

Maritime Arbitration: Dilemmas, Prospects and Challenges

Lessons from contracts for the carriage of goods by sea

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I. Introduction

The international shipping industry has traditionally resorted to arbitration for dispute resolution. The agreement to refer disputes to arbitration is usually contained in standard-form contracts widely used in the shipping industry.¹ The majority of maritime contracts that regulate the most important moments of maritime life ranging from the birth to the demise of the vessel, namely shipbuilding contracts, contracts for the carriage of goods by sea, maritime insurance and salvage, provide for recourse to arbitration.²

Maritime contracts usually involve disputes of substantial sums between experienced parties driven by the rule to keep the ships sailing or they do not make money.³ Important procedural advantages motivate their choice for arbitration: the global enforceability of arbitral awards, the neutrality of the forum, the ability to choose arbitrators specialized in shipping, the speed, cost and confidentiality of the proceedings.⁴ Although arbitration is generally viewed as procedural rather than

¹ Clare Ambrose, Karen Maxwell, Michael Collett, *London Maritime Arbitration* (4th edn, Informa 2017) 42.

² Francesco Berlingieri, 'International Maritime Arbitration' (1978-9) 10 J Mar L & Com 201; Fabrizio Marrella, 'Unity and Diversity in International Arbitration: The case of Maritime Arbitration' (2005) 20 Am U Intl L Rev 1056, 1059.

³ Russell Cortazzo, 'Development and Trends of Lex Maritime from International Arbitration Jurisprudence' (2012) 43 J Mar L & Com 255, 257.

⁴ Thomas Carbonneau, *The Law and Practice of Arbitration* (5th edn, JurisNet LLC 2014) 370-1; Joshua Karton, 'International Arbitration Culture and Global Governance' in Walter Mattli and Thomas Dietz (eds), *International Arbitration and Global Governance: Contending Theories and Evidence* (OUP 2014) 74, 75; José Alcántara, 'An International Panel of Maritime Arbitrators?' (1994) 11 J of Intl Arb 117,117. See also the international survey conducted by the Singapore International Dispute Resolution Academy (SIDRA) on the use of dispute resolution mechanisms by over 300 corporates and external counsel around the world between 2016 and 2018 <www.mlaw.gov.sg/news/press-releases/ability-to-enforce-outcomes-top-consideration-in-choice-of-dispute-resolution-mechanism> accessed 30 May 2020. One of the most important outcomes of the

substantive issue, in legal practice the choice of arbitration may determine the substantive result.⁵

Furthermore, the shipping sector is one of the most important supporters of ad hoc arbitration,⁶ ie arbitration that is not conducted under the supervision of any institution.⁷ The maritime industry regards highly the flexibility and increased privacy that ad hoc arbitration offers. Given this strong preference for ad hoc arbitration, the most prominent maritime arbitration centers stress that they are not administering bodies.⁸

Against this background, there are some inherent difficulties in the study of maritime arbitration: maritime arbitral proceedings are typically ad hoc, arbitral awards are not necessarily published⁹ and many cases remain unreported. Thus, it comes as no surprise that there are no global statistics on the number of maritime arbitrations and there are no predetermined criteria on what should be counted.¹⁰ All

survey is that: “enforceability was a key factor as to why arbitration remained the most often used dispute resolution mechanism despite dissatisfaction with its cost. Conversely, mediation’s current enforceability regime was what its users was least satisfied with.”

⁵ Michael Sturley, T Fujita, G van der Ziel, *The Rotterdam Rules The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Thomson Reuters Legal Limited 2010) 323; see also Roy Goode, ‘Usage And Its Reception In Transnational Commercial Law’ (1997) 46 ICLQ 7 considering that arbitrators have a greater freedom than national judges on the principles of law to be applied.

⁶ Fabrizio Marrella, ‘Unity and Diversity in International Arbitration: The Case of Maritime Arbitration’ (2005) 5 Am U Intl L Rev 1055, 1088. See also LMAA event: ‘BIMCO panel turns spotlight on arbitration challenges and possibilities’ <<http://lmaa.org.uk/event.aspx?pkNewsEventID=e2b19515-c09c-48e7-8460-699b161d0c7a>> accessed 30 May 2020.

⁷ Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer L Intl 2014) 169.

⁸ See more about the form and independence of these associations: for London, the London Maritime Arbitrators Association (LMAA) <www.lmaa.london/uploads/documents/GUIDELINES%20FULL%20MEMBERSHIP%202018.pdf>; for New York, the Society of Maritime Arbitrators (SMA) <www.smany.org/new-york-maritime-arbitration-guide.html>; for Singapore, the Singapore Chamber of Maritime Arbitration (SCMA) has developed a hybrid arbitration model combining the advantages of ad hoc arbitration with institutional assistance <www.scma.org.sg>. In Hong Kong, the Hong Kong Maritime Arbitration Group (HKMAG) was originally formed in February 2000 as a Division of the Hong Kong International Arbitration Center (HKIAC) and has recently become an independent organization <www.hkmag.org.hk/about> accessed 30 May 2020.

⁹ See LMAA Terms, s 28: “If the tribunal considers that an arbitration decision merits publication and gives notice to the parties of its intention to release the award for publication, then unless either or both parties inform the tribunal of its or their objection to publication within 21 days of the notice, the award *may* be publicised under such arrangements as the Association may effect from time to time. The publication will be so drafted as to preserve anonymity as regards the identity of the parties, of their legal or other representatives, and of the tribunal.”; SMA Rules, s 1: “Unless stipulated in advance to the contrary, the parties, by consenting to these Rules, agree that the Award issued *may* be published by the Society of Maritime Arbitrators, Inc. and/or its correspondents.” (emphasis added)

¹⁰ Loukas Mistelis, ‘Competition of Arbitral Seats in Attracting International Maritime Arbitration Disputes’ in Miriam Goldby and Loukas Mistelis (eds), *The Role of Arbitration in Shipping Law* (OUP 2016) 135. Clare Ambrose, ‘The role of standard forms and arbitrators’ in Miriam Goldby and Loukas Mistelis (eds), *The Role of Arbitration in Shipping Law* (OUP 2016) 251 stresses that unfortunately there is no common standard or source and securing reliable and consistent statistics would be useful to everyone involved in the dispute resolution sector. Bernard Eder, ‘London Arbitration: The Future in Context’ (9 April 2019) 5 <https://s3-eu-west-2.amazonaws.com/sqe-esscourt/wp-content/uploads/2019/04/10145607/2019_04_09_Worshipful-Company-of-Arbitrators-Lecture.pdf> accessed 30 May 2020 also stresses that no one knows how many arbitration awards are published

we know is some estimates on the appointments and numbers of awards issued per year under the rules of each association. According to these estimates, London handles 75-80 percent of the world's maritime arbitration work,¹¹ followed by New York,¹² while Singapore has recently gained prominence as a maritime arbitration center.¹³

Arbitration is the dispute resolution method of choice for the shipping industry, but this does not mean that it has been immune from criticism. Complaints are occasionally heard about costs and delays in maritime arbitration.¹⁴ As maritime arbitration has received less scholarly attention compared to commercial and investment arbitration and remains largely unexplored, this essay aims to shed some light on this complex phenomenon.

Apart from an unexplored and fascinating subject, maritime arbitration is also topical. For example, a project of the *Comité Maritime International* (hereinafter CMI) aims to investigate its potential role in maritime arbitration. The purpose of the project, which is still a work in progress, is to provide insight into some crucial issues, such as a comparative analysis of the arbitration rules and practices in the main arbitral seats or whether CMI should develop its own model rules on maritime arbitration.

Arbitration is also a particularly important issue to be taken into consideration for the drafting, negotiation and ratification of international maritime conventions or liability regimes in the transport sector. For example, the arbitration chapter has proved to be one of the most controversial issues during negotiations of the

annually in England. For a comparative analysis of available statistics from LMAA, LCIA, ICC, SIAC, Stockholm Chamber of Commerce, HKIAC and SCMA see James Clanchy, 'Arbitration statistics 2018: London bucks downward trends' (*Lexisnexis Blog*, 20 June 2019) <www.lexisnexis.co.uk/blog/dispute-resolution/arbitration-statistics-2018-london-bucks-downward-trends> accessed 30 May 2020.

¹¹ Bruce Harris, 'London Maritime Arbitration' (2011) 77 *Arb* 116, 123. The President of the LMAA, Ian Gaunt, in a recent interview suggests that, on the basis of a survey, around 80 percent of international maritime arbitrations have their seat in London, see <www.maritime-executive.com/features/ian-gaunt-explains-the-benefits-of-london-arbitration>. See also the relevant survey: HFW, 'The Maritime Universe in Numbers: Will Brexit Impact London's Standing' (March 2018) <www.hfw.com/downloads/HFW-The-maritime-arbitration-universe-in-numbers-March-2018.pdf> and its updated version: HFW, 'The Maritime Universe in Numbers: One Year On' (May 2019) <www.hfw.com/downloads/001161-HFW-The-maritime-arbitration-universe-in-numbers-One-Year-On-May-19.pdf> accessed 30 May 2020.

¹² Andreas Maurer, 'Transnational Shipping Law' in Miriam Goldby and Loukas Mistelis (eds), *The Role of Arbitration in Shipping Law* (OUP 2016) 236.

¹³ Leng Sun Chan, 'Common Types of Shipping Arbitration in Singapore and London' in Miriam Goldby and Loukas Mistelis (eds), *The Role of Arbitration in Shipping Law* (OUP 2016) 202.

¹⁴ Clive Aston, 'A look at the London Arbitration Scene' <www.lmaa.london/uploads/documents/LSLC%20talk.pdf> accessed 30 May 2020; Thomas Carbonneau, *The Law and Practice of Arbitration* (5th edn, JurisNet LLC 2014) 376; Michael van Gelder, 'Maritime Arbitration: Quo Vadis? Have Delays and Costs Caused us to Lose the Way?' (1995) 12 *J Int Arb* 79; Robert Force, Anthony Mavronicolas, 'Two Models of Maritime Dispute Resolution: Litigation and Arbitration' (1991) 65 *Tul L Rev* 1461, 1465 refer to delay, increased costs, and greater legal formality; Antonios Tsavdaridis, *International Maritime Arbitration* (Sakkoulas 1999) 99-108 discusses criticism and problems of maritime arbitration.

Rotterdam Rules.¹⁵ In this context, the debate on maritime arbitration and the perspective of a unified maritime arbitration convention or model law remains topical. To regulate or not to regulate? This is an important dilemma facing maritime arbitration and this essay provides some insights.

II. The international legal regime – Unification approaches

A. *International treaties*

Maritime arbitration is a genuinely international field of increased interaction among international and national laws. It involves the application of both maritime substantive law and arbitration law. Arbitration agreements and arbitral awards are primarily affected by international law, namely by the New York Convention,¹⁶ as well as by the UNCITRAL Model Law.¹⁷ Specifically, the New York Convention applies to the recognition and enforcement of foreign arbitral awards ‘arising out of differences between persons, whether physical or legal’.¹⁸ Thus, the New York Convention, to which 163 states, including all the major trading nations, are parties,¹⁹ establishes the conditions for enforcement of maritime arbitral awards. In the UNCITRAL Model Law, the term commercial is interpreted widely to include ‘carriage of goods or passengers by air, sea, rail or road.’²⁰

In the absence of a uniform regime for the resolution of shipping disputes, mandatory rules derived from international law treaty instruments, such as the New York Convention and national laws come into play. The inherent international nature of shipping leads to a constant interaction of different national laws and international law. This multiplicity of regimes brings inevitably confusion for maritime parties and conflict of laws. Even in the ideal scenario that uniform international rules apply, different state courts may adopt different interpretations and reach different results.

A characteristic example is disputes arising from contracts for the carriage of goods by sea, which are differently regulated depending on the form of the contract. On the one side, there is no international convention on chartering and this industry is dominated by standard-form contracts.²¹ On the other side, the law governing bills of lading is a combination of mandatory international law and local law. Despite the

¹⁵ United Nations Convention on the Carriage of Goods Wholly or Partly by Sea (hereinafter Rotterdam Rules).

¹⁶ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958 (hereinafter New York Convention).

¹⁷ UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 (hereinafter UNCITRAL Model Law).

¹⁸ Art I(1).

¹⁹ UNCITRAL, Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2> accessed 30 May 2020.

²⁰ Art 1(1) fn 2.

²¹ William Tetley, *International Maritime and Admiralty Law* (Yvon Blais Inc 2002) 173; see also Grant Hunter, ‘Standard forms- The BIMCO experience’ in Rhidian Thomas (ed), *Legal Issues Relating to Time Charterparties* (Informa 2008) 1.

relevant unification efforts, this area of law remains highly fragmented.²² Carriage of goods by sea under bills of lading in most countries is governed by one of the following international conventions: the Hague Rules, the Hague - Visby Rules, or the Hamburg Rules, while some states have also enacted national legislation.²³ Lately, there has also been a new Convention, the Rotterdam Rules, still not yet in force.²⁴ From these rules, the Rotterdam and Hamburg Rules specifically address arbitration, while the older Hague - Visby Rules do not touch upon the issue.²⁵

The arbitration chapter has proved to be one of the most controversial issues during negotiations of both the Rotterdam Rules and the Hamburg Rules.²⁶ Given the different forms of regulation governing contracts of carriage, the adoption of an entirely uniform regime is a complex endeavor, hindered by the competing interests of different maritime parties.

At the same time, the general arbitration convention, ie the New York Convention is to a certain extent outdated, as it has been a long time since it was signed. For example, the term 'agreement in writing' as defined in the New York Convention²⁷ does not correspond to the current needs of international trade.²⁸ The New York Convention also leaves some space for review of foreign arbitral awards on the grounds of state public policy.²⁹ This provision inevitably leads to different approaches of the states as to the interpretation of public policy and the extent of review of arbitral awards may considerably vary among contracting states.³⁰

²² For an analysis of these unification efforts see Michael Sturley, 'Transport Law for the twenty-first century: an introduction to the preparation, philosophy, and potential impact of the Rotterdam Rules' in Rhidian Thomas (ed), *A New Convention for the Carriage of Goods by Sea- The Rotterdam Rules* (Lawtext Publishing 2009) 1-33.

²³ Rhidian Thomas (ed), *A New Convention for the Carriage of Goods by Sea- The Rotterdam Rules* (Lawtext Publishing 2009) 2, William Tetley, *International Maritime and Admiralty Law* (Yvon Blais Inc 2002) 66.

²⁴ For a comprehensive analysis of the Rotterdam Rules see Yvonne Baatz and others (eds), *The Rotterdam Rules: A Practical Annotation* (Informa 2009); Michael Sturley, T Fujita, G van der Ziel, *The Rotterdam Rules The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Thomson Reuters Legal Limited 2010); Rhidian Thomas (ed), *The Carriage Of Goods By Sea Under The Rotterdam Rules* (Lloyd's List 2010); Rhidian Thomas (ed), *A New Convention for the Carriage of Goods by Sea- The Rotterdam Rules* (Lawtext Publishing 2009); Alexander von Ziegler and others (eds), *The Rotterdam Rules 2008* (Kluwer L Intl 2010).

²⁵ Francesco Berlingieri, 'A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules' (2009) Paper delivered at the General Assembly of the AMD, 49 <www.uncitral.org/pdf/english/workinggroups/wg_3/Berlingieri_paper_comparing_RR_Hamb_HVR.pdf> accessed 30 May 2020.

²⁶ Michael Sturley, 'The modern international conventions governing the carriage of goods by sea' in Miriam Goldby and Loukas Mistelis (eds), *The Role of Arbitration in Shipping Law* (OUP 2016) 104.

²⁷ Art II(2) 'an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.'

²⁸ Albert Jan van den Berg, 'The New York Convention of 1958: An overview' 6 <www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf> accessed 30 May 2020.

²⁹ Art V(2)(b).

³⁰ Sigvard Jarvin, 'Leading Arbitration Seats- A Comparative View' in Stefan Frommel and Barry Rider (eds), *Conflicting Legal Cultures in Commercial Arbitration* (Kluwer L Intl 1999) 61.

B. The CMI Project

Against this fragmented background, several initiatives towards a more uniform maritime arbitration regime have been taken from time to time. However, the idea of a permanent International Court of Maritime Arbitration and the joint ICC/CMI international maritime arbitration rules did not gain support within the shipping industry.³¹

A more recent project of the CMI aims to investigate its potential role in maritime arbitration.³² The purpose of the project, which is still a work in progress, is to provide insight into some crucial issues, such as a comparative analysis of the arbitration rules and practices, as well as recognition and enforcement issues in the main arbitral seats; whether arbitration is a valid option for the resolution of maritime disputes in countries where the court system appears unsatisfactory; whether CMI should develop its own model rules on maritime arbitration.

However, the answer of the maritime law association of the most prominent seat, ie London, is characteristic of the stance towards such initiatives: “Although our Association will, of course, contribute as requested, to any relevant questionnaire and requests for information, it would not be eager to encourage the CMI to play a role in maritime arbitration. The reasons are twofold. First English arbitration law is now satisfactorily regulated by the Arbitration Act 1996. The UNCITRAL rules have not been adopted. Secondly, most maritime arbitrations are conducted in accordance with the Rules of the London Maritime Arbitrators Association which complement the Act and provide what has proved to be a satisfactory code for resolving maritime disputes.”³³ It comes as no surprise that main maritime arbitration service provider would not embrace any change in the current status quo.

A similar view is also expressed by the maritime law association of the United States.³⁴ They see no role for the CMI in maritime arbitration, since the LMAA and SMA are the primary choices for sophisticated industry entities and their roster, rules, and procedures are accepted by the maritime legal community. They stress that at this time when Singapore, Houston and other maritime arbitral centers are seeking to increase their market share, the last thing the industry needs is another competing model.

³¹ In 1978, the International Chamber of Commerce (ICC) and the CMI jointly issued a set of rules for maritime arbitration. The administration of arbitration cases submitted under the ICC/CMI Arbitration Rules was entrusted to an organization common to the two institutions, the International Maritime Organization (IMAO). The rules were designed for the conduct of arbitration disputes relating to maritime affairs including *inter alia* charterparties, contracts of carriage of goods by sea and other contracts. See Rolf Stoedter, ‘The International Maritime Arbitration Rules (ICC-CMI)’ (1980) 8 Intl Bus Law 302; Fabrizio Marrella, ‘Unity and Diversity in International Arbitration: The Case of Maritime Arbitration’ (2005) 5 Am U Intl L Rev 1055, 1099.

³² CMI, Questionnaire - CMI Arbitration (20 February 2015), 1-2 <<https://comitemaritime.org/work/arbitration/>> accessed 30 May 2020.

³³ CMI, Questionnaire - CMI Arbitration: British Maritime Law Association Reply (9 February 2016) <<https://comitemaritime.org/wp-content/uploads/2018/05/UK-.pdf>> accessed 30 May 2020.

³⁴ See the majority view in CMI, Questionnaire - CMI Arbitration: The Maritime Law Association of the United States Reply (5 May 2015) <<https://comitemaritime.org/wp-content/uploads/2018/05/USA.pdf>> accessed 30 May 2020.

C. Industry self-regulation through standardization

1. The benefits of standardization

In general, standard-form contracts are a common feature in many kinds of commercial relationships because they reduce transaction costs.³⁵ Standard contracts aim to promote certainty, predictability and uniformity regarding the parties' rights and obligations and the meaning of contractual terms in numerous transactions.³⁶

In the shipping context, several institutions have undertaken the task to develop such standard-form contracts suitable for all kinds of goods and trades. BIMCO has undertaken a large amount of this documentary work.³⁷ Other organizations issuing standard-form contracts are the Federation of National Associations of Ship Brokers and Agents (FONASBA) and other regional organizations. BIMCO has a standard-form contract available for every stage of the ship's life, from shipbuilding to scrapping.³⁸ The primary purpose of these documents is to strike a fair balance among the contracting parties, promote commercial certainty by adopting a clear and legally sound language and prevent disputes.³⁹

Clearly the parties' intention to resort to arbitration may be frustrated, if they first have to expend time and costs to resolve preliminary issues, such as the validity of the arbitration clause, the seat of arbitration and the appointment of arbitrators.⁴⁰ Such concerns can be avoided or minimized when arbitration clauses are clear and well-drafted. Even when dealing with jurisdictions which are known for their pro-arbitration approach, such as London, New York and Singapore, caution is still required as there is no certainty that a defect in the arbitration clause can be resolved through proper interpretation. It is thus necessary for the parties to specify all the key elements of an arbitration agreement in order to avoid legal battles.

In contrast to international regulatory attempts in bills of lading, the chartering markets and their attorneys have traditionally resisted any international law governing charterparties.⁴¹ Thus, although the charterparty is the cornerstone of shipping transportation, there is no uniform international legal regime and this industry is currently dominated by standard-form contracts.

³⁵ Mark Patterson, 'Standardization of Standard-Form Contracts: Competition and Contract Implications' (2010-2011) 52 *Wm & Mary L Rev* 331.

³⁶ Nicole Kornet, 'The Interpretation and Fairness of Standardized Terms: Certainty and Predictability under the CESL and the CISG Compared' (2013) 24 *Eur Business L Rev* 319,319. See also Marcel Kahan, Michael Klausner, 'Standardization and Innovation in Corporate Contracting (Or "The Economics Of Boilerplate")' (1997) 83 *Virginia LRev* 713,719-729.

³⁷ BIMCO <www.bimco.org/about-us-and-our-members/about-us> accessed 30 May 2020; Grant Hunter, 'Standard forms- The BIMCO experience' in Rhidian Thomas (ed), *Legal Issues Relating to Time Charterparties* (Informa 2008) 1.

³⁸ Grant Hunter, 'Standard forms- The BIMCO experience' in Rhidian Thomas (ed), *Legal Issues Relating to Time Charterparties* (Informa 2008) 1.

³⁹ BIMCO <www.bimco.org/about-us-and-our-members/about-us> accessed 30 May 2020; Hunter refers to these virtues as the '3 Cs', Grant Hunter, 'Standard forms- The BIMCO experience' in Rhidian Thomas (ed), *Legal Issues Relating to Time Charterparties* (Informa 2008) 1-2.

⁴⁰ Kohe Noor Hasan, Bazul Ashhab, 'Shipping and International Trade Disputes' in Sundaresh Menon and Denis Brock (eds), *Arbitration in Singapore A Practical Guide* (Sweet & Maxwell Asia 2014) 518.

⁴¹ William Tetley, *International Maritime and Admiralty Law* (Yvon Blais Inc 2002) 173.

All standard-form charterparty contracts contain jurisdiction or arbitration clauses, which specify the forum in which disputes arising under the contract will be resolved, as well as the applicable law.⁴² Typically they provide for arbitration in London under English law or arbitration in New York under US law.⁴³ Recently, Singapore law and arbitration has been also added as an option.⁴⁴ In this context, the parties usually make a clear choice of the applicable law governing the charterparty.⁴⁵ Standard-form contracts also provide for a default option in case that users fail to make a nomination of applicable law and arbitral seat.⁴⁶

Apart from standard forms, BIMCO also produces a number of special clauses, which can be incorporated to any maritime contract, according to the will of the parties. One of the most important special standard clauses is the BIMCO Standard Dispute Resolution Clause, which is regularly reviewed and updated.

Since there is no international law regulating charterparties, the legal issues and disputes arising from charterparties are resolved by resort to the applicable national law. It is also possible for the parties to agree that the Hague, the Hague-Visby and the Hamburg Rules, apply to charterparties. This can be achieved by a clause paramount, sections containing the Rules verbatim, or by stipulating that the rules applicable to the bills of lading issued under the charterparty apply to any cargo claim under the charterparty.⁴⁷ Theoretically, it is also possible for the parties to incorporate the Rotterdam Rules, even though they are not yet in force.⁴⁸ Bills of lading often incorporate charterparty terms, one of the most common being the arbitration clause. Therefore, it can be said that this industry is to a great extent self-regulated.

2. De facto harmonization - Uniformity and interpretation issues

Because of the high degree of standardization of the industry,⁴⁹ English law is by default the applicable law and most of the shipping arbitration business is

⁴² William Tetley, *International Maritime and Admiralty Law* (Yvon Blais Inc 2002) 176. For example, the BIMCO Standard Dispute Resolution Clause 2017 and the BIMCO contracts in different types of trades, available at BIMCO website upon registration.

⁴³ For example, among 64 charterparties most commonly encountered in bibliography and case law, as well as those found in BIMCO and FONASBA websites, only 4 do not provide for arbitration. Thus, an arbitration clause was found in more than 90% of the cases. From the 60 charterparties including an arbitration clause, 46 provide for arbitration in London in accordance with English law, as the first option, or as an alternative, or even exclusively in a few cases. Therefore, London has almost general jurisdiction in this industry. New York arbitration in accordance with US law is the second most common option in the aforementioned charterparties, appearing in 33 charterparties, ie more than half of them. For the charterparties studied, see Annex of Charterparties.

⁴⁴ Singapore appears in standard forms developed after the inclusion of Singapore in the BIMCO Dispute Resolution Clause in 2013, namely in 6 forms from the charterparties mentioned in the preceding fn.

⁴⁵ Terence Coghlin, John Kimball, Andrew Baker, *Time Charters* (7th edn, Informa 2014) 5.

⁴⁶ See for example the BIMCO Standard Resolution Clause 2017, sub-clause *; BIMCO, NYPE 2015, clause 54, subclause *; BIMCO, Uniform General Charter GENCON cl. 19 (d).

⁴⁷ Yvonne Baatz (ed), *Maritime Law* (3rd edn, Informa 2014) 121.

⁴⁸ *ibid* 122.

⁴⁹ Bryan Druzin in 'Spontaneous Standardization and the New *Lex Maritima*' in Miriam Goldby and Loukas Mistelis (eds), *The Role of Arbitration in Shipping Law* (OUP 2016) 63 characterizes this

concentrated in London, followed by New York. As most of the standard forms provide for arbitration in London under English law, the industry assigns the resolution of the majority of disputes to English law and English arbitrators, and ultimately, in cases of subsequent challenges to arbitral awards, to English judges.

The extensive use of standard arbitration clauses, apart from its purpose to help the parties achieve quick and flexible dispute resolution, inevitably reinforces arbitration business in the most commonly selected arbitration centers. Thus, arbitration law itself may be seen as a ‘subtle’ manner of standardization: when shipping parties opt for arbitration in a specific state, they adopt that state’s mandatory arbitration rules, as well as the default terms by choosing not to customize an alternative term.⁵⁰ In this context, these rules operate as standard contract terms: they are the same for all the parties that adopt them and state legislatures and courts in this state implicitly perform the function of standard-setting organizations.⁵¹

Therefore, the use of English law and arbitration in London in the vast majority of standard-form contracts leads to a de facto harmonization of the substantive legal regime and an increased concentration of the maritime dispute resolution business in London. This brings to the foreground several policy issues, such as the interface of arbitration with legal orders and the role of state courts in arbitration, the privatization of justice and the development of the law from non-state organs, which will continue to attract debates and shape future maritime arbitration law.

Apart from these important policy considerations, there are also several practical issues arising from this extensive industry standardization. First of all, it seems that standard forms are sometimes outdated. For example, some forms that were drafted in the 19th or 20th century are still in use.⁵² This is explained, in part, by the fact that the industry gives little attention on the form or is reluctant to adopt a new form that it is unfamiliar with. The network effects theory provides a further explanation. Network effects provide increased value, but they also constitute significant barriers to entry.⁵³ Like improved products in the market, it is difficult for new contractual terms to be established compared to widely adopted and long-used contracts.⁵⁴ Switching costs prevent parties from adopting a new contract term, even if the previous terms are inferior compared to the new ones.⁵⁵

In this context, shipping parties may prefer an established standard-form

industry standardization as ‘spontaneous’ because it occurs without a central body doing the standardizing.

⁵⁰ Marcel Kahan, Michael Klausner, ‘Standardization and Innovation in Corporate Contracting (Or “The Economics Of Boilerplate”)’ (1997) 83 Virginia LRev 713,763-764 support this argument in corporate law using Delaware’s corporate law as an example.

⁵¹ Marcel Kahan, Michael Klausner, ‘Standardization and Innovation in Corporate Contracting (Or “The Economics Of Boilerplate”)’ (1997) 83 Virginia LRev 713,763-764.

⁵² UNCTAD Report, Charterparties A comparative analysis <http://unctad.org/en/PublicationsLibrary/c4isl55_en.pdf> 5.

⁵³ Mark Patterson, ‘Standardization of Standard-Form Contracts: Competition and Contract Implications’ (2010-2011) 52 Wm & Mary L Rev 344.

⁵⁴ *ibid.*

⁵⁵ See Marcel Kahan, Michael Klausner, ‘Standardization and Innovation in Corporate Contracting (Or “The Economics Of Boilerplate”)’ (1997) 83 Virginia LRev 713,727-728.

contract compared to a new untested contract. For example, the old forms NYPE 1946 and ASBATANKVOY are still widely used.⁵⁶ Shipbrokers suggest numerous amendments and additional clauses taking into account the specific needs of their clients.⁵⁷ Over the years, standard forms have been amended on the aftermath of disputes and arbitral awards.⁵⁸

However, despite this extensive industry standardization, uniformity remains always a difficult task to achieve. First of all, it should not be understated that these standard-form contracts do not exist in a ‘vacuum’, but they are subject to the applicable contract law, including the contract interpretation rules and the mandatory rules on the enforceability of such terms.⁵⁹ These rules differ from one jurisdiction to another and it is always possible that the same contract can have different legal effects depending on the governing law.⁶⁰ Even when the wording of a standard clause remains intact by the parties and even if the same national law- ie the predominant English law- applies, courts and arbitral tribunals in different jurisdictions may adopt different approaches and interpretations.

Furthermore, even in cases where disputes are resolved by international arbitration tribunals, domestic courts will need to recognize the award and domestic officers, such as bailiffs and sheriffs, will need to seize assets, freeze bank accounts, or take other necessary steps to execute the award in cases that parties fail to comply voluntarily.⁶¹ To a certain extent, standardization may reduce the uncertainty about the content of the applicable law, but it is not a guarantee for uniform interpretation and enforcement.⁶² Thus, standardization does not solve the problem that international business transactions are subject to multiple laws in different jurisdictions.⁶³

For example, a fundamental difference between common law and civil law resides in the method of interpretation of contracts. Specifically, under English law, the approach is objective when the courts look into the intention of the parties, ie they consider what meaning the document would convey to a reasonable person having the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.⁶⁴ It is submitted that

⁵⁶ Yvonne Baatz (ed), *Maritime Law* (3rd edn, Informa 2014) 119.

⁵⁷ *ibid.*

⁵⁸ For example, with regards to AMWELSH, BIMCO’s explanatory note states that it has been amended in line with decisions arrived at by arbitration in the USA, or otherwise because of disputes, which had arisen between owners and charterers.

⁵⁹ Nicole Kornet, ‘The Interpretation and Fairness of Standardized Terms: Certainty and Predictability under the CESL and the CISG Compared’ (2013) 24 *Eur Bus L Rev*, 319,321

⁶⁰ *ibid.*

⁶¹ Katharina Pistor, ‘The Standardization of Law and Its Effect on Developing Economies’ (2002) 50 *Am J Comp L* 97, 99.

⁶² *ibid.*

⁶³ *ibid.*

⁶⁴ *Seatrade Group NV v Hakan Agro DMCC The Aconcagua Bay* [2018] EWHC 654 (Comm): “In interpreting a contract the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge that would have been available to the parties would have understood them to be using the language in the contract to mean; the court focuses on the meaning of the words in their documentary, factual and commercial context.”; *Lukoil Asia Pacific PTE Limited v Ocean Tankers (PTE) Limited (The Neptune)* [2018] EWHC 163 (Comm), [2018] 1 *Lloyd’s Rep* 654, Popplewell J summarizing the principles on construction of commercial contracts; *Boskalis*

judicial interpretation in standard-form contracts should aim to promote the functions of standard terms, while allowing parties to opt out of those standards and customize their own terms.⁶⁵ A consistent interpretation of standard terms is appropriate, while there should be no inquiry into the subjective intent of the parties.⁶⁶

On the contrary, the civilian approach focuses on the parties' intentions and there is no standard interpretation of standard terms.⁶⁷ While common law focuses more on strict textual interpretation, civil law chooses the subjective method and therefore, interpretation of contracts is a matter of fact, not of law.⁶⁸ This leads to important differences in the interpretation of standard-form contracts in different jurisdictions.

III. Conclusions and Way Forward

Charterparties have been traditionally exempted from the international conventions governing carriage of goods by sea, while only some aspects of bills of lading are regulated by international law. Given the dominance of self-regulation through standard-form contracts, the first important question is whether the current regime is efficient. Since there is no uniform international law regulating maritime arbitration, a further crucial question is whether such law would be necessary and/or desirable.

It has been submitted that an international convention on charterparties may be unnecessary and even harmful in an area where freedom of contract, custom, and standard forms have already prevailed and work efficiently.⁶⁹ In fact, the experience of the Rotterdam Rules indicates that the charterparty industry would still wish to be excluded in any convention governing carriage of goods by sea. The Rotterdam Rules have also proved the difficulties in regulating dispute resolution issues, such as jurisdiction and arbitration.

In essence, it appears that the shipping industry favors the current flexible regime of arbitration and party autonomy. Apart from the reluctance of the shipping industry, a further complex issue in the adoption of an international legal regime is that it would introduce new rules and concepts, not tested in any legal system. Since new issues will need to be clarified in case law and judges in different jurisdictions lack a common point of reference, increased uncertainty would lead parties to opt out

Offshore Marine Contracting BV v Atlantic Marine and Aviation LLP (The "Atlantic Tonjer") [2019] EWHC 1213 (Comm).

⁶⁵ Marcel Kahan, Michael Klausner, 'Standardization and Innovation in Corporate Contracting (Or "The Economics Of Boilerplate")' (1997) 83 Virginia LRev 713,765.

⁶⁶ *ibid.*

⁶⁷ Joshua Karton, *The Culture of International Arbitration and The Evolution of Contract Law* (OUP 2013) 210. See also Nicole Kornet, 'The Interpretation and Fairness of Standardized Terms: Certainty and Predictability under the CESL and the CISG Compared' (2013) 24 Eur Bus L Rev 319,325.

⁶⁸ Joshua Karton, *The Culture of International Arbitration and The Evolution of Contract Law* (OUP 2013) 210.

⁶⁹ William Tetley, 'Uniformity of International Private Maritime Law-The Pros, Cons, and Alternatives to International Conventions-How to Adopt an International Convention' (1999-2000) 24 Tul Mar LJ 775, 802.

of the international uniform regime and choose instead a specific legal order to govern their transactions.⁷⁰

Indeed, it would appear striking for such a highly qualified pool of individuals as those involved in the charterparty industry to accept an unsatisfactory regime. Self-regulation through standard forms seems to be working efficiently and an international convention or model law regulating maritime arbitration is thus undesirable.⁷¹ Any new regime or model rules for maritime arbitration should take into consideration the specific needs of the shipping industry. Lack of support within the industry and the major maritime arbitration centers would render any relevant attempt unsuccessful.

However, there are still steps to be taken towards greater transparency in maritime arbitration. While this essay sheds light on some of the issues facing maritime arbitration, further research is necessary with the view to increase the available information and knowledge on maritime arbitration, as well as its international visibility. The CMI can play a leading role in such an effort in the future.

Annex of Charterparties

AMWELSH
ASBATANKVOY
AUSTWHEAT
BALTIME
BALTIMORE
BARECON
BARECON89
BARGEHIRE
BARGEHIRE94
BIMCHEMTIME
BIMCHEMVOY
BISCOILVOY
BLACKSEAWOOD
BOXTIME
BPTIME3
CENTROCON
CEMENTVOY
COAL OREVOY
EXXONMOBIL
FERTICON
FERTISOV
FERTIVOY
GASTIME
GASVOY
GENCON

⁷⁰ Katharina Pistor, 'The Standardization of Law and Its Effect on Developing Economies' (2002) 50 Am J Comp L 97, 110-111 brings the Convention on the International Sale of Goods as an example.

⁷¹ However, see Michael Sturley, T Fujita, G van der Ziel, *The Rotterdam Rules The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Thomson Reuters Legal Limited 2010) 354 on the risks of leaving arbitration completely unregulated, as arbitration could become the 'back-door' route for carriers to avoid their obligations under the international convention.

GENTIME
GRAINCON
HEAVYCON
HEAVYLIFTVOY
HYDROCHARTER
INTERTANKTIME 80
LINERTIME
LNGVOY
MULTIFORM
MUNTAJATCHARTER
MURMAPATIT
NANYOZAI
NIPPONCOAL
NIPPONORE
NORGRAIN
NUBALTWOOD
NUVOY
NYPE
NYPE93
NYPE 81 (code name ASBATIME)
PANSTONE
POLCOALVOY
PROJECTCON
QAFCOCHARTER
RUSWOOD
TANKERVOY
SCANCON
SHELLTIME4
SOVCOAL
SOVCONROUND
SOVORECON
SUGAR CHARTERPARTY
SUPPLYTIME
SUPPLYTIME2005
SUPPLYTIME89
SYNACOMEX
WINDTIME
WORLDFOOD
YARACHARTER