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Cover Story

Which type of costs should be taken into account in assessing whether there has been a constructive total loss of a vessel?

Introduction

In June 2019, the UK Supreme Court released a judgment (*Sveriges Angfartygs Assurans Forening (The Swedish Club) v Connect Shipping Inc and another* [2019] UKSC 29), clarifying which type of costs incurred in the salvage of a damaged vessel should take into account when assessing whether such vessel is a constructive total loss or not. Section 60(2)(ii) of the Marine Insurance Act 1906 ("**MIA**") provides that in the case of damage to a vessel, there is constructive total loss where "she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired".

On 23 August 2012, a vessel under the name "Renos" was seriously damaged by an engine room fire while on a voyage in the Red Sea. Salvors were appointed under Lloyds Open Form 2011. The vessel was towed by the salvors to Adabiya, where her cargo was discharged, and subsequently to Suez, where the salvage services ended. Notice of abandonment was served on the insurers on 1 February 2013, while the vessel was at Suez. The "Renos" was insured at an agreed value of US$12m under a hull and machinery policy subscribed by the appellants (among others). The lead hull and machinery insurer was the first appellant, the Swedish Club.

The proceedings

In the High Court, it was agreed by both sides that there had been an insured loss. Although the insurer acknowledged liability for a partial loss, they did not accept the notice of abandonment or a constructive total loss.

The High Court held in favour of the owners of the vessel that there was a constructive total loss and the Court of Appeal concurred with the High Court upon the insurer's appeal.

The judgment

The issues

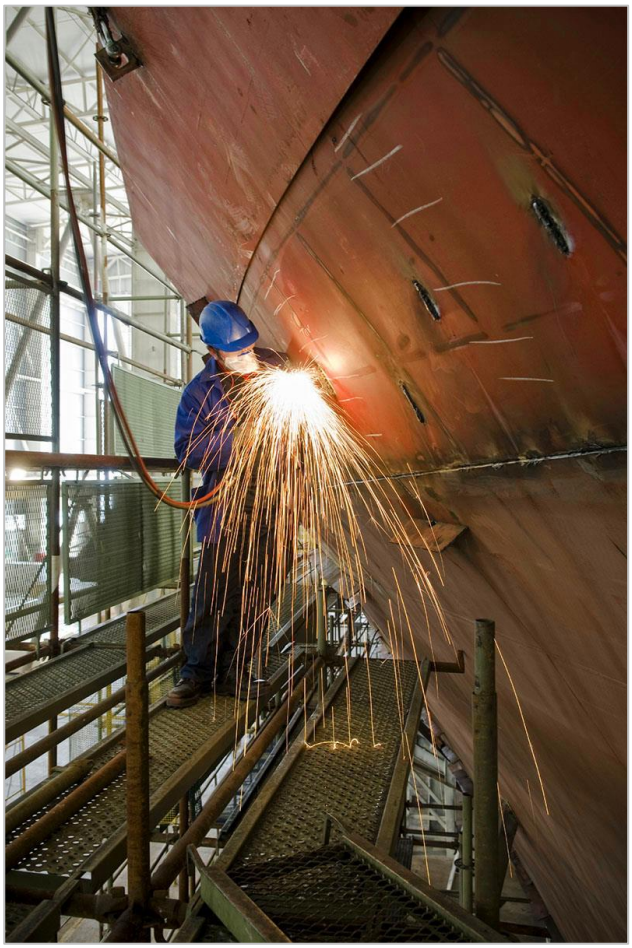
The insurers then appealed to the Supreme Court based on the following two issues:

1. Issue 1: Whether "the cost of repairing the damage" to the vessel under s.60(2)(ii) of MIA includes expenditure already incurred before the service of notice of abandonment;
2. Issue 2: whether the relevant costs include charges payable to the salvors under the SCOPIC (Special Compensation, Protection and Indemnity) clause of Lloyd's Open Form.

Issue 1: Expenditure incurred before notice of abandonment

The Supreme Court did not accept the insurers' argument that expenditure incurred before the service of the notice of abandonment fell outside the scope of costs under s.60(2)(ii) of MIA.

The Supreme Court held that firstly, as a matter of language, the references in the MIA in relation to expenditure which "would" be incurred reflect the hypothetical character of the calculation and not the chronology of the expenditure. Secondly, as a general rule, the loss under a hull and machinery policy occurs at the time of the casualty and not when the measure of indemnity is ascertained. This rule applies even if the loss developed after the time of the casualty. Constructive total loss is a partial loss which is financially equivalent to a total loss, however, whether there has been such loss would depend on the objective facts. It therefore follows from this objective approach and the fact that the loss is suffered at the time of the casualty, that the damage referred to in s.60(2)(ii) MIA is in principle the entire damage arising from the casualty from the moment that it happens. The measure of that damage is its effect on the depreciation of the vessel, represented by the entire cost of recovering and repairing it. Thus, it cannot make any difference when that cost was incurred, where the service of a notice of abandonment is thus irrelevant.



Therefore applying such approach, together with the prospective cost of repairing the vessel, "the cost of repairing the damage" would include all reasonable costs of salving and safeguarding the vessel from the time of the casualty

onwards.

Issue 2: SCOPIC Charges

Under the International Salvage Convention 1989, Article 8(1)(b) provides that in performing salvage services, a salvor had a duty to "exercise due care to prevent or minimise damage to the environment"; and article 14(1) entitles the salvors to "special compensation" from the shipowner in performing their duty under article 8(1)(b). Pursuant to the Lloyds Open Form, it is the liability of the shipowner to avoid environmental damage. It is well settled that "the cost of repairing the damage" includes certain costs not spent directly on the actual repair of the vessel, for example the cost of preliminary steps when their objective purpose was to enable the ship to be repaired. The Supreme Court held that the cost of repairing the damage would generally include salvage charges, the cost of temporary repairs, towage and other steps plainly preliminary to carrying out permanent repairs of the vessel. However, given that the purpose of SCOPIC charges was to protect the potential liability of the shipowner for environmental pollution and had nothing to do with the measure of the damage to the vessel and the possibility of repairing her, the Supreme Court held that the SCOPIC charges cannot be taken into account when deciding whether the vessel is constructive total loss or partial loss.

The Supreme Court thus unanimously allowed the appeal in part, dismissing issue (1) but allowing it on issue (2), and remitted the case back to the High Court to determine whether there was a constructive total loss.

Conclusion

Under this judgment, the Supreme Court has clarified the position on which type of costs should be counted under s.60(2)(ii) of MIA in determining whether there has been a constructive or partial loss of a vessel. In particular, the Supreme Court has overturned the decision of the lower courts, holding that, contrary to the widely held view, that SCOPIC charges were not part of the salvage costs which would be counted towards the "repair of the damage" and could not be taken into account for the purposes of the MIA.

Shipowners and insurers should be aware of the potential significant financial consequences of this distinction, as Lloyd's Open Form is a world-standard for salvage contracts and the SCOPIC clause is included by most parties as a matter of course.

MPA suspends another bunker operator in Singapore

The Maritime and Port Authority of Singapore (the "**MPA**") suspended the bunker craft operating licence of Inter-Pacific Petroleum, a bunker craft operator and supplier. The MPA announced that it was investigating Inter-Pacific Petroleum after an enforcement check for using a magnet to tamper with the mass flow metering system of its bunker tanker, Fragrance, during bunkering operations. The MPA did not comment whether the enforcement check was part of routine operations or a more focused campaign.

This was the second suspension of a similar kind in just over a month. In April 2019, the bunker craft operator licence of Southernpec (Singapore) was suspended by the MPA after the company was found to be using a magnet to interfere with the mass flow meter on board a tanker during a bunkering operation. Southernpec's bunker craft operator licence and supplier license were subsequently revoked.

UN orders Nigeria to release Swiss tanker

The International Tribunal for the Law of the Sea ordered Nigeria to release the "San Padre Pio", an oil tanker managed by Switzerland-based ABC Maritime, and its crew which had been detained since January 2018.

The Nigerian navy intercepted and arrested the "San Padre Pio" in January 2018 and alleged that the oil tanker was "engaged in one of several ship-to-ship transfers of gasoil". 16 crew members were detained in prison and charged with "conspiring to distribute and deal with petroleum product without lawful authority or appropriate license, and with having done so with respect to the petroleum product on board". Switzerland lodged a complaint with the International Tribunal and argued that the vessel had been in international waters and its seizure constituted a violation of international law.

The International Tribunal ruled that the "San Padre Pio" "has not only been detained for a considerable period of time but also that the vessel and its crew are exposed to constant danger to their security and safety". Nigeria was ordered to release the "San Padre Pio", its cargo and the crew members upon the posting of a bond or other financial security by Switzerland. The bond level payable by Switzerland was set at US$14 million.

UK sets out ambitions for maritime in zero-emission era

The Department for Transport of the UK government revealed in its Maritime Annual Report 2018-2019 (the "**Report**") that the maritime sector contributed £14.5 billion to the national economy in 2017 and provided an indirect boost of more than £37 billion.

The Report together with a previously published Clean Maritime Plan set out the vision of the UK government to maintain the momentum in the maritime strategy and to turn the UK into a "word-leading maritime hub", which is in line with the Maritime 2050 initiative launched in 2018. The Department of Transport also plans to set up a Centre for Smart Shipping and will continue working with industry to develop maritime innovation hubs in general, and with the Maritime Research and Innovation UK to develop initiatives in clean and smart shipping.

In addition, a new Maritime UK Solent cluster shall be launched gathering various stakeholders including the academia, two major ports, a major naval base, commercial vessel operators, manufacturers, technology hubs and the leisure marine sector.

LPG carrier caught breaching sulphur limit off Shanghai

A surveillance ship of the Shanghai Maritime Safety Administration spotted a Panama-flagged liquefied petroleum carrier "emitting black smoke from its stern" when passing through waters off Shanghai, which violated China's sulphur emission rules. The carrier appeared to be the Vietnam-based Blue Energy & Maritime (BME Shipping).

This year, Beijing has put into effect national shipping emission control areas ("**ECAs**"), which cover nearly all of China's territorial sea and large parts of the Yangtsz and Pearl Rivers. The emission limits for the coastal ECAs and inland water ECAs are 0.5% and 0.1% sulphur content respectively.

According to the Chinese authorities, the surveillance ship used its onboard sniffer sensor and dispatched a drone equipped with an exhaust gas detector which found that the liquid petroleum gas carrier was burning high sulphur fuel oil. The authorities said the detection marked a "breakthrough" by utilising new technologies to implement the nation's vessel emission regulation.

Aprile SpA and others v Elin Maritime Ltd (Elin)

[2019] EWHC 1001 (Comm)

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Facts

On 10 June 2016, by a non-negotiable bill of lading (the "**Bill of Lading**"), the agent of the shipowner acknowledged shipment on board the motor vessel "ELIN" (the "**Vessel**") of 201 packages of cargo in apparent good order and condition for carriage. During the voyage, the Vessel encountered heavy seas and some cargo was lost and/or damaged. The Claimants, being the shipper, the consignee, the notify address of the Bill of Lading, and the insurer of the cargo on the voyage (collectively the "**Cargo-interests**"), brought a claim in contract, tort, and bailment against the shipowner for the loss of and/or damage to deck cargo. Whilst there is a dispute as to whether the balance of the cargo which was lost and/or damaged was carried in the Vessel's hold or on deck, the Court ordered the trial of the preliminary issue stated hereinbelow:-

> *"Whether, on a true construction of [the Bill of Lading], [the shipowner] is not liable for any loss or damage to any cargo carried on deck howsoever arising, including loss or damage caused by unseaworthiness and/or [the shipowner]'s negligence."*

The shipowner argued that, the plain and clear wordings in pages 1 and 2 of the Bill of Lading exclude all its liability for the carriage of deck cargo and the Court should not re-write parties' bargain so that they will mean something different from its clear wording:-

> *"Page 1: The Carrier shall in no case be responsible for loss of or damage to the cargo, <u>howsoever arising</u> … in respect of deck cargo."* (emphasis added)
>
> *"Page 2: [70 packages identified on the list attached thereto were] loaded on deck at shipper's and/or consignee's and/or receiver's risk; the carrier and/or Owners and/or Vessel being not responsible for loss or damage <u>howsoever arising</u>."* (emphasis added)
>
> (collectively "**Exclusion Clauses**")

The Cargo-interests contended, among other things that, first, <u>*The Imvros*</u> [1999] 1 Lloyd's Rep 848 (cited by the shipowner) has been criticized by academics and the Singapore Court as wrong since it is inconsistent with prior rulings; secondly, the implied obligation of seaworthiness was a fundamental and overriding obligation and the Exclusion Clauses shall not cover a breach of absolute obligation of seaworthiness unless clearly worded according to <u>*R v Canada Steamship Line*</u> [1952] A.C. 192; and thirdly, the wordings of the Exclusion Clause are not sufficiently clearly drafted to exclude liability for negligence.

Held

The Court held in favour of the shipowner that, upon the true construction of the terms of the Bill of Lading, the Exclusion Clauses, which provide that it will not be liable for loss of or damage to deck cargo "howsoever arising", can exclude all loss or damages, including the liability for its negligence and failure to perform due diligence to make the ship seaworthy.

At the outset, the Court noted that the carriage of deck cargo is inherently risky and deck cargo is in a special category concerning claims for general average. The Court also commented that clause limiting or excluding liability shall be interpreted precisely in the same way free from prior case authorities yet with the guidance therein in mind.

Further, same or similar wordings of exclusion have been held to exclude both liability for unseaworthiness causing the loss of cargo (*The Imvros*) and liability for negligence causing the loss of cargo (*Travers v Cooper* [1915] 1 K.B. 73 and *The Danah* [1993] 1 Lloyd's Rep. 351). There is also no case justifying a departure from the aforesaid authorities.

The Cargo-interests contended that *The Imvros* is inconsistent with *The Galileo* [1914] p.9, *R v Canadian Steamship Company* [1952] A.C. 192, *Steel v State Line S.S. Co.* [1877] 3 A.C. 72, *Owners of the Cargo on Ship "Maori King" v Hughes* [1895] 2 Q.B. 550, and *Belships v Canadian Forest Products Ltd* (1999) A.M.C. 2606. The Court disagreed with the Cargo-interests' contention and held that:-

1. There is nothing in *The Galileo* challenging the conclusion as to the true construction of the words "without responsibility for loss and damage whoever caused" in *The Imvros*.
2. It is wrong to adopt the mechanistic application of the three propositions espoused in *R v Canada Steamship Lines Limited* as they are just aids to construction. The Court bears the duty to construe the Exclusion Clauses to see what they plainly mean to any ordinarily literate and sensible person.
3. The exclusion clause in *Steel v State Line S.S. Co*.and *The Maori King* applied during the voyage and after the ship had set sail, and it was for this reason the implied obligation of seaworthiness was unaffected by the exemption clause. Nevertheless, *The Imvros* was interpreted as being applicable both before and during transit.
4. *Belships v Canadian Forest Products Ltd* was wrongly decided upon a mechanistic application of *R v Canada Steamship Lines Limited*.

In light of the aforesaid, the Court held that the shipowner is not liable for any loss or damage to deck cargo howsoever arising, whether caused by unseaworthiness or by negligence.

Ark Shipping Co LLC v Silverburn Shipping (IoM) Ltd

[2019] EWCA Civ 1161

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Facts

The shipowner bareboat chartered its vessel "*ARCTIC*" (the "**Vessel**") to the charterer for a period of 15 years under the charterparty on an amended BARECON 89 Form (which is a standard form commonly used in bareboat charter) dated 17 October 2012 ("**Charterparty**"). On 31 October 2017, the Vessel arrived at the Caspian port of Astrakhan for repairs and maintenance. The Vessel's class certificate expired on 6 November 2017, which is before she entered dry dock for repairs and some five years after her last special survey in 2012. On 7 December 2017, the shipowner sent a notice to the charterer, purporting to terminate the Charterparty and demand for the return of the Vessel on the ground that the charterer had breached Clause 9A of the Charterparty stated hereinbelow by failing to maintain the Vessel in class:-

> "*…[the Charterer] shall keep the Vessel with unexpired classification of the class indicated in Box 10 and with other required certificates in force at all times*…" (the "**Term**")

On 12 March 2018, two maritime arbitrators held that the Term was not a condition and charterer's obligation to maintain the Vessel in class is not absolute. On 22 February 2019, the High Court reversed the ruling of the arbitrators and held in favour of the shipowner that the Term was a condition and the obligation to maintain the Vessel is absolute rather than merely requiring due diligence exercise. The charterer therefore appealed to the Court of Appeal on the issue of whether the Term is a condition or an innominate term.

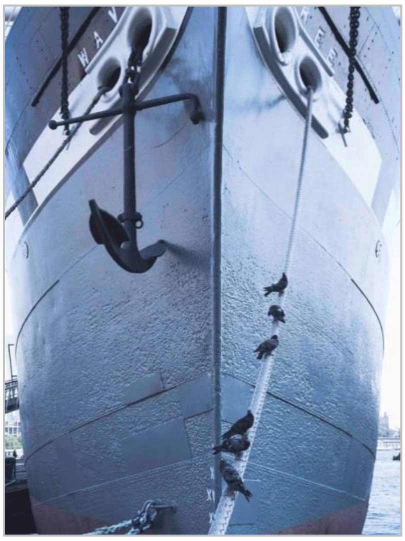

Photo by Simon Abrams on Unsplash

In the appeal, the shipowner relied much on *Bunge v Tradax* [1981] 1 WLR 711 and *The Seaflower* [2001] 1 All ER (Comm) 240, whereas the charterer submitted that these authorities were clearly distinguishable.

Ruling

The Court of Appeal allowed the appeal and held that, whilst the Vessel's classification status is a matter of status, which is important and as distinct from the physical condition of the Vessel, it still does not suffice to make the Term a condition since:-

1. The Term was not expressed to be a “condition”.

2. There is no temporal element in the Term (which is a consideration under ***Bunge v Tradax***).

3. There is no inter-dependence between the Term and other terms. These are key considerations under ***Bunge v Tradax***.

4. Despite the importance of classification status of the Vessel, it was outweighed by a plethora of the factors stated above and below.

5. The Term is located in middle of Clause 9A, which is an industry standard form. Such structure strongly suggested that the Term was not a condition.

6. The Court considers that the scope of “other required certificates in forces” is wide and could not be limited to the certificates required by class. It therefore only points towards two conclusions, which are first, only a part of the Term is a condition (which is an unattractive and improbable construction), or secondly, the 15-year charterparty could be terminated by the shipowner upon any breach in respect of any of the certificates required. The width of the charterer’s obligation in this regard is damaging to the shipowner’s case.

7. The shipowner’s submission that a breach of the Term potentially puts the Vessel’s insurance at risk and that Term shall therefore be classified as a condition is unsustainable since leaving a Vessel uninsured does not constitute a breach of condition, let alone putting the Vessel at risk of being uninsured.

8. Breach of the Term may likely result in different consequences (namely trivial, minor or very grave consequences). It therefore suggested that the Term is innominate rather than a condition since no inquiry as to the gravity of the actual consequence is necessary in the case of condition.

9. Whilst a statement as to a vessel’s class at the commencement of the charterparty may be a condition, the Court is not persuaded that a 15-year warranty to maintain the Vessel in class at all times is also a condition, bearing in mind that the risk of trivial breaches having disproportionate consequences destructive of a long-term contractual relationship may overweigh the advantages of certainty.

In light of the aforesaid, the Court of Appeal construed the Term, which imposed an obligation on the charterer to keep the Vessel with unexpired classification and other required certificates in force at all times, to be an innominate term.

Classic Maritime Inc v Limbungan Makmur SDN BHD & another

[2019] EWCA Civ 1102

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Facts

On 29 June 2009, the charterer and the shipowner entered into a long-term contract of affreightment for shipments of iron ore ("**COA**"). Pursuant to the COA, seven shipments should have taken place between July 2015 and June 2016. On 5 November 2015, a dam burst occurred at the Fundao dam, where iron ore was mined. Due to the dam burst, the charterer was unable to perform the contract in respect of five shipments but even if the dam burst had not occurred, the charterer would have defaulted anyway.

The charterer's defence was that he was not liable according to Clause 32 of the COA labelled "EXCEPTIONS" ("**Exception Clause**"), which provides that:-

> "*[n]either the Vessel, … nor the Charterers,… shall be responsible for loss or damage to, or failure to supply, load, discharge or deliver the cargo resulting from: … accidents at the mine…; or any other causes beyond the … Charterers' … Control; always provided that any such events directly affect the performance of either party under [the COA]. If any time is lost due to such events or causes such time shall not count as Laytime or demurrage (unless the Vessel is already on demurrage in which case only half time to count).*"

The High Court held that the charterer was not entitled to rely on Exception Clause referring to "accident at the mine" because it would not have been ready to provide cargoes for shipment even the dam burst had not occurred. The charterer therefore breached of its duty under COA. Nevertheless, the Court compared the position the shipowner was actually in with the position it would have been in had the charterer been able and willing to supply and ship the cargoes but for the dam burst. Following such comparison and due to the Court's consideration that the shipowner would otherwise be put in a better financial position, the shipowner was awarded nominal damages of US$1 for each of the five shipments.

The shipowner appealed on the issue of damages and the charterer cross-appealed on the issue of liability.

Issue

1. Whether it was necessary for the charterer to prove that, but for the dam burst, it could and would have performed and complied with the COA?

2. Whether the shipowner can recover substantial damages as a result of the charterer's breach of COA under the compensatory principle?

Held

The Court of Appeal ("**CA**") dismissed the charterer's cross appeal and allowed the shipowner's appeal.

On the first issue, CA concurred with the shipowner and held that, the wordings "resulting from" and "directly affect the performance" in Exception Clause impose a causation requirement and therefore, the charterer shall prove that the dam burst directly affected the performance of the charterer's obligations. CA disagreed with the charterer's submission that causation needed not be established when dealing with the "contractual frustration" clause as established in the line of authorities in *Bremer v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109 and *The Golden Victory* [2007] UKHL 12. CA considered that, Exception Clause should not be analyzed on the basis that it is a contractual frustration clause and further commented that what matters is the construction and the language of the Exception Clause. As such, CA held the charterer liable since, fairly speaking and based on the factual finding of the High Court, the charterer's failure to perform was not "resulted from" the dam burst and the dam burst did not "directly affect" the charterer's performance of its obligation. By the same token, the causation requirement is also imported to the final sentence of the Exception Clause, namely the time-lost clause.

On the second issue, CA held that, the compensatory principle is that the victim of a breach of contract is entitled to be put in the same position as if the contract had been performed, and therefore, damages for the breach of contract is a comparison between the position which the shipowner was in as a result of the breach and the position it would have been in if the contract had been performed and the charterer had supplied the cargoes. CA further ruled that, the charterer's obligation was to supply cargo and it would be in breach for failing to do so regardless of whether it was willing to perform its obligation. Thus, CA found the High Court erred in its application of the compensatory principle when it ruled that, firstly, the charterer's obligation was to be ready and willing to supply a cargo, and secondly, the comparison should be made with reference to the shipowner's position if the charterer had been ready and willing to perform and the shipowner's position. In light of the aforesaid, since the shipowner and the charterer agreed that the comparison conducted by CA would result in a damages award of more than US$19 million, the damages were so awarded.

Should we use arbitration to resolve shipping disputes?

Introduction

Arbitration is a consensual alternative dispute resolution process where parties agree to submit their disputes to be resolved by one or more arbitrators instead of resolving through Court proceedings. Arbitration is private and confidential, and there are no restrictions on who may represent the parties in an arbitration.

The use of arbitration for resolution of maritime disputes has long been the conventional practice in many countries, and the number of maritime arbitration is expected to continue to grow. Indeed, arbitration has various inherent advantages over litigation.

Informal and confidential nature

Given the informal and less litigious nature of arbitration, arbitration is relatively less damaging to the business relationship between parties to a dispute. Parties of the shipping industry, especially Chinese companies and businessmen, often prefer a non-confrontational mean of dispute resolution. In addition, media attention is most unlikely as the entire arbitration process, including the arbitral hearing, is conducted privately and is confidential. This helps maintain harmony between the parties, avoids open animosity or hostility, and is conducive for future commercial dealings.

Appointment of arbitrator(s)

As maritime disputes often involve issues of a technical nature, parties may wish to select arbitrators with sufficient experience and the right field of expertise to determine their disputes, rather than relying on judges who may not have such experience or expertise. This allows more accurate and fairer outcomes of dispute resolution and avoids possible prejudice to parties.

In Hong Kong, a list of arbitrators with commercial or legal experience in maritime fields has been maintained by the Maritime Arbitration Group, a division of the Hong Kong International Arbitration Centre ("**HKIAC**") formed in February 2000 for promoting the use of maritime arbitration in Hong Kong.

Enforceability

Arbitral awards are easily enforceable in foreign courts through the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**"). This is particularly important in the context of resolving disputes in Hong Kong. When compared to a judgment grant by the courts of Hong Kong which is enforceable in only a

handful of foreign countries, an arbitral award can be enforced in all the contracting states of the New York Convention (approximately 160 states as of April 2018). In addition, in 1999, the People's Republic of China ("**PRC**") and Hong Kong signed the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region, by virtue of which it is now established that Hong Kong arbitral awards can be enforced in the PRC and vice versa.

In contrast, judgments made in Hong Kong courts have a smaller degree of foreign enforceability, and notably is not directly enforceable in the United States and Japan, which are where many trading partners or contracting parties in maritime commercial activities are from.

Cost-effectiveness

Arbitration is generally more cost effective than litigation due to various reasons. First, arbitration is flexible and can usually be resolved in a short period of time. This lowers legal costs and related administrative costs. Unlike the judge of a court of law whose diary is often packed with court hearings, an arbitrator is usually less tied up and more willing to take a proactive role in monitoring the progress of the arbitration. Speedy dispute resolution can reduce uncertainty in a company's business and cash flow.

Maritime arbitrations can be conducted in the absence of an oral hearing, i.e. on a "documents only" basis, thereby greatly saving time and costs incurred by parties. The HKIAC "Documents Only" arbitration procedure is available where parties have agreed, or where the arbitration tribunal has directed, that no oral hearing is needed. This "Documents Only" procedure is suitable for straightforward maritime disputes where there is only one single issue at stake and/or smaller amounts are involved. Parties are required to submit their submissions with supporting documents in accordance with the strict time limits imposed under the relevant procedural rules in order to ensure that the dispute can be resolved in a timely manner.

Furthermore, the HKIAC has introduced the HKIAC Small Claims Procedures to deal with low value shipping disputes, such as small claims for outstanding charter hire. The claim or counterclaim involved may not exceed the sum of US$50,000. The arbitration fee to be paid by the claimant to the arbitrator is fixed at HK$15,000, and a further HK$7,500 for any counterclaim that exceeds the value of the original claim shall be paid by the respondent. HKIAC charges HK$1,500 for appointment of an arbitrator. These are trivial amounts when compared to the costs in pursuing litigation.

Another advantage of arbitration over conventional litigation is the permission to resort to third-party funding for arbitration. Hong Kong allows a third party funder to provide funding to a party under a written funding agreement in return for a financial benefit without committing the common law tort and offence of champerty and maintenance. This applies to both arbitral proceedings in Hong Kong, and for work done in Hong Kong on arbitrations outside the territory.

Due to poor economic conditions in recent years, many ship owners and their insurers are open to adopting third party funding arrangements in relation to charterparty arbitrations, being the most common form of

shipping arbitration. Third party funding can be very useful in various high-value maritime arbitration matters, including ship building or repair disputes, and ship sale and purchase disputes. In addition, if a ship owner or charterer is declined by or finds itself not protected under its traditional freight, demurrage, defence coverage and/or protection and indemnity insurance, it may resort to funding discussion with a commercial funder.

While arbitration is generally more cost-effective than litigation, there may be scenarios where the arbitration process becomes protracted and costly. For example, high-value shipping transactions can be very complex and may involve multiple parties based in different jurisdictions who between them enter into several related contracts. In order to save time and money, it is ideal for the parties to resolve all disputes in one set of legal proceedings, rather than in many different (but related) proceedings.

Whilst the above can be easily achieved through litigation at court, it is quite difficult to do so in arbitral proceedings due to the fact that arbitration is a consensual process. If some contracts stipulate arbitration but some do not, the dispute resolution process may become protracted, complicated and costly when parties are caught in parallel disputes in different forums with potentially inconsistent outcomes. A party's case in an arbitration may largely depend on the findings of another related arbitration. This raises the question of how the two arbitrations should be managed and whether they should be heard together. Any attempt to have a dispute involving multiple contracts heard in one single arbitration may also raise the issue of whether all parties concerned have agreed to arbitration involving all other parties. Notwithstanding the above, parties may counter the said difficulties in multi-party disputes by carefully drafting arbitration agreements and including joinder and consolidation provisions.

Active government support

Maritime arbitration enjoys strong support from the Hong Kong and Chinese government. In the Hong Kong Chief Executive's 2018 policy address, the Chief Executive acknowledged the importance of the maritime sector in driving Hong Kong's economic development, and suggested ways to bolster Hong Kong's maritime industry, including implementing measures in support of Hong Kong's provision of reliable and quality dispute resolution services for the global maritime industry, as well as providing funding for the development of a Belt-and-Road e-arbitration platform. The above will no doubt further expedite and improve the quality of maritime arbitration, especially arbitrations relating to parties along the Belt-and-Road. The Chinese government has also indicated support of Hong Kong's position as an international legal hub and its plans to become the arbitrator of Belt-and-Road disputes. This will certainly bring benefits to the development of maritime arbitration and result in more efficient and reliable arbitration proceedings in future.

Finality

Unlike a court judgment, an arbitral award is subject to very limited rights of review by the Court. The Court may only set aside an award on very limited grounds, for example, where a party is not given proper notice of the

appointment of the arbitrator or where the arbitrator has exceeded his jurisdiction.

While the finality of award makes arbitration a quick and certain method of dispute resolution, it may also render the results unfair to one of the parties. The court's limited power to set aside an arbitral award may bar a wronged party from seeking redress. However, this concern can be partly mitigated by appointing experienced and impartial arbitrators to determine the dispute.

Conclusion

Arbitration has distinct advantages over litigation: speedy resolution, a high degree of foreign enforceability and commercially amicable. It is an attractive option for parties who desire an expedient resolution of dispute and wish to avoid lengthy confrontations. However, it should be noted that when the dispute involves multiple parties or a complex situation, arbitration may become protracted. Parties should exercise care in drafting arbitration clauses, choosing arbitral rules and appointing arbitrators so as to mitigate the risks discussed above.

For enquiries, please contact our Litigation & Dispute Resolution Department:

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