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Unity and Diversity in International Arbitration: The Case of Maritime Arbitration

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INTRODUCTION

In a recent speech, the President of the International Court of Justice noted that:

> The proliferation of courts presents us with risks, the seriousness of which it would be unwise to underestimate. In my view, to leave it to the common sense of the judges to deal with these consequences may well prove insufficient. What needs to be done is to determine the relative positions of the new judicial bodies within the modern international framework and, to this end, to establish new links between these bodies.[1]

The proliferation of international courts mentioned here is not confined solely to the area of interstate relations.[2] In truth, it is a

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1. *See* Gilbert Guillaume, Remarks Before the Sixth Committee of the U.N. General Assembly (Oct. 27, 2000), *available at* http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/iSpeechPresident_Guillaume_SixthCommittee_20001027.htm (last visited Aug. 16, 2005). Guillaume, President of the International Court of Justice, added that:

> Over the last two decades this process has quickened and taken on a global aspect. In 1982, the United Nations Convention on the Law of the Sea gave birth to the International Tribunal for the Law of the Sea, which became operational in 1996. Meanwhile, in 1994 we had the Marrakesh Agreement, out of which was to come the quasi-judicial dispute settlement mechanism of the World Trade Organization (WTO). I should also mention at this point the agreements currently undergoing ratification which could in due course lead to the creation of an African Court of Human Rights and the International Criminal Court. In parallel with these developments, the last 20 years have seen the establishment of a number of *ad hoc* tribunals, such as the Iran-United States Claims Tribunal, or the International Criminal Tribunals for the former Yugoslavia and Rwanda. Thus we are now seeing a multiplication, not to say a proliferation, of international judicial bodies.

Id.

2. *See id.*

> This development has to be viewed in the context of more far-reaching changes in international relations. Thus the second half of the twentieth century has witnessed an expansion and diversification in the ways in which States relate to one another. The areas in which they co-operate have undergone a substantial expansion: security, education, economics, the environment, scientific research, communications, transport, etc. Nowadays there seems to be no area which is not covered. At the same time, the non-State players—commercial companies, non-governmental organizations

complex phenomenon that interweaves with the parallel diversification of tribunals set up to resolve disputes on a transnational level; maritime arbitration is an important example of this phenomenon.[3]

Maritime arbitration has developed on both an interstate and a transnational relations level.[4] With regard to the former, that is, the law of the sea, arbitration provides one of the means for peaceful settlement of disputes provided by international law and, more significantly, by the Convention on the Law of the Sea of December 10, 1982 ("Montego Bay Convention").[5] As for the transnational aspect—the main subject of this article—it is said that maritime arbitration has ancient origins, and furthermore, just as maritime law preceded "terrestrial" commercial law, maritime arbitration preceded international commercial arbitration, with its roots dating back to the times of the ancient *lex mercatoria*.[6] One of the first legal

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(NGOs), private individuals—engage increasingly in transnational activities, thus demonstrating how permeable frontiers are. Moreover, these cross-frontier transactions—in the wide sense of the word—have themselves become more diverse. This trend will undoubtedly intensify with new technological advances, for example in the field of telecommunications. This dual expansion in inter-State relations and cross-frontier transactions, in terms both of subject-matter and of frequency, has inevitably rendered it necessary, if not essential, to make all these relationships subject to the rule of law. As a result, new areas have been opened up to international law, whilst new players have entered the arena. The proliferation of courts may be perceived as a process of adaptation to these fundamental changes.

Id.

3. *See generally* Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 RECUEIL DES COURS 101 (1998).

4. *See* TULLIO TREVES, NUOVE TENDENZE, NUOVI TRIBUNALI, LE CONTROVERSIE INTERNAZIONALI 35 (Milan, Italy, 1999) ("The experience of the so-called transnational arbitration . . . evidences that borderlines between the law of intergovernmental relationships and that regulating international relationships amongst individuals are uncertain. Moreover, dispute resolution mechanisms used by private actors may present strong analogies with jurisdictional or arbitral proceedings used for intergovernmental dispute resolution.") (translation by author).

5. Convention on the Law of the Sea, U.N. Doc. A/CONF.62/122 (1982) [hereinafter UNCLOS].

6. Undoubtedly the *lex maritima* was an essential component of ancient *lex mercatoria*. *See* William Tetley, *The General Maritime Law—The* Lex Maritima *(With a Brief Reference to the* Ius Commune *in Arbitration Law and the Conflict of*

testimonials of maritime arbitration was actually found in Venice, in the *Capitolare navium* of the *Repubblica Serenissima* (Maritime Code of the Republic of Venice), in a document dating back to 1229.[7] Nevertheless, despite the multi-secular existence of such an institution and its wide distribution in merchant trading, there has been limited scholarly review and investigation of maritime arbitration.[8]

The general perception is that arbitration becomes maritime arbitration if it in some way involves a ship.[9] In truth, the ship—*rectius*—the connection between the case and the ship, serves as the

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Laws), 20 SYRACUSE J. INT'L L. & COM. 105, 107 (1994); FRANCESCO GALGANO, LA *LEX MERCATORIA* (4th ed., Bolonia, Italy, 2001); Sergio M. Carbone, *Autonomia privata e modelli contrattuali del commercio marittimo internazionale nei recenti sviluppi del diritto internazionale privato: Un ritorno all' antico*, 1995 DIRITTO MARITTIMO [DIR. MAR.] 315. *See generally* Fabrizio Marrella, *La nuova lex mercatoria: Principi unidroit ed usi dei contratti del commercio internazionale*, TRATT. DI DIR. COMM. E DIR. PUBBL. DELL'EC. DIR. DA FR. GALGANO (Padua, Italy, 2003). See generally the precious bibliography on maritime arbitration compiled by ROBERT JARVIS, *An Annotated Bibliography of English-Language Materials on Maritime Arbitration*, 14 TUL. MAR. L.J. 49 (1989), as well as Black, *Maritime Arbitration in the Asian Century*, 14 TUL. MAR. L.J. 261 (1990) (introducing twelve brief articles on arbitration in various countries); Cohen, *Table of Comparative Maritime Arbitration Procedures*, 1976 LLOYD'S MAR. & COM. L.Q. 422.

7. *See* FABRIZIO MARRELLA & ANDREA MOZZATO, ALLE ORIGINI DELL'ARBITRATO COMMERCIALE INTERNAZIONALE: L'ARBITRATO A VENEZIA TRA MEDIOEVO ED ETÀ MODERNA (2001).

8. *See* F. Berlingieri Jr., *The Effect on Arbitration of Recent International Maritime Law Conventions*, RAS. ARB., 265 (1982); Mario Riccomagno, *The Practice of Commercial Arbitration in the Mediterranean with Particular Regard to Maritime Disputes*, 1996 ARB. DISP. RESOL. L.J., 108 [hereinafter Riccomagno, *Practice of Commercial Arbitration*] (discussing the origins and internationalization of arbitration); Mario Riccomagno, *Arbitration in Multimodal Transport*, 1997 DIR. MAR. 898, 898 (commenting that trade developments typically arise ahead of developments in the law, as with multimodal transport, which the author believes lags behind other transportation forms that established uniformity through international conventions); Sergio M. Carbone & Lopez De Gonzalo, *L'arbitrato marittimo*, *in* L'ARBITRATO PROFILI SOSTANZIALI 1084 (G. Alpa ed., 1999); CLARE AMBROSE & KAREN MAXWELL, LONDON MARITIME ARBITRATION (2d ed. 2002); *see also infra* note 99.

9. *But see* AMBROSE & MAXWELL, *supra* note 8 (asserting there is no strict definition that requires a ship and noting, in fact, any arbitration carried out on the terms of the London Maritime Arbitrators' Association might be considered maritime arbitration).

constant element of "species" of maritime arbitration. Typically, issues center around: the investigation of damage to transported goods and ensuing liability attached to the maritime carrier; damages to the ship caused by the nature of the carried goods; issues of lay days and demurrage including damages resulting from late entry to port or late access to the operative quay; damages suffered by the carrier as a result of force majeure; issues relating to non-execution of charter parties (for example, non-payment of the charter fee, late return of the vessel or early collection of the ship); sale, construction and ship repairs; matters relating to salvage at sea; and maritime insurance.

Given that maritime arbitration is a species belonging to the "genus" of international commercial arbitration, what are its distinctive characteristics? Or, on the other hand, is the specificity of maritime arbitration not so marked as to require a different regulation? Moreover, is the advent of arbitration through electronic means going to have a serious effect in the world of maritime arbitration?

In order to answer these questions, this article will first examine the process of diversification of the types and sources of arbitration law relating to maritime matters. This will highlight how widespread maritime arbitration has emerged, as well as the operators' perception of maritime arbitration. The final part of this article considers the emerging problems related to arbitration clauses that exist in electronic format, such as those contained in dematerialised bills of lading.

I. THE DIVERSIFICATION OF ARBITRATION IN MARITIME MATTERS AND THE RISK OF INTERNATIONAL CONFLICTS OF JURISDICTION

As mentioned earlier, international disputes relating to maritime issues can be resolved either through intergovernmental arbitration or through transnational commercial arbitration. Undoubtedly, the classic method for settlement of international disputes practiced on an intergovernmental level is arbitration as provided, for example, in

Article 2, paragraphs 3 and 33 of the United Nations Charter,[10] referred to in the Montego Bay Convention.[11] In this context, the arbitration mechanism interweaves with the role entrusted to the International Tribunal for the Law of the Sea ("ITLOS"). This court, based in Hamburg, Germany, has jurisdiction over disputes concerning the interpretation and application of the Montego Bay Convention as well as other international agreements relating to the law of the sea. The ITLOS hears cases, inter alia, on issues concerning the nationality of ships; the freedom to navigate in the exclusive economic zone; the prompt release of ships and equipment detained due to suspected violation of the Montego Bay Convention; the prevention of marine pollution resulting from the disposal of waste; and, more generally, on the conservation and management of marine resources.[12] It has exclusive jurisdiction, through its Seabed Disputes Chamber, over disputes relating to activities in the international seabed area.

It should also be noted that the International Court of Justice may hold concurrent jurisdiction over a maritime dispute with the International Tribunal for the Law of the Sea and arbitrators.[13] Each contracting State can, at the time of signing, with the ratification or with adhesion to the Montego Bay Convention, elect to resolve its

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10. *See* U.N. CHARTER, art. 2, para. 3 ("All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."). The Charter also states that "parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall first seek a solution through negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." *Id.* art. 33. For a general overview on the subject, see JOHN COLLIER & VAUGHAN LOWE, THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW 19-58, 84-92 (1999).

11. *See* UNCLOS, *supra* note 5, art. 279. UNCLOS entered into force on an international level on November 16, 1994.

12. For sources to which reference on the subject has been made, see Tullio Treves, *Codification du droit international et pratique des etats dans le droit de la mer*, 223 RECUEIL DES COURS 25 (1990); Tullio Scovazzi, *The Evolution of the International Law of the Sea: New Issues, New Challenges*, 286 RECUEIL DES COURS 53, 122-24 (2000).

13. *See* UNCLOS, *supra* note 5, art. 287, ¶ 1.

dispute under the auspices of the court it chooses.[14] In the absence of such a choice, however, the acceptance of "ordinary" (intergovernmental) arbitration is nevertheless assumed—as provided for in Annex VII—and this same solution is imposed if contracting States have selected different methods by which to resolve disputes.[15]

Therefore, the Montego Bay Convention, as well as providing for judicial settlement, also leaves ample room for international arbitration, regulated by Articles 279-299 and Annexes VII-VIII.[16]

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14. *See id.*

15. *See id.* ¶ 5.

16. In full, Article 287 provides that:

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:

(a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;
(b) the International Court of Justice;
(c) an arbitral tribunal constituted in accordance with Annex VII;
(d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

2. A declaration made under paragraph 1 shall not affect or be affected by the obligation of a State Party to accept the jurisdiction of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to the extent and in the manner provided for in Part XI, section 5.

3. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.

4. If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree.

5. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree.

6. A declaration made under paragraph 1 shall remain in force until three months after notice of revocation has been deposited with the Secretary-General of the United Nations.

7. A new declaration, a notice of revocation or the expiry of a declaration does not in any way affect proceedings pending before a court or tribunal having jurisdiction under this article, unless the parties otherwise agree.

Generally, these articles call for ad hoc intergovernmental arbitration, but Article 188, paragraph 2 also refers to transnational commercial arbitration *tout court*, for disputes concerning the interpretation or execution of international contracts in compliance with Articles 187(c)(i) and 153.[17]

All these rules in favor of arbitration are not enough to prevent serious conflicts of international jurisdiction; conflicts that, in theory, could put interstate and transnational arbitration bodies at odds with each other. A first sign of this may be seen in the dispute between Ireland and Great Britain over the construction of a nuclear fuel MOX facility.[18] The arbitration tribunal, formed under Annex VII of the Montego Bay Convention,[19] first ordered provisional measures, but later suspended the proceedings as it waited to see whether the Court of Justice of the European Communities had jurisdiction to resolve this matter and within what boundaries.[20] In this complex case, Article 282 of the Montego Bay Convention has regulated the

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8. Declarations and notices referred to in this article shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties."

Id. art. 287.

17. *Id.* art. 188, ¶ 2 ("Disputes concerning the interpretation or application of a contract referred to in article 187, subparagraph (c)(i), shall be submitted, at the request of any party to the dispute, to binding commercial arbitration, unless the parties otherwise agree.").

18. In this case, Ireland accused the British plant of violating UNCLOS, since the plant causes high levels of unacceptable environmental risks for Ireland. Erik Martiniussen, *Britain Must Consult Ireland Over Sellafield*, BELLONA FOUNDATION, July 1, 2003 (discussing the dispute between Ireland and Great Britain arising out of Britain's new MOX production facility at Sellafield, which has been in operations since December 2001), *at* http://www.bellona.no/en/energy/nuclear/sellafield/30287.html (last visited Aug. 16, 2005). Ireland cites both the radioactive discharges from the plant and the transportation of MOX as problematic. *Id.*

19. The arbitration tribunal was composed of Judge Thomas A. Mensah (President), Professors James Crawford and Gerhard Hafner, L. Yves Fortier and Sir Arthur Watts.

20. *See* REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 196 ff. (Vol. 1, 2002); REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 984 ff. (Vol. 4, 2003).

conflict of international jurisdictions, even though the resolution of this case seems to have been reached through comity.[21]

It is also clear that, with reference to the discipline of "special arbitration" of Annex VIII to the Montego Bay Convention, Article 5, paragraph 2 introduces a rule clearly derogating from the general principle of international law that the reports resulting from a fact finding panel are not per se binding. Here, the result of the fact finding activity is automatically obligatory between the parties unless they have agreed to the contrary. Therefore, even fact finding activities and decisions may potentially "conflict" with those of arbitrators and other international organisms in proceedings that in one way or another concern the same facts.[22]

On the other hand, under Article 290 of the Montego Bay Convention, ITLOS (functioning similar to the Sea Bed Disputes Chamber regarding disputes affecting the international seabed area)[23] can issue provisional measures during the "set up phase" of the arbitration board.[24] ITLOS must first, however, find prima facie that the arbitration tribunal has jurisdiction to review the adopted measures.[25] Once the arbitration tribunal is in place, the same arbitrators can modify, revoke or confirm the measures adopted by ITLOS.[26]

In addition to the intergovernmental arbitral provisions of the Montego Bay Convention discussed above, States can also bring certain maritime claims before other bodies operating in the area of international trade, the most prominent being the World Trade Organisation ("WTO"). Decisions in both the GATT Dispute Panel

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21. *See* P. M. DUPUY, DROIT INTERNATIONAL PUBLIC 566 (7th ed. 2004).

22. *See* UNCLOS, *supra* note 5, Annex VIII, art. 5, para. 2 ("Unless the parties otherwise agree, the findings of fact of the special arbitral tribunal acting in accordance with paragraph 1, shall be considered as conclusive as between the parties.").

23. *Id.* arts. 1, 133, 157.

24. *Id.* art. 290, ¶ 1.

25. *Id.*

26. *Id.* ¶ 2 (providing for the revocation of provisional measures as soon as the circumstances jusifying the provisional measures have "changed or ceased to exist"). However, parties may only prescribe, modify, or revoke measures at the request of a party to the dispute. *Id.* ¶ 3.

Report on Mexican Complaint Concerning United States–Restrictions on Imports of Tuna ("*Tuna/Dolphin I*") in 1991 and the United States-Import Prohibition of Certain Shrimp and Shrimp Products ("*Shrimp/Turtle I*") in 1998 highlight the WTO's prominence.[27] The *Tuna/Dolphin I* case involved the U.S. ban on Mexican tuna imports put in place to discourage the use of certain fishing methods to catch tuna, as these methods led to the death of dolphins and other species caught during the fishing process.[28] Here, the panel interpreted GATT Articles III and XX to conclude that the protection of the maritime environment, in compliance with Article XX, constituted an exception to the rule of national treatment.[29]

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27. *See, e.g.*, GATT Dispute Panel Report on Mexican Complaint Concerning United States–Restrictions on Imports of Tuna, DS21/R-39S/155 (Sept. 3, 1991) [hereinafter *Tuna/Dolphin I*] (finding that U.S. prohibitions of tuna from Mexico under the Marine Mammal Protection Act violated Article XI and XX of the GATT Agreement); United States-Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp/Turtle I*] (reversing the Panel's finding that the United States prohibition against shrimp imports is not within the scope of measures permitted under the breadth of Article XX of the GATT 1994, and concluding that the measure fails to meet the requirements of Article XX), *available at* http://www.ppl.nl/hugo/TekstShrimpAB-58abr.htm (last visited Aug. 16, 2004).

28. *See Tuna/Dolphin I*, *supra* note 27, ¶¶ 2.1-2.12.

29. *Id.* ¶¶ 7.1-7.3 (concluding that the prohibition on imports and the Marine Mammal Protection Act are not justified by Article XX(b) or Article XX(g)); *see* General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XX, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT], *available at* http://www.wto.org/english/docs_e/legal_e/gatt47.pdf (last visited Aug. 16, 2005). On matters of general exceptions, Article XX of GATT 1994, (as well as Article XIV of GATS and 8 of TRIPs) provides that:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (a) necessary to protect public morals;
>
> (b) necessary to protect human, animal or plant life or health;
>
> (c) relating to the importations or exportations of gold or silver;
>
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under

Government measures that aimed to conserve natural resources, or were rather designed for the protection of non-trade interests, were therefore admissible within WTO rules.[30] In the case at hand, this happened by virtue of the fact that the Agreement, on technical

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paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

(e) relating to the products of prison labour;

(f) imposed for the protection of national treasures of artistic, historic or archaeological value;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;

(i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;

(j) essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.

30. In order to reach such conclusions, the panel extended the sphere of application of WTO rules beyond the notion of "product" to embrace that of "production process." This method of "constructive" interpretation has been criticized by some scholars and it has finally been abandoned in the *Tuna/Dolphins II* case. *See* Francesco Francioni, *Environment, Human Rights and the Limits of Free Trade*, *in* ENVIRONMENT, HUMAN RIGHTS AND INTERNATIONAL TRADE 19 (Francesco Francioni ed., 2001); *see also* Douglas A. Kysar, *Preferences from Processes: The Process/Products Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 535 (2004) (discussing a theoretical distinction between product-related information, including a good's harm to the user, versus process-related information, namely whether a production process harms workers, animals, or the environment). *See generally* EDITH WEISS & JOHN H. JACKSON, RECONCILING ENVIRONMENT AND TRADE 161-85, 407-97 (2001).

barriers to trade and that on sanitary and phyto-sanitary measures, fell under the material law of the WTO. The final decision in the case of *Shrimp/Turtle I* followed this approach, demonstrating that there are new ways to litigate on environmental—including maritime—matters through the WTO Dispute Settlement Body ("DSB").[31]

Conversely, issues of WTO law can be dealt with by the bodies created by the Montego Bay Convention to resolve issues relating to the law of the sea. For instance, the July 28, 1994 agreement on Part XI of the Montego Bay Convention refers in Section 6 to the norms of GATT 1947 or "to other later agreements."[32] The awkward reference to GATT '47 is thus interpreted as an implicit general referral to the law of the WTO.

This intertwining of "maritime" issues with those relating to "international trade" as highlighted on an interstate level, becomes an inextricable problem when one looks at another legal dimension of "international" arbitration, namely transnational commercial arbitration.

II. SOURCES OF CONTEMPORARY INTERNATIONAL MARITIME ARBITRATION LAW

To truly understand the nature of international maritime arbitration, one needs to consider the sources of arbitration law. In the following section, I will highlight relevant rules stemming from different formal sources that relate to maritime arbitration.

A. INTERNATIONAL CONVENTIONS

Particularly relevant among the international multilateral agreements on international commercial arbitration are the European Convention on International Commercial Arbitration of April 21, 1961 ("Geneva Convention") and, more importantly, the United Nations Convention on the Recognition and Enforcement of Foreign

31. *See* John H. Jackson, *Comments on* Shrimp/Turtle *and the Product/Process Distinction*, 11 EUR. J. INT'L L. 303 (2000).

32. For further discussion, see Dominique Carreau, *Droit de la mer et droit international du commerce*, *in* MÉLANGES LUCCHINI ET QUÉNEUDEC 118 (Paris, 2003).

Arbitral Awards of June 10, 1958 ("New York Convention").[33] Yet neither of these treaties contains specific rules regarding maritime issues. The general viewpoint is that maritime arbitration is covered within the "general" conventions on commercial arbitration. Furthermore, even where States have formulated the "commercial reservation" provided for by the New York Convention,[34] courts have treated "maritime" issues as "commercial" matters, thereby placing these disputes within the scope of the New York Convention.[35]

If, therefore, the genus of international commercial arbitration incorporates maritime arbitration, it is necessary to verify whether, among the main international conventions of uniform maritime law, there are specific rules on matters of arbitration. Even a perfunctory examination of the main agreements highlights the presence of a few, albeit short, rules on matters of arbitration. However, these norms illustrate the emergence of a trend towards proliferation of maritime arbitration rules.

The earliest international agreements, such as the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of August 25, 1924 ("Brussels Convention of 1924"), later modified by the Protocols of February 23, 1968 and of December 2, 1979 (the so-called "Hague-Visby Rules"), do not contain specific rules either on matters of maritime arbitration or forum selection despite the relatively frequent presence of arbitration agreements and *forum prorogatum* clauses within bills of lading.[36]

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33. European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. 364 [hereinafter Geneva Convention]; United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. 3, 330 U.N.T.S. 3, 21 U.S.T. 2517 [hereinafter New York Convention], *available at* http://www.jus.uio.no/lm/un.arbitration.recognition.and.enforcement.convention.new.york.1958/doc.html (last visited Aug. 18, 2005); *cf.* Inter-American Convention on International Arbitration, Jan. 30, 1975, O.A.S.T.S. No. 42.

34. New York Convention, *supra* note 33, art. I, ¶ 3.

35. *See, e.g.*, Island Territory of Curacao v. Solitron Devices, Inc., 356 F. Supp. 1, 12-13 (S.D.N.Y. 1973), *aff'd on other grounds*, 489 F.2d 1313 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1974).

36. International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, 120 L.N.T.S. 155

The wise "old" approach consisted of regulating substantive matters and procedural matters, including arbitration, in separate international agreements for the sake of consistency of the two sets of rules. However, this approach did not account for the difficulties of intergovernmental negotiations and treaty-making that result between States with differing political agendas.

More recent international agreements apply another approach: combining rules of substantive maritime law with jurisdictional and arbitral norms. The International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision, adopted at Brussels on May 10, 1952 and in force as of September 14, 1955, provides an example, where civil jurisdictional norms are combined with the maritime concept of collisions.[37] Under Article 2 of this convention, the parties can mutually agree to repeal, in part, the jurisdiction of the court or resort to arbitration rather than subjecting themselves to jurisdiction in one of three different courts: (1) the tribunal of the defendant's domicile; (2) the tribunal at the point of the ship's arrest or point of arrest had the defendant not offered security or other guarantee; or (3) the tribunal where the collision took place (if the collision occurs in a port or harbor, rather than on high seas).

Other rules on arbitration may be found in the International Convention Relating to the Arrest of Sea-Going Ships, similarly adopted in Brussels on May 10, 1952 ("Brussels Convention of 1952").[38] Under this Convention (which regulates the arrests of ships flying the flag of one of the contracting States executed in another

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[hereinafter Brussels Convention of 1924], *available at* http://www.comitemaritime.org/ratific/brus/bruidx.html (last visited June 10, 2005); *see* Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, 1968, *available at* http://www.admiraltylawguide.com/conven/visbyrules1968.html (last visited July 10, 2005); *see also* SERGIO M. CARBONE, CONTRATTO DI TRASPORTO MARITTIMO DI COSE 47 (Milan, Italy, 1988). *See generally* GUENTER TREITEL & F. REYNOLDS, CARVER ON BILLS OF LADING 86, 87 (2001).

37. International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision, May 10, 1952, 439 U.N.T.S. 217; *see also* SIMON GAULT ET AL., MARSDEN ON COLLISION AT SEA (2003).

38. *See* Gabriele Silingardi, *Sequestro della nave o dell'aeromobile*, ENCICLOPEDIA DEL DIRITTO XLII, 168 (1990); La China, *Sequestro della nave o dell'aeromobile*, DIGESTO IV/SEZ. COMMERCIALE, XIII, 369 (1996).

contracting State), Article 7, paragraph 3 states that if the court of the State where the ship has been seized does not have jurisdiction to decide on the merits and if the parties have agreed on arbitration, the same tribunal may set a date to start arbitration.[39] A new treaty on arrest of ships was signed in Geneva on March 12, 1999, adopting a similar solution to that highlighted above with regard to Article 7; this treaty, however, has not yet entered into force and may not for some time.[40]

The United Nations Convention on the Carriage of Goods by Sea of March 30, 1978 ("Hamburg Rules") also provides for recourse to arbitration.[41] Specific rules concern the validity of the arbitration

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39. International Convention Relating to the Arrest of Sea-Going Ships, May 10, 1952, 439 U.N.T.S. 193, art. 7, ¶ 3 [Brussels Convention of 1952], *available at* http://www.admiraltylawguide.com/conven/arrest1952.html (last visited Aug. 14, 2005).

40. *See* International Convention on Arrest of Ships, art. 7, ¶ 3, U.N. Doc. A/CONF.188/L.2 (Mar. 12, 1999). Article 7, paragraph 3 parallels the language of the Brussels Convention of 1952:

> In cases where a Court of the State where an arrest has been effected or security provided to obtain the release of the ship: (a) does not have jurisdiction to determine the case upon its merits; or (b) has refused to exercise jurisdiction in accordance with the provisions of paragraph 2 of this article, such Court may, and upon request shall, order a period of time within which the claimant shall ring proceedings before a competent Court or arbitral tribunal.

41. *See* United Nations Convention on the Carriage of Goods by Sea, March 31, 1978, art. 22, 17 I.L.M. 603 [hereinafter Hamburg Rules]. Article 22 states that:

> 1. Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to carriage of goods under this Convention shall be referred to arbitration.
>
> 2. Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and a bill of lading issued pursuant to the charter-party does not contain special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier may not invoke such provision as against a holder having acquired the bill of lading in good faith.
>
> 3. The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:
>
> (a) a place in a State within whose territory is situated:
>
> (i) the principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or

agreement, which must be "evidenced in writing" and that, when dealing with an arbitration clause *par reference*, "special annotation" should be made in the bill of lading.[42] However, the Hamburg Rules have no legally binding force in the majority of the most economically advanced countries, and so, possible conflicts of international arbitration rules are rare in current practice.

The United Nations Convention on International Multimodal Transport of Goods ("IMTG") of May 23, 1980—not yet in force—confirms the need, in the wake of the Hamburg Rules, for the will of the parties to be "evidenced in writing" in order to arbitrate matters of multimodal transportation.[43] This treaty, however, contains mandatory uniform rules from which private parties cannot

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(ii) the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(iii) the port of loading or the port of discharge; or

(b) any place designated for that purpose in the arbitration clause or agreement.

4. The arbitrator or arbitration tribunal shall apply the rules of this Convention.

5. The provisions of paragraphs 2 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith is null and void.

6. Nothing in this article affects the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage by sea has arisen.

42. *Id.* art. 22, ¶ 2.

43. *See* United Nations Conference on a Convention on International Multimodal Transport, vol. 1, Final Act and Convention on International Multimodal Transport of Goods, art. 27, U.N. TDBOR, U.N. Doc. TD/MT/CONF/17 (1981) [hereinafter IMTG], *available at* http://r0.unctad.org/ttl/docs-legal/unc-cml/United%20Nations%20Convention%20on%20International%20Multimodal%20Transport%20of%20Goods,%201980.pdf (last visited Aug. 15, 2005). "International multimodal transport" is defined as "the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country." *Id.* art. 1.

derogate.[44] The IMTG sets a deadline of two years within which arbitration must begin before parties may resort to relevant domestic courts.[45] Furthermore, the five jurisdictions indicated in the Hamburg Rules[46] become obligatory in the IMTG.[47] The parties, however, are free to turn to arbitration through a submission agreement in cases where they had not included an arbitration clause in the contract.[48]

In cases of salvage, the International Convention on Salvage of April 28, 1989 ("London Convention") partially regulates arbitration.[49] According to this treaty, in cases of contractual salvage, a time-bar for litigation (including via arbitration) is set up to a maximum of two years from the day on which assistance ceased.[50] In addition, the London Convention provides for an interesting exhortatory rule based on which the contracting States shall "encourage, as far as possible and with the consent of the parties, the publication of arbitral awards made in salvage cases."[51]

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44. *Id.* art. 27(4) (declaring null and void any contracts that fall under the IMTG and include an arbitration clause, but do not follow the provisions of Article 27).

45. *Id.* art. 25(1) (giving the complaining party six months after the offending party fails to fulfill the contract to state, in writing, the nature of the claim).

46. Hamburg Rules, *supra* note 41, art. 22(2) (explaining the locations named in the Hamburg Rules in Article 22(3) are either a place within the State which is the principle place of business of the defendant, the principle habitation of the defendent, place of contract creation, the port of loading or discharge, or any other place named in the contract between the parties).

47. IMTG, *supra* note 43, art. 27(2).

48. *Id.* art. 27(5).

49. International Convention on Salvage, Apr. 28, 1989, art. 23, 1953 U.N.T.S. 193, *available at* http://untreaty.un.org/English/UNEP/salvage_english.pdf (last visited June 23, 2005).

50. *Id.* art. 23, which further states that:

> The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration to the claimant. An action for indemnity by a person liable may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs, if brought within the time allowed by the law of the State where proceedings are instituted.

Id. art. 23(2)-(3).

51. *Id.* art. 27.

All in all, beyond the classic problem of relations of international and municipal law, one needs to be aware of possible conflicts between intergovernmental rules on (private) maritime arbitration. The relevant treaties may conflict in regard to the time-bar of arbitral proceedings or may involve the choice of *situs arbitri* (the seat of the arbitration) with respect to those rules of international conventions (multilateral, but perhaps also bilateral) that discipline "general" arbitration, most significantly the Geneva Convention and the New York Convention.

In a different context, concerning the conflict between the rules on jurisdiction of the Brussels Convention of 1952[52] and the corresponding regulations of the Brussels Convention of September 27, 1968 on jurisdiction and enforcement of judgements on civil and commercial matters, the Italian Court of Cassation, using the *lex specialis* criterion, correctly established the prevalence of the special discipline—that which regards arrest issues—over the general discipline on jurisdiction of the 1968 Brussels Convention.[53] But what happens if one faces a conflict of rules on time-bars or on the selection of the seat of arbitration?

The "old" approach of entrusting treaties on "general" arbitration with the discipline of specific questions of maritime arbitration seems to me the best way to avoid the proliferation of fragmented regulations, scattered throughout different conventions of uniform transport law, as well as on jurisdiction. As a matter of fact, proliferation of such rules increases the chances of conflict between conventions, reducing predictability in the business arena.

B. NATIONAL SOURCES

Recent statutory reforms of domestic arbitration law have provided an opportunity to regroup, within the "general" arbitration discipline, special rules on maritime arbitration. For example, the very recent reform of arbitration in Germany allows for the introduction of a special rule on maritime arbitration, stating that in order to validate the arbitration agreement contained in the bill of lading, an express reference to the arbitration clause must be

52. Brussels Convention of 1952, *supra* note 39, arts. 7-8.

53. *See* Cass., sez. un., 28 oct. 1987, n.7972, Giur. It. 1989, 149.

contained in a charter party.[54] The British Arbitration Act of 1996 established procedural rules with regard to the staying of admiralty proceedings and the contextual concession of provisional measures at the request of the arbitrator.[55] The French legislative solution (which

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54. Code of Civil Procedure, §1031 Nr. 4 ZPO. Section 1031 provides:

(1) The arbitration agreement must be contained either in a writing signed by the parties or in letters, telefaxes, telegrams or other forms of data transmition exchanged between then, assuring the proof of the agreement.

(2) The form requirement of paragraph 1 shall be deemed to have been satisfied in the event that the event that the arbitration agreement is contained in a writing transmitted from on[e] party to the other party or from a third party to both parties, and [if no objection was raised in good time] the contents of the document are viewed in the business as a part of the agreement in the event that objection thereto is not made in due time.

(3) In the event that a contract that complies with the form requirements of paragraph 1 or 2 refers to a document containing an arbitration clause, such shall constitute an arbitration agreement in the event that the reference is such that it makes such clause a part of the contract.

(4) An arbitration agreement can also arise by means of issuance of a freight certificate in which express reference is made to an arbitration clause contained in a charter agreement.

(5) Arbitration agreements to which a consumer is a party must be in a document [which has been personally] signed by the parties. The document may not contain agreements other than such as relate to arbitral proceeding; the foregoing shall not be applicable in the event of notarization. A consumer is any natural person acting in the transaction that is the subject of the dispute for a purpose that cannot be attributed to either the commercial or professional activity of such person ["gewerbliche oder selbständige berufliche Tätigkeit"].

(6) [Any non-compliance with the form requirements is cured by entering into argument on the substance of the dispute in the arbitral proceedings.]

GERMAN COMMERCIAL CODE & CODE OF CIVIL PROCEDURE IN ENGLISH 467 (Charles E. Stewart trans., 2001).

55. Article 11 reads:

(1) Where Admiralty proceedings are stayed on the ground that the dispute in question should be submitted to arbitration, the court granting the stay may, if in those proceedings property has been arrested or bail or other security has been given to prevent or obtain release from arrest-
(a) order that the property arrested be retained as security for the satisfaction of any award given in the arbitration in respect of that dispute, or
(b) order that the stay of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award.
(2) Subject to any provision made by rules of court and to any necessary modifications, the same law and practice shall apply in relation to property

does, however, date back to 1980) does not provide for specific rules along statutory lines regarding maritime arbitration.[56]

Neither does U.S. federal arbitration legislation offer innovative ideas. The United States Constitution attributes competency of "all cases of admiralty and maritime jurisdiction" to the federal government.[57] In the United States, the Federal Arbitration Act receives general application, equating in general terms "maritime transactions" with non-maritime transactions, thus allowing the application of general arbitration law,[58] except for special rules to be determined in the Carriage of Goods by Sea Act.[59]

A slightly different solution, adopted in Australian law through the Carriage of Goods by Sea Act of 1991 (modified in 1998) confirms the validity of arbitration clauses contained in documents of maritime transport on the condition that the parties carry out the

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retained in pursuance of an order as would apply if it were held for the purposes of proceedings in the court making the order."

Arbitration Act, 1996, c. 23, art. 11; *see also* AMBROSE & MAXWELL, *supra* note 8, at 45.

56. *See* Delebecque, *L'arbitrage maritime contemporain: point de vue français*, 2004 DIR. MAR. 436.

57. *See* U.S. CONST., art. III, § 2.

58. *See* 9 U.S.C.A. § 1 (West 2005); *see also* Vimar Seguros y Reaseguros, S.A. v. M.V. Sky Reefer, 29 F.3d 727 (1st Cir. 1994); Stuart C. Gauffreau, *Foreign Arbitration Clauses in Maritime Bills of Lading: The Supreme Court's Decision in* Vimar Seguros y Reaseguros v. M/V Sky Reefer, 21 N.C. J. INT'L L. & COM. REG. 395, 411-20 (1996).

59. Carriage of Goods by Sea Act, 46 U.S.C.A. appx. § 1300 et seq. (West 2005); *see* M. Cohen, *Current Law and Practice of Maritime Arbitration in New York*, LE DROIT MARITIME FRANÇAIS 589-95 (1996). *But see* Marine Liability Act, ch. 6, § 46 (2001) (Can.) (articulating a more detailed standard for arbitration in maritime transactions), *available at* http://www.canlii.org/ca/sta/m-0.7/ (last visited Aug. 16, 2005). Specifically, the Canadian Marine Liability Act states:

> [A] claimant may institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada that would be competent to determine the claim if the contract had referred the claim to Canada, where (a) the actual port of loading or discharge, or the intended port of loading or discharge under the contract, is in Canada; (b) the person against whom the claim is made resides or has a place of business, branch or agency in Canada; or (c) the contract was made in Canada.

Id.

arbitration process in Australia.[60] The Chinese solution, on the other hand, could be seen at face value to be more liberal, since Article 257 of the Civil Procedure Law of 1991[61] and Article 65 of the Arbitration Law of 1995 (in force since September 1, 1995) repeal the jurisdiction of domestic courts in favor of arbitration when the controversy concerns "economic, commercial, transport and maritime matters."[62]

C. A-NATIONAL SOURCES (*LEX MERCATORIA*)

The non-governmental sources of the law of maritime arbitration are of varying nature and are found in the works of the *Comité Maritime International* as well as, above all, in the so-called *droit formulaire*, that is in the (substantial) rules molded in the widespread forms of international model contracts.[63] As for the discipline of arbitration proceedings, the a-national sources stem from regulations of institutional arbitration drawn up by the various centers of maritime arbitration that dominate the world of the shipping business. The principle centers in the western world are the Society of Maritime Arbitrators ("SMA") based in New York,[64] the London

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60. Carriage of Goods by Sea Act, 1991, ch. 174 (asserting that an arbitration clause cannot overrule the jurisdiction of a court extended jurisdiction by Section 11(2) unless the provision of the contract provides that the arbitration must occur in Australia), *available at* http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/90CF2CBCB0984055CA256F71005091B3/$file/CarOfGoodBySea91.pdf (last visited Aug. 16, 2005).

61. Law of Civil Procedure of the People's Republic of China, art. 257 (1991), *available at* http://www.qis.net/chinalaw/prclaw34.htm (last visited Aug. 16, 2005).

62. Arbitration Law of the People's Republic of China, art. 65 (1995), *available at* http://www.qis.net/chinalaw/prclaw47.htm (last visited Aug. 16, 2005).

63. *See* William Tetley, *The* Lex Maritima, *in* LEX MERCATORIA AND ARBITRATION 43, 47 (Thomas Carbonneau ed., 1998); Aboubacar Fall, *Defence and Illustration of* Lex Mercatoria *in Maritime Arbitration*, 15 J. INT'L. ARB. 83, 85-94 (1998); GEORGIOS I. ZEKOS, PROBLEMS OF APPLICABLE LAW IN COMMERCIAL AND MARITIME ARBITRATION 173-83 (1999); Marrella, *supra* note 6.

64. *See* Society of Maritime Arbitrators, Inc. (describing the Society's mission as both providing information about and encouraging alternative dispute resolution in the maritime industry), *at* http://www.smany.org (last visited Aug. 16, 2005).

Maritime Arbitrators Association ("LMAA"),[65] the *Chambre Arbitrale Maritime* in Paris,[66] and the German Maritime Arbitration Association ("GMAA") based in Hamburg.[67] With reference to the eastern side of the world, noteworthy centers are the Maritime Arbitration Commission of Moscow and the China Maritime Arbitration Commission of Beijing, both created out of public initiatives (by former socialist States) to allow participation in world trade.[68] To these we can add the Tokyo Maritime Arbitration Commission ("TOMAC") that has very recently published new institutional arbitration rules, in force since September 1, 2001.[69]

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65. *See* London Maritime Arbitrators Associations, *Notes on London Arbitration* (stating the Society's purpose is to advance and encourage professional knowledge of the London maritime arbitrators and to assist in the resolution of maritime disputes), *at* http://www.lmaa.org.uk/notes.asp (last visited Aug. 16, 2005).

66. *See* Chambre Arbitrale Maritime de Paris (describing the services provided by the Chambre, including providing experienced maritime arbitrators and providing cost and time efficient arbitration proceedings), *at* http://www.arbitrage-maritime.org/us/intro.htm (last visited Aug. 16, 2005).

67. *See* German Maritime Arbitration Association, *History* (describing the history of the Association as well as the procedures undertaken during GMAA maritime arbitrations), *at* http://www.gmaa.de/englisch/ge_gmaa.htm (last visited Aug. 16, 2005); *see also* Exis Technologies Ltd., *Maritime Organizations Links from Exis Technologies Limited* (listing other relevant centers, including the *Asociaciòn Espanola de arbitraje maritimo* (IMARCO) in Madrid; the Indian Council of Arbitration in New Dheli; and the Singapore International Arbitration Center), *at* http://www.existec.com/hwmaritorg.asp (last visited Aug. 16, 2005).

68. *See* China Maritime Arbitration Commission, Chinese Maritime Arbitration Commission Arbitration Rules (1995), *at* http://www.arbiter.net/cmrule0.html (last visited Aug. 16, 2005).

69. *See* Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange, Inc., The Rules of the Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange, Inc. (2003), *available at* http://www.jseinc.org/en/tomac/arbitration/ordinary_rules.html (last visited Aug. 16, 2005); Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange, Inc., The Rules for Simplified Arbitration of TOMAC (2003) (articulating arbitration rules for disputes involving claims that do not exceed twenty million yen), *available at* http://www.jseinc.org/en/tomac/arbitration/simplified_rules.html (last visited Aug. 16, 2005); Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange, Inc., The Rules of the Small Claims Arbitration Procedure (SCAP) of TOMAC (2003) (providing the rules of arbitration for disputes up to five million yen) *available at* http://www.jseinc.org/en/tomac/arbitration/scap_rules.html (last visited Aug. 16, 2005).

III. THE DIFFUSION OF MARITIME ARBITRATION IN MODEL CONTRACTS AND RESULTING BUSINESS OPERATORS' PERCEPTION

A. ARBITRATION CLAUSES IN MODEL CONTRACTS

Examination of the main uniform international model contracts highlights the progressive formation of a detailed, a-national discipline of the main aspects of maritime traffic. It also reveals the widespread turn to arbitration and, therefore, the spinning off from domestic jurisdiction in the main sectors of the shipping business. This is confirmed in the doctrine that highlights how, while forum selection clauses (typically in favor of the carrier) are more frequent in liner contracts of transport documented by bills of lading, in other contracts it is the turn to arbitration that prevails.[70] These are contracts that regulate many of the most important moments of maritime life ranging from "the cradle to the grave"—or rather from ship building—and time and voyage charter parties for transportation of dry and liquid goods, to contractual salvage at sea and also maritime insurance.

Thus, the Association of West European Shipbuilders ("AWES") model contract—the main contract for the construction of ships—provides arbitration with a stamped clause.[71] Here, the arbitration clause is variously articulated, since it provides for a pre-arbitration expert opinion followed, if the dispute persists, by an ad hoc arbitration phase in which the parties are free to fix the place of arbitration, the applicable law, and the authority that will appoint the arbitration tribunal in cases of impasse.[72] With regard to the sale of ships, one must refer to the Norwegian saleform, a model contract that was created by a private association with a transnational character—the Baltic and International Maritime Council

70. Carbone, *supra* note 6, at 458.

71. AWES, Standard Shipbuilding Contract, art. 15, *available at* http://www.cesa-shipbuilding.org/public_documents_site.phtml?sid=&doctype=pub (last visited Aug. 16, 2005).

72. *Id.*

("BIMCO")—and which is periodically updated.[73] The most recent version, that of 1993, provides for arbitration of the contract-type according to a ternary scheme in which the parties can opt for arbitration in either London or in New York, or they may complete the arbitration clause indicating the seat of arbitration and the applicable law.[74]

The Standard Ship Management Agreement model contract ("SHIPMAN 98"), adopted by BIMCO, includes an analogous solution for ship management. This is a management contract in which the ship owner entrusts the manager with the technical-commercial running of the shipping business and with ample power relating to the operative management of the ship.[75]

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73. *See* STRONG & HERRING, THE NORWEGIAN SALE FORM (London 2004).

74. BIMCO, Memorandum of Agreement, Salesform 1993, *available at* http://www.bimco.dk/upload/saleform_1993.pdf (last visited Aug. 16, 2005).

> a) This Agreement shall be governed by and construed in accordance with English law and any dispute arising out of this Agreement shall be referred to arbitration in London in accordance with the Arbitration Acts 1950 and 1979 or any statutory modification or re-enactment thereof for the time being in force, one arbitrator being appointed by each party. On the receipt by one party of the nomination in writing of the other party's arbitrator, that party shall appoint their arbitrator within fourteen days, failing which the decision of the single arbitrator appointed shall apply. If two arbitrators properly appointed shall not agree they shall appoint an umpire whose decision shall be final.
>
> b) This Agreement shall be governed by and construed in accordance with Title 9 of the United States Code and the Law of the State of New York and should any dispute arise out of this Agreement, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for purpose of enforcing any award, this Agreement may be made a rule of the Court. The proceedings shall be conducted in accordance with the rules of the Society of Maritime Arbitrators, Inc. New York.
>
> c) Any dispute arising out of this Agreement shall be referred to arbitration at . . . subject to the procedures applicable there.
>
> The laws of . . . shall govern this Agreement.

Id. art. 16.

75. *See* BIMCO, Standard Ship Management Agreement 1998 [hereinafter SHIPMAN 98] (detailing provisions that address, inter alia, pay, bunkering, fees, budgets, indemnity, responsibilities, duration of contract, inspection of vessel, and

Turning now to voyage charter parties, the Uniform General Charter ("GENCON")—the best known and most widespread contractual model—did not, until its 1994 revision, provide for any arbitration agreement, even though it has been noted that the arbitration clause was normally included in the supplementary 'rider' clauses, often in rather brief formulations, such as 'general average/arbitration in London' or 'Arbitration in London in the usual manner.'[76] Now GENCON 1994 incorporates the BIMCO Standard Law & Arbitration Clause, providing for arbitration in London or New York according to respective law or in a third place that the parties must decide upon at the time of signing the contract.[77]

Other contractual forms specifically address particular types of ships or goods to be transported. Thus, the Continent Grain Charter Party ("SYNACOMEX 2000"), created by the *Syndicat National du Commerce Extérieur des Céréales* of Paris in 1957—subsequently modified in 1960, 1974, 1990 and finally in 2000 on the impulse of, among others, the *Comité Central des Armateurs de France* and the *Chambre Arbitrale Maritime de Paris*—is a model contract used for the transportation of cereals between European ports and those of North Africa. This model contract assigns dispute resolution to arbitration at the aforementioned *Chambre Arbitrale Maritime de Paris*.[78]

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arbitration), *available at* http://www.bimco.dk/upload/shipman_98.pdf (last visited Aug. 16, 2005).

76. *See* Carbone & De Gonzalo, supra note 8, at 1087.

77. *See* BIMCO, Uniform General Charter 1994, cl. 19 [hereinafter GENCON 1994] (indicating that if the parties choose a jurisdiction for arbitration other than London or New York, they must determine that jurisdiction at the time of contract and list it along with the maximum that jurisdiction allows for small claims/shortened arbitration), *available at* http://www.bimco.dk/upload/gencon_94.pdf (last visited Aug. 16, 2005).

78. *See* BIMCO, Continent Grain Charterparty 2000 [hereinafter SYNACOMEX], *available at* http://www.bimco.dk/upload/synacomex_2000.pdf (last visited Aug. 16, 2005).

> Any dispute arising out of the present contract shall be referred to Arbitration of "Chambre Arbitrale Maritime de Paris – 16 rue Daunou – 75002 Paris. The decision rendered according to the rules of the Chambre Arbitrale and according to French Law shall be final and binding upon both parties. The right of both parties to refer to any disputes to arbitration ceases twelve months after date of completion of discharge or, in case of cancellation or

For transportation of grain from North America to Europe, parties may use the North American Grain Charter Party ("NORGRAIN 89"), created by the Association of Ship Brokers and Agents Inc., and certified by BIMCO and the Federation of National Associations of Ship Brokers and Agents ("FONASBA").[79] Here, arbitration is carried out in New York, according to New York law and following the rules of the Society of Maritime Arbitrators, or in London, according to English law with arbitrators (and/or umpire) who are members of BIMCO.[80] The application of small claims procedures is also used here for minor controversies.[81]

For the transportation of minerals, on the other hand, there is a special arbitration clause provided in the Standard Coal and Ore Charter Party model contract ("OREVOY"), recommended by BIMCO, the General Council of British Shipping in London, and FONASBA. The OREVOY form contains three different arbitration clauses: one provides for arbitration in London according to English law; the second provides for arbitration in New York according to New York law and following the arbitration rules of the Society of Maritime Arbitrators; and the third requires the indication of *situs arbitri*, assuming *lex situs arbitri*, as the law of arbitration proceedings.[82]

For the transportation of coal from American ports to the rest of the world, one refers to the American Welsh Coal Charter model contract ("AMWELSH 93") created by the Association of Ship

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non-performance, twelve months after the cancelling date as per Clause 6 or after the actual date of cancellation whichever is the later. Where this provision is not complied with, the claim shall be deemed to be waived and absolutely barred.

Id. cl. 28; *see* Bonassies, *Brèves observations sur le développement de l'arbitrage en droit français*, LE DROIT MARITIME FRANÇAIS 211-14 (2004).

79. BIMCO, North American Grain Charter Party 1989 [hereinafter NORGRAIN 89], *available at* http://www.bimco.dk/upload/norgrain_89.pdf (last visited Aug. 16, 2005).

80. *Id.* cl. 45(a)-(b).

81. *Id.* (allowing the parties to define a maximum monetary denomination to consider a "small claim" for purposes of either the Shortened Arbitration Procedure in the New York clause or the Small Claims Proceedure in the London clause).

82. *See id.* cls. 23.1-23.3.

Brokers and Agents of New York in 1953, later modified in 1979 and in 1993.[83] Its use is recommended by both BIMCO and FONASBA. In this contract, the arbitration clause provides for either arbitration in New York according to New York law with three arbitrators, or arbitration in London according to English law with two arbitrators and/or an umpire, as required by an ancient tradition that is widespread in England although actually of Venetian origin.[84]

The transportation of Polish carbon is regulated by the Coal Voyage Charter 1971 model contract ("POLCOALVOY") created by BIMCO and modified in 1997.[85] Here, similar to SYNACOMEX 2000, the arbitration clause fixes a deadline of two years or one year for any claim deriving from the charter party or bill of lading respectively, "otherwise the claim shall be deemed waived and absolutely barred."[86]

In the transportation of fertilisers, parties frequently use the North American Fertilizer Charter Party 1978/88 model contract ("FERVIVOY 88"), created by Canpotex Shipping Services Ltd. of Vancouver in 1978 (later modified in 1988) and recommended by BIMCO.[87] This arbitration clause follows the model of three alternatives: either arbitration in London using English law; New

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83. *See* BIMCO, Americanized Welsh Coal Charter 1993 [hereinafter AMWELSH 93], *available at* http://www.bimco.dk/upload/amwelsh_93_001.pdf (last visited Aug. 16, 2005).

84. *Id.* cl. 32; *see also* MARRELLA & MOZZATO, *supra* note 7, at 57.

85. *See* BIMCO, Coal Voyage Charter 1997, cl. 33(b) [hereinafter POLCOALVOY]. Clause 33(b) states:

> 1. Any dispute arising under this Charter Party and any Bill of Lading issued thereunder shall be referred to arbitration at the place indicated in Box 35 subject to the procedure applicable there. The laws of the place indicated in Box 35, shall govern this Charter Party and any Bill of Lading issued thereunder.
>
> 2. If arbitration in London is agreed . . . any dispute arising out of this Charter Party or any Bill of Lading issued thereunder shall be governed and construed in accordance with English Law and . . . referred to arbitration in London in accordance with the Arbitration Act 1996 . . . ."

86. *Cf.* SYNACOMEX, *supra* note 78, cl. 28.

87. *See* BIMCO, North American Fertilizer Charter Party 1988 [hereinafter FERTIVOY], *available at* http://www.bimco.dk/upload/fertivoy_88.pdf (last visited Aug. 16, 2005).

York using U.S. law; or any third place according to *lex situs arbitri*.[88]

With regard to the transporting of liquid gas, we refer to the Gas Voyage Charter Party model contract ("GASVOY"), created by BIMCO in 1972 and certified by the Chamber of Shipping of the United Kingdom.[89] It provides an arbitration clause envisaging an umpire with London as the *situs arbitri* and the application of English law.[90]

Among the contractual forms of time charter party, the best known and most widespread are the Uniform Charter Party ("BALTIME 1939")[91] and the Time Charter New York Produce Exchange Form ("NYPE 93").[92] The first was created by BIMCO and diffused through the work of the Chamber of Shipping of the United Kingdom and of the Japan Shipping Exchange Inc. NYPE 93 was first created in 1913 (with modifications made in 1921, 1931, 1946, 1981 and 1993) by the American Association of Ship Brokers and Agents; its use has been recommended by both BIMCO and FONASBA. The NYPE's arbitration agreement, in contrast to the preceding model form,[93] provides for the normal alternatives of arbitration, with the indication of automatic application of the small claims procedure whenever it is possible.[94] Other model contracts of time charter party refer to particular types of ships, including BPTIME3 Time Charter Party, which is used for tankers. In contrast

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88. *Id.* cls. 37.1-37.3.

89. *See* BIMCO, Gas Voyage Charter Party to Be Used for Liquid Gas Except LNG 1972 [hereinafter GASVOY], *available at* http://www.bimco.dk/upload/gasvoy.pdf (last visited Aug. 16, 2005).

90. *Id.* cl. 29.

91. *See* BIMCO, Baltic and International Maritime Conference Uniform Time-Charter 1974, cl. 23 [hereinafter BALTIME] ("Any dispute arising under the Charter to be referred to arbitration in London (or such other place as may be agreed according to Box 24)."), *available at* http://www.bimco.dk/ upload/baltime_1939_74_001.pdf (last visited Aug. 16, 2005).

92. BIMCO, Time Charter New York Produce Exchange Form 1993 [hereinafter NYPE 93], *available at* http://www.bimco.dk/upload/nype_93.pdf (last visited Aug. 16, 2005).

93. BALTIME, *supra* note 91, cl. 25.

94. NYPE 93, *supra* note 92, cl. 45(a)-(b).

to the previous contractual models, this one provides for arbitration in London as an alternative to domestic jurisdiction.[95]

Supply vessels normally follow the Uniform Time Charter Party for Offshore Service Vessels ("SUPPLYTIME 89"), created by BIMCO in 1975 (later modified in 1989) and recommended by the International Support Vessel Owners' Association of London.[96] This provides for either ad hoc arbitration to be carried out in London according to English law, or in New York according to the rules of the Society of Maritime Arbitrators, based on New York law.[97]

With regard to model contracts involving the chartering of the ship, BIMCO created the BIMCO Standard Bareboat Charter ("BARECON 2001").[98] BARECON 2001 provides for arbitration by offering the alternatives of London as *situs arbitri* and to English law according to the arbitration regulation of the LMAA, or to New York with the application of "Title 9 of the United States Code and the Maritime Law of the United States" according to the regulation of the Society of Maritime Arbitrators.[99] Also noted among the contracts of affreightment is the BIMCO Standard Volume Contract of Affreightment for the Transportation of Bulk Dry Cargoes ("VOLCOA"), published in 1982 and adopted by the General Council of British Shipping of London, International Shipowners'

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95. BIMCO, BPTIME3 Time Charterparty 2001, cl. 36 [hereinafter BPTIME3] ("The High Court in London shall have exclusive jurisdiction over any dispute which may arise out of this Charter. Notwithstanding the aforesaid, the parties may jointly elect to have such dispute referred to arbitration in London . . . ."), *available at* http://www.bimco.dk/upload/bptime_3(1).pdf (last visited Aug. 16, 2005).

96. BIMCO, Uniform Time Charter Party for Offshore Service Vessels 1989 [hereinafter SUPPLYTIME 89], *available at* http://www.bimco.dk/upload/supplytime_89.pdf (last visited Aug. 16, 2005).

97. *Id.* cl. 31(a)-(c).

98. BIMCO, Standard Bareboat Charter 2001 [hereinafter BARCON 2001], *available at* http://www.bimco.dk/upload/barecon_2001_001.pdf (last visited Aug. 16, 2005).

99. *Id.* cl. 30. Clause 30 states:

> (a) [A]ny dispute arising out of or in connection with this Contract shall be referred to arbitration in London . . . . (b) [A]ny dispute arising out of or in connection with this Contract shall be referred to three persons at New York. . . . [and] (c) [A]ny dispute arising out of or in connection with this Contract shall be referred to arbitration at a mutually agreed place . . . .

Association, FONASBA, and the Japan Shipping Exchange, Inc. of Tokyo.[100] This model also offers three alternatives, citing London, New York or another location elected by the parties as the site of arbitration.[101]

A special arbitration clause is included in the Lloyd's Open Form ("LOF 2000") that disciplines contractual salvage.[102] To the choice of English law as *lex contractus*, the following arbitration clause is added:

> The Contractor's remuneration and/or special compensation shall be determined by arbitration in London in the manner prescribed by Lloyd's Standard Salvage and Arbitration Clauses ('the LSSA Clauses') and Lloyd's Procedural Rules. The provisions of the LSSA clauses and Lloyd's Procedural Rules are deemed to be incorporated in this agreement and form an integral part hereof. Any other difference arising out of this agreement or the operations hereunder shall be referred to arbitration in the same way.[103]

Other arbitration clauses are included in some of the main contractual models of maritime insurance. This occurs in the case of Protection and Indemnity (P&I) Insurance contracts, which expressly state that the Club and the ship owners who are members resolve any dispute through arbitration.[104]

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100. *See* BIMCO, Standard Volume Contract of Affreightment for the Transportation of Bulk Dry Cargo (1982), *available at* http://www.bimco.dk/upload/volcoa.pdf (last visited Aug. 16, 2005).

101. *Id.* cl. 21 (stating, additionally, that if the amount claimed by either party does not exceed $3,500, or another amount agreed to, the parties will use the Simplified Arbitration Procedure of the Society of Maritime Arbitrators, Inc.).

102. Lloyd's of London, Lloyd's Standard Form of Salvage Agreement (2000), *available through* https://www.lloydsagency.com/Agency/agency.nsf/0/7CD5023502679E8A80256B56005C286F?OpenDocument (last visited Aug. 16, 2005).

103. *Id.* cl. I.

104. *See* SJUR BRAEKHUS & ALEXANDER REIN, HANDBOOK OF P&I INSURANCE 103-04 (2d ed. 1979); S. FERRANINI, LE ASSICURAZIONI MARITTIME 43 ff., 226 ff. (3d ed. 1991).

B. THE OPERATORS' PERCEPTION OF MARITIME ARBITRATION

From the observations made thus far, it follows that a large part of the shipping business prospers far away both from municipal courts and from "general" arbitration practitioners! To verify this hypothesis, I circulated a special questionnaire (created together with Professor Philippe Fouchard) among shipping operators. By consolidating these responses with those of other studies,[105] some useful conclusions emerge to illustrate the particular role of (transnational) maritime arbitration.

First of all, the collected answers showed that operators are strongly against the idea of creating an international court of maritime arbitration, whether established through intergovernmental convention or private agreement.[106] Furthermore, arbitration centers are not eagerly awaiting the convergence between "commercial" and maritime arbitration due to an alleged specificity of disputes even though this is controversial in doctrine. The same autonomist anxiety has led operators to reject the idea of complete uniformity between maritime arbitration regulations in the wake of what took place, to a certain extent, on the level of "general" arbitration amongst the International Chamber of Commerce, the American Arbitration Association and the International Center for Settlement of Investment Disputes.

In the maritime world, out of respect for a multisecular tradition, parties select arbitrators from among those who have a specific professional background in the sector where they have accumulated significant practical experience, which is rarely experience of legal/judicial type. The search for suitable arbitrators narrows down to three categories of candidates: a) individuals who have operated in

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105. For more information on those amongst the rare and precious studies on the matter, see, e.g., Lord Mustill, *Maritime Arbitration: The Call for a Wider Perspective*, 1992 J. INT'L ARB. 51; Johannes Trappe, *Maritime Arbitration Rules of Different Arbitral Institutions: Some Comparative Remarks*, 1998 ARB. 257-65; Riccomagno, *Practice of Commercial Arbitration*, *supra* note 8, at 135; Carasso Bulow, *A User's Experience of London and New York Maritime Arbitration*, EUR. TRANSPORT L. 293-319 (1998), Charles Jarrosson, *La spécificité de l'arbitrage maritime*, 2004 DIR. MAR. 444-49.

106. *Contra* Jose M. Alcantara, *An International Panel of Maritime Arbitrators?*, 11 J. INT'L ARB. 117, 117-18 (1994).

the maritime field as ship owners, agents, shippers or insurers; b) maritime business counsels, judges and lawyers with significant experience, professors of maritime and admiralty law; and c) experts such as naval commanders, architects and engineers.

Arbitration clauses contained in several of the contractual models indicated above confirm this data. For example, in the contracts of AMWELCH 93, NORGRAIN 89 and NYPE 93, it is an expressed requirement that the arbitrators be "carrying on business in London," or that they are "Members of the Baltic Mercantile & Shipping Exchange and engaged in Shipping."[107] The New York model contracts and the VOLCOA and OREVOY forms in particular, require that the arbitrators be "commercial men."[108] However, in the model forms of AMWELCH 93, NORGRAIN 89 and NYPE 93, arbitrators must be "commercial men" as well as "conversant with shipping matters." Even the contracts of SUPPLYTIME 89 and FERTIVOY 88 state that arbitrators must be members of the Society of Maritime Arbitrators of New York!

To underline the sectorial nature of maritime arbitration, it is important to note that while the main point of aggregation in the world of "general" arbitration is the International Council for Commercial Arbitration ("ICCA"), maritime arbitrators refer to the International Congress of Maritime Arbitrators ("ICMA"). It is therefore easy to understand why a spokesman from the powerful London Maritime Arbitration Association confirmed, with a certain degree of sarcasm, that arbitrators must be specialists on maritime matters and not specialists of arbitration law! He added that the world of shipping is a club and that very few arbitrators are lawyers.[109]

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107. *See* AMBROSE & MAXWELL, *supra* note 8.

108. *See* Korea v. New York Navigation Co., 469 F.2d 377, 378 (2d. Cir. 1972); *see also* Pando Compania Naviera v. Filmo, 2 All E.R. 515 (1975); Cedric Barclay, *Practical Experience in Maritime Arbitration*, *in* NEW TRENDS IN THE DEVELOPMENT OF INTERNATIONAL COMMERCIAL ARBITRATION AND THE ROLE OF ARBITRAL AND OTHER INSTITUTIONS 275-80 (Pieter Sanders ed., 1983).

109. In answering the LMAA questionnaire, it was noted how "arbitrators are specialists in maritime matters, not necessarily in arbitration, . . . few are lawyers and even fewer eminent lawyers." Questionnaire by LMAA [hereinafter Questionnaire] (on file with author). On average in London, 400 maritime awards are registered per year.

The responses provided by the German Maritime Arbitration Association to the questionnaire support the LMAA's observation that the nature of disputes is different from that found in international commercial arbitration, since maritime arbitration involves decisions relating mainly to factual questions rather than legal questions.[110] It has been said that, in addition to excellent knowledge of maritime documents, "the required skill for solving such disputes is common sense, fairness and honesty, specific knowledge of the trade and a calculator!" Such a tendency is the antithesis of the race towards procedural law that, in recent years, has characterized the world of "general" international commercial arbitration.[111]

The need for rapid resolution of controversies, or "the need for speed"[112] has forced the LMAA and SMA to create the Small Claims Procedure, analogous to a "fast track" procedure, which is known, inter alia, in ICC arbitration.[113] When arbitration takes place in London, reference is made to the Small Claims Procedure of the

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110. *See* Barclay, *supra* note 108, at 277 (suggesting, when choosing an arbitrator, a client should favor an arbitrator with "sound practical knowledge" of ships and shipping, and intimating that this is so because an expansive knowledge and understanding of the facts are immensely important); *see also* Kazuo Iwasaki, *A Survey of Maritime Arbitration in New York*, 15 J. MAR. L. & COM. 69, 70 (1984) (indicating that an arbitrator's impartiality and knowledge of maritime business are the most important factors in choosing an arbitrator and, in fact, are more important than knowledge of the applicable or maritime law).

111. For a criticism of this trend, see RENE DAVID, ARBITRATION IN INTERNATIONAL LAW 1-2 (1985), whose book rests as an unmatched masterpiece on the matter; *see also* Pierre Lalive, *Avantages et inconvénients de l'arbitrage ad hoc*, *in* ETUDES OFFERTES À PIERRE BELLET 301 ff. (Paris, 1991); Bruno Oppetit, *Philosophie de l'arbitrage commercial international*, J. DE DROIT INT'L 819 (1993).

112. *Speedier Arbitration as a Response to Changes in World Trade: A Necessary Goal or a Threat to the Expectations of the Parties?*, *in* IMPROVING INTERNATIONAL ARBITRATION (International Chamber of Commerce, 1998) (Liber Amicorum for Michel Gaudet).

113. *See, e.g.*, The London Maritime Arbitrators Assn., The LMAA FALCA (Fast and Low Cost Arbitration) Rules (Jan. 31, 1997) *available at* http://www.lmaa.org.uk/default.asp (last visited Aug. 16, 2005); The London Maritime Arbitrators Assn., The L.M.A.A. Small Claims Procedure (Jan. 1, 2002), *available at* http://www.lmaa.org.uk/default.asp (last visited Aug. 16, 2005); Society of Maritime Arbitrators, Inc., Rules for Shortened Arbitration Procedure (Aug. 16, 2001), *available at* http://www.smany.org/sma/about6-1.html (last visited Aug. 16, 2005).

LMAA, while arbitrators in New York refer to the Shortened or Simplified Arbitration Procedure of the Society of Maritime Arbitrators, Inc. of New York. These references are found in the model forms of AMWELSH 93, POLCOALVOY, NORGRAIN 89, NYPE 93, SHIPMAN 98 and BARECON 2001. It should be noted, however, that the demand for rapid justice is a characteristic common to both worlds—that of maritime traffic as well as that of non-maritime traffic—and is an ancient demand, as proved by some studies on medieval Venetian arbitration.[114]

All the interviewees recognised that existing international conventions on "general" international commercial arbitration, particularly the New York Convention of 1958, seem fit to regulate many (if not all) of the issues that specifically concern maritime arbitration. When asked whether a special convention on recognition and enforcement of maritime awards would be useful, the interviewees' unanimous response was "no."

It also emerged from the questionnaire that ad hoc arbitration remains a widespread practice in the maritime world, highlighting a greater inclination towards ad hoc arbitration in the maritime sector than in other sectors of transnational commercial arbitration, although there are no available statistics to confirm this. For example, in contrast to other sectors of international trade, some maritime associations (LMAA in London, SMA in New York, and GMAA in Hamburg) did not have institutional administrative machineries, limiting them to promoting ad hoc arbitration, even if their own arbitration regulations disciplined them. Many other countries have begun to create their own institutional bodies, such as the Commission for Maritime Arbitration within the Russian Chamber of Commerce,[115] the Chinese Maritime Arbitration Commission of Beijing, TOMAC,[116] the *Chambre Arbitrale*

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114. MARRELLA & MOZZATO, *supra* note 7, at 55.

115. *See* S.N. Lebedev, *Commentary by Prof. S.N. Lebedev*, 7 Y.B. COM. ARB. 249, 249-52 (1994); Steven W. Block, *Recent Developments at the Russian Maritime Arbitration Commission*, 25 J. MAR. L. & COM. 521 (1994).

116. *See* Lawrence G. Cohen, *Maritime Arbitration in Asia*, 29 J. MAR. L. & COM. 117, 117-20 (1998).

Maritime de Paris,[117] the *Asociacion Espanola de Arbitraje Maritimo* of Madrid,[118] the European Court of Arbitration of Strasbourg,[119] and the Indian Council of Arbitration of New Delhi.[120] The offer of a "service" of maritime arbitration is a recent phenomenon, even if it is a trend that has been visible in "general" commercial arbitration for a long time. The responses from the arbitration organisations are, however, rather vague regarding the possible prevalence of arbitration according to law over arbitration *ex aequo et bono*.

IV. THE PROBLEM OF THE FORM (AND SIGNATURE) OF THE ARBITRATION CLAUSE FOR MARITIME ARBITRATION IN THE ERA OF E-COMMERCE

It is becoming increasingly common in daily life to exchange data and information via electronic means, with obvious consequences for law, especially laws deriving from less recent international conventions. In fact, the main international conventions' rigorous formal requirements imposed with regard to arbitration clauses undoubtedly refer to the traditional written and "offline" form, provoking more than a little confusion on the legal status of those arbitration clauses existing "online" or those contained in dematerialised bills of lading.[121]

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117. *See* Chambre Arbitrale Maritime de Paris, *General* (discussing the formation of the *Chambre Arbitrale Maritime de Paris* in 1966 by the maritime professions—ship-owners, shippers, insurers, ship-brokers and ship-agents—as a private and independent organization), *at* http://www.arbitrage-maritime.org /us/intro.htm (last visited Aug. 16, 2005).

118. *See* Arbitration Associations, *The Spanish Maritime Institute for Arbitration and Contracting (IMARCO)*, 4 J. INT'L ARB. 123, 124 (1987) (describing the formation and present status of IMARCO).

119. *See* European Court of Arbitration, *What is the European Court of Arbitration*, *at* http://cour-europe-arbitrage.org (last visited Aug. 16, 2005).

120. *See* Indian Council of Arbitration, *ICA and Its Services*, *at* http://www.ficci.com/icanet (last visited Aug. 16, 2005).

121. This problem is currently being faced by the UNCITRAL working group dealing with the draft international convention on *door-to-door* carriage. According to Professor Berlingieri, chairman of the group, the treatment of this peculiar issue has been postponed to a joint meeting with the UNCITRAL working group on electronic commerce. For more information on relevent literature not

When maritime arbitration derives from a contract created in electronic format, including an arbitration agreement contained in a bill of lading or charter party, some particularly complex questions arise.[122] Without specific uniform rules of international law on these matters, hopefully domestic courts will look at case law of foreign courts in the wake of international arbitrators who constantly strive to apply principles of law that are enjoying wide international consensus.[123] In fact, there are four main problems warranting separate consideration: (a) whether the arbitration agreement must always be stipulated in *written* form; (b) whether the so-called *electronic form* is equivalent to the *written form*; (c) whether the

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specifically addressing maritime arbitration, see Llewellyn Joseph Gibbons, *Resolving E-commerce Disputes B2B and B2C: An Introduction to Online Dispute Resolution Modalities*, *in* ADR & THE LAW (18th ed. 2002); Roger P. Alford, *The Virtual World and the Arbitration World*, 18 J. INT'L ARB. 449, 453-57 (2001); Jasna Arsic, *International Commercial Arbitration on the Internet*, 14 J. INT'L ARB. 209, 210 (1997).

122. *See* F. Berlingieri, *Trasporto marittimo e arbitrato*, 2004 DIR. MAR. 423; Mario Riccomagno, *The Incorporation of Charter Party Arbitration Clauses into Bills of Lading*, 2004 DIR. MAR. 1187 (comparing the authorities of the Courts of Italy, England and the United States); Comite Maritime International, *Rules for Electronic Bills of Lading* (June 29, 1990) (responding to issues such as the form and content of the receipt message, terms and conditions of the contract of carriage, and the right of control and transfer), *available at* http://www.comitemaritime.org/cmidocs/rulesebla.html (last visited May 27, 2005); George F. Chandler, III, *The Electronic Transfer of Bills of Lading*, 20 J. MAR. L. & COM. 571, 571-79 (1989); Diana Faber, *Electronic Bills of Lading*, 1996 LLOYD'S MAR. & COM. L.Q. 232, 234-44; Georgios I. Zekos, *Electronic Bills of Lading and Negotiability*, 4 J. WORLD INTELL. PROP. L. 977, 978-83, 1007 (2001) (comparing paper versus electronic bills of lading and describing the Bolero Title Registry, which records the changes in the right to possession of goods in transit that are the subject of the Bolero bill of lading (BBL); BBLs are electronic documents which replicate the functions of traditional bills of lading); *see also* UNCTAD/ICC, *Rules for Multimodal Transport Documents*, Rule 2.6 ("Multimodal transport document . . . means a document evidencing a multimodal transport contract, and which can be replaced by electronic data interchange messages insofar as permitted by applicable law and be: (a) issued in a negotiable form or (b) issued in a non-negotiable form indicating a named consignee"), *available at* http://r0.unctad.org/en/subsites/multimod/mt3duic1.htm (last visited Aug. 16, 2005). The Bolero Project deserves particular attention. *See* Bolero Project, *Home* (describing the project as "a neutral secure platform enabling paperless trading between buyers, sellers, and their logistics service and bank partners"), *at* http://www.bolero.net (last visited Aug. 16, 2005).

123. Such wording is found in ICC Award No. 7110, on which see Marrella, *supra* note 6, at 395.

arbitration agreement needs to be signed by the parties (and contained in the same document together with the bill of lading); (d) whether the *electronic signature* equates to the hand-written signature.

It is clear that only a valid and effective arbitration clause provides the necessary foundation for all types of arbitration and that the principle of the autonomy of the arbitration clause—a general principle of the law of international arbitration—calls for the survival of the clause in the fate of the main contract. The latter may also end up invalid, in which case the determination of such invalidity will be contained in the award. Consequently, from an international private law standpoint, the arbitration agreement can be subject to a *lex contractus* that differs from the rules governing contracts that contain arbitration clauses.[124] Through the arbitration clause, the parties choose the type of arbitration that they want: ad hoc/institutional, according to law/according to equity, or an online or offline arbitration.[125]

Traditionally, in order to resolve problem (a), it is necessary to apply the rules concerning the form of the arbitration agreement from the standpoint of a given jurisdiction.[126] Under Italian arbitration law, for instance, simplification of the formal requirements has been introduced only in favor of *international* arbitration (maritime and non-maritime) in that "arbitration clauses contained in general conditions of contract or in model forms are not subject to specific approval foreseen in articles 1341 and 1342 of the civil code [i.e. double signature requirement]." An "[a]rbitration clause contained in general conditions incorporated into a written agreement between the parties is valid, provided that the parties had knowledge of the clause

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124. *See* Nathalie Voser, *Current Develoment: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration*, 7 AM. REV. INT'L ARB. 319, 322-23 (1996) (noting arbitrators determine the *lex contractus* based on various attributes of the legal relationship between the parties including, but not limited to, the parties' habitual residence, the parties' domicile, or the place of agreement).

125. This point is particularly important since, on one side we may have online and offline bills of lading; on the other side a bill of lading may provide for online or offline arbitration.

126. Note, however, that from the standpoint of Italian law there is a distinction between domestic, international, and foreign arbitration.

or should have known such through ordinary diligence."[127] European Union law provides a more comprehensive solution relevant to e-commerce—including electronic bills of lading—but applicable only vis-à-vis forum selection clauses on jurisdiction and the enforcement of judgements.[128]

In relation to question (b) posed above, the validity of online arbitration clauses, from the standpoint of recent Italian law, is confirmed by statutory rules contained within the current Uniform Code (*Testo Unico*) on administrative documents. Here, it is stated

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127. Code of Civil Procedure [C.P.C.], art. 833.

128. *See* Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12).

> 1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either: (a) in writing or evidenced in writing; or (b) in a form which accords with practices which the parties have established between themselves; or (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.
>
> 2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing".
>
> 3. Where such an agreement is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.
>
> 4. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.
>
> 5. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.

Id. art. 23.

that computer generated documents, if created according to formal requirements indicated in the aforementioned law, satisfy "the requirement of the written form" and therefore the contracts created by electronic instruments or by telematic methods are "valid and relevant in every legal way."[129]

This solution converges, on a comparative level, with more recent arbitration legislation. In Belgian law, for example, Article 1677 of the *Code Judiciaire* provides for the written form of the arbitration clause only *ad probationem*, allowing the arbitration agreement to be in other forms (including in electronic form), on the condition that the parties agree to this.[130] A similar solution is found in German legislation,[131] Spanish legislation,[132] the English Arbitration Act of

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129. Disposizioni Legislative in Materia di Documentazione Amministrativa [Legislative Dispositions in Matters of Administrative Documentation] 28 dicembre 2000, n.445, art. 10, *reprinted in* GAZZ. UFF. n.42 del 20 febbraio 2001-Supplemento ordinario n.30., *available at* http://www.parlamento.it/parlam/leggi/deleghe/00443dla.htm (last visited Aug. 16, 2005).

130. Belgium Code Judiciaire, art. 1677 (May 19, 1998) ("An arbitration agreement shall be constituted by an instrument in writing signed by the parties or by other documents binding on the parties and showing their intention to have recourse to arbitration."), *available at* http://www.jus.uio.no/lm/belgium.code.judicature.1998/1677 (last visited Aug. 16, 2005).

131. *See* Code of Civil Procedure, §1031 Nr. 4 ZPO (approving of an arbitration agreement contained within a document signed by the parties or in an exchange of letters, telefaxes, telegrams or other means of telecommunication that provide a record of the agreement).

132. *See Ley n.60/2003 de 23 de diciembre, de arbitraje*, art. 9 (Dec. 23, 2003). Article 6 states:

> 1. El convenio arbitral, que podrá adoptar la forma de cláusula incorporada a un contrato o de acuerdo independiente, deberá expresar la voluntad de las partes de someter a arbitraje todas o algunas de las controversias que hayan surgido o puedan surgir respecto de una determinada relación jurídica, contractual o no contractual.
>
> 2. Si el convenio arbitral está contenido en un contrato de adhesión, la validez de dicho convenio y su interpretación se regirán por lo dispuesto en las normas aplicables a ese tipo de contrato.
>
> 3. *El convenio arbitral deberá constar por escrito, en un documento firmado por las partes o en un intercambio de cartas, telegramas, télex, fax u otros medios de telecomunicación que dejen constancia del acuerdo. Se considerará cumplido este requisito cuando el convenio arbitral conste y sea*

1996,[133] Vietnamese law[134] and, last but not at all least, Japanese law, where Law 138 of 2003, in force since March 1, 2004, states clearly

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accesible para su ulterior consulta en soporte electrónico, óptico o de otro tipo.

4. Se considerará incorporado al acuerdo entre las partes el convenio arbitral que conste en un documento al que éstas se hayan remitido en cualquiera de las formas establecidas en el apartado anterior.

5. Se considerará que hay convenio arbitral cuando en un intercambio de escritos de demanda y contestación su existencia sea afirmada por una parte y no negada por la otra.

6. Cuando el arbitraje fuere internacional, el convenio arbitral será válido y la controversia será susceptible de arbitraje si cumplen los requisitos establecidos por las normas jurídicas elegidas por las partes para regir el convenio arbitral, o por las normas jurídicas aplicables al fondo de la controversia, o por el derecho español.

133. *See* Arbitration Act, 1996, c. 23, § 5. Clauses 2-6 of Section 5 set out the parameters of an "agreement":

(2) There is an agreement in writing- (a) if the agreement is made in writing (whether or not it is signed by the parties), (b) if the agreement is made by exchange of communications in writing, or (c) if the agreement is evidenced in writing.

(3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.

(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.

(5) An exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.

(6) References in this Part to anything being written or in writing include its being recorded by any means.

134. *See* Ordinance on Commercial Arbitration, No. 08/2003/PL-UBTVQH of Feb. 25, 2003, *translated in* 16 WORLD TRADE & ARB. MATERIALS, 213, 215 (2004) (quoting Article 9, paragraph 1, which states: "The arbitration agreements must be made in writing. Arbitration agreements reached through mails, telegrams, telex, fax, electronic mails or other written forms clearly expressing the wills of the involved parties to settle their disputes through arbitration shall be regarded as written arbitration agreements.").

that "when an arbitration agreement is made by way of electromagnetic record (records produced by electronic, magnetic or any other means unrecognizable by natural sensory function and used for data-processing by a computer) recording its content, the arbitration agreement shall be in writing."[135]

The aforementioned solutions, however, will operate in international arbitration only through the so-called "most favorable legislative clause" provided by the New York Convention. In fact, Article VII of the New York Convention states that:

> The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.[136]

If in some jurisdictions online arbitration clauses for international maritime and non-maritime arbitration may be recognised as valid and operative, conversely, the New York Convention refers only to offline arbitration. Here, Article II provides that "[t]he term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

There is no doubt that in 1958, when the New York Convention was adopted and signed, nobody could have foreseen the advent of e-commerce and therefore the New York Convention never intended to deal with e-commerce or e-arbitration.[137] Further evidence is provided by the fact that a special committee at UNCITRAL is currently preparing a protocol that is designed to bring the New York Convention into line with the demands of e-commerce. Similar considerations can be made with reference to the Hague-Visby

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135. *See* Arbitration Law, Law No. 138, art. 13, para. 4 (2003), *translated in* 16 WORLD TRADE & ARB. MATERIALS, 167, 172 (2004).

136. New York Convention, *supra* note 33, art. VII.

137. *See generally* Nicolas de Witt, *Online International Arbitration: Nine Issues Crucial to Its Success*, 12 AM. REV. INT'L ARB. 441, 442 (2001).

Rules, the Brussels Convention of 1952, that of Hamburg, May 30, 1978, and the Geneva Convention of 1980 up until the London Convention of 1989.[138] None of these conventions were ever intended to deal with online arbitration agreements, thus no legal claim to enforce electronic arbitration clauses may be based on such treaties.

A different question is raised in question (c), regarding the classic problem of the validity of the arbitration clause stipulated *per relationem*; quite a common circumstance in international trade. This problem does not arise for arbitration clauses contained in so-called "liner" bills of lading, as these clauses are pre-stamped on the reverse of the bill, but they often arise in the case of transportation on *tramp* ships, since the charter party in the bill contains the arbitration clause. Italian case law distinguishes between stipulations *per relationem perfectam* (perfect relationship) and *per relationem imperfectam* (imperfect relationship) to consider the clause, in the last case, inoperative despite the opposing evaluation proposed by authoritative doctrine.[139] The arbitration clause contained in a charter party contract is not binding for the holder of the bill of lading if specific reference of such clause is not made in the document.[140]

The persistence of this restrictive approach regarding the admissibility of arbitration clauses within bills of lading is welcome only by those judges or lawyers (even some professors of law!) hostile towards arbitration. It would be very interesting to open a debate or launch a study on this specific point to evaluate the state of the art of this issue in various jurisdictions. This same problem,

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138. *See* discussion, *supra* Part 2.1.

139. Assicurazioni Generali c. Agenzia Marittima Tirreno (Cass. 1969), 1969 DIRITTO MATITTIMO 279; Ditta Augusto Miserocchi c. Paolo Agnesi S.p.A. (Cass. 1971), 1972 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 563; Riccardo Luzzatto, *Una questione sempre aperta: La "forma" della clausola compromissoria per arbitrato estero*, 1977 DIR. MAR. 403; Francesco Berlingieri, *Requisiti di Validità Della Clausola Compromissoria*, 1991 DIR. MAR. 583.

140. *See* Jaunch & Hubener c. Soc. Navigation Transocéanique (Cass. 1981), 1982 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 821, 1982 DIR. MAR. 391; Molini Lopresti S.p.A. c. Continentale Italiana S.p.A. (Cass. 1996), 1996 RIVISTA DELL'ARBITRATO 717. Compare with the landmark case of Soc. Granitalia c. Soc. Agenzia Maritt. Sorrentini (Cass. 2000), RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE 1003, 2002 DIR. MAR. 225.

moreover, cannot be overcome simply by electronic bills of lading as the relationship between different legal documents operated by a weblink may still lead directly to the arbitration clause (case of *relatio perfecta*) or refer to standard terms, including the arbitration clause (case of *relatio imperfecta*).

We now come to examine the final question, (d), and focus on the characteristics of the signature of the arbitration agreement in maritime arbitration. Article II of the New York Convention demands an arbitration clause that is "signed by the parties" and, for the reasons outlined above, there is no doubt that electronic signatures (as well as e-commerce and e-arbitration) falls outside the New York Convention's sphere of application. The New York Convention can offer to e-traders and e-arbitrators only its most favorable legislation clause.[141] Thus, the actual validity of an online signature depends on the domestic law of the *situs arbitri* and, more importantly, on that of the *exequatur* State.

Inside the European Union, it is generally held that under Directive 1999/93/EC courts will consider the electronic signature as valid.[142]

In other countries, the same reasoning can deny the validity of electronic signatures, with consequent problems of *exequatur* of the foreign award according to the New York Convention. This will happen in countries whose domestic law is less favorable or simply does not provide rules for e-arbitration clauses. Here, faced with the silence of the New York Convention, one should refer to domestic law of the country of *exequatur,* a paradise for comparative lawyers!

From the point of view of Italian law, the further issue of authentication of the document containing the award becomes crucial where arbitrators draw up "as many authentic texts of the award" as there are parties and each party must receive an authentic version. The party that intends to obtain enforcement of the award must deposit it as an authentic or certified copy, together with an authentic

141. New York Convention, *supra* note 33, art. VII.

142. 2000 O.J. (L 13) 12.; *see also* Council Directive 2000/31/EC, 2000 O.J. (L 178) 1.

or certified copy of the arbitration clause in the chancery of the Court of the seat of arbitration."[143]

The same situation arises in foreign arbitration where, in compliance with Article 839 of the Code of Civil Procedure, "the plaintiff must produce the award as an authentic or certified copy, together with the bill of arbitration of equivalent document, as an authentic or certified copy."[144] I suspect no jurisdiction has clear rules on this matter when dealing with online arbitration clauses and online awards.

Are online clauses and awards "authentic" documents? Does the possibility of printing, via internet, the clause and the award in the Chancery of the *Exequatur* Court equate to the production of a certified copy? The only certainty is that a document will never be authentic as long as it is contained in a web page belonging to one of the parties or the arbitrators.

CONCLUSION

So from these considerations there emerges a panorama characterised by the multiplicity and competition of international institutions charged with the resolution of disputes in the maritime field. This occurs on an intergovernmental level, where the phenomenon of the "proliferation of international courts" continues to progress, as noted by the President of the International Court of Justice.[145] A possible solution to this problem could be to attribute to the International Court of Justice special jurisdiction to resolve "conflicts of jurisdiction" between international courts.

Competition between arbitration institutions is more intensive on the transnational level where, in terms of law and economics, the fight in the market of maritime arbitration is particularly scarce due to its concentration—more or less a duopoly—in New York and in London, with the arbitration chamber of Paris in third place, but far

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143. Code of Civil Procedure [C.P.C.], art. 825, §§ 1-2.

144. *See id.* art. 839.

145. *See* Pres. of the International Court of Justice, H.E. Judge Gilbert Guillaume, Address to the Unived Nations General Assembly (Oct. 26, 2000), *available at* http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/iSpeech President_Guillaume_GA55_20001026.htm (last visited Aug. 16, 2005).

behind the leading two in terms of its importance. A glance to the standard clauses "suggested" in maritime model contracts leads to London and New York, with the consequent application of English and New York law, a fact that overrides any comment on the statistics of arbitration centers.

Continental Europe, including Italy, the real highway of the Mediterranean Sea, finds itself divided into maritime arbitration centers that are of minor (and/or local) importance, despite a long maritime tradition. In this setting we should, however, ask if there is "a European culture of maritime arbitration" and whether a discussion on this subject would not be useful. On the other hand, the separation of the world of maritime arbitration from that of international commercial arbitration makes it difficult to carry out not only the required process of cross-fertilization, but also that of *reconductio ad unum* of arbitration rules, creating watertight compartments that can inhibit the development of one or the other. In case the reasons to separate "maritime" arbitration from "commercial" arbitration within the genus of international arbitration prevail, it becomes possible to formulate auspices for a better uniformity and certainty of maritime law.

One solution, although negatively perceived by shipping operators and private arbitration centers, could be to create an International Court of Maritime Arbitration within the International Maritime Organisation ("IMO"). Recently, in the sector of intellectual property, similar considerations have led the World Intellectual Property Organisation ("WIPO") to create special organisms and to formulate a regulation of institutional arbitration giving new blood to an institution that seemed to be in crisis after the launch of the WTO. In this way, another arbitral institution was created within an inter-governmental organization to compete with the already existing private organizations. The success of this initiative has yet to come.

Thus, in my opinion, the path that the IMO might take should differ from that taken by the WIPO. The solution consists in the development of a new activity that private maritime centers have so far failed to carry out. I speak of the establishment of an arbitration court at the IMO, to resolve particular questions of transnational maritime law handed over by the maritime arbitrators within the framework of ad hoc or administered arbitration procedures around

the world. The progressive stratification of persuasive precedents that would be published on the internet might contribute significantly to the unification of maritime law and arbitration. The coordination of the jurisdiction of this new international tribunal with that of others operating in the maritime sector may be assured eventually by the International Court of Justice. As an alternative, the jurisdiction of ITLOS may be increased in the same direction in order to interact with maritime arbitrators and thus contribute to uniformity of maritime law.

In any case, the advent of the internet will undoubtedly revolutionize the world of transnational maritime arbitration. In the not too distant future there will be electronic arbitration or even offline arbitration, in which the parties, their lawyers and the arbitrators will "meet" via videoconferencing (on the internet), hold hearings with witnesses, or consult experts that they find "physically" onboard ships in the middle of the ocean. In this way, the need for a rapid, simple and effective resolution of disputes will, in maritime arbitration more than anywhere else, be satisfied through ubiquity. A virtue that, as well as being possessed by Saints, is today also accessible through technology.