The Use of Arbitration in the Settlement of Maritime Disputes: Balancing Competing Interests

This article discusses the use of arbitration in settling maritime disputes, and aims to draw attention to the most important requirement for resolving such disputes: balancing competing interests. Arbitration is the organisation of private justice through which parties freely choose arbitrators to settle their disputes. Maritime arbitration is the organisation of private justice through which shipowners, charterers, insurers, brokers, and maritime agents freely choose arbitrators to settle their maritime disputes.

Philippe Delebecque
Professor, Sorbonne Law School, Paris
Président of Maritime Chamber
Arbitration of Paris

History and Scope of Maritime Arbitration

Maritime arbitration is very common in the settlement of maritime affairs. The old French Ordinance of Marine, dated 1681, already stated that arbitration was the ordinary way to settle maritime conflicts. Maritime arbitration is a type of settlement, only a type, because there are, in this area, other modes of dispute resolution: conciliation and mediation. In practice, parties often engage an arbitration only to provoke or to trigger discussions and then to reach an agreement.

Maritime arbitration has a large scope of application. We find arbitration clauses in all maritime contracts: salvage, shipbuilding, agency, carriage of goods (when a bill of lading is issued with a charter-party), charters-parties, voyage charter, time charter and bare boat charter.

Balancing Interests in Maritime Arbitration

Balancing competing interests is a requirement under the rule of law, where we have to consider interests of the creditor and interests of the debtor. In maritime law, interests are opposing. For example, the shipowner's interests are in conflict with shipper's interests and there are often conflicts between a weaker party and a stronger party.

There are numerous different chambers of maritime arbitration, including:
- in London, the London Maritime Arbitrators Association (LMAA)
- in New York, the Society of Maritime Arbitrators (SMA)
- in Hong Kong, the Hong Kong Maritime Arbitration Group (HKMAG)
- in Singapore, the Singapore Chamber of Maritime Arbitration (SCMA)

- in Dubai, the Emirates Maritime Arbitration Centre (EMAC)
- in Hamburg, the German Maritime Arbitration Association (GMAA)
- in Paris, the Chambre Arbitrale Maritime de Paris (CAMP).

Sensitivities of these chambers are not the same. In Paris, if you are a shipowner, you are not sure to win your arbitration and if you are a shipper, you are not sure to lose your arbitration.

In addition, balancing competing interests must be taken in consideration when considering choice of applicable law. Civil law and common law are the two large families of law – Qatar follows the civil law system: there are rules; the reasoning is based on codes and abstract principles. There are differences between civil law and common law when it comes to proceedings. However, without a doubt, there are no large gaps concerning substantive law.

Issues

Balancing interests is not necessarily a condition of the validity of a contract, but a factor that parties and arbitrators should take into consideration. The issue concerns certain maritime contracts in particular and, below, I will demonstrate my reasoning on carriage of goods, charters-parties and insurance. Numerous issues arise in bills of lading, charters-parties and insurance, and ship and commodities insurance.

Some issues are quite classical to shipping contracts and relate to:
- cargo claims (damage to or shortage of the goods after transport);
- liberty and deviation clauses (e.g., the application of a strike clause when the destination port is on strike);
- unseaworthiness of the vessel;
- freight – prepaid or not – and lien in case of non-payment;
- letter of undertaking given by a "Protection and Indemnity Club";
- demurrage.

Regarding recent issues, we can cite:
- hardship clauses in contracts of affreightment (when a contract is concluded over a long period, is it possible to revise it?);[1]
- reefer clauses;[2]
- the anti-corruption clause recently adopted by BIMCO;
- piracy and its effect on the duties of the parties;
- quality of combustible materials.

Let's consider the carriage of goods and bill of lading. Here, we have to reach a balance of interests between the carrier and the shipper (cargo interest). The context is as follows:
- A maritime contract (a "charter-party") between a shipowner and a charterer for the hire of the ship.
- A detailed list of the ship's cargo in the form of a receipt associated with charter-party (the "bill of lading").
- The charter-party contains an arbitration clause.
- The bill of lading refers to the charter-party and to the conditions of the charter-party.
- The bill of lading is issued by the shipowner and transmitted to the charterer, who in turn transfers or endorses the bill of lading to a third party, generally the buyer of the goods (most often bulk) that are being carried.
- The third party in possession of the bill of lading may ask for the delivery of the goods and, if there is damage, may act against the shipowner who issued the bill of lading.

In this context, three questions appear:

(1) The charter-party – Is it enforceable against the third party? There is no problem if the third party is aware of the charter-party, but if this is not the case, the arbitrators must appreciate this factor and the criteria of balance of interests will be relevant.

(2) An anti-suit injunction (ASI) – If a third party challenges the clause, is it possible for the shipowner to obtain an ASI from an English court? The answer is no for European Court of Justice.[3] However, with Brexit, this crucial question has been re-opened.

(3) What are the applicable rules? Do we apply the Hague Rules?[4] The Hague Visby Rules (HVR)?[5] It is not easy to decide. Fortunately, there is now often a paramount clause in the bill of lading and a reference to a specific convention (usually the HVR). In any case, arbitrators must decide which convention applies when considering the balance of interests.

In this context, there are often disputes and arbitration regarding the carrier's liability on the following recurrent issues:
- The amount of compensation, especially in bulk carriage.[6]
- The validity of "Free In and Out"[7] (FIO) clauses that derogate from the HVR; CAMP jurisprudence favours FIO clauses.[8]
- The liability of the carrier – there is a ping-pong game going on between the carrier and the shipper. If the damage is proved, the carrier is ipso facto liable; however, the carrier can rebut its liability by proving that the damage came from an excepted cause (e.g., fire), and the shipper may neutralise this exemption and prove the fault of the carrier.[9]
- Insurer's subrogation – the insurer indemnifies the consignee and after having paid the insurance proceeds, sues the carrier. However, in this perspective, the insurer must justify that it is in the shoes of the consignee, that it is subrogated in its rights. It is often difficult to prove that all conditions of subrogation have been met.[10]

Under the Rotterdam Rules, the requirement of balancing competing interests is clearly taken into consideration. It is a new - the new - Maritime Convention. It has not yet been ratified, but it is a source of inspiration for the specialists. Shippers' interests – cargo interests – are taken into consideration:
- The carrier has to make the ship seaworthy during the voyage and not only before the voyage as in the HVR.
- Nautical fault as "excepted peril", is deleted.
- In case of damage, compensation is higher than under the HVR.

On the other side, the carrier's interests are considered:
- The Rotterdam Rules define the duties of the shipper and its liability as well.
- Freedom of contact in volume contracts is now possible.
- Arbitration is duly admitted (article 75).

It will be interesting to follow the application of this new convention

1. *See CAMP n° 1179, infra*, Annex.
2. *See CAMP n° 1201, infra,* Annex.
3. ECJ, 10 February 2009, *Allianz SpA v. West Tankers*, Case C-185/07 (parties to contracts that contain arbitration clauses will sometimes try to take disputes to court instead. Courts in certain European countries, such as Italy and Spain, are sometimes inclined to disregard foreign arbitration clauses and determine the issues themselves. Until the *West Tankers* decision, English courts protected English arbitration by issuing an ASI. This position became condemned following the West Tankers decision.
4. International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, and Protocol of Signature, Brussels, 25 August 1924.
5. The Hague Rules as amended by the Brussels Protocol 1968.
6. See *Sea Tank Shipping AS v. Vinnlustodin HF and another (Aqasia)* [2018] EWCA Civ 276: The Hague Rules package or unit limitation provision in article IV rule 5 does not apply to bulk cargo.
7. Meaning that it is the responsibility of the charterers to load or the consignees to discharge the cargo for their respective accounts (free of expense to the owners).
8. See *CAMP n° 1220, infra,* Annex.
9. See *CAMP n° 1188, n° 1217, infra,* Annex.
10. *See also*, the "loss payee clause" issue: CAMP n° 1191, *infra,* Annex.

to see if arbitration jurisprudence will differ from national jurisprudence in balancing the competing interests of carrier and shipper.

Now we will consider the various types of charter-parties and the requirement of balancing competing interests.

Voyage charters. A vessel owned or managed by a company is put at the disposal of a charterer who has to pay a freight. Nautical and commercial operations are assumed by the company. This kind of contract is not a contract of hire; it looks like a carriage of goods in which freedom of contract is open. Arbitration is most often focussed on the following recurrent issues:

- laytime calculation;
- payment of demurrage;
- determination of expected time of arrival (ETA) and notice of readiness (NOR);[11]

Clauses included in voyage charters are not always easy to understand. They are sometimes ambiguous, and arbitrators have to give their interpretation. Once again, the requirement to balance competing interests must be taken into consideration.[12]

Time charters: A time charter is a type of hire contract. The charterer has to pay a hire to the owner of the ship calculated by day (e.g., USD 10 000 per day). In this contract, the shipowner assumes the nautical operations of the ship and the charterer assumes the commercial aspect. The operations are divided between the two parties. Disputes often arise between the owner and the charterer regarding, for example, the question of whether the vessel has been stopped by such or such event and who must assume the consequences. If there is a problem with the engine of the vessel and if the vessel has to go under repair, the vessel becomes "off hire" and payment is suspended. This issue is a matter of dispute.[13]

Another recurrent problem is to interpret the "safe port clause". The charterer may go with the vessel only to safe ports. How should one understand this expression? This stipulation is included in all time charters. Arbitrators refer here to a famous precedent, the Eastern City case,[14] whichever maritime arbitration chamber is involved.

Moreover, when the charterer issues a bill of lading, we can determine whether the holder of the bill of lading can sue the shipowner. The answer is, in principle, no. But, the solution is not always this one: arbitrators must consider all the facts and circumstances.[15]

I could go on about other charter-parties but I'd like to draw attention to two types of charter-parties in particular.

- Trip time charter – A trip time charter is a short time charter for an agreed specified route. Should a trip time charter be considered a *voyage charter* or a *time charter*? The accurate qualification is, without doubt, a time charter. English and French cases are in line with this conclusion.
- Slot charter – A slot charter is an agreement between liner companies in which they share their transport capacity. In this kind of charter-party, the parties are free to organise their relations and most of the time, they are bound by an arbitration clause.[16]

11. *See, e.g., CAMP n° 1204, infra*, Annex.
12. *See e.g., CAMP n° 1195, 1215, infra*, Annex.
13. *See e.g., CAMP n° 1221, infra*, Annex.
14. *Leeds Shipping v. Société Française Bunge (Eastern City)* [1958] 2 Lloyd's Rep. 127. *See also*, more recently, *Gard Marine and Energy Limited v. China National Chartering Company Limited and another (Ocean Victory)* [2017] UKSC 35 .
15. *See CAMP n° 1224, infra*, Annex.
16. *See* P. Delebecque, Slot Chartering and Vessel-Sharing Agreements, International Congress of Maritime Arbitration, ICMA XIX, Hong Kong.

Insurance Contracts

This article would not be complete without saying something about insurance contracts. It is impossible to conceive maritime law and maritime operations without insurance. Arbitration is not very usual between insurer and insured. If there is a dispute, there is, first of all, mediation. In any case, the need to balance the interests between the parties to the insurance contract is taken into consideration.

As for vessel insurance, the indemnity is determined by the agreed value established by the parties. For commodities insurance, the two systems in place, the civil law one – abstract – and the common law one – concrete – are prima facie different; however, in fact, the guarantees do not differ.[17] The major problem concerns the relationship between third party and liability insurer, and especially the Protection and Indemnity Club, the shipowner's insurer. Under civil law system, a direct action is possible: the third party may sue the insurer directly. Under the common law system, the rule is different. The liable person must first pay the victim of the damage and after that, this person has recourse against the insurer: the "pay to be paid rule". The question is the following: is it possible for the third party to circumvent the arbitration clause in the contract concluded with the insured party and sue the insurer directly? This question is under discussion. English and French cases are not perfectly clear on this matter.

Some words to conclude. How does one reach a balance of competing interests? One can reach this requirement by law; however, it depends, politically speaking, on which interest the legislator considers to be the one deserving protection. One can reach this requirement by arbitration. It is a better way. Arbitrators are open minded and hear the two sounds of the bell.

A final word: In maritime arbitration, in London, Hong Kong, New York, and Paris, arbitrators consider first of all the intention of the parties; they consider the contract. Pacta sunt servanda is a fundamental principle, especially in maritime arbitration. The music we have to play is "contract first"!

Annex – Awards of the Chambre Arbitrale Maritime de Paris (CAMP) (Maritime Arbitration Chamber of Paris)

1. CAMP n° 1179 – Contract of affreightment; hardship situation; partial execution; force majeure (no). To be validated, the notification of a situation of hardship has to be: (1) unambiguous. (2) given during the period of execution of the contract. (3) followed by the meeting between the parties as planned by the clause. For only one of the three contracts partially executed due to the crisis in the steel industry, the notification fulfilled these requirements, but the conditions of the situation of hardship were not fulfilled nor those of force majeure, because the main obstacle to the execution of the Charterer's commitments had been the freight rate of the contract, which was exactly what the hardship clause ruled out of its application. The charterer was condemned to indemnify the shipowner for its loss of earnings on the basis of the difference between the contract's performance and that of the market at the time of the planned shipment's execution with a deduction of a percentage of 25%, taking into account imponderable factors.

2. CAMP n° 1188 – Rice in bags under bill of lading. Shortage and damages to cargo. Letter of undertaking giving jurisdiction to CAMP. Carrier's liability for shortage (yes). For moisture and torn bags (in part). A receiver, who is the holder of a bill of lading to order, is

17. *See*, e.g., *CAMP n° 1231, infra*, Annex.

entitled to claim against the carrier identified as such on the bill of lading. By applying the Hague Rules, the carrier was found liable to indemnify the holder on a "cost, insurance and freight" (CIF) basis for the whole shortage but for two-thirds only of damages caused by wetting due to condensation, unavoidable on a bulk carrier for the sea passage under consideration, and for half of the bag leakages which could not be prevented whatever means of supervision was used.

3. CAMP n° 1191 – Rice in bags under B/L to order. Surrogate insurer. Loss payee clause. Admissibility (yes). Assessment of loss. Despite some clerical errors in documents produced by the claimant, it appears from the facts that the seller received the indemnity of behalf of the buyer to whom he transferred it (the buyer debtor of the sale price had asked for the insurer to pay the indemnity in the hands of the seller: loss payee clause). Therefore, by virtue of the deed of subrogation delivered by the receiver, the insurer is entitled to claim. The carrier's liability being undisputed, in the absence of official market prices, the arbitrators assessed the damages on the basis of the CIF price invoiced plus 5%.

4. CAMP n° 1195 – Discharging in Ivory Coast. European regulation forbidding any financial relationship with Ivory Coast authorities. Impossibility to perform. Ship owner compensation (yes). Unrecovered expenses (yes). Loss to opportunity of profit (no). The voyage charter to Abidjan was contrary to the European regulation forbidding payment through local authorities at the time of payment, rendering its execution impossible, which vindicated the charterer's decision to cancel the charter-party. However, as the charterer's decision was not free from mistake, the charterer was required to indemnify the shipowner for its unrecoverable expenses, but not for lost opportunity of profit.

5. CAMP n° 1201 – Charter-party Gencon; carriage of lychees to be refrigerated; London reefer clause; cargo damage; vessel's liability; damage assessment. Within a few days after vessel's departure, it appeared that maximum duration of cooling down prescribed by the charter-party would be exceeded, inducing the charterers to request the appointment of a surveyor by the local tribunal of commerce before her arrival. The surveyor, having ascertained large quantities of fungal growth in the cargo, recommended a quick sale after sorting. The subrogated insurers demanded to be indemnified on a market price basis for the losses by the owner. Having dismissed numerous exceptions raised by the defendant regarding the applicability of the arbitration clause, the competence of the arbitral tribunal and the admissibility of the claim, the arbitrators considered that typewritten clauses giving precise instructions on the cooling-down procedure to be followed on board prevailed over the printed clause 2 and the London Reefer Clause which, being mentioned without its wording in the charter-party, obviously had not been discussed during charter-party negotiations. They decided that because the cargo damage was more extensive in the compartments where refrigeration had been the slowest, the causal link between the length of time to cool down the cargo and the damage was ascertained. They assessed the losses on the basis of the amount put forward by the insurers but subtracted a proportion of the damage due to the aging of the lychees after a given date and related sorting expenses.

6. CAMP n° 1204 – Synacomex 90. Political unrest in Egypt. Berthing delayed. Dispute on laytime calculation at discharging. Validity of notice of readiness tendered on roads (yes). Application of clause 25 (no). On the day of her arrival at Damietta, the vessel dropped anchor in the inner anchorage where samples were taken, then was ordered to go on outer roads and came alongside only nine days later. The dispute hinged on the validity of the Notice of Readiness (NOR)[18] tendered on roads and the laytime calculation during waiting time. The charterer put forward the statement of facts, which mentioned a situation of political unrest and curfew, when the owner referred to the Master's remarks pointing out that the port remained open and active. The Tribunal decided that the NOR had been validly tendered on the roads, since sampling was not dealt with in the charter-party and that no reason why the vessel did not go alongside on arrival was given. On the matter of laytime, it considered that clause 25 of charter-party, regarding the exceptions to laytime calculation, should be construed strictly and that the lack of official documentation about the state of the port during the waiting time did not allow for its application.

7. CAMP n° 1215 – Synacomex 90. Social unrests. Strike, curfew. Force majeure (no). Laytime calculation. During the so called "Arab spring", a vessel was chartered to discharge a cargo of wheat in bulk in a Tunisian port. After remittance of her NOR and while the authorities ordered a curfew from 9 PM to 5 AM, the vessel had to wait a few days before coming alongside, and her discharging was frequently interrupted by a sit-in of the receiver's staff. The dispute related to the laytime calculation. The arbitrators considered the charterer did not prove the curfew constituted a force majeure case that prevented discharging. The demonstration of the staff in charge of the discharge was aimed at protesting against the nomination of a new chief executive. This was not sufficient, under French law, to qualify as a strike. In addition, because the charter-party was concluded during the Tunisian events, the charterer could not claim that it was not able to anticipate such disturbances.

8. CAMP n° 1217 – Transport of refrigerated containers. Lack of means of wedging inside containers. Shipper's fault. Carrier's liability (no). Two refrigerated containers, one packed with boxes of frozen chicken and the other with boxes of frozen meat, were loaded in Brazil on different vessels bound for Asia. On arrival, a partial thawing was observed due to obstruction of cold air supply inside the containers caused by the collapse of piles of boxes. The arbitrators considered that for the shipper to pile up boxes inside a container omitting to provide proper dunnage in empty spaces was tantamount to professional misconduct. To no avail, the shipper pleaded the carrier's assumption of liability since it was clear for the arbitrators that the shipper's misconduct was the certain and sole cause of the damages. On the basis of article 4-2.i of the Hague Rules, the carrier was exempted of any liability.

9. CAMP n° 1220 – Synacomex. Wheat in bulk. Cargo wetting. Claimant insurers. Admissibility (yes). Legal subrogation. FIO clause. Shipowner liability (no). During cargo discharging in an African port, heavy rains interrupted operations several times. Some cargo having become wet, the insurer ordered a survey in the receiver's warehouse after the vessel's departure in order to assess the damage. Having indemnified the insured, the subrogated insurer claimed compensation from the shipowner based on the charter-party terms which included the Hague Rules. The shipowner challenged the validity of the subrogation, opposed the claim timebar and, on the merits, maintained that charter-party clause 5 attributed the risk of the discharge operation to the charterer. On the merits, the arbitrators observed that the statement of facts and time sheet showed that holds had been closed in due time before the rain started and that moisture could only happen after the goods were out of the holds. Pursuant to clause 5, cargo was to be discharged at the risk of the charterer, applying consequently a "jurisprudence of CAMP" (this clause prevails over article 3-2 of The Hague Rules).

10. CAMP n° 1221 – NYPE 46. English law. Claimant shipowner. Off hire for cranes breakdowns. Crane damages by stevedores. On the off-hire periods for crane breakdowns, the arbitrators applied an additional clause which, contrary to the printed clause of the charter-party, did not charge the shipowner for the bunkers spent when the hire was reduced proportionally to the number of available cranes and reinstated the periods wrongly deducted when a shore crane was

18. In voyage chartering, the NOR is a document used by the captain of a ship to notify that the ship is ready to load and/or unload goods.

supplied by the shipowner in the place of a broken-down crane. They also declared the charterer liable for the damage to the crane caused by stevedores.

11. CAMP n° 1224 – NYPE Produce. Identification of the carrier. A vessel was time-chartered for the shipment of rice in bags from Vietnam to two ports in West Africa. Shortage and damage due to moisture were ascertained in both discharge ports. The claimant cargo insurers asserted that because the bill of lading was headed with the shipowner's name, it should assume the responsibility of the sea carrier, while the shipowner disputed the admissibility of the cargo insurer's claims as well as the description of sea carrier attributed to it. First, the arbitrators declared the claim admissible after having verified the validity of the subrogation. They then determined that by allowing the name of the owner company in the charter-party, the shipowner was in fact the sea carrier, and legally linked to the bill of lading holders. They therefore held that the shipowner was liable for the shortage but, as far as damage due to moisture was concerned, the amount was to be shared with the time charterer whose fault the shipowner could take advantage of in order to mitigate its liability.

12. CAMP n°1231 – Rice in bags. French marine cargo insurance policy. Ship damage during voyage. Cargo discharging and redirection. Goods depreciation due to late arrival near the use-by-date. Indemnification by insurer (no). Depreciation of the commercial value alone. Natural depreciation not provided.

BIOGRAPHY

PHILIPPE DELEBECQUE has been a Professor at Aix-Marseille University since 1983 and Paris-I (Sorbonne Law School) since 1992. Dr. Delebecque is a Member of French Marine Academy, Vice-President of French Maritime Law Association, President of Maritime Arbitration Chamber of Paris, Member of International Maritime Committee, and former President of French Association of Air and Spatial Law.