or official state regulation. The lack of international law governing charterparties contrasts sharply with the intensive lawmaking activity in the area of bills of lading.

At the same time, international conventions on arbitration law evolved. The Geneva Protocol and Convention, and more significantly, the New York Convention, regulated the international enforcement of arbitral awards. The UNCITRAL Model Law aimed to harmonize further national arbitration laws worldwide.

While the legal landscape evolved, the maritime industry also changed. Shipping growth in China has prompted the rise of Asian maritime arbitral seats. China, Hong Kong, Japan, Korea and Singapore are notable examples; in this book, we focus on the fastest emerging seat: Singapore. Recently established in an arbitration-friendly jurisdiction, the SCMA is considered very promising. An excellent geographical position, the use of the English language and clear governmental policy in support of arbitration increase the global appeal of Singapore as a maritime arbitration center. We also touch on other important Asian jurisdictions: Hong Kong, Japan, and Korea.

§1.03 THEORETICAL FOUNDATIONS OF MARITIME ARBITRATION

[A] The Interface of Arbitration and National Legal Orders

An understanding of the interplay between the arbitral process and the different national legal systems that may affect that process is fundamental to a proper understanding of international arbitration.[168] The historical study of maritime arbitration revealed that arbitration developed since the dawn of commerce, separate from courts, and even facing sporadic judicial hostility.[169]

In contemporary times, the appropriate balance between the right of the courts to supervise arbitrations and the right of parties to seek assistance from the courts when necessary is still a sought-after objective for arbitration statutes around the world.[170] Thus, to understand current international arbitration, it is crucial to examine the theoretical underpinnings of the relationship between courts and arbitration.

Both courts and arbitration are organized social institutions with sometimes overlapping and conflicting functions that resolve disputes through an intellectual structure of laws, customs, and beliefs.[171] Courts and arbitration also differ in important aspects: courts are a permanent establishment with a full-time staff that renders judgments enforced coercively through public force; arbitrators operate in conference rooms on a part-time basis and rely on courts to enforce their arbitral awards.[172]

168. Blackaby et al., *supra* n. 56, at 57.
169. Menon & Brock, *supra* n. 90, at 11.
170. Blackaby et al., *supra* n. 56, at 439.
171. Nicholas Healy et al., *Cases and Materials on Admiralty* 139 (5th ed. West Academic Publishing 2011).
172. *Ibid.*

[1] Judicial Supervision of Arbitration

In general, courts of different legal systems and traditions accept arbitration, but the degree and model of judicial supervision differ.[173] Evaluating judicial review requires considering the relationship between the courts and arbitration, the two main actors in the maritime dispute resolution system.

In practice, judicial review of arbitration agreements arises in three situations. First, a court before which an action is brought in a matter which is the subject of an arbitration agreement refers the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.[174] Second, the court may examine the existence and effect of an arbitration agreement when a request for interim measures is made.[175] Third, the arbitration agreement will be reviewed when an action to annul or refuse recognition and enforcement of an arbitral award is brought. In accordance with the UNCITRAL Model Law, an arbitral award may be set aside if a party to the arbitration agreement was under some incapacity or the arbitration agreement is not valid.[176] Under both the New York Convention and the Model Law, recognition and enforcement of an arbitral award may be refused if the parties to the arbitration agreement were under some incapacity or if the agreement was not valid under its governing law.[177]

Judicial review of arbitral awards arises in two different contexts: first, when the local courts of the arbitral seat annul or set aside the award;[178] and second, when courts in other jurisdictions are asked to recognize and enforce arbitral awards, most commonly in accordance with the New York Convention but also under other applicable regional arbitration conventions.

The New York Convention addresses only the minimum permissible grounds for refusing recognition and enforcement of a foreign arbitral award and does not establish a uniform international standard for setting aside awards.[179] The UNCITRAL Model Law sets forth exclusive grounds to set aside arbitral awards,[180] but there remain variations depending on the jurisdiction. For example, the Singapore High Court may,

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173. For a brief analysis of the courts' stance in different legal systems, *see* Won Kidane, *The Culture of International Arbitration* 32 (OUP 2017).
174. UNCITRAL Model Law, Art. 8(1); New York Convention, Art. II(3).
175. UNCITRAL Model Law, Art. 9.
176. Article 34(2)(a)(i).
177. New York Convention, Art. V(1)(a); Model Law, Art. 36(1)(a)(i).
178. Annulment is also termed "setting aside" or "*vacatur,*" *see* Born, *supra* n. 18, at 3163. This book will follow the terminology used in the relevant statute of each jurisdiction: English law uses the term "set aside" (ss. 67, 68, 69 and 71 of the English Arbitration Act), U.S. law uses the term "vacate" (FAA, 9 USC, s. 10) and Model Law jurisdictions (Singapore, Hong Kong, Greece, Japan, Korea) use the term "set aside."
179. The New York Convention only limits the jurisdictions in which annulment of an arbitral award may be sought, i.e., the place where the award was made or under the law of which the award was made, *see* Born, *supra* n. 18, at 3163-3165. However, Born, *supra* n. 18, 3168-3172, suggests that although the Convention does not expressly limit the scope of judicial review of awards in annulment actions, the correct view is that the Convention sets implied limits by requiring contracting states to recognize arbitration agreements in Art. II.
180. Article 34(2): "an arbitral award may be set aside by the court specified in Article 6 *only if.*" (emphasis added)

in addition to the grounds set out in Article 34(2) of the UNCITRAL Model Law, set aside the award on the grounds of fraud or corruption, or a breach of the rules of natural justice.[181] Jurisdictions that have not adopted the Model Law, such as England and the U.S., also provide different regimes of judicial review of arbitral awards.

There is substantial debate on the extent of judicial review of arbitral awards in international arbitrations.[182] Some commentators argue that a substantive judicial review is an essential safeguard against biased or unjust awards, while others argue that extensive review is unnecessary and leads to the very delay and expense that arbitration agreements sought to avoid in the first place.[183] Less extensive judicial review means greater autonomy for the arbitral tribunal but also less scope to develop precedent and nourish commercial and maritime law.[184] Striking the right balance between autonomy and judicial review is an essential but difficult task for countries interested in establishing a prominent arbitral seat.[185]

Courts and policymakers seem to view arbitration as a means to lighten the courts' caseload in the face of flourishing international trade and an increase in the number of disputes.[186] While it is more common to examine dispute resolution from the perspective of the user, the point of view of the state and its citizens is also critical.[187] Fortunately, in this context, the objectives of the state do not differ largely from those of the user: it is essential to the prosperity of a state that its system resolves disputes quickly, cheaply and fairly, be it in a court or through arbitration.[188] Currently, many countries have enacted or reformed legislation in accordance with the UNCITRAL Model Law; the New York Convention applies almost universally. However, judges may feel still that they should or could have done the work of arbitrators and may occasionally lean towards the reexamination of arbitral awards.[189]

The UNCITRAL Model Law regulates the extent of court intervention.[190] In Model Law countries, courts generally agree that they should adopt an "arbitration-friendly" policy, i.e., refrain from reviewing an award on its merits; read an award generously and set it aside only for serious violations of due process; and intervene to support

181. SIAA, s. 24.
182. Born, *supra* n. 18, at 3354. A recent survey presents the views of arbitrators, in-house counsels, external lawyers working at law firms, expert witnesses, litigation funders, academics and those working at arbitral institutions on the topic of appeals against an arbitral award on the merits, *BCLP Annual Arbitration Survey 2020*, https://www.bclplaw.com/images/content/1/8/v2/186066/BCLP-Annual-Arbitration-Survey-2020.pdf, accessed August 31, 2020.
183. Born, *supra* n. 18, at 3354 with further citations.
184. Martin Davies, *More Lawyers but Less Law: Maritime Arbitration in the 21st Century,* 24 A&NZ Mar LJ 13 (2010).
185. *Ibid.*
186. Joshua Karton, *The Culture of International Arbitration and the Evolution of Contract Law* 73 (OUP 2013).
187. John Thomas, *Commercial Dispute Resolution: Courts and Arbitration* 2 (April 6, 2017), www.judiciary.uk/wp-content/uploads/2017/04/lcj-speech-national-judges-college-beijing-april2017.pdf, accessed August 31, 2020.
188. *Ibid.*
189. Healy et al., *supra* n. 171, at 142.
190. Article 5.

arbitration only if and when judicial assistance is needed.[191] In short, courts should "supervise with a light touch but assist with a strong hand."[192]

For the shipping industry, arbitration is the preferred dispute resolution mechanism. Indeed, the most important commercial courts of the world—namely, the English High Court, the Southern District of New York, and the courts in Hong Kong, Singapore, and Tokyo—are considered specialists in commercial disputes and often resolve maritime disputes.[193] Nevertheless, parties prefer to resolve disputes with arbitrators that understand the shipping industry.

[2] The Impact of Technological Developments

At the same time, ongoing interest in alternative dispute resolution (ADR) methods and the enactment of national and international legislation on international arbitration have increased knowledge about and acceptance of arbitration.[194] Technological developments facilitate the dissemination of knowledge and will have an impact on the future of maritime arbitration. Advances in technology can be used to enhance efficiency, increase cost-effectiveness, and improve security in international arbitration,[195] as well as to assist in the practice of law and the work of courts.[196] Technology can also effectively reduce the environmental impact of arbitration by offering alternatives, such as limiting international travel in favor of videoconferencing or reducing paper consumption by sending electronic documents.[197] Currently, travel restrictions and precautionary measures due to the coronavirus pandemic (COVID-19) have renewed discussions on online dispute resolution and alternatives to in-person arbitration.[198]

191. Hwang, *supra* n. 80, at 194.
192. *Ibid.*
193. Goldby & Mistelis, *supra* n. 144, at 2; Karton, *supra* n. 186, at 111.
194. Loukas Mistelis, *Competition of Arbitral Seats* in Goldby & Mistelis (eds.), *supra* n. 32, at 135.
195. The IBA Arbitration Committee has recently launched a new online guide to technology advances that can support international arbitration. The guide provides different types of technology that can be used by arbitration practitioners, parties and tribunal members and gives examples of vendors and providers, *see Technology Resources for Arbitration Practitioners* (March 2019), www.ibanet.org/technology-resources-for-arbitration-practitioners.aspx, accessed August 31, 2020. *See also* Sven Lange & Irina Samodelkina, *Digital Case Management in International Arbitration*, Kluwer Arbitration Blog (August 13, 2019), http://arbitrationblog.kluwerarbitration.com/2019/08/13/digital-case-management-in-international-arbitration/, accessed August 31, 2020 on the advantages and challenges of using digital case management systems.
196. Gross, *supra* n. 54, at 13.
197. *See* more on the Green Pledge for Arbitration in Lucy Greenwood & Kabir Duggal, *The Green Pledge: No Talk, More Action*, Kluwer Arbitration Blog (March 20, 2020), http://arbitrationblog.kluwerarbitration.com/2020/03/20/the-green-pledge-no-talk-more-action/, accessed August 31, 2020.
198. For example, the LMAA *Guidelines for the Conduct of Virtual and Semi-Virtual Hearings*, https://lmaa.london/wp-content/uploads/2020/08/LMAA-Guidelines-for-Virtual-Hearings-V1.pdf. The Korean Commercial Arbitration Board announced the release of the Seoul Protocol on Video Conferencing in International Arbitration, www.kcabinternational.or.kr/static_root/userUpload/2020/03/18/1584509782805DD02R.pdf. Maxwell Chambers in Singapore offers virtual ADR solutions to minimize any disruptions to proceedings due to current travel

On the other hand, the risks associated with new technology must be considered carefully.[199] The use of Artificial Intelligence is sure to affect dispute resolution and the legal profession. Legal predictive analytics, i.e., programs developed to predict the legal outcome of cases, already raise important questions for court judgments: it is not complicated to imagine the effect on arbitration.[200] The dialogue on the use of Artificial Intelligence in arbitration is underway and will continue to attract debate in the digital era.[201] Although the shipping industry is considered conservative, it will inevitably be affected by technological change and Artificial Intelligence.[202]

[3] Theories on the Legal Nature of Arbitration

The relationship between international arbitration and the traditional functions of a sovereign state is debated vigorously. During the first half of the twentieth century, scholars developed several theories to describe the legal nature of arbitration and its relationship with the legal system: the jurisdictional, the contractual, the mixed or hybrid, and the autonomous.[203]

The jurisdictional theory relies on state power to control and regulate arbitration and suggests that parties may only arbitrate to the extent allowed by the law of the place of arbitration.[204] This theory highlights the nature of arbitration as a procedure

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restrictions, www.maxwellchambers.com/2020/02/18/maxwell-chambers-offers-virtual-adr-hearing-solutions/, accessed August 31, 2020.

199. The IBA and the ICCA have formed a *Joint Task Force on Data Protection in International Arbitration Proceedings*, www.arbitration-icca.org/projects/ICCA-IBA_TaskForce.html, accessed August 31, 2020. The ICCA, the New York City Bar Association and the International Institute for Conflict Prevention and Resolution have launched the *2020 Cybersecurity Protocol for International Arbitration*, www.arbitration-icca.org/media/14/76788479244143/icca-nyc_bar-cpr_cybersecurity_protocol_for_international_arbitration_-_print_version.pdf, accessed August 31, 2020. *See also* Sarah McEachern, *Data Protection, Privacy, Confidentiality and Cybersecurity*, IBA Arbitration Committee Newsletter September 2019 on questions and potential implications of the application of the EU's General Data Protection Regulation on international arbitration proceedings.
200. For example, France has banned data analytics related to judges' rulings, *see* Simon Taylor, *France Bans Data Analytics Related to Judges' Rulings*, Law.com (June 4, 2019), www.law.com/legal-week/2019/06/04/france-bans-data-analytics-related-to-judges-rulings/, accessed August 31, 2020. ArbiLex is a data analytics startup for international arbitrations, using Artificial Intelligence to help parties reach resolutions quickly and efficiently, *see* Frederick Daso, *ArbiLex, A Harvard Law School Legal Tech Startup, Uses AI to Settle Arbitrations*, Forbes (February 4, 2020), www.forbes.com/sites/frederickdaso/2020/02/04/arbilex-a-harvard-law-school-legal-tech-startup-uses-ai-to-settle-arbitrations/, accessed August 31, 2020.
201. Maud Piers & Christian Aschauer (eds.), *Arbitration in the Digital Age: The Brave New World of Arbitration* (CUP 2018). Big data, artificial intelligence, robotics and the availability of new energy sources are considered as important developments that will have an impact on shipping very soon, *see* UNCTAD, *50 Years of Review of Maritime Transport: 1968-2018: Reflecting on the Past, Exploring the Future*, 38, https://unctad.org/en/PublicationsLibrary/dtl2018d1_en.pdf, accessed August 31, 2020.
202. Gross, *supra* n. 54, at 4-5.
203. Julian Lew, Loukas Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration* 71 (Kluwer Law International 2003); Born, *supra* n. 18, at 213.
204. Lew, *supra* n. 203, 74.

rather than an agreement.[205] According to the jurisdictional theory, the state sanctions privately administered justice systems as delegated justice or parallel justice.[206]

The contractual theory emphasizes arbitration's contractual character, highlighting its dependence on the parties' agreement[207] and the role of party autonomy in the arbitral process.[208] The contractual theory is considered more favorable to the development of arbitration since foreign arbitral awards are not subject to the restrictive regime applied to foreign judgments.[209]

The hybrid or mixed theory is both jurisdictional and contractual: arbitration not only derives its effectiveness from the agreement of the parties but also has a jurisdictional nature involving the application of procedural rules.[210] The autonomous theory treats arbitration as neither contractual nor jurisdictional.[211]

The last two representations have been criticized for offering little guidance on the nature and consequences of arbitration.[212] Perhaps the ultimate value of these theories is in the fact that they highlight the core elements of international arbitration: it begins as a private agreement between the parties, continues with private proceedings in which the wishes of the parties play a significant role, and ends with a binding award which under appropriate conditions is enforceable by the courts in most countries of the world.[213] Arbitration has been characterized accurately as a private process with public effect, implemented with the support of the public authorities of the state and its national law.[214]

More recent works have shifted the focus to the interplay between arbitration and national legal orders, as opposed to its legal nature. The dilemma underlying these theories is territoriality versus autonomy of arbitration.[215] Emmanuel Gaillard, one of the leading authorities of arbitration, suggests three representations: (a) the "monolocal" theory, (b) the "multilocal" (or "Westphalian") theory, and (c) the "transnational" approach.[216] Under the "monolocal" theory, international arbitration is a component of

205. Born, *supra* n. 18, at 214.
206. Lew, Mistelis & Kröll, *supra* n. 203, at 74.
207. *Ibid.*, 76.
208. Born, *supra* n. 18, at 213.
209. Emmanuel Gaillard, *Legal Theory of International Arbitration* 13 (Martinus Nijhoff 2010).
210. Born, *supra* n. 18, at 214.
211. *Ibid.,* 215.
212. *See* Gaillard, *supra* n. 209, at 13 characterizing as pointless the conclusion that arbitration was of mixed nature. Born, *supra* n. 18, at 215 also expresses uncertainty as to the doctrinal or practical consequences of the autonomous theory.
213. Blackaby et al., *supra* n. 56, at 26.
214. *Ibid.*
215. Mistelis, *supra* n. 194, at 139. For an in-depth analysis of these theories, *see* Julian Lew, *Achieving the Dream: Autonomous Arbitration,* 22 Arb Intl 179 (2006), Roy Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration*, 17 Arb Intl 19 (2001), Tetsuya Nakamura, *The Place of Arbitration: Its Fictitious Nature and Lex Arbitri*, 15(10) Mealey's IAR 23-29 (2000), Noah Rubins, *The Arbitral Seat Is No Fiction: A Brief Reply to Tetsuya Nakamura's Commentary "The Place of Arbitration: Its Fictitious Nature and Lex Arbitri,"* 16(1) Mealey's IAR 23-28 (2001), Philippe Pinsolle, *Parties to an International Arbitration with the Seat in France Are at Full Liberty to Organise the Procedure as They See Fit: A Reply to Article by Noah Rubins,* 16(3) Mealey's IAR 30 (2001), Tetsuya Nakamura, *The Fictitious Nature of the Place of Arbitration May Not Be Denied*, 16(5) Mealey's IAR 22 (2001).
216. Gaillard, *supra* n. 209.

one legal system—the seat of the arbitration.[217] The "multilocal" representation considers arbitration to derive its authority from a plurality of legal orders, which conditionally enforce the arbitral awards.[218] The "transnational approach" views international arbitration as an autonomous legal order, delocalized and detached from national laws and courts.[219] In its extreme form, the transnational approach assigns only the enforcement of arbitral awards to the national courts.[220]

Apart from explaining the interface between courts and arbitration, these theories explain the underpinnings for various arbitration models and the concomitant approaches of different legal traditions. Despite efforts to harmonize both maritime law and arbitration, which are manifest in the persistent dialogue among different legal traditions and the ongoing convergence of arbitration laws and proceedings, the English-based common law concept of arbitration remains different from the civil law concept.[221] Salient policy implications stem from each concept: English law maintains a degree of supervision of arbitral awards, whereas civil law systems abstain from a review of the merits.

[4] Selection of Seat: Practical Implications

On a practical level, the privatization of dispute resolution and the progressive detachment of arbitration from state court scrutiny face limitations. Regardless of the advantages and disadvantages of these theories, national courts are essential to the function of current international arbitration: in fact, the New York Convention derives its authority from the national courts.[222] Performance depends wholly on the losing party's willingness to fulfill the award; without recourse to appeal within the arbitration process, the outcome depends ultimately on the courts and the laws executed by them.[223]

In practice, the selection of the arbitral seat has important legal implications for the parties because local courts undertake several crucial functions relevant to the arbitration. As stressed in a recent judgment of the Singapore Court of Appeal, the seat of an arbitration is essential to arbitration law: its significance lies in the fact that for legal reasons, the arbitration is regarded as situated in the state or territory of the seat, thereby identifying the state whose laws will govern the arbitral process, i.e., the curial

217. *Ibid.*, 15.
218. *Ibid.*, 24.
219. *Ibid.*, 35. This theory has been supported in France (*see* relevant French case law, especially the *Götaverken* case on a shipping dispute, the well-known *Hilmarton* case and the recent *Putrabali* case), but English case law and authorities do not embrace these ideas, *see* Francis Mann, *England Rejects "Delocalised" Contracts and Arbitration*, 33 ICLQ 193-198 (1984); William Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 ICLQ 21, 22 (1983).
220. Karton, *supra* n. 186, at 42; For the abstention of the English practitioners from transnational theories, *see* Michael Mustill, *Transnational Arbitration in English Law* in Francis Rose (ed.), *International Commercial and Maritime Arbitration* (Sweet & Maxwell 1988).
221. Pieter Sanders, Arbitration, *International Encyclopedia of Comparative Law*, vol. XVI, Chapter 12, 31 (Martinus Nijhoff 2014).
222. Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 5 (Deventer 1981).
223. Healy et al., *supra* n. 171, at 141.

law of the arbitration.[224] Parties to an arbitration agreement know that it may be necessary not only to resort to a court to enforce an award but also to seek the support of a court during the arbitration.[225] In fact, it may be necessary at the outset of an arbitration for the claimant to ask the local court to enforce an agreement to arbitrate that the adverse party seeks to circumvent.[226] In this context, the court may be required to restrain or stay domestic or foreign court proceedings brought in breach of the arbitration agreement or resolve jurisdictional challenges.[227]

Local courts may also be required to appoint or remove arbitrators, enforce interim measures, take evidence, and conduct annulment proceedings.[228] Particularly in time-sensitive maritime claims, it may become necessary to apply to the court to obtain security through ship arrest, freezing injunctions,[229] or other appropriate measures.[230]

At the award enforcement stage, recognition and enforcement proceedings under the New York Convention require state courts. Since shipping is a multi-jurisdictional international activity, the successful party typically resorts to the court of another country to enforce the award. Successful, effective international arbitration depends on the enforcement of foreign arbitral awards in a simple and fast procedure.[231] As such, state courts inevitably are the effective gatekeepers of award compliance with the international minimum standards set forth under the New York Convention.[232]

224. *BNA v. BNB and BNC* [2019] SGCA 84 [65]. *See* further on the different legal significance of the seat as compared to the venue: "The seat will also be considered to be the jurisdiction in which the arbitral award is 'made' for the purposes of the New York Convention. The venue(s) where an arbitration might be held, on the other hand, have far less significance. The venue is simply the physical place where the arbitral tribunal will have to hold its hearings and meetings, if the parties so provide for it. It is not common for parties to do so, and it is certainly not essential that parties specify a venue; the choice of venue is likely to be motivated by mundane considerations of logistical and practical convenience and cost. For the same reason, venues of the arbitration, unlike a seat, can change in the life of any arbitral process."
225. Thomas, *supra* n. 187, at 5.
226. Blackaby et al., *supra* n. 56, at 57.
227. Thomas, *supra* n. 187, at 5.
228. Mistelis, *supra* n. 194, at 139.
229. Ambrose, *supra* n. 26, at 286.
230. In the United States, there are two available procedures for obtaining security for maritime claims. Under Supplemental Admiralty Rule B Attachment and Garnishment, a plaintiff can attach tangible or intangible personal property belonging to the defendant (in personam action), while under Supplemental Admiralty Rule C, the plaintiff can bring an in rem action against the ship or other property. Under the FAA, 9 USC, s. 8: "If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award." For the available interim relief in the context of shipping under Singapore law, *see* Kohe Noor Hasan & Bazul Ashhab, *Shipping and International Trade Disputes* in Menon & Brock (eds.), *supra* n. 90, at 545.
231. Anton Maurer, *The Public Policy Exception under the New York Convention* 2 (JurisNet 2013).
232. Jan Paulsson, *Arbitration Unbound: Award Detached from the Law of Its Country of Origin*, 30 ICLQ 384 (1981).

The success of a maritime arbitral seat can be attributed at least partially to the stance of the local courts towards arbitration and major maritime law issues.[233] Even when uniform international rules apply, different state courts may adopt different interpretations and, therefore, reach different conclusions. The evolution of the arbitration market has led to competition not only among arbitral seats but also among states which attempt to attract more cases through favorable national laws and court systems.[234] Accordingly, local substantive maritime law and the stance of local courts are also essential factors in this legal battle.

The shipping industry has achieved an increased degree of uniformity through self-regulation. The prominence of maritime arbitration and its concentration in London accentuates the arbitration's interface with the state and spotlights important policy considerations. In this context, the landscape of contemporary maritime arbitration seems antagonistic. From a substantive law standpoint, the application of English law in a majority of cases and the emergence of uniform international rules lead to a greater degree of unification. However, the extensive use of standard form contracts and the assignment of dispute resolution to arbitrators raise the issue of the development of maritime law by parties exterior to the state legal systems.[235] This sector-specific, private lawmaking activity has been described as a shift from territorial to functional fragmentation.[236]

Maritime arbitration is closer to English law and common law maritime arbitration centers.[237] However, maritime arbitration awards issued in common law systems are often enforced in different legal systems. Maritime arbitration is a field of increased legal dialogue and conflicts and convergences among different state courts, legal systems, and traditions.

The interface between arbitration and national legal orders has been studied recently with empirical methods. Empirical research confirms that there is a mutual relationship between the choice of seat and the "legal infrastructure" of the seat, i.e., the national arbitration law and the stance of the local courts.[238] "Legal infrastructure" has been analyzed according to: (a) "arbitration-friendliness" of the national arbitration law; (b) enforceability of arbitration agreements and awards; and (c) neutrality and impartiality of the forum.[239] The reverse holds true: when a party chooses a state based on its substantive law, it often leads to the choice of the same state as the seat of the arbitration.[240]

In general, a country with a competent and impartial judiciary and a well-developed commercial law is preferred as an arbitral seat.[241] But contributory factors create exceptions to the generality. For example, despite sophisticated commercial and

233. Ian Gaunt, *Maritime Arbitration in London* in Goldby & Mistelis (eds.), *supra* n. 32, at 150.
234. Dezalay & Garth, *supra* n. 119, at 7; Karton, *supra* n. 186, at 70.
235. Ambrose, *supra* n. 32, at 249.
236. Dan Wielsch, *Global Law's Toolbox: How Standards Form Contracts* in Horst Eidenmüller (ed.), *Regulatory Competition in Contract Law and Dispute Resolution* 72 (Beck 2013).
237. Goldby & Mistelis, *supra* n. 144, at 3.
238. Mistelis, *supra* n. 194, at 137.
239. *Ibid.*
240. 2015 Survey, *supra* n. 70, at 2.
241. Karton, *supra* n. 186, at 70-71.

arbitration laws and a reliable and impartial judicial system, the U.S. is not as frequently chosen as an arbitral seat as England. This may be because non-U.S. lawyers are dissuaded by the complexity of U.S. federal and state laws.[242]

Another significant factor in choosing an arbitral seat is convenience: this includes location, frequent use, language, culture, established contacts with lawyers and the efficiency of the national court system.[243] Other crucial factors include transport and hearing facilities and, last but not least, cost.[244]

Contrariwise, the arbitration practice of a state is influenced by the preferences of the parties. Arbitration business generates profits, as parties are more likely to hire in-state legal practitioners, experts, and arbitrators during the arbitration, and they will use the infrastructure of the state in general.[245]

The official "CIArb London Centenary Principles" identify a number of key characteristics that create an appropriate and effective arena for international arbitration.[246] The ten propositions known as the London Principles are identified as necessary for an effective, efficient and safe seat for the conduct of international arbitration: law, judiciary, legal expertise, education, right of representation, accessibility and safety, facilities, ethics, enforceability and immunity. The GAR CIArb Seat Index, developed from comments submitted by Global Arbitration Review readers, evaluates individual arbitral seats against a range of standard criteria based on data from recent surveys that assess arbitral seats according to the London Principles.[247]

[B] Party Autonomy

The factual, legal and ideological foundation of any international arbitration is party autonomy.[248] It is the most important principle and the most prominent rule in international arbitration, and it is accepted internationally.[249] The parties' agreement to arbitrate is the key feature of the dispute resolution process outside national courts.[250]

242. *Ibid.*
243. Mistelis, *supra* n. 194, at 137.
244. *Ibid.*, 138.
245. Karton, *supra* n. 186, at 70.
246. CIArb, *London Centenary Principles,* https://globalarbitrationreview.com/digital_assets/9bd26b47-c325-457a-9c1f-ca775028e2b0/London-Centenary-principles.pdf, accessed August 31, 2020.
247. *GAR—CIArb Seat Index,* https://globalarbitrationreview.com/edition/1001277/gar-ciarb-seat-index?utm_source = GAR + Alerts&utm_medium = email&utm_campaign = GAR-CIArb&utm_term = GAR + - + CIArb + Seat + Index%3a + Just + launched&utm_content = 55191&gator_td = qomtJbLNpZb%2b5JZZlTgGq1BW4jDA8VdEA%2bmEv7ZS2CEsfYIiS7GpjEqyrAvV6W7MCvhYMSXW9wWpSe8mmqEPtK42vxrWFDVvcyrSAu8oqI3JB%2bGv%2fWMg%2bvbwaNT%2fjOr8x8GcajerfjLodN0wl2eE9WeT6%2byuPMJjvfCf0NM4EQ4%3d, accessed August 31, 2020.
248. Karton, *supra* n. 186, at 79.
249. Many authorities in international arbitration have acknowledged and comprehensively analyzed the principle, *see ibid.*
250. Blackaby et al., *supra* n. 56, at 71.

While judges are state officials who derive their authority from the state, arbitrators are private contractors whose authority stems from the will of parties.[251] Judges adjudicate specific cases by chance, while arbitrators are selected by the parties for expertise in a specific subject matter.[252] A private agreement may vest authority in an arbitrator, as well as deprive an arbitrator of that authority.[253] Judicial review, by contrast, is not subject to a contract: the authority of a court to review an arbitration award or any other arbitration-related matter does not derive from a private agreement.[254]

Parties agree to arbitrate for significant advantages borne of party autonomy[255] such as: (a) the freedom to choose a neutral forum; (b) the international enforceability of the awards; and (c) the flexibility, speed, cost, and confidentiality of arbitration. The primary objectives and the perceived advantages of commercial and maritime arbitration are expressions of the fundamental principle of party autonomy.

Merchants have entrusted dispute resolution to members of their trade since the times of the medieval guilds. Currently, party autonomy is indicated through the selection of maritime professionals and the use of arbitral rules developed by special arbitration associations in particular markets.[256] Parties desire autonomy as well as shipping expertise.

Specific manifestations of party autonomy are evident in both the maritime arbitration agreement and the arbitral process. In contracts of affreightment, arbitration agreements are usually contained in standard form contracts, which are a clear expression of party autonomy. The industry has reached a high degree of self-regulation through standardization. The importance of guaranteeing party autonomy in the maritime industry was indicated by Singapore's SCMA shift from an institution that administers arbitration to a maritime industry-driven entity.

The doctrine of party autonomy is dominant in the entire arbitral process, from the constitution of the arbitral tribunal and the choice of law to the arbitral procedure and the form of the award.[257] Arbitration is governed by the parties' agreement with regard to both substantive law and procedural rules, subject to mandatory rules which cannot be derogated from by contract.[258] As the U.S. Court of Appeal for the Second Circuit observes, freedom of contract, like any freedom, has its limits.[259] It is in part

251. Karton, *supra* n. 186, at 41.
252. Healy et al., *supra* n. 171, at 139-140.
253. *Hoeft v. MVL Group Inc*, 343 F3d 57, 60 (2d Cir 2003).
254. *Ibid.*
255. According to empirical surveys, the most significant advantages of arbitration are the parties' freedom to choose a neutral forum together with the international enforceability of awards, *see* Mistelis, *supra* n. 194, at 136; Christian Bühring-Uhle, *A Survey on Arbitration and Settlement in International Business Disputes* in Christopher Drahozal & Richard Naimark (eds.), *Towards a Science of International Arbitration: Collected Empirical Research* 31 (Kluwer Law International 2005); Cindy Buys, *The Tensions Between Confidentiality and Transparency in International Arbitration*, 14 Am Rev Intl Arb 121, 122 (2003).
256. Born, *supra* n. 18, at 84.
257. Karton, *supra* n. 186, at 79.
258. Lew, Mistelis & Kröll, *supra* n. 203, at 27.
259. *Hoeft v. MVL Group Inc*, 343 F3d 57, 60 (2d Cir 2003).

because arbitration awards are subject to minimal judicial review that courts exercise such strong support for the arbitral process.[260]

Establishing an equilibrium between the forces of party autonomy and mandatory rules is a goal for maritime arbitration that it is endorsed specifically in both international arbitration law (e.g., the UNCITRAL Model Law and the New York Convention) and international maritime law.

Party autonomy is manifest in the UNCITRAL Model Law through freedom of the parties to determine the following: (a) the applicable substantive law,[261] (b) the arbitral procedure,[262] (c) the construction of the tribunal,[263] (d) the place of arbitration,[264] and (e) the language used in the proceedings.[265] Mirroring the provisions of the New York Convention, the Model Law also provides for grounds to set aside[266] or refuse enforcement[267] of an arbitral award, thereby curtailing party autonomy.

The principle of party autonomy and its limits is present in both Articles II and V of the New York Convention.[268] One of the most important constraints on both party autonomy and the power of arbitrators is the arbitrability doctrine—reflected in the requirement of "subject matter capable of settlement by arbitration," which applies in both the pre-award stage under Article II(1)[269] and the enforcement stage under Article V(2)(a).[270] However, this constraint is construed narrowly,[271] and the tendency is to accept a dispute's arbitrability rather than posing restrictions on party autonomy.[272]

Article V(1) of the New York Convention balances party autonomy with mandatory rules: state courts may refuse enforcement on the basis of procedural defects specified in Article V(1), only when a party invokes such a ground and furnishes proof thereof.[273] Article V(1)(d) also demonstrates party autonomy, giving priority to the

260. *Ibid.*
261. Article 28, *see also* UNCITRAL Secretariat, *Explanatory Note on the Model Law on International Commercial Arbitration*, para. 39.
262. Article 19, *see also* UNCITRAL Explanatory Note, *supra* n. 261, paras. 34, 35.
263. Articles 10, 11 and 13, *see also* UNCITRAL Explanatory Note, *supra* n. 261, para. 23.
264. Article 20, *see also* UNCITRAL Explanatory Note, *supra* n. 261, para. 36.
265. Article 22, *see also* UNCITRAL Explanatory Note, *supra* n. 261, para. 36.
266. Article 34.
267. Article 36.
268. Maurer, *supra* n. 231, at 71.
269. Article II(1): "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."
270. Article V(2): "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
    (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country."
271. Born, *supra* n. 18, at 567.
272. *Ibid.*, 952 referring to a U.S. Supreme Court case involving the U.S. COGSA. However, national legislations may still impose restrictions on arbitrability, such as the Australian COGSA, s. 11(3) stipulating that the arbitration agreement is effective only if it provides for arbitration to be conducted in Australia.
273. Maurer, *supra* n. 231, at 71.

parties' arbitral agreement and applying the law of the arbitral seat only in the absence of a relevant agreement by the parties.[274]

The most significant weapon against party autonomy is public policy as a ground to block, delay, or refuse award enforcement, as provided in Article V(2)(b) under the New York Convention. But courts in most jurisdictions are very reluctant to deny recognition of foreign awards on the basis of the exception.[275] In practice, even if this ground for refusal is invoked, only seldom is it successful.[276]

Maritime law is characterized by the presence of mandatory laws that promote international uniformity: there is an amalgam of international conventions on maritime law, covering both substantive and procedural aspects.[277] For example, the United Nations Convention on the Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules) contains jurisdiction and arbitration chapters. Even when these mandatory rules do not regulate arbitration directly, they affect arbitration and limit party autonomy, as they may trigger the public policy exception of the New York Convention to block enforcement.[278] Thus, the determination and application of these mandatory rules are of profound importance for the parties, their counsels, and arbitrators when arbitrating disputes in contracts of carriage by sea.

§1.04 SOCIOECONOMIC CONTEXT

We have observed that arbitration is a widespread and complex phenomenon intertwined with commerce. Research in international arbitration has focused primarily on the doctrinal analysis of the relevant legal provisions, court decisions, and published arbitral awards.[279]

More recent studies have acknowledged that interdisciplinary research is essential in international arbitration since there are multiple sources of law and different legal orders interact in the dispute resolution process.[280] Though most of these studies refer to international commercial arbitration in general, our focus will be on those aspects pertinent to maritime arbitration, specifically related to contracts of carriage by sea. A better understanding of our subject matter may be achieved by studying the interaction of maritime arbitration with sociological and cultural perspectives and economic and market theories.

274. Gary Born, *The New York Convention: A Self-Executing Treaty,* 40 Michigan Journal of International Law 115, 125 (2018).
275. Born, *supra* n. 18, at 3667.
276. Reinmar Wolff, *Article V(2)(b)* in Reinmar Wolff (ed.), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 Commentary* 405 (CH Beck Hart Nomos 2012).
277. Ignacio Arroyo, *Concept, Sources, and International Organizations Relating to Shipping Law* in David J Attard (ed.), *The IMLI Manual on International Maritime Law*, vol. 2, 5 (OUP 2016).
278. An illustrative example is the statute of limitations provided for in Art. III(6) of the Hague-Visby Rules. State courts may refuse enforcement of an arbitral award that ignores the aforementioned statute of limitations, considering such a provision as part of the international public policy, *see* Tsavdaridis, *supra* n. 37, at 337.
279. Karton, *supra* n. 186, at 17.
280. *Ibid.*

[A] Sociological and Cultural Perspectives

The first and most important study on the sociology of arbitration was conducted in 1996 by Yves Dezalay and Bryant Garth.[281] More recent works also consider international arbitration using the tools of sociology.[282] Empirical studies in international commercial arbitration are rare, as confidentiality and the duration of the proceedings make it impractical to observe a large number of arbitrations.[283]

The only way to access a representative body of arbitration experiences is to conduct personal interviews with leading practitioners.[284] Maritime arbitration is even more difficult to study because proceedings are typically ad hoc, many arbitral awards are not published, and many cases remain unreported.[285] The only way to access more information is to solicit maritime arbitrators and arbitration centers.[286]

Some works offer empirical insights on international arbitration, but they usually refer to institutional arbitration.[287] The Queen Mary School of International Arbitration has conducted surveys since 2006 on various arbitration topics, such as the evolution of international arbitration (2018), improvements and innovations in arbitration (2015), preferred practices in the arbitral process (2012), choices in international arbitration (2010), and recognition and enforcement of foreign awards (2008).[288] Other surveys have examined maritime arbitration from the perspective of operators,[289] users,[290] and lawyers.[291] A survey specific to shipping disputes attempted to evaluate whether the enforcement of forum selection or arbitration clauses in maritime contracts deprives the plaintiff of its rights.[292] Other recent projects have focused on the needs of commercial dispute resolution users.[293] Two recent surveys focused on arbitration in specific regions.[294]

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281. Dezalay & Garth, *supra* n. 119.
282. Emmanuel Gaillard, *Sociology of International Arbitration*, 31 Arb Intl 1-17 (2015); Thomas Schultz & Robert Kovacs, *The Rise of a Third Generation of Arbitrators?: Fifteen Years after Dezalay and Garth*, 28 Arb Intl 161 (2012).
283. Christian Bühring-Uhle & Gabriele Scherer, *The Arbitrator as Mediator* in Drahozal & Naimark (eds.), *supra* n. 255, at 135.
284. *Ibid.*
285. *See* above Introduction.
286. Goldby & Mistelis, *supra* n. 144, at 3.
287. *See* Drahozal & Naimark, *supra* n. 255; Loukas Mistelis, *Arbitral Seats: Choices and Competition* in Stefan Kröll et al. (eds.), *International Arbitration and International Commercial Law: Synergy, Convergence, and Evolution* 363 (Kluwer Law International 2011).
288. *Queen Mary School of International Arbitration, Empirical Research*, www.arbitration.qmul.ac.uk/research/index.html, accessed March 1, 2020.
289. Marrella, *supra* n. 2, at 1085.
290. Lucienne Bulow, *A User's Experience of London and New York Maritime Arbitration,* 33 European Transport Law 294 (1998).
291. Kazuo Iwasaki, *A Survey of Maritime Arbitration in New York*, 15 J Mar L & Com 69 (1984).
292. Martin Davies (ed.), *Jurisdiction and Forum Selection in International Maritime Law* 8 (Kluwer Law International 2005).
293. *2018 Global Pound Conference Series Report*, www.pwc.com/gx/en/forensics/gpc-2018-pwc.pdf; Singapore International Dispute Resolution Academy (SIDRA), *International Dispute Resolution Survey 2020 Final Report*, https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey/index.html, accessed August 31, 2020.
294. Tony Cole et al., *Arbitration in the Americas: Report on a Survey of Arbitration Practitioners* (2018), www2.le.ac.uk/departments/law/research/arbitration/files/arbitration-in-the-americas-

Most commentators agree that competition for arbitration business plays an important role in international arbitration, regardless of the methodological tools employed.[295] Arbitrators and "would-be" arbitrators compete for appointments and market share against other forms of dispute resolution; arbitral fora with their respective states compete with each other to attract arbitrations.[296] Arbitration awards mean not only large compensation for prevailing parties but also substantial fees for arbitrators and international arbitration practice groups in law firms, which compete to get the biggest and most high-profile cases.[297] At present, there are also "scorekeepers" trying to keep track of this data, and publications have awarded prizes to top performers.[298]

Accordingly, from a sociological perspective, arbitration can be conceived of as a system in which, as the arbitration business flourishes, regulatory competition among different arbitration centers increases, and states decrease the level of oversight in their national court systems to attract more arbitration business.[299] In this cycle, the private and state mechanisms for dispute resolution represent the products of competition in the market for handling commercial conflicts.[300]

Conceiving of the relationship among different places and modes of dispute resolution as a system can be very helpful in the context of maritime arbitration. The concept of a system enables a substantive comparison and assessment among structures within the system based on specific dispute resolution objectives, such as reliability, efficiency, and flexibility. The procedural practices, rendered arbitral awards and relevant court decisions in each of the dominant maritime arbitral jurisdictions will be studied. London, New York, and Singapore maritime arbitration seats will be assessed as structures within a system of dispute resolution for contracts of carriage of goods by sea. A comparative study of these seats and their practices will lead to important conclusions about arbitration as the current dispute resolution mechanism of preference in contracts for the carriage of goods by sea.

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report-on-a-survey-of-arbitration-practitioners focuses on arbitration in the North, South, Central, and Caribbean Americas; Petra Butler et al., *A Study of International Commercial Arbitration in the Commonwealth* (2020), https://library.commonwealth.int/Library/Catalogues/Controls/Download.aspx?id=8023 accessed August 31, 2020 focuses on commercial arbitration in the Commonwealth.

295. Christopher Drahozal, *Regulatory Competition and the Location of International Arbitration Proceedings* in Drahozal & Naimark (eds.), *supra* n. 255, at 111; Horst Eidenmüller (ed.), *Regulatory Competition in Contract Law and Dispute Resolution* (Beck 2013); Karton, *supra* n. 186, at 28, 57.
296. Karton, *supra* n. 186, at 58; Catherine Rogers, *Ethics in International Arbitration* 31-32 (OUP 2014).
297. Rogers, *supra* n. 296.
298. *Ibid*. *See also* for example Michael Goldhaber, *2015 Arbitration Scorecard: Deciding the World's Biggest Disputes*, Law.com (July 1, 2015) captured more than one hundred major arbitration disputes, amounts in controversy, and other relevant data, www.law.com/almID/120273107 8679/, accessed August 31, 2020.
299. Dezalay & Garth, *supra* n. 119, at 7.
300. *Ibid.*, 120.

The continued competition for maritime arbitration business makes evident the strengths and competitive advantages of each structure.[301] It is worth iterating that, in international arbitration generally, successful innovations tend to be duplicated from the rules of one arbitration center to another, gradually uniformizing procedural details.[302]

Recent works have begun to identify a culture of international arbitration.[303] This culture consists of norms that shape behavior by promoting a community consensus that encourages unified thinking and discourages deviation from the norms through peer pressure.[304] A complete picture of maritime arbitration involves acknowledging cultural realities. Without reliable global data on maritime arbitration outcomes, perceiving its culture is essential to comprehending the decision-making processes of arbitrators and predicting future developments in the law through arbitral awards.[305]

For instance, the legal culture of the parties, their representatives and arbitrators has a major impact on the procedures chosen and emphasizes differences between common law and civil law backgrounds.[306] At the same time, an ongoing convergence of arbitral procedures leads gradually toward a standard arbitral procedure[307]—a hybrid that takes features from both common law and civil law.[308]

More importantly, these theories have underlined that since international arbitration does not depend on the coercive power of any state and lacks enforcement mechanisms, it is founded largely on the perception of its legitimacy.[309] In other words, ensuring the legitimacy and reliability of arbitration as an international system of dispute resolution in contracts of carriage will sustain arbitration as a dispute resolution mechanism.[310] Arbitration's procedural rules aim to promote its legitimacy, even though they are not derived from a formal authority.[311]

The shipping industry relies on its professionals for dispute resolution. In the historical study of arbitration, it was highlighted that merchants have always entrusted the resolution of their disputes to specialists. Arbitration allows merchants to choose

301. *See,* for example, SMA, *Maritime Arbitration in New York, supra* n. 28: "the Society of Maritime Arbitrators, Inc. (SMA), a professional, nonprofit organization that, *unlike other arbitral forums*, requires its members to only issue fully reasoned awards. The SMA then makes those awards available to the maritime community through subscription to its Awards Service, as well as the Lexis-Nexis and Westlaw information retrieval systems. Also, *unlike some other arbitral forums*, the SMA charges no fee to the parties for its services, nor does it oversee or administer the arbitration proceeding. Instead, that crucial task is left to the discretion of the participating arbitrators."
302. Karton, *supra* n. 186, at 67. Characteristic examples of convergence are the introduction of expedited procedures and emergency arbitrator procedures.
303. Karton, *supra* n. 186; Kidane, *supra* n. 173.
304. Karton, *supra* n. 186, at 19-20.
305. *Ibid.*, 2.
306. Drahozal & Naimark (eds.), *supra* n. 255, at 82.
307. *Ibid.*; Karton, *supra* n. 186, at 11.
308. Karton, *supra* n. 186, at 11.
309. *Ibid.*, 116.
310. Ambrose, *supra* n. 32, at 253.
311. Karton, *supra* n. 186, at 73.

arbitrators familiar with their business issues, thus leading, as Max Weber[312] noted, "to the increasing importance of particularism in law, especially in commercial law."[313]

For their legitimacy, arbitrators do not rely solely on their personal careers and authority but also on the social capital of an international system of justice.[314] This social capital refers to the reliability of maritime arbitration as a system of justice. Lacking an enforcement mechanism, the esteem in which the system is held encourages its continued use. Trust is critical to achieving voluntary compliance with arbitral awards, the end goal of the arbitral process.[315]

This trust should not be taken for granted, not least because arbitration faces criticism. Commentators warn that if arbitration is not efficient, it may lose its appeal as the preferred forum for the resolution of international commercial disputes.[316] For the sustainability of this system, its reliability has to be ascertained continuously, and it should not depend on state supervision.[317] Arbitral award transparency is essential to confirm the value of the system.[318] If arbitral awards are published and made public, users can be informed on the thinking and views of maritime arbitral tribunals. Such awards will also contribute to the development of maritime and arbitration law.

[1] The English Arbitration System

Historically, England has resisted the complete autonomy of arbitration. Arbitration in England developed in close connection with the courts. As such, England is a paradigm of "delegated justice," as opposed to the civil law paradigm of "parallel justice."[319]

The judicial review of arbitral awards is an integral part of the English arbitration system.[320] Previously, in cases of disputes about the interpretation of the standard terms of contracts, chambers with counsels highly specialized in commercial and shipping law were involved.[321] Appeals of major issues were sent to the Commercial Court, a branch of the High Court created in the late nineteenth century.[322]

While this practice was considered best for the development and enrichment of English maritime arbitration law, it was also criticized as legalistic, long, and costly.[323]

312. Guenther Roth & Claus Wittich (eds.), *Economy and Society* 882 (University of California Press 1978).
313. Dezalay & Garth, *supra* n. 119, at 117.
314. *Ibid.*, 83; Karton, *supra* n. 186, at 28.
315. Karton, *supra* n. 186, at 74.
316. *Ibid.*, 63.
317. Ambrose, *supra* n. 32, at 253.
318. *Ibid.*
319. Dezalay & Garth, *supra* n. 119, at 197.
320. Karton, *supra* n. 186, at 81.
321. Dezalay & Garth, *supra* n. 119, at 130-131.
322. *Ibid.*
323. *Ibid.*, 122, also stress that the Commercial Court was further contributing legal and business expertise to the development of standard form contracts and watched out for the interests of the shipowners who depended on the standard form contracts. What was particularly important was high-quality expertise to promote certainty and to adapt English law to the needs not only of the shipping world, but more generally to the commercial world (130-132); *see also* Pieter

It also prevented arbitrators from rendering reasoned awards, lest the award be set aside.[324]

This has been a difficult tightrope for the English legal system. Until the abolition of the special case procedure by the Arbitration Act of 1979, the Commercial Court had the jurisdiction to set aside awards on the ground of error of facts or law.[325] As a result, many arbitration issues took a judicial route. Following heavy criticism, the English Arbitration Act of 1996 limits strictly the remedies available for challenging awards.[326] As a result of these two Acts, the arbitration scene in London changed.[327]

The scrutiny of the English courts was restricted substantially, and arbitrators were encouraged to adopt efficient, cost-effective procedures. While the reduced number of London maritime arbitration appeals decreases the courts' contribution to the development of the law,[328] a number of disputes do still reach the judicial level, so that the most complex legal issues are resolved, and the decisions may serve to nourish commercial and maritime law and jurisprudence.[329]

English arbitration culture is reinforced further through its relationship with the courts. In London, judges of the Commercial Court are appointed from the legal profession where they will have acted as arbitrators or appeared as lawyers in arbitrations.[330] Having an understanding of the importance of party autonomy, the relationship with the court and the court's proper role in respect of it, they are able to utilize those lessons as judges.[331] English judges can sit as arbitrators, and retired judges sometimes become arbitrators: therefore, there is a real exchange of practice between courts and arbitration.[332]

Shipping disputes are handled by private actors "in the shadow" of law.[333] Initially, arbitrators were members of the shipping trade who performed the role of arbitrator on an honorary basis.[334] At that time, the shipping industry would handle its own disputes through simple, informal, friendly proceedings.[335] Arbitrators were chosen from a small group of respected commercial men and experienced commercial

Sanders, *Quo Vadis Arbitration?: Sixty Years of Arbitration Practice: A Comparative Study* 29 (Kluwer Law International 1999).

324. Sanders, *supra* n. 323.
325. Arbitration Act 1979, Chapter 42.
326. Ambrose, *supra* n. 26, at 371.
327. Dezalay & Garth, *supra* n. 119, at 137 report that after the revision of the special case procedure, Lord Diplock, in a series of judgments in the early 1980s cut down dramatically the opportunities for appeal to the courts. The court limited the appeal to cases confronting to standard terms, refusing to get involved with "one-off" cases.
328. Bernard Eder, *Does Arbitration Stifle Development of the Law? Should s.69 Be Revitalised?* 2 (April 28, 2016), https://s3-eu-west-2.amazonaws.com/sqe-essexcourt/wp-content/uploads/2016/05/08152910/CIArb-EDER-AGM-Keynote-Address-28-April-2016-AMND-1.pdf, accessed August 31, 2020.
329. Dezalay & Garth, *supra* n. 119, at 199.
330. Thomas, *supra* n. 187, at 5.
331. *Ibid.*
332. *Ibid.*, 6.
333. Dezalay & Garth, *supra* n. 119, at 199.
334. Ambrose, *supra* n. 26, at 2.
335. Carbonneau, *supra* n. 16, at 377.

lawyers.[336] The reference to "commercial men conversant with shipping matters" is characteristic in this respect and is still present in many standard charterparty forms. Nowadays, in response to changing needs, international commercial arbitration is a more formal legal process, distinguished as the judicialization of arbitration.[337]

The LMAA, founded in 1960, is not an arbitral institution per se and does not supervise or administer arbitrations actively. With over 2,900 appointments of arbitrators and an estimated maritime arbitration market share of 80%, the LMAA handles the majority of arbitrations in contracts of affreightment. The LMAA emphasizes the professional skills and experience of arbitrators as the most important feature of its reputation.[338] It maintains a broad mixture of disciplines among its members, welcoming those with legal, technical, and commercial backgrounds.[339] The choice of disciplines indicates the value of technical, commercial, and economic considerations in deciding maritime disputes.

[2] Arbitration in New York

The New York maritime arbitration center emphasizes autonomy of arbitration to attract arbitration business. Being a nation with a strong litigation culture, arbitration was not the preferred dispute resolution mechanism for business disputes in the U.S.[340] Historically, arbitration played a much more limited role in law and economic power.[341] However, as New York became a major shipping center, the need for maritime arbitration grew.[342]

New York is one of the leading arbitration centers globally, and the most important venue for arbitration in the U.S. New York is the home of arbitration institutions that administer thousands of cases. These include the American Arbitration Association (AAA), its International Center for Dispute Resolution (ICDR), and the International Institute for Conflict Prevention and Resolution (CPR). New York is also the base for the ICC's North American operations, conducted by Sicana, Inc. (SICANA), and the location of a large office of the dispute resolution service JAMS.[343] The New York International Arbitration Center (NYIAC) is a nonprofit organization formed to strengthen and promote the conduct of international arbitration in New York.[344] In the

336. Newman & Hill, *supra* n. 146, at 90.
337. Catherine Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 Stanford Journal of International Law 53, 67 (2005); Dame Elizabeth Gloster, *Symbiosis or Sadomasochism? The Relationship Between the Courts and Arbitration*, 34 Arb Intl 321, 336 (2018) referring to over-formality and excessively formalistic observance of procedures in arbitration instead of flexibility.
338. LMAA, History, *supra* n. 21.
339. LMAA, *Guidelines for Full Membership,* http://lmaa.org.uk/uploads/documents/GUIDELINES%20FULL%20MEMBERSHIP%202018.pdf, accessed August 31, 2020; Horton, *supra* n. 25.
340. Dezalay & Garth, *supra* n. 119, at 201.
341. *Ibid.*
342. SMA, *Where Arbitration Began*, *supra* n. 153.
343. *Ibid.*
344. It does not administer arbitrations or publish arbitration rules, *see* https://nyiac.org/about/, accessed August 31, 2020.

maritime domain, apart from the presence of the SMA, the Maritime Arbitration Association (MAA) of the U.S. also offers ADR services in the U.S.[345]

The SMA is a professional nonprofit entity that, similar to the LMAA, does not administer arbitrations. The SMA was born in 1963 when prominent New York chartering broker, Jack Reynolds, brought together like-minded maritime professionals aiming to provide more structure to the New York arbitral process.[346]

Distinctive aspects of New York maritime arbitration under the SMA Rules include the following: (a) the default rule of publication of arbitral awards;[347] (b) the requirement that its members issue fully reasoned awards;[348] and (c) the appointment of arbitrators without charging a fee.[349] Another relevant difference between New York arbitration and English arbitration is that in the U.S., there is no available remedy for errors of law, apart from egregious mistakes: judicial review of arbitral awards is strictly limited.[350]

Similar to the LMAA, SMA stresses that all of its members have commercial shipping experience, and many have legal experience also.[351] The SMA arbitrators are drawn from the industry's various disciplines, including owning and chartering management, maritime law, trading, engineering, and insurance.[352] Membership in SMA is open to individuals with demonstrated maritime credentials and good character.[353]

Although the SMA does not provide any statistics on its caseload or number of awards issued per year, it is reported that it is second only to London.[354] Lack of data notwithstanding, because of the default rule of publication of arbitral awards under the SMA Rules, the SMA has published over four thousand awards.

[3] Developments in the East: The Rising Prominence of Singapore

It is reported that in the 1950s and 1960s, there were no disputes in the Pacific region and that any issues in long-term contracts with Japanese companies were handled informally, "over sake."[355] While the HKIAC was successful initially in handling

345. MAA, www.maritimearbitration.com, accessed August 31, 2020.
346. Martowski, *supra* n. 154, at 2.
347. Section 1, SMA Rules.
348. SMA, *Why Arbitration in New York under SMA Rules*, www.smany.org/arbitration-why-sma-new-york.html, accessed August 31, 2020.
349. SMA, *Guide to Maritime Arbitration in New York*, www.smany.org/new-york-maritime-arbitration-guide.html#section07, accessed August 31, 2020.
350. *See* below Chapter §3.01[B].
351. SMA, *Why Arbitration in New York under SMA Rules, supra* n. 348.
352. Martowski, *supra* n. 154, at 2.
353. SMA, *Why Arbitration in New York under SMA Rules, supra* n. 348.
354. Martowski, *supra* n. 154, at 2.
355. Dezalay & Garth, *supra* n. 119, at 275.

shipping disputes,[356] Singapore has gained prominence recently as the most popular seat of arbitration in Asia.[357]

Over the last twenty years, global trade and cross-border investment in Asia has grown, and it continues to grow.[358] The Asian region is gaining prominence in the shipping industry: a substantial part of the world's tonnage is owned or controlled by Asian interests.[359] These developments have created a need for a dispute resolution hub in key maritime centers in Asia, such as Hong Kong, Shanghai, and Singapore. Singapore appears particularly well-situated to play this role.

Singapore has adopted a clear and specific governmental policy to develop as an international arbitration center. The main elements are as follows: (a) a well-developed and business-friendly common law legal system; (b) commercially experienced lawyers; (c) sound judges; and (d) an increasingly sophisticated commercial jurisprudence that matches Singapore's modern connectivity and central geographical location.[360] Singapore is perceived as a neutral third-country venue with a strong tradition of the rule of law, who exercises maximum judicial support of arbitration with minimum intervention.[361] Apart from Singapore's excellent geographical position and a policy to develop as an arbitration center, the use of English as its operational language is also a critical factor in its success, attracting disputes from other jurisdictions.[362] Last but not least, the presence of competent maritime law and arbitration professionals, such as lawyers, arbitrators and experts, is another important asset.

Originally, Singapore concentrated its efforts on arbitration alone.[363] The SIAC, which commenced operations in 1991, is an established international arbitration institution.[364] Singapore has been reported as the most improved arbitral seat over the

356. *Ibid.*

357. Chan, *supra* n. 35, at 201; Karton, *supra* n. 186, stresses that Singapore's rise to prominence as an arbitral venue would not have been possible without significant governmental support (p. 70) and refers specifically to "a conscious program of raising SIAC's profile" (p. 64).

358. For more detailed figures, *see Singapore International Commercial Court Committee Report* 8-11 (November 2013), www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/-report-of-the-singapore-international-commercial-court-committee-_90a41701-a5fc-4a2e-82db-cc33db8b6603-1.pdf, accessed August 31, 2020.

359. *2019 UNCTAD Review of Maritime Transport*, *supra* n. 39, at 36-38. For the most important factors leading to the concentration of shipping activity in Asia *see* Sundaresh Menon, *Singapore Chamber of Maritime Arbitration 10th Anniversary Keynote Address: The Race to Relevance* 2-3 (October 2019), www.supremecourt.gov.sg/Data/Editor/Documents/Keynote%20Address%20by%20CJ%20-%20The%20Race%20to%20Relevance.pdf, accessed August 31, 2020.

360. *Singapore International Commercial Court Committee Report*, *supra* n. 358, at 7.

361. *See also* SIAC, *Highlights: What Singapore Has to Offer*, http://siac.org.sg/64-why-siac, accessed August 31, 2020.

362. Leng Sun Chan, *Making Arbitration Work in Singapore* in Anselmo Reyes & Weixia Gu (eds.), *The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific* 143 (Hart Publishing 2018).

363. *Singapore International Commercial Court Committee Report, supra* n. 358, at 7.

364. The SIAC is the fourth most preferred arbitral institution (after the ICC, the LCIA and the AAA/ICDR), *see* Queen Mary University of London and White & Case, *2010 International Arbitration Survey: Choices in International Arbitration*, 23, www.arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf, accessed August 31, 2020.

last five years.[365] These developments have increased the global appeal of Singapore as an arbitration venue in general.[366]

However, Singapore recently expanded its focus from arbitration to dispute resolution aiming to increase its business by persuading international clients (particularly those with business or investments in Asia) to select Singapore as a dispute resolution center.[367] Singapore promises the resolution of disputes with international counterparties via a variety of dispute resolution solutions that serve party needs and preferences. To offer distinct dispute resolution services, the Singapore International Mediation Center (SIMC) and the Singapore International Commercial Court (SICC) have been established. With the government's support, Singapore also launched the arbitration facility center, Maxwell Chambers, in 2010, which was expanded in 2019.

Singapore's maritime arbitration center is equally internationally conscious and responsive to the shipping industry's needs. The SCMA was established in November 2004 to accommodate the needs of the maritime industry in Asia[368] and, after industry feedback, began functioning independently in 2009.[369] The SCMA states that it has developed a hybrid model of arbitration, which combines the advantages of ad hoc arbitration favored by the maritime community with the benefits of institutional assistance.[370]

In 2013, Singapore was included as the third option in the BIMCO Standard Dispute Resolution Clause.[371] This is an important achievement that has contributed to a steady increase in its caseload.[372] In 2018, SCMA registered fifty-six maritime case references, the highest number since its formation in 2009.[373] For perspective, this is the equivalent of approximately 4% of LMAA's estimated number of references.[374] The SCMA has also seen an increase in its total claim amount from USD 89 million in 2018

365. 2015 Survey, *supra* n. 70, at 11.
366. Chan, *supra* n. 35, at 202; Mistelis, *supra* n. 194, at 147.
367. *See* Hwang, *supra* n. 80, at 200-201 further elaborating on the dispute resolution scene in Singapore.
368. Hasan & Ashhab, *supra* n. 230, at 511.
369. SCMA website; *Exclusive Interview with the SCMA*, *supra* n. 29.
370. *Ibid.*: "The Rules also offer optional 'opt-in' features. For a nominal fee, a party may invoke the assistance of the SCMA to: (a) act as appointing authority; (b) determine challenges to the tribunal; (c) provide the tribunal with fundholding services; and (d) authenticate awards pursuant to the Singapore International Arbitration Act. This unique approach ensures that end-users may continue to resolve maritime disputes in the traditional non-administered way, with the option for add-on services, if necessary."
371. *See also* below Chapter §2.01[D]. Chao Hick Tin (Chairman of the SCMA) in *Exclusive Interview with the SCMA*, *supra* n. 29, considers the inclusion of SCMA in the BIMCO Standard Dispute Resolution clause as one of the achievements with the biggest impact on the maritime industry since the international maritime community regards Singapore as one of the three epicenters of maritime arbitration alongside London and New York.
372. SCMA, *Year in Review 2018*, *see also Exclusive Interview with the SCMA*, *supra* n. 29 which provides data on the caseload from 2009 until 2019.
373. SCMA, *Year in Review 2018*.
374. The LMAA reports 1561 estimated references in 2018 and 1756 in 2019. A recent survey suggests that Singapore saw the equivalent of approximately 14% of London's maritime arbitration caseload in 2018 and 13% in 2019. However, this survey includes arbitrations handled by the SIAC and ICC, as well as LMAA arbitrations conducted in Singapore. Similarly, the number for maritime arbitrations in London is formed from statistics obtained from the LCIA, LMAA and ICC, *see* HFW Survey, *supra* n. 33.

to USD 120 million in 2019.[375] As an act of welcome transparency, the SCMA provides statistics on the number of cases, the types of disputes and the sums involved in its yearly promotional newsletters. The institute is encouraged by the maritime industry's growing confidence in SCMA.[376]

The SCMA considers China, India, and Indonesia as its key markets.[377] Its strategy aims to engage users in these markets through joint conferences and promotional events.[378] The SCMA entered recently into cooperation agreements with the China Maritime Arbitration Commission (CMAC)[379] and the Guangzhou Arbitration Commission to promote arbitration for the resolution of maritime disputes.[380] Against this background, one challenge for Singapore common law lawyers and arbitrators is to gain relevant knowledge and experience in handling arbitration proceedings under civil law since many important Asian jurisdictions, such as China, Indonesia, Japan, and Korea, are civil law jurisdictions.[381]

SCMA membership is open to all companies and individuals within the maritime community, aiming to reflect the wishes of all its users. This parallels Singapore's "user-centric" approach to dispute resolution.[382] The SCMA as an organization does not intervene in case procedures: the parties and the tribunal operate independently.[383] As such, SCMA arbitration commences when the claimant notifies the respondent, and no management fees are paid to the SCMA.[384]

The year 2019 marked the tenth anniversary of the SCMA's independent function from SIAC in 2009.[385] On the occasion of this anniversary, it arranged a year-long marketing campaign and celebratory events aiming to raise its profile.[386]

The SCMA is currently preparing the fourth edition of its Rules.[387] Apart from updating its maritime arbitration rules, Singapore is considering amendments in its arbitration regime. For such reforms, Singapore seeks industry feedback.[388] This practice of consulting the private sector before passing any amendments to the

375. SCMA, *Year in Review 2019*.
376. SCMA, *Year in Review 2018*.
377. *Ibid.*
378. *Ibid.*
379. SCMA Press Release, *SCMA Signs Cooperation Agreement with the China Maritime Arbitration Commission*, https://scma.org.sg/SiteFolders/scma/387/Events/MediaRelease20181113.pdf, accessed August 31, 2020.
380. SCMA Press Release, *SCMA Signs MOU with the Guangzhou Arbitration Commission*, https://www.scma.org.sg/SiteFolders/scma/387/Events/Announcement/Press%20Release%20and%20SCMA%20Chairman%20Remarks_MOU%20with%20GZAC.pdf, accessed August 31, 2020.
381. *Exclusive Interview with the SCMA*, *supra* n. 29.
382. Steven Chong, *Making Waves in Arbitration: The Singapore Experience*, Speech delivered at the SCMA Distinguished Speaker Series 29 (November 10, 2014), www.supremecourt.gov.sg/Data/Editor/Documents/J%20Steven%20Chong%20Speeches/SCMA%20Distinguished%20Speaker%20Series%202014%20(10%2011%2014).pdf, accessed August 31,2020.
383. SCMA Rules 4, 5, 6.
384. *Commentary on the 3rd Edition of the Rules of SCMA,* para. 1.
385. SCMA, *Year in Review 2018*.
386. *Ibid.*
387. *Exclusive Interview with the SCMA*, *supra* n. 29.
388. *See SCMA Rules Revision Public Consultation 2020* (Consultation Period: June 16, 2020-September 30, 2020), https://www.scma.org.sg/SiteFolders/scma/387/rules/SCMA%2

arbitration regime creates a successful blend of "top-down" reform with initiatives coming from the government and "bottom-up" reform with initiatives and feedback coming from the users and arbitration community.[389] The aim of this practice is to innovate and anticipate global trends to keep Singapore ahead of the competition.[390]

As the world's center of gravity for shipping, finance and trade shifts eastwards, the future of Singapore, an international maritime and dispute resolution hub, is promising.

[B] The Role of Economics, Psychology, and Other Disciplines in Arbitration

Economic theories offer highly relevant explanations for the phenomenon of maritime arbitration. For example, market theories applied easily to the market for arbitration services explain information asymmetries that prevent a structure of perfect competition.[391] Market competition may be said to lead fora to adopt innovations introduced by their competitors quickly, which in turn leads to the increased harmonization of procedural rules and national arbitration statutes.[392] Whether harmonization or regulatory competition produces better rules in terms of economic efficiency remains a topic of debate.[393]

The standardization of contracts in the shipping industry has attracted the interest of experts, who have used the concept of network effects to explain the extensive use of boilerplate clauses.[394] Behavioral law and economics can also offer interesting insights into international maritime arbitration. Studying the cognitive and motivational problems of individuals involved in the arbitral process would teach us about arbitral decision-making.[395]

0Rules%20Revision%20-%20Public%20Consultation.pdf and one year ago the *Public Consultation on SIAA*, https://app.mlaw.gov.sg/news/public-consultations/public-consultation-on-international-arbitration-act, accessed August 31, 2020.

389. Chan, *supra* n. 362, at 159.
390. *Ibid.*, 143.
391. Karton, *supra* n. 186, at 63.
392. *Ibid*.
393. *See* further arguments on the costs and benefits of both harmonization and regulatory competition in Katharina Pistor, *The Standardization of Law and Its Effect on Developing Economies,* 50 American Journal of Comparative Law 97, 104-107 (2002).
394. Bryan Druzin, *Spontaneous Standardization and the New Lex Maritima* in Goldby & Mistelis, *supra* n. 32, at 64, *see also* Wielsch, *supra* n. 236, at 80: Initially, network effects lead to the use of the standard term and later, once a boilerplate clause has been legally tested, it becomes more valuable for other players in the market; Mark Patterson, *Standardization of Standard-Form Contracts: Competition and Contract Implications,* 52 William and Mary Law Review 327, 343 (2010-2011) also notes: "contract standardization can also increase the inherent value of the contract in a more direct way: a contract that is more commonly used is more commonly interpreted by courts, and therefore is a contract whose meaning and interpretation is more certain." The standardization process in charterparty industry is further analyzed below in Chapter §2.01[E].
395. Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 Stanford Law Review 1471, 1475 (1998). For a behavioral analysis of commercial arbitration, *see* Christopher Drahozal, *Behavioral Analysis of Arbitral Decision Making* in Drahozal & Naimark (eds.), *supra* n. 255, at 319. *See also* Jan-Philip Elm, *Behavioral Insights*

Other recent interdisciplinary forays into arbitration include a recent treatise[396] that attempts to provide systematic psychological insight into arbitration. For example, factors such as the number of arbitrators comprising the tribunal, the language of the proceedings and the process for questioning witnesses and experts affect how arbitrators decide.[397] Another interesting topic is the exploration of the potential impact of anthropology in arbitration.[398] Anthropology is particularly useful in understanding the needs and sensitivities of a particular market, whether geographic or industry-related, to alleviate fears and perceived biases.[399] From a policy perspective, anthropology can also facilitate structural changes in the field of arbitration.[400]

§1.05 DEVELOPMENT AND CURRENT STATE OF MARITIME ARBITRATION

[A] The Most Prominent Maritime Arbitral Seats

According to the LMAA, London appointed more than 2,900 arbitrators and rendered over five hundred awards in 2019. New York is the second-largest maritime arbitration center with approximately five hundred cases per year.[401] But these figures do not reveal much since the numbers of cases are reported differently depending on the institution.[402] As of the writing of this book, it has been estimated that London and New York together handle 90% of the global maritime arbitration work.[403] In the East, the addition of Singapore as an option in the BIMCO Standard Dispute Resolution Clause has increased its prominence as a maritime arbitration center.

While the introduction of Singapore and more recently Hong Kong to the global maritime arbitration stage is promising, history and tradition keep London and New York dominant in maritime arbitration.[404] The standard arbitration clauses of all

into International Arbitration: An Analysis of How to De-Bias Arbitrators, 27 Am Rev Intl Arb (2016). For a specific application of this approach in investment law and arbitration, *see* Lauge Skovgaard Poulsen, *Bounded Rationality and the Diffusion of Modern Investment Treaties,* 58 International Studies Quarterly (2014).

396. Tony Cole (ed.), *The Roles of Psychology in International Arbitration* (Kluwer Law International 2017).
397. William Park, *Chapter 1: Rules and Reliability—How Arbitrators Decide* in Cole (ed.), *supra* n. 396, at 6-7.
398. Ilias Bantekas, *Chapter 15: The Psychological Anthropology of International Arbitration* in Cole (ed.), *supra* n. 396, at 375-390.
399. *Ibid.,* 389.
400. *Ibid*.
401. Maurer, *supra* n. 34, at 236. Ian Gaunt suggests that one hundred maritime arbitration cases were handled in New York in 2012, *The London Maritime Arbitrators Association's Ian Gaunt Explains Why Arbitration Is More Important than Ever in Today's Cash-Strapped Markets, and Why London Is Still Dominant Seat*, www.thebaltic.com (Autumn 2013), www.lmaa.london/uploads/documents/The%20State%20of%20London%20Maritime%20Arbitration%20-%20Baltic%20Magazine.pdf, accessed August 31, 2020.
402. Mistelis, *supra* n. 194, at 135.
403. Maurer, *supra* n. 34, at 236.
404. For a historical explanation of the development of London and New York as prominent maritime arbitration centers, *see* Jarvis, *supra* n. 109, at 29-34. For a sociological perspective,

commonly used charterparties name London or New York. Tradition hand in hand with extensive industry standardization leads to a concentration of arbitration expertise in a small number of highly qualified professionals at these locations.

From a practical standpoint confirmed with those negotiating standard form charterparties, the arbitration clause is one of the last and quickest points to be considered.[405] For example, during a negotiation to charter a ship, the interest of the owner is to find employment for his vessel, while the interest of the charterer is to find a ship to deliver cargo. They agree to the contract as willing parties without much concern about the exact wording contained in the contract.[406] Arbitration clauses are often characterized as "midnight clauses" because they are considered at the very last moments in contract negotiations.[407] Too often, dispute resolution clauses are ignored because it is assumed during negotiations that a dispute will never arise.[408]

Empirical research has confirmed that the arbitration clause is seldom a top priority, and lawyers may be unable to persuade their clients that the completeness of the clause is important to save money and time later should arbitration occur.[409] Given the indifference of the contracting parties toward arbitration clauses, a reluctance to contemplate a possible dispute,[410] and the genuine interest of the shipowners to keep their ships sailing rather than wasting valuable time and effort negotiating an arbitration venue, London is chosen almost "automatically."[411] Thus, it can be said that London has "general jurisdiction" in the industry, as it is the default option in most standard form contracts.[412]

The shipping industry opts for English law, even where there is no English party and despite the fact that England is no longer economically dominant in this industry.[413] For example, it has been estimated that 50% of the cases arbitrated in London in

see Dezalay & Garth, *supra* n. 119, at 45, discussing the status of the International Chamber of Commerce: "History is a key legitimator in the legal field. No one can compete with tradition without ending up underscoring that one group is a new arrival and another the established elite, akin to the aristocracy."

405. Harris, *supra* n. 33, at 116; John Thomas, *Developing Commercial Law Through the Courts: Rebalancing the Relationship Between the Courts and Arbitration* 17 (March 9, 2016), www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf, accessed August 31, 2020 referring to the clauses inserted in standard form contracts as a matter of routine: these "embedded" clauses remain for many years making any task of change difficult.
406. Arthur Bowring, *Resolving Maritime Disputes Through Arbitration*, Pacific Maritime Magazine (January 1, 2015), www.pacmar.com/story/2015/01/01/features/resolving-maritime-disputes-through-arbitration/309.html, accessed August 31, 2020.
407. Blackaby et al., *supra* n. 56, at 72.
408. Bowring, *supra* n. 406.
409. Robert Coulson, *Survey of International Arbitration Procedures* in Drahozal & Naimark (eds.), *supra* n. 255, at 104.
410. Blackaby et al., *supra* n. 56, at 72.
411. Harris, *supra* n. 33, at 118.
412. Gralf-Peter Calliess & Annika Klopp, *Lex Maritima Vanishing Commercial Trial: Fading Domestic Law?* in Goldby & Mistelis (eds.), *supra* n. 32, at 220.
413. Karton, *supra* n. 186, at 70.

2012 involved Chinese companies, and the majority refer to charterparty and shipbuilding disputes.[414] It has been suggested that Chinese companies accept London in arbitration clauses because they are indifferent or lack bargaining power.[415] It is estimated currently that around 30% of the LMAA's caseload involves at least one Chinese party.[416] Other estimates suggest that of two thousand new LMAA references in 2015, no more than one hundred were seated outside London.[417] Approximately 85% of LMAA cases proceed on documents alone.[418] In approximately 5% of the cases that advanced to a hearing, there were overseas arbitrators, and in around 25%-30% of those, overseas lawyers attended.[419]

The preference for London extends farther than areas where England was dominant historically: in fact, it is perceived that English law is more developed and predictable, and the English bar and courts possess more expertise than those of other countries.[420] English law is valued for its certainty and sophistication, its reputation for respecting the bargain reached between the contracting parties and for the large number of historical precedents reflected in case law.[421] English maritime law is spoken of as the cornerstone of maritime service industries in London.[422] In essence, the selection of English law is important throughout the negotiation, agreement, and performance of the contract.[423] With large sums of money at stake, commercial people need to know precisely and efficiently where they stand.[424]

Against this background, there is a broad consensus that English law will continue to be the choice in most international maritime contracts, including contracts of affreightment. It is notable that competing arbitration venues, such as Singapore and Hong Kong, promote themselves as seats where disputes arising from English law contracts can be resolved.

414. Guo Yu, *Maritime Arbitration in China: Strive for a Bigger Presence* in Goldby & Mistelis (eds.), *supra* n. 32, at 186-187.
415. *Ibid.*
416. TheCityUK *Legal Excellence, Internationally Renowned UK Legal Services 2018*, 35, https://www.thecityuk.com/assets/2018/Reports-PDF/86e1b87840/Legal-excellence-internationally-renowned-UK-legal-services-2018.pdf, accessed August 31, 2020.
417. Commercial Bar Association, *Brexit Report Arbitration Sub-Group* (January 2017), 24, https://app.pelorous.com/media_manager/public/260/COMBAR%20Brexit%20Arbitration%20Report%20as%20sent%20to%20MoJ%2011.1.17%20(003).pdf, accessed August 31, 2020.
418. *Ibid*.
419. *Ibid*.
420. Karton, *supra* n. 186, at 70; Dezalay & Garth, *supra* n. 119, at 141, characterize the English Commercial Court as "the best English judicial product to market in the international competition."
421. Commercial Bar Association, *Brexit Report*, *supra* n. 417, at 6.
422. Epaminondas Embiricos, *Appeals from Arbitration Awards*, www.lmaa.london/uploads/documents/C50AppealsfromArbitrationAwards.pdf, accessed August 31, 2020.
423. *Ibid.*
424. *Ibid.*

The large English maritime community of highly qualified professionals in the field of shipping and the unbesmirched reputation of English judiciary integrity,[425] practitioners and processes contribute greatly to London's dominance.[426]

Also of note are logistical factors, such as access to sea and ports, and the presence of shipping companies, Protection and Indemnity (P&I) clubs,[427] and other insurers, such as Lloyd's and the Baltic Exchange.[428] This is not to imply that shipping nations attract maritime arbitration business necessarily. For example, its strong tradition as a maritime nation and the presence of shipowners and shipbrokers in Piraeus would suggest that Greece has a substantial arbitration industry. However, quite the opposite is true. Greece has established only minor and local maritime arbitral institutions, despite its long maritime tradition and location in the Mediterranean Sea.[429]

The competition among maritime arbitral seats is evident. The most popular maritime arbitration centers are London, New York, Singapore, China,[430] Hong Kong, Moscow and Tokyo. Hamburg, Oslo, Paris, Rotterdam and Seoul have attempted to attract maritime disputes.[431] But maritime arbitration business remains in the reign of London and New York.

Important maritime centers, such as Moscow, Shanghai and Tokyo, have established their reputations as maritime arbitral seats but have not managed to be named

425. Legal UK, *The Strength of English Law and the UK Jurisdiction* (2017), www.judiciary.gov.uk /wp-content/ uploads/2017/08/legaluk-strength-of-english-law-draft-4-FINAL.pdf, accessed August 31, 2020: "The UK has a strong and incorruptible judiciary, which is drawn from the highly experienced ranks of the senior legal profession. It is structurally and practically independent from both the executive and the legislature. This ensures fair and predictable dispute resolution. International parties litigating in the UK can be confident that their disputes will be decided only on their intrinsic merits, without regard to nationality, politics, religion or race."

426. Harris, *supra* n. 33, at 119; *see also* Legal UK, *The Strength of English Law and the UK Jurisdiction ibid.*, considering ten points as the strengths of English law and jurisdiction; Commercial Bar Association, *Brexit Report*, *supra* n. 417, at 6-7.

427. A Protection and Indemnity or P&I club is a not-for-profit mutual insurance association, providing cover for its shipowner and charterer members against third party liabilities arising out of the use and operation of ships.

428. Carbonneau, *supra* n. 16, at 373.

429. *See also* Konstantinos Calavros, *Evaluation and Prospects of International Arbitration in Greece,* 4 Greek Journal Diaitisia 449, 450 (2018) asserting that despite the adoption of the UNCITRAL Model Law, Greece has not managed to attract disputes, even regarding disputes coming from countries with which Greece maintains established and strong relationship.

430. The CMAC has its headquarters in Beijing, with sub-commissions in Shanghai, Tianjin, Chongqing, Guangdong, Hong Kong and Fujian, Pilot Free Trade Zone Arbitration Center in Zhejiang and other places and liaison offices in major coastal cities such as Dalian, Tianjin, Qingdao, Ningbo, Guangzhou, and Zhoushan.

431. Mistelis, *supra* n. 194, at 144; The International Congress of Maritime Arbitrators (ICMA) lists the most important associations around the world promoting maritime arbitration, https:// icmaweb.com/maritime-arbitration-associations, accessed August 31, 2020. Some of the most recent maritime arbitration initiatives include the following: the Nordic Offshore and Maritime Arbitration Association (NOMA) established in November 2017 on the initiative of the Danish, Finnish, Norwegian and Swedish Maritime Law Associations; in the MENA region, the Emirates Maritime Arbitration Center (EMAC) established in Dubai and the *Cour Internationale d'Arbitrage Maritime et Aérien* (International Court of Maritime and Air Arbitration-CIAMA) in Morocco; and the Asia-Pacific Maritime Arbitration Center established in Busan in 2018.

as options in the BIMCO Standard Dispute Resolution Clause.[432] Singapore's addition to the BIMCO Clause has placed it ahead of competitors in the Asia-Pacific region.[433] In September 2020, BIMCO announced the addition of Hong Kong in its new Law and Arbitration Clause, evidence of its growing popularity as a hub for dispute resolution.[434]

In sum, adherence to tradition and practical experience are responsible for the dominance of London and New York as maritime arbitration seats. The standard arbitration clauses of all commonly used charterparties reinforce the tradition by naming London and New York as arbitration seats. Handling almost 90% of the global maritime arbitration business, London and New York have the highest concentrations of individuals with practical experience and arbitration expertise.

Thus, the centers of the system of international adjudication of disputes in contracts of carriage by sea are located in London and New York; Singapore has distinguished itself recently, and Hong Kong is currently emerging as a new option in standard form contracts. For this reason, this book will compare the distinguishing features of maritime arbitration practice in London, New York and Singapore to understand the merits and issues of each.

[B] The International Political Environment

Dispute resolution cannot be studied without appraising the industry for which it exists.[435] With this goal in mind, we examine international political and financial developments pertaining to the shipping industry, specifically sea trade and transport. Maritime transport is the cornerstone of international trade and the global economy. It is estimated that over 80% of global trade by volume is carried by sea.[436]

To understand the legal issues of arbitration in contracts for the carriage of goods by sea, it is necessary to reflect on the impact of the shipping sector on arbitration. In the previous section, it was suggested that sociological, economic, cultural and psychological perspectives affect arbitration in contracts of carriage and are highly relevant in any attempt to explain the international legal regime and practice or to propose new approaches to current challenges. It is equally important to understand the international political and financial environment.

The shipping sector generates a wide variety of disputes, typically between parties based in different jurisdictions. Shipping disputes had and will continue to have an important impact on arbitration due to standard forms in shipping contracts providing for arbitration and the international nature of the industry.[437] International

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432. *See* below Chapter §2.01[E].
433. Yu, *supra* n. 414, at 187.
434. *See* below Chapter §2.01[E].
435. James Allsop, *International Maritime Arbitration: Legal and Policy Issues,* Paper presented to World Maritime University and to the Australian Maritime and Transport Arbitration Commission (2007), www5.austlii.edu.au/au/journals/FedJSchol/2007/7.html, accessed August 31, 2020.
436. *2019 UNCTAD Review of Maritime Transport*, *supra* n. 39, at 89.
437. Hasan & Ashhab, *supra* n. 230, at 510.

arbitration is growing continuously, and the shipping sector is one of its predominant supporters.[438]

Many of these disputes can only be understood by studying the market.[439] This is especially true in contracts of carriage. Freight and hire rates fluctuate rapidly and can motivate the disputes.[440] The underlying uncertainty of the international political and financial environment affects the shipping industry[441] and, consequently, the arbitration of shipping disputes. Thus, it is important to closely examine and understand the role of these influences in dispute resolution.

That which affects maritime trade necessarily impacts maritime arbitration. Recent socioeconomic and political threats that increase uncertainty about the future of international trade and the maritime industry include the current rise of protectionist policies in a number of countries;[442] the increasing income disparity between the wealthiest and the middle class that may compromise consumer spending power;[443] and trade tensions between the U.S. and China.[444]

Periods of financial crisis, such as the one experienced in 2007-2008, can have a serious effect on the shipping sector. The shipping industry was impacted both in terms of supply and demand: global trade slowed down while too many vessels were built, and not enough were scrapped.[445]

In 2016, the Baltic Dry index, a measure of freight rates for bulk carriers that carry commodities, reached its lowest low. All shipping segments except tankers suffered record low freight rates and weak earnings. According to the most recent official figures,[446] international maritime trade lost momentum in 2018, reflecting developments in the world economy and trade activity. Volumes expanded a mere 2.7% in 2018, down from 4.1% in 2017. The slowdown affected nearly all maritime cargo segments. In 2018, total volumes were estimated at 11 billion tons.

438. Mistelis, *supra* n. 194, at 135.
439. Paul Todd, *Principles of the Carriage of Goods by Sea* 15 (Routledge 2016). For an analysis of external shocks that have significantly impacted the development of ocean freight rates and, in the longer term, shipping market structures, such as the Suez Canal closure and the Oil Shock of 1973, *see* UNCTAD, *50 Years of Review of Maritime Transport 1968-2018*, *supra* n. 201, at 22-24.
440. Todd, *supra* n. 439, at 16.
441. *2019 UNCTAD Review of Maritime Transport*, *supra* n. 39, at Executive Summary. *See also* Gross, *supra* n. 54, at 3-4.
442. *Ibid.*
443. UNCTAD, *50 Years of Review of Maritime Transport 1968-2018*, *supra* n. 201, at 78.
444. *2019 UNCTAD Review of Maritime Transport*, *supra* n. 39, at Executive Summary; BIMCO Bulletin, *Trade War: Now Is the Wrong Time for Business as Usual* (November 2018), http://portfolio.cpl.co.uk/BIMCO/201811/trade-war/?fbclid=IwAR2QzdYixNqe3EqP8-5fPMB24lDlx8RpzEKJemYptVwgvrdo26UiDW1atCw, accessed August 31, 2020 considers the consequences of a trade war between the U.S. and China.
445. ICS, *2017 Annual Review*, 28, www.ics-shipping.org/docs/default-source/ICS-Annual-Review-2017/ics-annual-review-2017.pdf?sfvrsn=10; *The Global Shipping Industry's Woes*, The Economist (September 9, 2016), www.economist.com/blogs/graphicdetail/2016/09/daily-chart-6, accessed August 31, 2020.
446. *2019 UNCTAD Review of Maritime Transport*, *supra* n. 39, at Executive Summary.