Resolution of Maritime Disputes: Ad-hoc vs Institutional Mechanisms

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ABSTRACT

Maritime industry had for long, recognised the relevance and significance of arbitration as a method of dispute resolution. The industry has been utilizing quasi-ad-hoc mechanism in conducting its arbitrations. Of recent, the industry is witnessing a phenomenal shift from the traditional quasi –ad-hoc mechanism to institutional mechanisms whereby special administrative centers dedicated to the resolution maritime disputes are being established to administer the dispute resolution. Recently, the government of Dubai in the United Arab Emirates, pursuant to Decree No (14) of 2016 had established Emirates Maritime Arbitration Center with the objective of settling local and international maritime disputes using alternative dispute resolution methods. The paper investigates the two approaches of adhoc vs institutionalism of administering dispute settlement in the maritime industry from a tailored analytical tool of 'access to arbitration' mirrored on the well-established legal principle of access to justice.

Keywords: Arbitration, Mediation, Jurisdiction, Adhoc, Institutional

1. INTRODUCTION

Maritime arbitration is one of the leading commercial areas that promoted the resort to arbitration as a method of resolving disputes.¹ Although what characterizes a dispute as maritime or otherwise can be legally absurd, any dispute involving vessels, ship, salvage have all been regarded by precedence as maritime disputes.² The dispute generally covers diverse areas³ such as charter party, shipbuilding, sale and purchase of ships, and other sale of goods transaction requiring transportation by sea.⁴

¹ For a general discussion on arbitration, See Nigel Blackaby and others, *Redfern & Hunter on International Arbitration* (5 edition, Oxford University Press 2009).

² 'Martucci - USING PRINCIPLES AND POLICIES OF MARITIME ARBITRAT.Pdf' <<https://cardozoocr.com/wp-content/uploads/2012/12/CAC109.pdf>> accessed 31 October 2018.

³ FD Rose, *International Commercial and Maritime Arbitration* (Sweet & Maxwell Ltd 1988).

⁴ J Lew and others, *Arbitration in England. Including Chapters on Scotland and Ireland* (Kluwer Law International 2013) 145.

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The choice of arbitration in resolving maritime disputes may not be unconnected with the appeal arbitration has enjoyed over a period of time from the era of *lex maritima* to the contemporary admiralty and maritime law.⁵ Arbitration has provided a solution to the myriad problems encountered by the industry in the absence of global regulatory framework. With the birth of International Maritime Organization (IMO), arbitration as an international law mechanism of dispute settlement was well-embraced by the IMO legal framework.⁶ To date, arbitration has continued to serve maritime industry in the context of both interstate and pure commercial or transnational arbitration.⁷ The latter form of arbitration ie commercial and transnational maritime arbitration is the preoccupation of this paper.

Maritime disputes are generally understood to be resolved through litigation or ad-hoc dispute resolution mechanisms. The nature of resolution of maritime disputes was largely regulated through quasi ad-hoc mechanisms whereby rules are developed by maritime associations to facilitate the resolution of the disputes. The preference of London and New York as major global hubs in resolving maritime disputes may not be unconnected with the adoption and the maturity of the framework established whereby maritime disputes are resolved through the ad-hoc/quasi ad-hoc mechanism. In essence, maritime industry had for long, recognized the relevance and significance of ad-hoc dispute resolution processes. Of recent, the industry is witnessing a shift from the traditional quasi –ad-hoc mechanism to institutional mechanisms whereby special centers dedicated to the resolution maritime disputes are being established to administer the dispute resolution. Recently, the government of Dubai in the United Arab Emirates, pursuant to Decree No (14) of 2016 had established Emirates Maritime Arbitration Center with the objective of settling local and international maritime disputes using alternative dispute resolution methods.⁸ This pattern of institutional mechanism differs from the style adopted by pioneer regimes such as London Maritime Arbitrators Association etc. While the shift from adhoc or quasi-adhoc to institutional mechanism has numerous advantages, other factors may reveal the disadvantages of institutional mechanism in designing a framework for the resolution of maritime disputes. The paper investigates the two approaches of adhoc vs institutionalism of administering dispute settlement in the maritime industry and further prioritizes the approach that best suits the industry demand and the dictates of justice

The paper is divided in to four major sections. After the introduction, section one provides an analytical account of features of maritime arbitration. Section two introduces a tailored tool of ‘access to arbitration’ as an intellectual lens, mirrored in the image of the principle of ‘access to justice’.⁹ Section three analyses the ad-hoc vs institutional approaches to regulating maritime arbitrations and contextualizing the discourse with the Emirates Maritime Arbitration (EMAC). Section four concludes with the challenges and recommendations towards a legally efficient approach to maritime arbitration.

⁵ William Tetley, ‘The General Maritime Law - The *Lex Maritima*’ (1994) 20 *Syracuse Journal of International Law and Commerce* 105.

⁶ ‘IMO General Terms and Conditions Standard.Pdf’

<<http://www.imo.org/en/About/Procurement/Documents/IMO%20General%20Terms%20and%20Conditions%20standard.pdf#search=arbitration>> accessed 31 October 2018.

⁷ Jose M Alcantara, ‘An International Panel of Maritime Arbitrators?’ (1994)121) 11 *Journal of International Arbitration* 117.

⁸ ‘EMAC - Home’ <<https://www.emac.org.ae/en/Pages/default.aspx>> accessed 31 October 2018.

⁹ Francesco Francioni, ‘Access to Justice, Denial of Justice and International Investment Law’ (2009) 20 *European Journal of International Law* 729.

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2. METHODOLOGY:

The research problem sought to be addressed is the dilemma between ad-hoc vs Institutional arbitral mechanism in resolving maritime disputes. In other words, which of the approaches provides more access to arbitration and further suits the industry demand. The notion of ‘access to arbitration’ is conceptualized as the intellectual lens of evaluating the two contending approaches. Access to arbitration as conceptualized in this paper denotes the ability of parties to have their chosen arbitral mechanism, and the extent of engagement with systemic barriers hindering access to arbitration mechanism. The paper adopts doctrinal legal research where the research problem will be addressed from the prism of hierarchical structure of sources of law. First, the primary sources of International Conventions, treaties, agreements forming part corpus juris of international law would be analyzed. Principles of *lex mercatoria* and *lex maritima* as encapsulated in international arbitration rules will be ranked a par with international agreements for sequencing and ordering. In addition, case law including international arbitral awards would be analyzed to support the legal arguments hypothesized by the paper. At the domestic legal systems, national legislations, cases, and domestic arbitral awards will form part of the primary sources of evidence to support the hypothesized legal argument. In addition, secondary sources containing opinion and arguments of major publicists would be used to complement the primary sources in analyzing the legal problem sought to be addressed by the paper.

3. FINDINGS AND CONCLUSIONS:

The paper concludes with the following:

The need to have a specialized mechanism for resolving maritime dispute is not only desirable but necessary owing to the peculiar nature of maritime industry and the need to ensure that only lawyers and industry experts with requisite knowledge and expertise are suitable to handle maritime arbitration cases or act as arbitrators and mediators to resolve maritime disputes. In this context, the paper concedes to the absence of demarcation between maritime and other closely related sectors such as energy, oil and gas and construction industries.

Flowing from the necessity of having a specialized mechanism for resolving maritime disputes, the paper finds the notion of ‘access to arbitration’ as one of the most important tools necessary, complementing legal efficiency and party autonomy in the design of a legal framework for the resolution of maritime disputes.¹⁰ In other words, access to arbitration need to trump any obstacle that could militate against the realization of access to maritime arbitration.

In addition, the paper recognizes the importance of institutional arbitration and the advantages it posits to maritime industry. Access to arbitration as conceptualized pursuant to the principle of party autonomy supports this finding. Institutional arbitration administered by maritime arbitration centers can facilitate access to arbitration, enlarge the scope of type disputes to be accommodated by the arbitration centers and further complement the variety of choices made by parties in maritime arbitration.

On the other hand, the paper finds that the narrative of institutional arbitration as a panacea to maritime industry concerns can hardly be described as ‘all-rosy’. On the contrary, experiences of some institutional arbitration mechanisms such as ICSID shows that institutional arbitration if not carefully designed and monitored may have a negative effect on access to arbitration. Indeed, maritime industry may not be an exception unless pro-access principles are prioritized in the legal instruments establishing the institutions and the jurisprudence coming out from the arbitral institutions.

¹⁰ Carlos Esplugues, ‘Some Current Developments in International Maritime Arbitration’ (Social Science Research Network 2009) SSRN Scholarly Paper ID 1952777 70 <<https://papers.ssrn.com/abstract=1952777>> accessed 31 October 2018.

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REFERENCES

- Alcantara JM, 'An International Panel of Maritime Arbitrators?' (1994) 11 *Journal of International Arbitration* 117
- Blackaby N and others, *Redfern & Hunter on International Arbitration* (5 edition, Oxford University Press 2009)
- 'EMAC - Home' <<https://www.emac.org.ae/en/Pages/default.aspx>> accessed 31 October 2018
- Esplugues C, 'Some Current Developments in International Maritime Arbitration' (Social Science Research Network 2009) SSRN Scholarly Paper ID 1952777 <<https://papers.ssrn.com/abstract=1952777>> accessed 31 October 2018
- Francioni F, 'Access to Justice, Denial of Justice and International Investment Law' (2009) 20 *European Journal of International Law* 729
- 'IMO General Terms and Conditions Standard.Pdf' <<http://www.imo.org/en/About/Procurement/Documents/IMO%20General%20Terms%20and%20Conditions%20standard.pdf#search=arbitration>> accessed 31 October 2018
- Lew J and others, *Arbitration in England. Including Chapters on Scotland and Ireland* (Kluwer Law International 2013)
- 'Martucci - USING PRINCIPLES AND POLICIES OF MARITIME ARBITRATION.Pdf' <<https://cardozo.jcr.com/wp-content/uploads/2012/12/CAC109.pdf>> accessed 31 October 2018
- Rose FD, *International Commercial and Maritime Arbitration* (Sweet & Maxwell Ltd 1988)
- Tetley W, 'The General Maritime Law - The Lex Maritima' (1994) 20 *Syracuse Journal of International Law and Commerce* 105