106 and 213-289.
4 Loukas Mistelis, "Competition of Arbitral Seats in Attracting International Maritime Arbitration Disputes", in Goldby & Mistelis, *The Role of Arbitration in Shipping Law*, 135-137.
5 Exceptions can be made under the International Centre for Settlement of Investment Disputes (ICSID) Convention, 1965, 575 *UNTS* 159, for the whole or part publication of an Award if the parties agree. https://www.google.com.hk/search?q=ICSID+awards&oq=ICSID+awards+&aqs=chrome..69i57j0i22i30l9.13171j1j15&sourceid=chrome&ie=UTF-8
6 The author is grateful to Ian Gaunt, President of the London Maritime Arbitration Association (LMAA), and Richard Lord QC, Jingsong Zhao and Phillip Yang for providing related information.
7 c.23. 35 *ILM* 155 (1996).

A comparative analysis approach is employed in discussing the views and perspectives of the London maritime arbitration community in contrast to their counterparts in jurisdictions such as Germany, Spain, China and Latin American countries. This approach is consonant with the object of addressing the *pros* and *cons* of the delocalization of maritime disputes.

2.2 Justice in Relation to Commercial Reality, Fairness and Procedure

It is difficult, if not impossible, to define the notion of justice precisely. It is frequently used in numerous published scholarly works and legal authorities, but an unequivocal and widely accepted definition of justice remains lacking. Even so, a definition, as tentative as it may be, is necessary to set the context and criteria for evaluating the merits and demerits of delocalization or denationalization of maritime dispute resolution and of their effects on access to justice of the parties concerned. Two valuable approaches which have been adopted by judges and scholars are discussed below.

The judicial viewpoint adopted in English law, connects justice with commercial sense or market practice in colloquial terms. English judges, including Lord Denning and Lord Diplock adopted this pragmatic approach.[8] In *The Maratha Envoy*,[9] which involved a dispute over a voyage charter, Lord Denning stated in the Court of Appeal that he "would swallow the commercial nonsense if it was the only way in which justice could be done. In the House of Lords, Lord Diplock, agreed with this point but when he applied it to the facts of the case, held - "I cannot swallow it [ie. commercial nonsense], nor… do I see that justice would be done if I could bring myself to do so." Such philosophically deviant nuances under English law points to the shipping industry's preference for arbitration through which cases are heard by so-called insiders who have commercial sense and are well versed in market reality.

The English law approach is decidedly not a panacea; indeed, it is sometimes deficient in resolving problems regarding justice when judges face complex facts and commercial practices in the shipping industry. As exemplified in *The Maratha Envoy* case, they may share a particular point of view regarding justice, but when it comes to applying it to a complex set of facts typified by shipping cases, they may end up delivering different, sometimes conflicting, judgments. Justice in such cases should, at any rate, reflect a degree of commercial sense. To ensure that justice is done, judges and arbitrators alike should consider maritime disputes from the perspective of commercial sense and market reality. Based on this rationale, the text below delves into the issues of market practice and reality as depicted in standard form contracts focusing on the proposition that the expertise of arbitrators in commercial and legal knowledge undoubtedly bodes well for the delivery of justice. Another reason why the English law approach remains functional, is that it follows the doctrine of *stare decisis* (precedent), which

8 See *Federal Commerce and Navigation Co. Ltd.* v. *Tradax Export SA, The Maratha Envoy* [1978] AC 2 (HL). See also *Glencore Grain Ltd*. v. *Flacker Shipping Ltd.*, (*The Happy Day)* [2002] EWCA Civ 1068; [2002] 2 Lloyd's Rep 487 per Potter LJ.

9 *The Maratha Envoy* was chartered to carry grain to Brake in the river Weser. The usual waiting area for Weser ports was the Weser lightship anchorage, about 25 miles from the mouth of the river and outside the limits of Brake. While waiting for a berth, the vessel sailed up river and when it was off Brake, served a notice of readiness. She then returned and anchored at the lightship.

brings jurisprudential certainty and stability.[10] As a doctrine, it is an indispensable facet of the common law which in effect translates to fairness which is a phenomenon akin to justice.

The association of fairness with justice is aptly demonstrated and exemplified by John Rawls in his book where he discusses the concept of justice in admirable detail.[11] He provides an instructive conception of procedural justice which is of great relevance to the discussion in this chapter. In his view and observation, procedural justice is of three kinds; namely, perfect procedural justice, imperfect procedural justice and pure procedural justice.[12] The second kind, is pertinent in the present context. According to Rawls, under an imperfect procedural justice mechanism, "the injustice springs from no human fault but from a fortuitous combination of circumstances that defeats the legal rules' purpose. The characteristic mark of imperfect procedural justice is that while there is an independent criterion for the correct outcome, there is no feasible procedure which is sure to lead to it."[13] The present author's deduction from the analysis of Rawls is that maritime arbitration is imperfect procedural justice. It is thus submitted that any critique of maritime arbitration dispute resolution procedures whether by this author or by judges, arbitrators and scholars, can only improve it; reaching perfect justice through it is virtually impossible.

2.3 Maritime Disputes and Maritime Arbitration

In this chapter, maritime disputes and maritime arbitration are addressed to cover the aspects of shipping law and seaborne trade issues arising from free on board (FOB), cost, insurance and freight (CIF) and cost and freight (CFR) sales. Bulk cargoes are sold under FOB or CIF terms under which the seller or the buyer has a contractual obligation to employ a ship to carry goods. Therefore, a relatively broad characterization of maritime disputes is depicted herein which mirrors industry and market practices.

2.4 Seat of Arbitration and its Legal Implications for Access to Justice of the Parties

The seat determines the law governing matters of procedure and the supervising jurisdiction of the courts of the country where the seat is located.[14] In that vein, London arbitration or London-based arbitration signifies that the formal seat of arbitration is London regardless of whether the arbitral proceedings actually take place there. Standard form contracts incorporating standard arbitration clauses are in widespread use in the shipping industry. Parties to these contracts normally agree to have their maritime disputes resolved in well-known seats of arbitration which are only a few in number, London being one of them. Maritime arbitration is thus delocalized from their domiciles to these popular seats, which, as mentioned earlier, are mostly in common law jurisdictions. In the event such a seat is chosen, the validity of the arbitration clause is governed by common law, in particular, the law of contract, even if the applicable law might be different.

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10 *Ismail* v. *Polish Ocean Lines, The Ciechocinek* [1976] QB 893, (CA), per Lord Denning MR, 495; [1977] QB 324, 341.
11 John Rawls, *A Theory of Justice*, Cambridge, Mass: Harvard University Press, (1971), Ch 1.
12 *Ibid*, 47-50.
13 *Ibid*, 74-75.
14 Robert Merkin, *Arbitration Law*, Informa, (2004).

As mentioned above, the seat of arbitration is not necessarily the place where the arbitration proceedings take place physically. Whereas in most circumstances the two are the same, in English law, the arbitral tribunal decides "when and where any part of the proceedings is to be held".[15] Thus, in practice, if an arbitration clause specifies London arbitration, the tribunal might decide to hold the proceedings elsewhere, such as in Hong Kong, Singapore, or Beijing. From the perspectives of the parties, this is one rationale for delocalization, and from the perspectives of arbitration centres, it is the legal basis for virtual justice through online proceedings which is a new practice adopted by London arbitrators discussed later in this chapter.

3. ROLE OF ARBITRATION IN DEVELOPMENT OF GENERAL MARITIME LAW

The general maritime law, sometimes referred to as the modern *lex maritima,*[16] contains several legal traditions inherited from the past which provide for legal certainty. Much of it has been ingrained into English law and serves as the extant transnational maritime law favoured by maritime arbitrators. Unsurprisingly, therefore, parties to maritime contracts frequently choose English law as the governing law.

Since the 19th century, the use of standard form contracts in shipping transactions has been widespread. A considerable amount of case law has been developed by the English courts in construing the provisions of these contracts, which in turn has provided legal certainty.[17] Needless to say, it has hugely benefitted parties involved in maritime disputes in terms of their access to justice in arbitration cases. Standard arbitration clauses channel disputes to renowned arbitration centres, even if they involve contracts entered into by parties domiciled elsewhere with little or no connection with the centres. This epitomizes the concept of delocalization of maritime dispute resolution.

3.1 Standard Form Contracts in Arbitration and Shipping Industry Practices

The use of standard form contracts is the virtual norm in international sales of goods and carriage of goods by sea. Sellers and buyers in international trade are usually domiciled in different countries. Depending on the specific terms of the sales contract, such as whether it is an FOB or CIF sale, either the seller or the buyer has a contractual obligation to arrange for the transportation of the goods to their destination. In most instances, carriage is by sea done through a charterparty in a standard form or a contract evidenced by a bill of lading or a sea waybill. The quantity, timing and physical characteristics of the goods will determine the type of shipping contract required.[18] Because of the sophisticated nature of shipping and international trade, invariably brokers are used in these transactions. In a charterparty, they connect the shipowner and the charterer to fix a vessel and in respect of carriage evidenced by a bill of lading, they arrange for the contract entered into between carrier and shipper. Notably, four types of shipping contracts are commonly used in maritime contracts for the employment

15 Arbitration Act, s. 34(2)(a).
16 See William Tetley, "The General Maritime Law - The *Lex Maritima*", 20 *Syracuse J. Int'l L. & Com*. 105 1994; see also https://www.elgaronline.com/view/nlm-book/9781782547228/b-9781782547235-L_5.xml;.
17 Anthony Rogers *et al*, *Cases and Materials on The Carriage of Goods by Sea*, New York: Routledge, (2016).
18 See Martin Stopford, *Maritime Economics*, New York: Routledge, (2009), 61-80.

of a ship, namely, one evidenced by a bill of lading or a voyage charters, both being contracts of affreightment, or a time charter or a demise or bareboat charter.[19]

Standard form contracts are a distinctive feature of all types of contracts of carriage. The United Nations Conference on Trade and Development (UNCTAD) has conducted a thorough analysis of the chartering process and the charter market with detailed information on the origins and development of the use of the standard form contract in shipping.[20] According to UNCTAD, standard charterparty forms can be traced back to the 19th century.[21] Since the 20th century, two London-based organizations have played, and still play, a significant role in the development of internationally utilized standard forms; namely, the Chamber of Shipping of the UK, founded in 1878, and the Baltic and International Maritime Council (BIMCO), established in 1905. These bodies have approved or issued several standard charterparty forms, referred to as "approved" or "official" forms in chartering practice, and also several modern versions of standard forms known as "agreed document". The latter are used in auxiliary shipping service sectors such as towage and salvage,[22] and in shipbuilding and ship sales.[23] There are also a number of long-standing standard forms of charterparties that are widely used in various trades in particular, cargo in bulk such as sugar, cocoa, steel, grain and oil products.[24] Trade in these goods was controlled by London-based associations which also controlled arbitration involving such trade. Over several centuries, standard form contracts have emerged as norms in general shipping law across the globe.[25]

As noted earlier, parties involved in shipping transactions are usually domiciled in different countries and their negotiations are often carried out under considerable time pressure. In the charter market, for instance, matching cargo with ship must be done very quickly; a ship owner's response to a charter offer is usually only valid for a short period of time like 24 hours.[26] By using a standard form in the negotiation process, the contents of which are readily available to both parties, they can utilize the limited time by concentrating on the particular points on which they require individually tailored provisions, leaving all other aspects to be governed by the terms of the standard form. The use of standard form contracts in shipping reduces the risk of misunderstanding between the parties and ensures that potential disputes arising from them are covered by the contract.

3.2 Standard Arbitration Clauses

Over the last 50 years, the shipping market has evolved into three separate segments; namely, bulk shipping, specialized shipping and liner shipping which Martin Stopford has examined instructively in his well-known seminal text.[27] Another significant feature of shipping practice

19 *Ibid*.
20 UNCTAD, *Charter Parties*, (1974, UN), paras 55-67.
21 *Ibid*, paras 58-60.
22 Towage and salvage standard forms are dominated by Lloyd's; *e.g*., Lloyds Open Form of Salvage Agreement.
23 See BIMCO shipbuilding standard form; for more standard forms in BIMCO, see www.bimco.org.
24 Examples are the "Sugar Charter Party (London Form)", "C(Ore)7 form which was devised by the British government", and "the New York Produce Exchange Time Charter".
25 See William Tetley, "The General Maritime Law", (1994), 105.
26 UNCTAD, Charterparty (UN 1974); see L.Y. Yang, *Arbitration Law*, Law Press, 25-30.
27 Martin Stopford, *Maritime Economics*, 61-80.

is that a standard arbitration clause is always included within the standard form contract.[28] Such clauses often state London arbitration as the "seat" and English law as the "applicable law". As mentioned, standard charterparty forms are used in the charter market, whereas for the liner market, English law uses international conventions incorporated in UK legislation.[29] Many liner carriers incorporate arbitration clauses from charterparties into contracts of carriage of goods in standard form bills of lading.[30]

The utilization of standard forms in international shipping positively affects access to justice of the parties concerned. Many standard forms are considered to represent a fair equilibrium between their interests.[31] Considerable improvement has been achieved by the work done over the last few decades by BIMCO and the UK Chamber of Shipping. The modern forms have corrected earlier unclear and controversial provisions and have thus made significant contributions to the contractual practices engendered by the shipping industry.

The employment of the standard form contracts in international shipping has also impacted the resolution of shipping disputes.[32] The agreed forms have contributed to international legal uniformity which has reinforced the feasibility of the denationalization of arbitration. Disparities among legal rules stipulated in different legal systems and jurisdictions have been neutralized to a great extent so that similar cases taken to delocalized arbitration centres such as London, tend to yield similar results. Furthermore, commonly used standard form contracts are usually drafted in the English language, recognized in the maritime domain as the international linguistic medium, and are based on common law principles regardless of parties not being domiciled in the UK.

However, the advantages of standard form contracts are not unlimited with regard to legal certainty given that an instrument such a charterparty remains an individually specific contract. While a ship has a particular speed, cargo capacity, dimensions and cargo-handling equipment, such elements as the quantity, timing, routing, and physical characteristics of cargoes to be carried are specific to each contract. These varying individual conditions under which a ship is employed, limit the use of stereotyped standard charterparty forms to fit all circumstances. Given that it is not a case of "same size fits all", parties to a charter need to tailor the standard form terms to meet their particular needs. Thus, standard charterparty forms are often amended by inserting or crossing out certain clauses. Such amendments, unless made with sophisticated legal skill and care, may easily lead to disputes over the construction of the charterparty. Most maritime disputes arise from inconsistency and ambiguities created by changes made or clauses added to a standard form charterparty.[33]

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28 UNCTAD, Charterparty (UN 1974).

29 For example, Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1968 (The Hague-Visby Rules) 1412 *UNTS* 128; see Lijun Zhao, "Uniform Seaborne Cargo Regimes", 133-170.

30 Yvonne Baatz, "Incorporation of a Charterparty Arbitratrion Clause into a Bill of Lading and its Effect on Third Parties" in Goldby & Mistelis, *The Role of Arbitration in Shipping Law*, 107.

31 UNCTAD, Charterparty (UN 1974).

32 See discussion in Gralf-Peter Calliess and Annika Klopp, "Vanishing Commercial Trial - Fading Domestic Law", September 2015, No. 56/2015, Centre for Transnational Studies, Universities of Bremen ans Oldenburg.

33 A good example is the case of *Dias Compania Naviera* v. *Louis Dreyfus*, (*The Dias*) [1978] 1 Lloyd's Rep 325, (HL). In this case the dispute involved the interpretation of Clause 15 of a voyage charter.

3.3 Influence of English Law on Shipping Law and Maritime Arbitration

Maritime arbitration centres and their supervisory courts in the common law jurisdictions in Singapore, Hong Kong, London and New York have worked together over centuries and played an essential role in the development of transnational shipping law and uniform construction of standard form clauses. English law has developed comprehensive case law on the construction and application of the terms of standard form charterparties. This has prompted maritime arbitrators to follow the English case law if that is chosen by the parties to be the applicable law. This practice of maritime arbitrators and the shipping industry has led to the enlargement of justice available to the parties to a maritime dispute.

The arbitration community in London has attracted consumers from all over the world. London remains the most prominent centre for the resolution of maritime disputes.[34] A glance at the table of cases in many published works on UK arbitration underscores the fact that to many scholars and practitioners, the mention of "London Arbitration" in large part connotes maritime arbitration.[35]

3.3.1 London Arbitration

Many factors led London to become a famous seat of maritime arbitration, including the arbitration friendliness of the English legal system and the long and robust tradition of maritime law enshrined in the common law. Dating back to the era of Queen Elizabeth I, arbitration was hugely favoured as a means of dispute resolution. It was preferable to have disputes resolved by panels of experienced merchants instead of judicial luminaries.[36] Over the past 50 years, London has fortified its position in maritime arbitration. This is attributable to several features, including the availability of specialized arbitrators with maritime experience, a speedy and effective arbitral procedure, a reputation for integrity and a well-established court system supporting arbitration; also, parties often choose English law as the applicable law.[37] The success of London arbitration would not be possible without the underpinning of the UK judicial system and the support for arbitration which the judiciary has constantly shown over centuries. Cumulatively, this has positioned London as an influential global centre for the settlement of maritime disputes. [38]

3.3.2 London-based Arbitral Bodies Specializing in Maritime Arbitration

London maritime arbitration is primarily administered by the London Maritime Arbitrators Association (LMAA), established in the 1960s. Apart from LMAA, there are also several

34 Loukas Mistelis, "Competition of Arbitral Seats in Attracting International Maritime Arbitration Disputes" in Goldby & Mistelis, *The Role of Arbitration in Shipping Law*, 144-148.

35 Robert Merkin & Louis Flannery, *Merkin and Flannery on the Arbitration Act 1996*, 6th Edition, London: Informa, 2020; Clare Ambrose, Karen Maxwell & Michael Collett, *London Maritime Arbitration*, 4h. Edition, London: Informa, 2018.

36 Roy Goode, Foreword to Goldby & Mistelis, *The Role of Arbitration in Shipping Law*; see also Preface by the authors.

37 Judgments reviewing maritime arbitral awards are reported in law reports such as Lloyd's Reports and in authoritative text books. See Baatz, "Incorporation of a Charterparty Arbitration Clause" in Goldby & Mistelis, *The Role of Arbitration in Shipping Law*, 107.

38 Ian Grant, "Maritime Arbitration in London", in Goldby & Mistelis, *The Role of Arbitration in Shipping Law*, 149.

private companies and associations providing specialized arbitration which have shaped global trade considerably. These bodies issue a kind of "private" standard form contract containing contractual terms and standard arbitration clauses which provide for London arbitration governed by English law in respect of trade in particular kinds of bulk cargo and their shipments globally.

They include the Grain and Feed Trade Association Ltd (GAFTA), which has an appeal panel and provides for arbitration procedures, the Federation of Cocoa Commerce, also known as the "Cocoa Association of London Ltd." which is a company incorporated under English law, the Federation of Oils, Seeds and Fats Associations Ltd (FOSFA), which also has an appeal panel and provides for arbitration procedures, the Coffee Trade Federation, the National Federation of Fruit and Potato Traders Ltd., the Sugar Association of London and Refined Sugar Association of London, the Tea Brokers' Association of London and the London Metal Exchange. If disputes arise, some influential companies in that particular sector act as arbitrators. The arbitration and appeal panels of the Cocoa Association of London usually handle 200-400 disputes per year over the quality of cocoa.[39] GAFTA is comparatively bigger and well known for global grain trade; it also provides arbitration relating to bulk trade in that commodity.[40]

4. DELOCALIZATION OF MARITIME DISPUTE RESOLUTION: RECENT CHANGES AND PRESENT CHALLENGES

Empirical evidence in Germany, Latin America and Spain illustrates that delocalization or denationalization of maritime dispute resolution has been on the rise in recent decades.[41] As a result of the New York Convention of 1958[42], arbitration has emerged as the dominant path for obtaining justice in maritime dispute resolution. However, while arbitration is a globally accepted phenomenon and shipping is a global industry, only a few seats of arbitration are popular for maritime dispute resolution. Among them, London is indisputably in the lead; and this is true despite the movement of much commercial shipping activity to the Asia Pacific region, especially to China.[43]

4.1 Delocalisation and Denationalisation of Maritime Dispute Resolution

The delocalization of maritime dispute resolution has occurred in many countries. In 1999, In a survey published in 1999, German legal scholar, Juergen Basedow, demonstrated the tendency of denationalization and remarked that perhaps it was a phenomenon in maritime law

39 See L.Y. Yang, *Arbitration Law*.
40 See *e.g.*, *SA Ungheresi Di Armamento Marittimo Oriente* v. *Tyser Line* (1902) 8 Com Cas 25; *Cosmos Bulk Transport Inc.* v. *China National Foreign Trade*, (*The Apollonius*) [1978] 1 Lloyd's Rep 53; *Tradigrain SA* v. *King Diamond Shipping SA*, (*The Spiros C*) [2000] 2 Lloyd's Rep 315.
41 Andreas Maurer, "Transnational Shipping Law: The Role of Private Legal Actors in International Shipping", 229-236. Mannuel Alba, "Maritime Arbitration in Spain", 155-176 in Goldby & Mistelis *The Role of Arbitration in Shipping Law.*
42 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 *UNTS* 3, (United Nations [UN]) New York Convention 1958.
43 Grant, "Maritime Arbitration in London", 149 in Goldby and Mistelis *The Role of Arbitration in Shipping Law.* See also Martin Stopford, *Maritime Economics*.

and arbitration that had been existing for long.[44] Maurer found empirical evidence that from 1951 to 2014, on average, fewer than 10 maritime law cases were decided per year by German courts. By comparison, the Commercial Court and the Admiralty Court of England heard approximately 2,000 cases during 1995-1997, and approximately 800-1,000 cases per year during 2000-2014.[45] In many of these cases, London-based maritime arbitral awards were reviewed. In Spain, vibrant maritime arbitration is lacking which has caused the shrinking of development of shipping law in that country, and a similar phenomenon has been observed in Latin America.[46] A large number of Chinese maritime disputes are outsourced to London arbitration. The most important reason why parties prefer denationalized arbitration to litigation in their national courts relates to the New York Convention of 1958 which ensures that an award is widely recognized and enforced in numerous jurisdictions, including the UK.[47] Other reasons are advantages of arbitration, such as confidentiality which is essential in international business. It appears, however, that London maritime arbitration has become costly, and in that respect, its advantages declined over time.[48] This situation led to the initiative on cost-saving procedures undertaken by the LMAA which had been established to promote and support London maritime arbitration.[49]

4.2 Pros and Cons of Maritime Arbitration under LMAA Terms

Undoubtedly, the LMAA has played an essential role in attracting disputing parties to London arbitration, and has improved the arbitration rules considerably. The flexibility of *ad hoc* arbitration procedures, including their application in an informal way, the speed and cost of proceedings, particularly in cases dealt with exclusively on the basis of documents, contribute to parties getting adequate access to justice. Even though institutional arbitration has become increasingly critical, London arbitration under LMAA terms and procedures are considered to be efficient and flexible.

4.2.1 Problems with Appointment of Arbitrators from Countries of the Parties and LMAA Membership

44 Jurgen Basedow "Perspektiven des Seerechts", *Juristenzeitung* 1999, 9-15.
45 Maurer, "Transnational Shipping Law" 229-236 in Goldby and Mistelis, *The Role of Arbitration in Shipping Law.*
46 Alba, "Maritime Arbitration in Spain" 155-176. in Goldby and Mistelis, *The Role of Arbitration in Shipping Law.*
47 Up until 2019, 161 states have become parties to this convention. The Arbitration Act 1996 which governs arbitration in the UK except in Scotland, gives effect to this convention.
48 In *Agrimex Ltd.* v. *Tradigrain S.A.* [2003] 2 Lloyd's Report 537, the parties and the court were of the view that the cost maritime arbitration was unreasonably high which was the reason behind a subsequent GAFTA award being reviewed by the English court. .
49 https://lmaa.london/faq/

There are three categories of LMAA members: full members,[50] aspiring full members,[51] and supporting members.[52] In practice, an arbitration clause may explicitly state that the arbitrators should be full members, which means the other two types are excluded. On the surface, it seems there is no restriction on parties appointing arbitrators who are not LMAA members.[53] But in practice, they are restricted from appointing arbitrators from their own countries. Under the rules, a full member should be living in the UK, but there is no such requirement for the other two types of members. This creates potential difficulties for parties to have proper access to justice if they are not from common law jurisdictions or are not proficient in English. It thus poses a problem with the denationalization of maritime arbitration. Membership requirements are excessively costly and burdensome for parties from non-common law or non-anglophonic jurisdictions, such as costs of translation of documents and interpretation fees in proceedings.

In the present author's view, the LMAA membership requirements are unnecessary and their removal will provide the parties better access to justice. In the early years since the 1960s, there were no geographical restrictions on full members. In those days, there were arbitrators from the ex-Soviet Union and Greece. Later, around the late 1990s, the geographical restriction relating to full members was introduced due to the potential need for arbitrators to attend emergency hearings in London. However, as modern communication technology has developed and continues to do so, location no longer poses a problem. Therefore, the geographical requirement for full members has now been removed. The essential requirement to be a full member is not the location but having a comprehensive understanding of the arbitral procedures and related substantive laws of the UK. Arbitrators residing outside the UK are not excluded anymore. Hence, it is likely that more overseas full members will be listed in the future.[54]

4.2.2 Flexibility under LMAA Arbitration and Access to Justice of Parties

The LMAA offers informal flexible arbitration procedures, which make commercial sense and bring justice to parties in the way the industry anticipates. That said, it is important to stress that the LMAA is no more than an association of practising maritime arbitrators. Since its establishment, the primary aim has been to improve professional knowledge, enhance communication between members, and draft and amend the rules.[55] Since the administration of arbitration is not a part of that, there are no full-time staff members to undertake administrative tasks. The President and Members of the LMAA Committees hold honorary positions; they are not employees. It can be concluded, therefore, that LMAA arbitration is *ad*

50 Full Member Listing, http://www.lmaa.london/membership-browse.aspx?mtype=1(accessed 1 June 2020). The maximum number over the past was 47. Full members are usually very busy due to the high frequency and their popularity to be appointed by parties. Popular full members may be appointed in roughly 100 cases a year. (Note: Internet sources were last accessed on 1 December 2021).

51 Aspiring Full Members Listing, http://www.lmaa.london/membership-browse.aspx?mtype=18 (accessed 1 June 2020). As of 2019, there were 30 aspiring full members.

52 There are 750 supporting members (50 from China) who are maritime lawyers or practitioners in other maritime-related areas.

53 LMAA Newsletters (2019-2020 Spring).

54 It is notable that the Hong Kong International Arbitration Commission (HKIAC) has facilities for online meetings.

55 See the earlier and latest 2017 versions of LMAA terms and procedures.

hoc and not institutional, but views on this may vary. It is surely not an arbitration institution that administers and manages proceedings like the International Chamber of Commerce (ICC) or other bodies dealing with commercial arbitration. An arbitration clause specifying "LMAA arbitration … to be administered by LMAA" is manifestly inaccurate; no administration services are provided and, if requested, will likely be refused simply because of insufficiency of staff, facilities and resources. [56]

4.2.3 Key Roles and Procedures

As an association of professional and full-time arbitrators, the LMAA plays a crucial role in three areas. First, it sets up criteria and qualifications for full-time arbitrators which mainly consider their expertise and experience in maritime matters. The parties may appoint full members. Second, it fosters new arbitrators and helps them to acquire the necessary qualifications and experience by guiding them in handling cases. The President may designate them as sole arbitrators in small cases for them to gain experience. Third, it formulates and generates sets of arbitration rules from which parties can choose. There are at present three such sets of rules; namely, Arbitration on LMAA Terms, LMAA Small Claims Procedure, and LMAA Intermediate Procedure.[57] The rules consider the subject matters of a dispute, whether oral hearings are required, the evidence to be submitted, and whether the parties agree to waive the right to appeal to the court on legal issues.

Cases heard under LMAA rules mainly concern the following:[58]

- shipbuilding contracts disputes,[59]
- time and voyage charterparty disputes,
- bill of lading disputes usually involving anti-suit injunctions, and
- guarantees such as instalment payments under shipbuilding contracts or charterparties.

London arbitration serves all categories of disputes. Under English law, if and when parties agree to a London arbitration clause, it is difficult to set aside the arbitration through lodging litigation in the UK or foreign countries.

5. DELOCALIZATION AND JUSTICE: *PROS* AND *CONS* OF THE LMAA RULES

5.1 Cost-Saving Approaches in Maritime Arbitration

56 Gleaned from visits to the LMAA offices by the present author in 2017 and 2018 in the capacity of a supporting member.

57 LMAA, Procedrual Rules and Guidelines, https://lmaa.london/the-lmaa-terms/.

58 LMAA Newsletters, Summary of Awards Sections (2018-2019).

59 *Wuhan Ocean Economic & Technical Cooperation Co. Ltd.* v. *Schiffahrts-Gesellschaft "Hansa Murcia" MBH & Co. K.G.* [2012] EWHC 3104 (Comm); *Wuhan Guoyu Logistics Group Co. Ltd. & Anor* v. *Emporiki Bank of Greece S.A.* [2012] EWCA Civ 1629; *Primera Maritime Hellas S.A.* v. *Jiangsu Eastern Heavy Industry Co., Ltd.* [2013] EWHC 3066 (Comm); *CLdN Bulk* v. *Shanghai Waigaoqiao Shipbuilding Co., Ltd.* (Lloyds List 24 January 2018); *Zhoushan Jinhaiwan Shipyard Co. Ltd.* v. *Golden Exquisite Inc.* [2014] EWHC 4050 (Comm); *Crescendo Maritime* v. *Bank of Communications* [2015] EWHC 3364 (Comm); *Spliethoffs Bevrachtingskantoor BV* v. *Bank of China Ltd.* [2015] EWHC 999 (Comm); *Neon Shipping Inc.* v. *Foreign Economic & Technical Cooperation Co. of China* (2016) EWHC 399 (Comm).

5.1.1 Documents-Only Arbitration to Reduce Costs

Maritime trade and shipping arbitrations are governed predominantly by the English common law, a remarkable and important feature of which is the adversarial system involving hearings, examinations and cross-examination of witnesses. This can be time-consuming and expensive for the parties. A distinctive feature of maritime arbitration on LMAA terms which is somewhat different from other types of commercial arbitration is the extensive use of the "documents only" form of arbitration. In recent times, some 80% of LMAA awards were handed down through this method which does not involve hearings and associated examinations or cross-examinations of witnesses.[60] In other words, only about 20% of arbitration proceedings involved hearings. Incidentally, the Arbitration Act 1996 provides that the tribunal can decide "whether and to what extent there should be oral or written evidence or submissions".[61]

In the view and observation of the author, "document only" arbitration pursuant to the LMAA rules is no hindrance to parties obtaining access to justice. Indeed, it simplifies the procedure and reduces cost. The arbitrator must interpret a contract based on the documents. If a hearing is necessary and justifiable, the costs of witnesses, experts and the likes, should be borne by the parties concerned. It is notable in this context that hearings involving examinations and cross-examination of witnesses are rare in civil law jurisdictions, including China from where the present author hails.

5.1.2 Two-Arbitrator Tribunal: Simplification of Procedure and Cost Reduction

A new cost-effective device under the latest version of the LMAA rules is the "two arbitrators only" approach. This has been happening in many cases since 2017.[62] This practice now incorporated in the 2021 version is rather uncommon in comparison with other types of international arbitration.

Under LMAA 2017 terms, article 2(c) allows a tribunal consisting of two arbitrators to save the costs for the parties. Under the circumstance that either before the third arbitrator is appointed or the third arbitrator's seat is vacant, if the two original arbitrators reach an agreement on any or all arbitral issues, they have the right to make decisions, orders and rulings on the agreed matters. Under limited circumstances, LMAA allows parties to appoint one or two arbitrations, which means this practice saves the cost as to a third arbitrator.

5.1.3 LMAA Arbitration Rules in Practice

Parties in the world shipping industry involved in maritime disputes welcome the cost-saving mechanisms described above. In 2018, LMAA had appointed 2,599 arbitrators to hear cases.[63] Taking into account that multiple arbitrators could be appointed in one case, it is estimated that there were some 1,561 arbitration cases in that year. Among them, 207 arbitrators were appointed as sole arbitrators in cases where the small claims dispute procedure applied. Usually,

60 LMAA Newsletters (2018-2019).
61 Arbitration Act 1996, s.34(2)(h).
62 Information gleaned from LMAA President; see LMAA Newsletter. Article 2(c) of the 2017 Terms states that "tribunal" includes a sole arbitrator, a tribunal of two or more arbitrators, and an umpire.
63 See latest statistical data at LMAA, http://www.lmaa.org.uk/event.aspx?pkNewsEventID=208da443-7800-4720-84b3-7f4f3f5fc9ce

this procedure applies where a dispute involves less than $100,000. As such, the total number of LMAA arbitral awards in 2018 was 508 which was about 33%.[64] This also meant that some 67% of the disputes were resolved before an arbitral award was given.

The maritime arbitration cases under the 2017/2021 version of the LMAA Rules can be viewed in three groups. First, an arbitral tribunal comprising three arbitrators decided all the cases involving hearings. There were roughly 100 of them in 2018.[65] Second, all of the cases using small claim procedures were decided by a sole arbitrator. There were about 20 such cases in 2018.[66] Third, it is noteworthy that two arbitrators decided roughly 80% of the cases in 2018.[67] Thus, the system as devised is feasible in practice. It improves the efficiency of arbitration and saves costs for the parties, which in turn, ensures that parties have access to justice in the way they want and at a lower cost.

5.2 Denationalization of Arbitration: Lessons for Chinese Parties in London Maritime Arbitration

London maritime arbitration seems to pose a disadvantage for parties from a non-common law background such as China, in terms of access to justice. The rising role of China in shipping is generating numerous international disputes involving Chinese parties. Over the last decade, that is, 2009-2018, approximately 10%-20% of LMAA cases involved Chinese parties but many of them failed.[68] Between 2009 and 2015, there were several contract disputes involving Chinese shipyards but they went on the decline and returned to a low level in 2018.[69] Due to confidentiality concerns and no requirement for publication of arbitral awards under English law, no official figures are available. It is estimated, nevertheless, that around 2,000 shipbuilding arbitration cases were decided in London following the 2008 financial crash; the majority of them involved Chinese shipyards.[70]

5.2.1 Responses from Chinese Parties

After so many cases were lost, concerns have been raised in China over whether London arbitration is fair and just. Some claim that it does not suit Chinese business practices and dispute resolution. Others argue that Chinese shipyards have a language disadvantage and that arbitrators do not appreciate Chinese business culture and language.

The present author observes that the LMAA has published its Terms and Procedures with a translated Chinese version.[71] Another interesting point is that the LMAA committee members have demonstrated an increasing interest in Chinese culture and the Chinese markets. The author met members of the LMAA Committee at a law conference in Shanghai, China. At an

64The 2018 data was used, namely, 2018 statistics calculated in 2019, since at the time of writing the 2019 data had not been published. See latest data at http://www.lmaa.org.uk/event.aspx?pkNewsEventID=208da443-7800-4720-84b3-7f4f3f5fc9ce
65 *Ibid*.
66 *Ibid*.
67 *Ibid*.
68 Estimated by President of the LMAA, see LMAA Newsletter (2020 Spring), 1-5.
69 *Ibid*.
70 See evidence and estimation in LMAA Newsletter (2019).
71 LMAA 2017 Terms, http://www.lmaa.london/terms2017.aspx. and the lattest version is 2021.

interview with the current Present of the LMAA it was revealed that he has adopted a Chinese name and has learned the Chinese language, both spoken and written.

It is noteworthy in this context that some Chinese shipyards have sought to replace London arbitration with that of other jurisdictions such as Beijing or Hong Kong in their standard-form shipbuilding contracts. However, buyers of ships and their financiers are accustomed to English law and London arbitration, so much so, that the new jurisdiction clauses proposed by Chinese parties have not been widely accepted.

5.2.2 Response from the LMAA

The former President of the LMAA, who is an experienced maritime arbitrator, stated that Chinese parties did not perform well in cases involving disputes over shipbuilding contracts, probably because they are markedly different from traditional maritime arbitration cases. Chinese shipyards failed in arbitration cases because in many instances they had not delivered the vessel by the "long stop" cancellation dates. Even if some could rely on reasons under the contract for the delays, they had not strictly fulfilled all the contractual requirements. The LMAA President suggested that Chinese parties, especially shipyards, should pay more attention to contract management and seek professional legal assistance before disputes arise and follow-up on their advice. They should comply strictly with contract performance, select and appoint lawyers and arbitrators in a timely and appropriate manner, determine an overall strategy at the outset, formulate essential defences and prepare witness statements. These are particularly important in "documents only" arbitration.[72] It is notable in this regard that in other types of traditional maritime arbitration, the success rate of Chinese parties is relatively high. COSCO China, for example, has been successful in several London arbitration cases.

6. DOWNSIDES OF DELOCALIZATION AND THEIR SOLUTIONS

The shipping sector is seemingly tenacious, able to withstand impacts such as lockdowns and other downsides perpetuated by the COVID-19 pandemic. In effect, these have created both challenges and opportunities for maritime arbitration and access by the parties to justice even though working from home has become the norm due to restrictions. London arbitrators continued to function normally until April 2020 albeit not in a conventional manner.[73] The current LMAA President has remarked that its arbitrators accept appointments, deal with interlocutory document applications and make awards on documents in the usual way by email correspondence; also courier and postal services are functioning satisfactorily. The only difficulty is with oral hearings attributable to social distancing requirements and travel restrictions.[74]

Recent virtual hearings in UK court proceedings show that virtual justice is feasible in view of technological innovations and it is less expensive for witnesses to give evidence through video

72 Ian Gaunt, *The Chinese Experience in London Arbitration and Court Proceedings*, CECCA International Maritime and Commercial Law Conference, London, 7 December 2018.
73 LMAA Virtual Hearing News Update, (London 2 April 2020), 1-2.
74 LMAA, LMAA Newsletter, (London, Spring Issue, 2020), 94.

conferencing facilities using documents in electronic bundles. Court business continues through telephone, virtual audio-video hearings and the use of skype and cloud video platforms (CVP).[75]

It is possible and feasible to extend this smart practice to arbitration with counsel and arbitrators participating in the proceedings with efficient and effective use of remote technology. This facilitates arbitration applications and appeals to be dealt with in the usual way. The LMAA has rapidly instituted virtual hearings conducted through video links to replace the conventional method. [76] Some LMAA arbitrators hear cases using virtual hearing room arrangements developed in conjunction with the International Dispute Resolution Centre and Opus 2.[77] LMAA also took the lead in a Vis Arbitration Moot competition in April 2020 in using an online dispute resolution platform, called Immediation[78] which is similar to Zoom.[79] In this moot arbitration, participants and arbitrators from around the globe, including Australia, London, Frankfurt, Brazil and Egypt were linked to documentation which included contracts, witness statements, and procedural orders, all distributed in soft copy.[80] According to LMAA, these virtual hearings are taking place satisfactorily and the technologies are obviously valuable.[81]

In the view of the present author, in the post-Covid period, section 34(2) of the Arbitration Act 1996 will be interpreted somewhat widely to cover smart arbitration and remote hearings. It is anticipated that once the users, namely, parties and arbitrators, gain further experience with this development, in all likelihood, London maritime arbitrations will explore newer techniques in the quest for increased efficiency and effectiveness which will enure to the benefit of all concerned and promote access to justice.

6. CONCLUSION

In this chapter, both legal and commercial perspectives are explored to review the interplay between arbitration and justice. For the shipping industry and parties from all over the world, arbitration in London is a popular choice for dispute resolution in relation to maritime contracts. Standard forms contracts such as bills of lading, charterparties and salvage agreement are in frequent use in shipping. They usually incorporate standard arbitration clauses, which often specify London as the seat of arbitration and common law as the applicable law. These practices of the global shipping industry have an impact on parties from non-anglophonic non-western countries and their capacity to appear before a typical common law tribunal such as in the UK.

75https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak?utm_medium=email&utm_source=.
76 LMAA Virtual Hearing News Update, London, 2 April 2020, 1-2.
77 Maritime London, "LMAA Geared Up for Virtual Arbitration Hearing", https://www.maritimelondon.com/covid-19-news/lmaa-geared-up-for-virtual-arbitration-hearings, 1 June 2020.
78 https://www.immediation.com
79 Information provided by the President of LMAA and Professor Stefen Kröll of Bucerius Law School, Hamburg.
80 Ian Gaunt, Remote Hearings - Vis Moot, https://www.linkedin.com/feed/update/urn%3Ali%3Aactivity%3A6654012505351950337/, 1 April 2020.
81 *Ibid*.

It is trite that Asian countries, including China are rapidly emerging as the new global shipping powers but only a few, such as Chinese shipyards, have any experience with London arbitration.

In this chapter the past and present status of the phenomenon of maritime arbitration is perused. It is necessary to know the past to gain an appreciation of the present; and only a clear understanding of the present points to what the future holds in store and what more can be done to further the position of parties in terms of their access to justice. While past practices and the case law in shipping remain largely unchanged, transactions have been stimulated by the device of standard form contracts which feature frequently in maritime arbitration. The shipping industry exhibits a preference for specialized maritime arbitration over commercial litigation in national courts which has led to delocalization or denationalization of maritime dispute resolution. In terms of recent changes and present challenges in this field, the *pros* and *cons* are examined. Among new emerging features, resort to remote arbitral hearings, assurance of justice and better access to it are highlighted.

As probably the most popular seat of maritime arbitration, a closer flook at London is afforded to recognize that it has enjoyed this dominant position for several centuries. A dynamic repository of case law jurisprudence has evolved which provides legal certainty for the global shipping industry. Commercial shipping activity has conspicuously moved to the Asia Pacific region, particularly to China.[82] But London has retained its position in the arena of maritime dispute resolution[83] reinforcing the phenomenon of denationalization which, in turn, poses further challenges for parties seeking adequate access to justice. In recent times, parties from Asian countries such as China are increasingly opting for London maritime arbitration. While official figures are sparse at best, it is estimated that some 2,000 shipbuilding cases have been arbitrated in London since the 2008 financial crisis.[84] As Asian maritime arbitration centres are evolving, there are lessons to be learned from the London experiences of Chinese shipyards, for those with little or no background in the common law which continues to dominate the field of shipping globally.

Last but not least, it is noted that there are many factors that influence justice and fairness, not the least of which is the complexity of the law which affects the ability of parties to access justice. The final message, as Rawls points out, is that arbitration is imperfect procedural justice.

82 Martin Stopford, *Maritime Economics*. UNCTAD, *Review of Maritime Transport*.
83 Andreas Maurer, "Transnational Shipping Law", see Goldby & Mistelis, *The Role of Arbitration in Shipping Law*, 229-235.
84 See details in LMAA Newsletters (2018-2019). Due to the confidentiality of arbitration and non-publication of arbitration awards under English law (unlike the US law), all statistical data included in this chapter are based on estimations which should be interpreted with caution. Some experienced arbitrators who were approached provided information to the best of their knowledge.