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## Maritime arbitration : a case study of Vietnamese law and practice

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**WORLD MARITIME UNIVERSITY**

Malmö, Sweden

**MARITIME ARBITRATION:**

**A Case Study of Vietnamese Law and Practice**

By

**NGUYEN QUANG ANH**

**Vietnam**

A dissertation submitted to the World Maritime University in partial  
Fulfilment of the requirements for the award of the degree of

**MASTER OF SCIENCE**

In

**MARITIME AFFAIRS**

**(SHIPPING MANAGEMENT)**

2004

## DECLARATION

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

Signature: .....

Date: .....**30 August 2004**.....

Supervised by: **Aldo Chircop**  
**World Maritime University**

---

Assessor: **Patrick Donner**  
Institution/organization: **World Maritime University**

Co-assessor: **Maira McConnell**  
Institution/organization: **Dalhousie University**

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## **ABSTRACT**

Title of Dissertation: **Maritime Arbitration:  
A Case Study of Vietnamese Law and Practice**

Degree: **M.Sc.**

This dissertation surveys the law and practice of maritime arbitration with a focus on the case of Vietnam. Arbitration is juxtaposed against admiralty proceedings to clarify the relationship between the two modes of dispute settlement in the maritime context. The advantages of arbitration are identified and in particular with reference to the carriage of goods by sea. However, there continues to be an active relationship between the two, and this is illustrated in the different stages of arbitration and conflicts of law issues.

The discussion also considers issues of validity, construction and legal effect of the arbitration agreements in standard contracts of carriage. The incorporation of the arbitration agreement in the charterparty into the bill of lading has important legal effect on third parties.

Although young and incomplete, the practice of maritime arbitration in Vietnam is very important for maritime trade for that country. Vietnam has recently adopted new legislation on commercial arbitration which is expected to have a significant impact on maritime arbitration. In particular in this context, the enforcement of arbitral awards is reviewed from both domestic and international perspectives.

The dissertation concludes with recommendations aimed at strengthening maritime arbitration in Vietnam.

**KEYWORDS:** Admiralty jurisdiction, Arbitration, Carriage, Dispute, Maritime, Vietnam.

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## **LIST OF ABBREVIATIONS**

AMWELSH 93	Americanized Welsh Coal Charter
AUSTWHEAT 1990	Australian Wheat Charter 1990
BIMCO	The Baltic and International Maritime Council
COAL-OREVOY	Standard Coal and Ore Charter Party
COMBICONBILL	Combined Transport Bill of Lading
CONLINEBILL	BIMCO Liner Bill of Lading
FALCA	Fast and Low Cost Arbitration
FERTIVOY 88	North American Fertilizer Charter Party 1978/88
GENCON	Uniform General Charter
GRAINCON	BIMCO Standard Grain Voyage Charter Party
HPA	Hochiminh Port Authority
ICC	International Chamber of Commerce
NIPPONCOAL	Coal Charter Party
NORGRAIN 89	North American Grain Charterparty 1973
NORGRAINBILL	North American Grain Bill of Lading
NSR	National Ship Registry
PA	Port Authority
UK	United Kingdom
US	United States
UNCITRAL	United Nations Commission on International Trade Law
SCANCON	Scandinavian Voyage Charter 1956
SCANCONBILL	Bill of Lading
SIAC	Singapore International Arbitration Center
WORLDFOOD 99	Voyage Charter Party

## CHAPTER 1

### INTRODUCTION

#### 1.1 Purpose of the dissertation

Over the past 18 years, Vietnam has witnessed a dramatic change in its maritime sector after the country's 6<sup>th</sup> National Congress in 1986 decided to adopt the 'renewal' process or "*doi moi*", as it is often called by other countries. The maritime sector has been considered a national strength of Vietnam. Vietnam has 3200 km of coastline and around 100 seaports, several of which are deep seaports with favourable conditions to receive vessels of various types and tonnage. The maritime sector has benefited from a strategic geographic advantage, as Vietnam is located on the major sea trade routes connecting Asia with Europe. This is evidenced in the cargo volume handled through the seaports of Vietnam which increased 9% annually between 1995 and 2002.<sup>1</sup> At the same time, the merchant fleet of Vietnam has increased from around 500 in 1990, to 770 ships with the total carriage capacity of nearly 1.500.000 GT in 2002.<sup>2</sup> More and more goods are being carried in and out of Vietnam and the number of enterprises involved in the maritime trade is on the rise.<sup>3</sup> Accordingly, there is also an increase in maritime disputes and the commercial consequences are significant.

In addition to changes in national maritime and competition policy from maritime countries such as Japan, Singapore, South Korea and China, Vietnam faces various difficulties in its pursuit of economic development. One of these is the lack of legal capability. Its *Maritime Code*<sup>4</sup> was adopted by Vietnam's National Assembly in 1990, during the initial period of implementation of the "*doi moi*" policy. The *Code* has remained unchanged for more than 14 years, in spite of the many developments

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<sup>1</sup> "Vietnam Maritime Administration Strengthens Its Management Capacity" (2002) 39 Visaba Times 2.

<sup>2</sup> "Vietnam Boosts Merchant Fleet" (2002) 36 Visaba Time 4.

<sup>3</sup> "The Vietnam Freight Forwarder Association" (2002) 39 Visaba Times 7.

<sup>4</sup> *Maritime Code*, dated 12 July 1990 by the National Assembly of Vietnam, CD-ROM: Vietnam's Lawdata (CD-ROM FORMAT: 92/QD-CXB, 2003).

that require legal development to support international business. More importantly, Vietnam has not developed a sufficient framework and procedure to effectively deal with maritime disputes.

Once disputes emerge, there are different ways to deal with them. Unfortunately, as far as carriage of goods by sea is concerned in Vietnam, not all shippers, consigners, consignees, shipowners or the insured parties in Vietnam have sufficient knowledge of the options available and that may have significant cost consideration. This situation frequently results in financial loss and damage to the reputation of parties.

The Maritime Arbitration Association, which was established in 1960, and the Vietnam Arbitration Centre for Foreign Trade were merged in 1993 and relocated so as to be part of the Vietnam Chamber of Commerce and Industry and operating under the name of Vietnam International Arbitration Centre. The Centre is capable of hearing commercial maritime disputes, but the fact is that there have been very few cases that parties have referred to the Centre. The reasons why will be clarified in this dissertation, but it can be readily concluded that there is an urgent need to change the mechanism and status of maritime arbitration in Vietnam.

Looking to other countries, regional as well as international, people involved in the maritime sector can observe that there are countless international conventions, rules, and model laws governing dispute resolution and standard forms of contract which provide guidelines for business persons. In addition, there is a handful of international institutions and national organizations specializing in dispute resolution. However, the number of claims in the maritime sector are definitely on the rise. This is partly due to the absence of an effective enforcement regime, but the main reason for this is that business persons do not have enough awareness and understanding of the nature and procedures to deal with a specific problem, given the international nature of shipping.

Arbitration has emerged as an effective dispute resolution method which saves time and money for parties to the dispute. Moreover, by choosing arbitration, the parties

in question work on the problem in a cooperative manner, instead of having to confront each other to advocate their arguments. The author argues that arbitration is a fast, economic and flexible method to resolve claims connected to the carriage of goods by sea in comparison with court proceedings. Additionally, readers will be able to appreciate arbitration because it also contributes to the maritime law jurisprudence, once case reports are published, thus providing the legal system with a well-organized and recorded precedents. Although not binding, those precedents serve as an effective means to develop the carriage regime and the maritime legal system in general.

This dissertation will thus survey and analyse the law of maritime arbitration. It discusses the nature of admiralty jurisdiction; how maritime arbitration is practiced in maritime powers such as the United Kingdom, the United States, Singapore and Hong Kong; identify good practices in developing maritime arbitration; and illustrate how the law is developed to cope with constant changes in the maritime industry, all of this with the needs of Vietnam in mind. The dissertation then uses the findings thereby to contribute to the ongoing process of developing maritime arbitration in Vietnam.

## **1.2 Methodology**

This dissertation attempts to answer the following questions:

What are the pros and cons of adjudication and arbitration in a maritime context ?

What is the relevance of international arbitration law and enforcement regimes to Vietnam in dealing with disputes arising out of commercial maritime operations ?

What has Vietnam experienced during the application of maritime arbitration ?

How can international arbitration awards and court rulings on commercial maritime disputes be recognized and enforced in Vietnam ?

What needs to be done to strengthen the existing maritime arbitration regime of Vietnam in view of facilitating its maritime industry ?

The dissertation adopts an analytical and comparative approach in discussing maritime arbitration. It purposely focuses on arbitration in resolving maritime disputes arising out of the contract of carriage of goods by sea, i.e., maritime cargo claims. Model rules, statutes and cases will be considered to demonstrate trends and eventually to align Vietnamese maritime arbitration law with international practices.

### **1.3 Structure of the dissertation**

The body of this dissertation is divided into six chapters. In addition to setting out the methodology and structure, this first Chapter has provided an introduction to the role of the shipping industry in relation to economic development in Vietnam and how arbitration helps to resolve disputes. In addition, it signifies the importance of strengthening the status of maritime arbitration in Vietnam.

Chapter 2 discusses the nature of admiralty jurisdiction, both *in rem* and *in personam*. Aspects of maritime arbitration are analysed and compared with admiralty proceedings in order to determine the advantages and disadvantages and thereby show why arbitration is a preferred method in dealing with claims in the commercial maritime context. Private international law applies not only to the law of the contract of carriage, but also to the arbitration process. This is complicated because of differences in civil and common law systems. The issue of conflicts of laws is thus discussed in this Chapter.

Chapter 3 studies the arbitration agreement. The author analyses arbitration clauses in some common standard bills of lading and charter-parties. These recommended arbitration terms do not exhaustively eliminate the potential discrepancies in

implementation and interpretation of the terms themselves. Therefore, in analysing these recommended terms by illustrating with cases and precedents, the author attempts to provide insight into the functioning of the arbitration mechanism. This Chapter also addresses the fast and low-cost arbitration procedures which are provided for in most arbitration centres.

Chapter 4 conducts a survey of maritime arbitration in Vietnam in the context of the recently adopted *Ordinance on Commercial Arbitration*.<sup>5</sup> The provisions of this Ordinance will be studied and discussed to enable an assessment of maritime arbitration in Vietnam.

Finally, Chapter 5 concludes the discussion by summarizing the findings and submitting practical recommendations to strengthen the maritime arbitration regime in Vietnam.

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<sup>5</sup> *Ordinance on Commercial Arbitration*, dated 25 February 2003, by the Standing Committee of the National Assembly of Vietnam, CD-ROM: Vietnam's Lawdata (CD-ROM FORMAT: 92/QD-CXB, 2003).



## **CHAPTER 2**

### **NATURE OF ADMIRALTY JURISDICTION AND ARBITRATION**

#### **2.1 Introduction**

In this Chapter, the author will examine one aspect of maritime law, namely admiralty jurisdiction. This falls under the procedural rules of maritime law, which provide for parties to maritime transactions the procedure to enforce their rights and secure the performance of their obligations. The parties to a maritime transaction are, *inter alia*, shippers, shipowners, charterers, shipyards, bills of lading holders and insurance companies who are provided with a comprehensive protective system of courts and procedures. For the purpose of this dissertation, admiralty jurisdiction will be analysed in order to clarify how it relates to arbitration in both civil law and common law countries. One similar feature of both admiralty procedure and maritime arbitration is that they provide parties (the claimant and the defendant) means to deal with maritime disputes. However, there are a number of advantages that encourage parties to choose arbitration as an alternative to adjudication. These advantages will also be compared in this Chapter.

#### **2.2 Nature of the ship as a legal person**

The ship is a special piece of maritime property, not only because of its value but also because of the very special legal status that it carries. Due to the international nature of shipping, the ship carries goods from nation to nation, sails between different jurisdictions and is involved in various international transactions. In its mobility, the ship can incur liabilities. In maritime claim cases, the ship gives its owner the possibility to limit the owner's liability and it can be arrested as a security. There are special duties stemming from the character and function of a ship. For example, in the contract of carriage the carrier is responsible for making the ship seaworthy, and is entitled to limit his liability to the cargo owners based on per package or per kilogram formulas. In collision cases the carrier enjoys limitation of

liability, however, the ship earns a maritime lien as a result of a collision if the ship is at fault. It is the international nature of shipping that gives the ship her special legal status. That status is at the heart of maritime law. Without it, the action *in rem* would not possess its unique procedural character.

## 2.3 Nature of admiralty proceedings

### 2.3.1 Action *in Rem*

By definition, “action *in rem* is an action in the admiralty court, commenced by the arrest of the *res*, i.e. the ship.”<sup>1</sup> However, the ship is not the only property that can be the subject of an action *in rem*, though it is the subject of most *in rem* cases.<sup>2</sup> It is worth mentioning that other properties of the debtor can be arrested, i.e., the cargo and freight, provided that the value of the ship is not sufficient to compensate the claims against it.<sup>3</sup> However, in the case of limitation of liability and once the limitation fund has been constituted before the court, all claims must be directed against the fund itself and not against any other property of the debtor.<sup>4</sup>

In the United Kingdom (UK), the action *in rem* is governed by the *Supreme Court Act 1981*,<sup>5</sup> which provides a list of maritime claims that give rise to an action *in rem*.<sup>6</sup> The purpose of an action *in rem* does not end with the ship; rather, the arrest

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<sup>1</sup> E. Lee, *Dictionary of Admiralty Law & Practice*, (London: Mansfield Law Publisher, 1986) s.v. “action *in rem*” [Lee, *Dictionary*].

<sup>2</sup> W. Tetley, “Arrest, Attachment and Related Maritime Law Procedure” (1999) 73 *Tulane Maritime Law Review* 1898 [Tetley, “Arrest”].

<sup>3</sup> *Ibid.*

<sup>4</sup> The limitation fund is constituted in accordance with the *Convention on Limitation of Liability for Maritime Claims, 1976*, the constitution of limitation fund is a unique feature of admiralty proceedings, because it can only be brought into play by action of the court, maritime arbitration cannot provide parties to the dispute with any type of security. See *Convention on Limitation of Liability for Maritime Claims, 1976*, 10 June 1958, art. 11; Online:

<<http://www.admiraltylawguide.com/conven/limitation1976.html>> (accessed on 01 June 2004).

<sup>5</sup> *Supreme Court Act 1981* (U.K.), 1981, c.54; S. Hodges & C. Hill, *Principles of Maritime Law* (London: LLP, 2001) at 599.

<sup>6</sup> *Ibid.*, s.20(2).

merely ensures that the shipowner shows up to defend the claim against him.<sup>7</sup> Once the alleged defendant shows up, the plaintiff will have an action *in personam* against the defendant. The action *in rem* should be constituted in combination with the action *in personam*. There must be liability *in personam*. An exception to this rule can be found in collision cases, where the ship is considered the “author” of the damage and it earns a maritime lien and consequently can be sued in a court of law.<sup>8</sup>

Singapore’s admiralty jurisdiction takes a similar position on the action *in rem* as English law. In 2003, the High Court of Singapore proposed the adoption of *Bill No. 32/2003 on Admiralty jurisdiction*, modelled on the *Supreme Court Act 1981*<sup>9</sup> of the UK.<sup>10</sup> In *The Kusu Island*<sup>11</sup> Justice Chai ruled that an action *in rem* is not an action against the *res* itself.<sup>12</sup> It is a procedural device to obtain jurisdiction over the owner of the *res*, in a writ *in rem*.<sup>13</sup> Thus, the defendant is not described simply as “the ship X” but as “the owner of the ship”.<sup>14</sup> Singapore allows an action *in rem* to be constituted against a party who would be responsible for the damage suffered by the claimant. As in the case of *The Rainbow Spring*,<sup>15</sup> the High Court held that according to the *High Court (Admiralty Jurisdiction) Act*,<sup>16</sup> in order to establish jurisdiction *in*

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<sup>7</sup> It has been confirmed that “English admiralty *in rem* actions are derived from a process of arrest of property to compel appearance of the defendant. It is a procedure developed in medieval Europe and firmly established in England by the 15th century.”; See: Tetley, “Arrest”, *supra* note 2, at 1900.

<sup>8</sup> Nevertheless, there is the view that, in UK, an action *in rem* is independent from an action *in personam*, the ship can be arrested and sued without the involvement of its owner. The action is against the ship, or other properties such as cargo, freight and not its owner, the owner may never appear. See C. Hill, *Maritime Law*, 5th ed. (London: LLP, 1998) at 102.

<sup>9</sup> *Supreme Court Act 1981*, *supra* note 5.

<sup>10</sup> Online: <<http://www.parliament.gov.sg/Legislation/Htdocs/Bills/030032.pdf>> (accessed on 01 June 2004).

<sup>11</sup> *The “Kusu Island”* – Singapore High Ct. (Lai Kew Chai J.), as reported in Lloyd’s Maritime Law Newsletter No. 142, 11 April 1985.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> *Admiral Shipping v. Rainbow Spring*; Online:

<[http://www.onlinedmc.co.uk/admiral\\_shipping\\_v\\_rainbow\\_spring\\_cofa.htm](http://www.onlinedmc.co.uk/admiral_shipping_v_rainbow_spring_cofa.htm)> (accessed on 01 June 2004).

<sup>16</sup> *High Court (Admiralty Jurisdiction) Act*; Online: <[http://statutes.agc.gov.sg/non\\_version/cgi-bin/cgi\\_getdata.pl?&actno=2001-REVED-123&date=latest&method=whole](http://statutes.agc.gov.sg/non_version/cgi-bin/cgi_getdata.pl?&actno=2001-REVED-123&date=latest&method=whole)> (accessed on 01 June 2004).

*rem*, the claimant only had to show that it had an arguable case that the defendant was the person who would be liable *in personam* on the claim.<sup>17</sup>

Similarly to Singapore, and being under the authority of the UK for more than 100 years, the admiralty jurisdiction of Hong Kong is profoundly influenced by the maritime jurisprudence of the UK. Legal bases for an action *in rem* are set out in a statutory provision,<sup>18</sup> modelled upon section 21(4)(b) of the UK *Supreme Court Act 1981*.

In the United States (US), both the action *in rem* and maritime attachment are used to bind the ship so as to secure a claim against the alleged defendant. However, maritime attachment is in effect an action *in personam* and will be discussed in part 2.3.2 of this research. The action *in rem* is based on the *Federal Rules of Civil Procedure 1966*.<sup>19</sup> The ship is personified and it is considered a “person” for the purpose of the claim and can be “executed” (through judicial sale) to satisfy claims by the claimant. This has been confirmed by Healy and Sharpe as follows:

Under United States law today as in the past, a ship can be named as sole defendant in a complaint filed in a United States district court, arrested by the United States Marshal, defaulted or tried and found at fault, and sold to a purchaser at a marshal’s auction all without the active participation of the shipowner *in personam* at any stage.<sup>20</sup>

In *The Barnstable*<sup>21</sup>, the US court ruled that:

The law in this country is entirely well settled, that the ship itself is to be treated in some sense as a principal, and as personally liable for the negligence of anyone who is lawfully in possession or her, whether as owner or charterer.<sup>22</sup>

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<sup>17</sup> *Ibid.*, s.4(4).

<sup>18</sup> “*Hong Kong court judgments produce good news for owners*”, Online: <[http://www.jsm.com.hk/live/Portal?xml=article&content\\_id=456](http://www.jsm.com.hk/live/Portal?xml=article&content_id=456)> (accessed on 01 June 2004).

<sup>19</sup> *Federal Rules of Civil Procedure 1966*, U.S.C. tit.28 (1966), Supplemental Rules for Certain Admiralty and Maritime Claim, Rules “C”; Online: <<http://www4.law.cornell.edu/cgi-bin/empower>> (accessed on 01 June 2004).

<sup>20</sup> N. J. Healy, & D. J. Sharpe, *Admiralty Cases and Materials*, 2d ed. (Minnesota.: West publishing Co., 1986) at 118 [Healy & Sharpe, *Admiralty Cases*].

<sup>21</sup> *The Barnstable*, 181 U.S. 464 (1901). Online: <<http://www.admiraltylawguide.com/supct/TheBarnstable.htm>> (accessed on 01 June 2004).

<sup>22</sup> *Ibid.*, at 467.

An action *in rem* can be pursued with the arrest of the ship in accordance with the international arrest regime which is provided for by the *International Convention for the Unification of Certain Rules relating to the Arrest of Sea-Going Ships, 1952*<sup>23</sup> (in force) and the *International Convention on Arrest of Ships, 1999*<sup>24</sup> (not in force). On the other hand, it can also be enforced based on the national law and procedure. However, it is useful to note that the national regime varies according to the legal systems of different countries. A country may implement the international arrest regime even without being a party and Vietnam is one example. However, the admiralty law of Vietnam is far from perfect and requires much development to strengthen legal provisions for the arrest of a ship.<sup>25</sup>

### **2.3.2 Action in Personam**

Generally, an action *in personam* is “an action against a specific person”.<sup>26</sup> It is to be found in the legal systems of all countries. Thus, unlike the action *in rem*, the action *in personam* is not a unique feature of admiralty procedure. Any person who sustains damage may initiate such an action in a court of law against the wrongdoers and demand compensation for the loss. The claimant is entitled to sue the wrongdoers directly. However, it is worth mentioning that in the US, statutory law has provided remedies for admiralty and maritime claims *in personam*.

In the US, an action *in personam* in a maritime context is defined as “a civil action in admiralty against a natural person, a corporation, or a government as the named defendant.”<sup>27</sup> The claimant in this case is furnished with maritime attachment, which

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<sup>23</sup> *International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships*, 10 May 1952; Online: <<http://www.admiraltylawguide.com/conven/arrest1952.html>> (accessed on 01 June 2004).

<sup>24</sup> *International Convention on Arrest of Ships, 1999*, 12 March 1999; Online: <<http://www.unctad.org/en/docs/imo99d6.pdf>> (accessed on 01 June 2004) [*Arrest Convention*].

<sup>25</sup> See part 2.4.3.2, below.

<sup>26</sup> Lee, *Dictionary*, *supra* note 1, s.v. “action in personam”.

<sup>27</sup> Healy & Sharpe, *Admiralty Cases*, *supra* note 20, at 856.

is a device designed to compel the appearance of the defendant in an action *in personam*.<sup>28</sup>

Maritime attachment comes into play when there is an admiralty or maritime claim *in personam* aimed at the defendant and the claimant believes that the “defendant shall not be found within the district”.<sup>29</sup> It has a similar effect to an action *in rem* in the UK in the sense that it involves the seizure of the *res* to secure the appearance of the defendant *in personam*. The scope of *maritime attachment* is not confined only to the ship and it encompasses a wide range of property of the defendant which is found within the jurisdiction of the court, such as goods, chattels, credits and effects.<sup>30</sup>

### 2.3.3 Maritime injunction

In addition to the actions *in rem* and *in personam*, contemporary admiralty procedure has adopted through case law and legislation such procedures as the “*Mareva injunction*”. These procedures, together with the actions *in rem* and *in personam*, provide the claimant with both pre-judgment and post-judgment measures to secure and enforce their maritime claims. Understanding the application of these procedures is essential for the interpretation and application of laws in admiralty cases.

The *Mareva injunction* (or “freezing” injunction as it is now called) has its name from the case *Mareva Compania Naviera S.A v. International Bulk carriers (The “Mareva”)*,<sup>31</sup> and its purpose is to restrain the movement of the defendant’s assets which are under the jurisdiction of a specific court while the dispute is being heard or to be heard by the court. The injunction ensures that the defendant does not undermine the court proceedings by liquidating or moving his properties to frustrate the judgement of the court. In this case, Lord Denning set out two situations for the application of the *Mareva injunction*:

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<sup>28</sup> A. M. Sheppard, *Modern Admiralty Law* (London: Cavendish, 2002) at 12.

<sup>29</sup> *Federal Rules of Civil Procedure 1966*, *supra* note 19, Rules “B”.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Mareva Compania Naviera S.A v. International Bulk carriers (The “Mareva”)* [1975] 2 Lloyd’s Rep. 509 [*The “Mareva”*].

1. If it appeared that a debt was due and owing - and there was a danger that the debtor might dispose of his assets so as to defeat it before judgement - the Court had jurisdiction in a proper case to grant an interlocutory injunction.
2. If the Court did not interfere by injunction, the shipowners would suffer a grave injustice which the Court had power to help avoid.<sup>32</sup>

This type of injunction applies not only to the ship but also to other assets of the defendant. It is given effect by a court order and it differs from an action *in rem* inasmuch that the property is not arrested but “frozen” as per the wording of the order in a pre-judgement situation. In *Iraqi Ministry of Defence & Ors. v. Arecepy Shipping Co. S.A. (The “Angel Bell”)*,<sup>33</sup> Justice Robert Goff held that the purpose of the *Mareva injunction* is such that it requires to be worded in a wide form to achieve the desired result. Thus an order of *Mareva injunction* can take various forms at the discretion of the issuing court. In comparison with an action *in rem*, the *Mareva injunction* is considered to be a flexible way to obtain security for the claim. However, it is not as strong as an action *in rem* because the scope of disadvantages imposed on the defendant, which restrains the defendant’s movement of property, is not as broad as that of an action *in rem*. Importantly, the person requesting the order has to abide by a number of important conditions.<sup>34</sup> Whereas, in an action *in rem*, the claimant is not necessarily required to provide similar undertaking to ensure that his action is a legitimate one.

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<sup>32</sup> *Ibid.*, at 511.

<sup>33</sup> *Iraqi Ministry of Defence & Ors. v. Arecepy Shipping Co. S.A., (The “Angel Bell”)* [1979] 2 Lloyd’s Rep. 491, as reported in Lloyd’s Maritime Law Newsletter No. 1, 15 November 1979.

<sup>34</sup> Lord Denning decided these obligations are: (i) the provision of full and frank disclosure of all materials in the claimant’s knowledge which are material for the judge to know; (ii) giving particulars of the claim that include ground, amount of the claim and points made by the defendant against these particulars; (iii) providing ground to believe that the defendant has assets under the jurisdiction of the court; (iv) identifying the risk that such assets would be removed before the judgement is satisfied; and (v) undertaking for damages in case claim or the injunction turns out to be unjustified. See *Third Chandris Shipping Corporation Western Sealane Corporation and Aggelikai Ptera Compania Maritime S.A. v. Unimarine S.A., (The “Genie”, “Pythia” and “Angelic Wings”)* C.A. [1979] 2 Lloyd’s Rep. 184 at 189.

## **2.4 Admiralty jurisdiction in Vietnam**

### **2.4.1 Introduction**

Under the judicial system of Vietnam, there is no specialized admiralty court. Instead, maritime disputes are resolved by judicial processes in courts within the People's Court system of the country and, pursuant to the subject-matter of the disputes, they may be heard in Civil Courts or Economic Courts. This Section will examine the court system in Vietnam.

### **2.4.2 Court system and maritime legislation in Vietnam**

#### **2.4.2.1 Court system**

According to the *Law on the Organization of the People's Court*,<sup>35</sup> the court system in Vietnam is organized in three levels based on their judicial authority.<sup>36</sup>

Firstly, the highest court in the system is the People's Supreme Court. It has five specialized courts, namely, the Criminal Court, the Civil Court, the Economic Court, the Administrative Court, the Labour Court and the Appellate Courts.<sup>37</sup> The People's Supreme Court of Vietnam is also the final court of appeal.

Secondly, the People's Provincial Courts exist in every province. There are about 60 courts at this level in Vietnam. These courts have the same scope of adjudicative authority as the People's Supreme Court, but they are at a lower level.<sup>38</sup> Within these courts, there are specialized courts similar to those in the People's Supreme Court, except for the Appellate Court which is solely at the level of the People's Supreme Court.

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<sup>35</sup> *Law on the Organization of the People's Court*, No. 33/2002/QH10, dated 02 April 2002, by the National Assembly of Vietnam, CD-ROM: Vietnam's Lawdata (CD-ROM FORMAT: 92/QD-CXB, 2003).

<sup>36</sup> *Ibid.*, art.2.

<sup>37</sup> *Ibid.*, art.18.

<sup>38</sup> *Ibid.*, art.27.



Finally, at the basic level, there are District Courts with judicial powers provided for by the various laws and regulations of the Nation and there is no specialized court at this level.<sup>39</sup>

It is a codified principle that courts in Vietnam exercise jurisdiction under a two-instance regime. A case is heard at the trial court or the court of first instance. If either the claimant or the defendant or both are not satisfied with the court's ruling, they have the right to appeal to the appellate tribunal. The power to rehear a case that has been tried by a particular court is vested in the court with immediate higher judicial power in the system. It is not necessarily the Court of Appeal under the People's Supreme Court.<sup>40</sup>

It is worth mentioning that pursuant to the *Ordinance on Economic Procedures*,<sup>41</sup> disputes that involve foreign factors<sup>42</sup> must be heard by courts at the provincial level or the People's Supreme Court.<sup>43</sup> The People's District Courts are not competent in this regard.

#### 2.4.2.2 Maritime legislation

In addition to the *Maritime Code*<sup>44</sup> and *Economic Procedures*,<sup>45</sup> Vietnamese law has a number of Ordinances, Decree and Directive intended to govern disputes arising from maritime business. In so far as disputes related to carriage of goods by sea are concerned, the principal governing statutes are the following:

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<sup>39</sup> Ibid., art.32.

<sup>40</sup> Ibid., art.11.

<sup>41</sup> *Ordinance on Economic Procedures*, dated 29 March 1994, by the Standing Committee of the National Assembly of Vietnam, CD-ROM: Vietnam's Lawdata (CD\_ROM FORMAT: 92/QD-CXB, 2003) [*Economic Procedures*].

<sup>42</sup> A dispute is considered to have "foreign factor" if at least one party to the dispute is a foreign national or foreign legal person, see art.87, *ibid*.

<sup>43</sup> *Economic Procedures*, *supra* note 41, art.13(2).

<sup>44</sup> *Maritime Code*, dated 12 July 1990, by the National Assembly of Vietnam, CD-ROM: Vietnam's Lawdata (CD\_ROM FORMAT: 92/QD-CXB, 2003).

<sup>45</sup> *Economic Procedures*, *supra* note 41.

1. *Ordinance on Civil Procedures*.<sup>46</sup>
2. *Ordinance on Commercial Arbitration*.<sup>47</sup>
4. *Ordinance on the Recognition and Enforcement of Foreign Civil Judgments in Vietnam*.<sup>48</sup>
3. *Ordinance on the Enforcement of Civil Judgments*.<sup>49</sup>
5. *Decree 25/2004, on the Implementation of the Ordinance on Commercial Arbitration*.<sup>50</sup>
2. *Directive No. 11-KHXX*.<sup>51</sup>

This dissertation will consider the latest developments of substantive maritime law in Vietnam by referring to the *Draft of the Amendment of the Maritime Code of Vietnam*,<sup>52</sup> hereinafter referred to as the *Draft*.

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<sup>46</sup> *Ordinance on Civil Procedures*, dated 12 July 1989, by the Standing Committee of the National Assembly of Vietnam, CD-ROM: Vietnam's Lawdata (CD-ROM FORMAT: 92/QD-CXB, 2003) [*Civil Procedures*].

<sup>47</sup> *Ordinance on Commercial Arbitration*, dated 25 February 2003, by the Standing Committee of the National Assembly of Vietnam, CD-ROM: Vietnam's Lawdata (CD-ROM FORMAT: 92/QD-CXB, 2003) [*Arbitration Ordinance*].

<sup>48</sup> *Ordinance on the Recognition and Enforcement of Foreign Civil Judgments in Vietnam*, dated 26 April 1993, by the Standing Committee of the National Assembly of Vietnam, CD-ROM: Vietnam's Lawdata (CD-ROM FORMAT: 92/QD-CXB, 2003).

<sup>49</sup> *Ordinance on the Enforcement of Civil Judgments*, dated 14 January 2004, by the Standing Committee of the National Assembly of Vietnam, CD-ROM: Vietnam's Lawdata (CD-ROM FORMAT: 92/QD-CXB, 2003).

<sup>50</sup> *Decree 25/2004*, No 25/2004/ND-CP, on the Implementation of the *Ordinance on Commercial Arbitration*, dated 15 January 2004, by the Government of Vietnam, CD-ROM: Vietnam's Lawdata (CD-ROM FORMAT: 92/QD-CXB, 2003).

<sup>51</sup> *Directive No. 11-KHXX*, for the application of the *Ordinance on Economic Procedures*, dated 23 January 1996, by the People's Supreme Court of Vietnam, CD-ROM: Vietnam's Lawdata (CD-ROM FORMAT: 92/QD-CXB, 2003).

<sup>52</sup> Substantial changes have been proposed, such matters as maritime lien, ship arrest, power of Port Authority, carriage of goods by sea and limitation of liability. The changes are intended to keep pace with the development of maritime law of countries in the region as well as international standards. The final *Draft* is scheduled to be put before the National Assembly of Vietnam by November 2004 for consideration and approval in May 2005 at the latest.

### 2.4.3 Admiralty jurisdiction in Vietnam

#### 2.4.3.1 General remarks

Due to the lack of a specialized admiralty court and admiralty procedure, maritime claims have recourse only to the Civil Courts or Economic Courts and procedures of these courts. This has caused many problems, including conflict between the *Maritime Code* and those specialized procedural rules such as time bars, burden of proof and the mechanism to secure a maritime claim.<sup>53</sup>

To illustrate the lack of competency in legal provisions securing a maritime claim, a typical example that the author has experienced while working at the Hochiminh Port Authority (HPA) can be described as follows:

Company “A” was the receiver of a fertilizer shipment transported aboard the Chinese *M/v X* under bills of lading. On 23 January 2002, on reception of the goods, “A” found that the fertilizer was damaged by sea water. Immediately, “A” made a claim against the owner of *M/v X* and filed a law suit at the People’s Provincial Court of Hochiminh City. He also made a request to arrest the ship in question because as scheduled the ship would leave the Port of Saigon in the morning of 25 January 2002. On 24 January 2002, the court in Hochiminh City sent a letter to HPA with the content that upon the request of cargo receiver “A”, the Court was now under its procedure engaged to resolve the case that was brought before it, which involved *M/v X*. The Court requested that HPA should “consider” and “assist” it within the scope of power vested in HPA by law. The Court also sent a copy of the statement of claim by Company “A”. HPA was put in a difficult situation where it could not ignore the Court’s letter but at the same time could not act beyond the authority conferred by the *Maritime Code*.

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<sup>53</sup> T. H. Hien, “Comments on the Maritime Code of Vietnam” (2002) 37 Visaba Times 4-5.

This situation occurs frequently and it has been a practice of the People's Provincial Court of Hochiminh City when dealing with maritime claims that involve the claimant's request for the arrest of the ship. The letter issued by the court in the above example served no purpose other than to provide information. HPA in this case could not "consider" and "assist" because it had no power to arrest. Part 2.4.3.2 below will examine such power. Fortunately, in most cases, a representative in Vietnam of the shipowner's P&I Club often speedily issues a letter of indemnity to secure the claim and get the ship to sail as soon as possible.

However, the example also shows that generally courts in Vietnam are not familiar with procedures to deal with maritime disputes. These disputes are forced to follow the *Civil* or *Economic Procedures*, and the practice of the court in this situation created uncertainty within admiralty jurisdiction in Vietnam. Whereas by nature, "maritime law is a complete system",<sup>54</sup> it requires knowledge and a specialized mechanism to enforce it. This situation is further complicated by the issuance of *Directive No. 11-KHXX*.<sup>55</sup> According to which, disputes concerning the carriage of goods by sea may be heard either at the Civil or Economic Court,<sup>56</sup> following either *Civil Procedures*<sup>57</sup> or *Economic Procedures*<sup>58</sup> respectively. Both the Economic Court and the Civil Court are concurrently capable of hearing disputes from the carriage contract. In effect, the *Directive* creates confusion in the interpretation of maritime legislation.

Due to the lack of a specialized admiralty court and admiralty procedures, there is no specific provision of law regarding the adjudicative power of a court in hearing maritime claims. It is necessary to review maritime claims that may give rise to

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<sup>54</sup> W. Tetley, *International Maritime and Admiralty Law*, 2d ed. (Montreal: Yvon Blais, 2002) at xiv.

<sup>55</sup> *Directive No. 11-KHXX*, *supra* note 51.

<sup>56</sup> *Ibid.*, cl.7.

<sup>57</sup> *Civil Procedures*, *supra* note 46.

<sup>58</sup> *Economic Procedures*, *supra* note 41.

litigation. These claims are incorporated in the *Maritime Code* under the headings of “maritime lien”,<sup>59</sup> “ship detention”<sup>60</sup> and “arrest of ship”.<sup>61</sup>

#### 2.4.3.2 Maritime liens and arrest regime

There are three devices to secure a maritime claim in Vietnam<sup>62</sup>: maritime lien (both maritime lien and possessory lien), ship arrest (under the *Maritime Code* and another regime as proposed by the *Draft*) and ship detention.

Firstly, the maritime lien is provided for by the *Maritime Code*, according to which creditors have the right to enforce the lien over the ship to secure payment of their prioritized debts on the basis of contractual agreement or court order, regardless of whether the ship has already been arrested, mortgaged or given as security for the payment of other debts.<sup>63</sup> The maritime lien over a ship is not affected by the change of her owner or operator, regardless of whether the purchaser of the ship was with or without notice at the time of sale, or the fact that it was under the lien.<sup>64</sup> Those priority debts are the following:

1. Compensation for loss of life, injury, or other damage to human health and in respect of rights generated by labour contracts.
2. All court fees, judgment execution fees, fees incurred in protecting the interests of creditors in the maintenance and sale of ships, and in dividing the proceeds of such sale, port fees, taxes and other relevant public fees, fees for pilotage, and fees for the protection and maintenance of ships after arrival at their last port.
3. Cost of salvage and of general average.
4. Compensation to be paid in respect of collisions or other maritime casualties and the loss of cargo and luggage, damage to port equipment and the cost of berth hired, voyage fees, and wharfage facilities.

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<sup>59</sup> *Maritime Code*, *supra* note 44, arts.30-34. See also arts.113-115, *ibid.* [translated by author].

<sup>60</sup> *Ibid.*, art.35 [translated by author].

<sup>61</sup> *Ibid.*, art.36 [translated by author].

<sup>62</sup> Though the *Maritime Code* preserves a Chapter on ship mortgage, however, once the disputes emerge concerning ship mortgage, courts in Vietnam apply either *Civil Procedures* or *Economic Procedures* to decide the case. Thus, in effect, ship mortgage is considered purely as an economic or civil transaction under the law of Vietnam rather than a maritime claim *per se*.

<sup>63</sup> *Maritime Code*, *supra* note 44, art.30.

<sup>64</sup> *Ibid.*

5. Other amounts of money owed under a contract signed by the captain or as the result of any other action taken by the captain within his powers as provided for by laws in force at the time when the ship was at a registered port for repair or during its voyage; claims for compensation lodged by the captain himself even when he is the owner or operator of the ship, or by the ship chandler, repairer, creditor, or other persons who have entered a contract with the captain.<sup>65</sup>

There is also the possessory lien which is provided in the *Maritime Code*. Creditors are entitled to a possessory lien over such monies in their possession as:

1. The freight for debts arising out of the labour contract.
2. Compensation for damages or compensation for the loss of freight.
3. Contribution to general average.
4. Payment for salvage excluding the amount payable to crews and other servants of the shipowner.<sup>66</sup>

Another form of possessory lien is the detention of cargo. This is the right of the creditor, on the basis of a valid contract or an order of a court, to detain cargo as provided by the law in order to guarantee payment of priority debts, notwithstanding that the cargo may be already detained, mortgaged or charged to guarantee other debts. These priority debts are in the following order:

1. All court fees, judgment execution fees, storage fees, sales fees and costs of distribution of proceeds of sale, taxes, and other public expenditure.
2. Money allocated to pay for salvage of cargo or to contribute to general average.
3. Compensation for loss of cargo.
4. Interests of the carrier.<sup>67</sup>

It appears that the right to detain cargo, in case the cargo has already been detained, is inoperative because it is impossible for a creditor to exercise the possessory lien over cargo that is in the possession of others.

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<sup>65</sup> *Ibid.*, art.31 [translated by author].

<sup>66</sup> *Ibid.*, art.33 [translated by author].

<sup>67</sup> *Ibid.*, art.113(2) [translated by author].

It is noteworthy that in order to give effect to a maritime lien, such lien must be entered into the National Ship Registry (NSR)<sup>68</sup> where the ship is registered.<sup>69</sup> This provision appears to address ships flying the Vietnamese flag rather than foreign ships. This implies that foreign ships are “immune” to maritime lien enforcement in Vietnam. Moreover, the *Maritime Code* does not give a legal definition of maritime lien and stipulates the procedure as well as the time bar to sell the ship under lien. This is a drawback, creating ambiguity in interpretation and implementation. Parties involved may suffer loss of time and money because the maritime lien may last unlimitedly.

In the *Draft*, maritime lien has been revised to address the shortcomings of the *Maritime Code*. Generally, provisions on maritime lien are modelled after the *International Convention on Maritime Liens and Mortgages, 1993*,<sup>70</sup> according to which the maritime lien is defined as the priority right of the creditor against the owner, demise charterer or operator of the vessel for the following claims:

1. Claims for wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf.
2. Claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel.
3. Claims for reward for the salvage of the vessel.
4. Claims for port, canal and other waterway dues and pilotage dues.
5. Claims based on tort arising out of physical loss or damage caused by the operation of the vessel other than loss of or damages to cargo, containers and passengers' effects carried on the vessel.<sup>71</sup>

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<sup>68</sup> NSR is maintained by the Vietnam Maritime Administration, pursuant to *Decision No.269/2003/QĐ-TTĐ*, on the Organization and Authority of the Vietnam Maritime Administration, dated 22 December 2003 by the Government of Vietnam, CD-ROM: Vietnam's Lawdata (CD-ROM FORMAT: 92/QĐ-CXB, 2003)

<sup>69</sup> *Ibid.*, art.30(3).

<sup>70</sup> *International Convention on Maritime Liens and Mortgages, 1993*, 06 May 1993; Online: <<http://www.admiraltylawguide.com/conven/liens1993.html>> (accessed on 01 June 2004).

<sup>71</sup> *Ibid.*, art.4(1).

Vietnam has adopted a “closed list” of claims that give rise to maritime lien and maritime lien is enforced by means of a court order. They expire after one year from the date the event giving rise to the maritime lien occurred.<sup>72</sup>

It seems that the maritime lien in Vietnam is used as a method to force the shipowner to appear before the court; and from that moment, the claimant can proceed against the shipowner.

Secondly, ship arrest is provided for by the *Maritime Code*. It is a judicial procedure by which the People’s Provincial Court orders the arrest of a ship to secure claims that have been brought before the Court.<sup>73</sup> It is essential that the claim be brought before the Court and it is considered to have been so when the claimant filed his claim, deposited the court fee and the court entered the case into its schedule.<sup>74</sup> The arrested ship is subject to judicial sale if the shipowner does not provide alternative measures to secure the claim within 30 days from the date the arrest order is served on the ship’s master.<sup>75</sup> The *Maritime Code* does not request the claimant to provide any countersecurity for his request

In addition, the *Civil Procedures* and *Economic Procedures* concurrently provide an open-ended list of measures to secure a claim. Among them are the “restriction on the movement or detention of the property in dispute”,<sup>76</sup> and “requirement of specific performance by the defendant”.<sup>77</sup> One can observe that while the *Maritime Code* does not allow the arrest of a sister ship, the *Economic Procedures* do allow a wide range of property to be the subject of “specific performance”.<sup>78</sup> It is at the court’s discretion to decide which property can be detained. Thus, sister ships or other types

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<sup>72</sup> *Maritime Code*, *supra* note 44, art.34(2).

<sup>73</sup> *Ibid.*, art.36(1).

<sup>74</sup> *Civil Procedures*, *supra* note 46, art.37. *Economic Procedures*, *supra* note 41, art.33.

<sup>75</sup> *Maritime Code*, *supra* note 44, art.36(3).

<sup>76</sup> *Civil Procedures*, *supra* note 46, art.41 [translated by author].

<sup>77</sup> *Economic Procedures*, *supra* note 41, art.42 [translated by author].

<sup>78</sup> *Ibid.*



of property that belong to the shipowner can be detained or attached (i.e., bank accounts and freight).

Ship arrest in this case is similar to maritime attachment in the US, in the sense that it allows the sanction to apply to a wide range of property that is found within the court's jurisdiction.

Thirdly, as mentioned, another regime of ship arrest is proposed in the *Draft*. With the desire to have the best of both worlds, the *Draft* has incorporated the *International Convention on Arrest of Ships, 1999*,<sup>79</sup> although Vietnam is not a party to the convention. The *Draft* introduces a closed list of maritime claims that lead to the arrest of a ship and this is exactly the same as that adopted in article 1 of the *Arrest Convention*. In addition, and to protect parties having interests in the arrested ship, the *Draft* requires that the claimant must deposit a certain amount of money to cover possible losses caused by wrongful arrest or excessive bailment.

In the *Draft*, a new concept of “beneficial owner” is introduced which includes:

1. Owner of the ship; or
2. Bareboat charterer, time charterer or voyage charterer.<sup>80</sup>

The intention of the law makers is to give the claimant a right to arrest one or several other ships in the possession of the “beneficial owner”.

Lastly, as stipulated in the *Maritime Code*, the Port Authority (PA) in Vietnam is allowed to detain a ship for up to 72 hours, in the following situations:

1. Sea-going ships as security for claims made against them in respect of port fees or as compensation for damage to port facilities, quays, courses, anchorage, or docks.

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<sup>79</sup> *Arrest Convention*, *supra* note 24.

<sup>80</sup> *Draft*, *supra* note 52 and accompanying text, art.38(2) [translated by author].

2. Ship wrecks or other obstructions to maritime activities as security in respect of claims made in relation to their disposal.<sup>81</sup>

In this case, the party which made the request could be fully liable for any damages sustained by the shipowner resulting from their request.<sup>82</sup> The phrase “fully liable for any damages”<sup>83</sup> is an ambiguous provision about the liability of the party making the request to temporarily detain the ship. The shipowner may have recourse to this provision to make a counterclaim to demand that the requestors compensate for whatever damages he has sustained. The temporarily detained ship must be released after 72 hours provided that there is no court order to arrest the ship.<sup>84</sup>

The power of a PA to temporarily detain a ship in these situations is in addition to the power of a court to arrest the ship, and this provision is reiterated in the *Draft*.

## **2.5 Final comment on admiralty jurisdiction**

In Vietnam, both the action *in rem* as well as the action *in personam* exist as in many other countries. However, as far as admiralty practice is concerned, the maritime legal system of Vietnam is not complete, lacking a dedicated enforcement procedure to secure the proper implementation of substantive law. The court system of Vietnam is not in line with the needs of the maritime industry of the country. The lack of a specialized admiralty court has posed several disadvantages for litigants. These shortcomings lead to financial loss and may lead to injustice when a specific maritime claim is resolved by the court by applying the *Civil Procedures* or *Economic Procedures*. It is for these reasons that arbitration could be used as an alternative to court proceedings in resolving maritime disputes. In the next part, arbitration and its legal features will be studied to clarify how it can be used as an alternative procedure in resolving maritime disputes in Vietnam.

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<sup>81</sup> *Maritime Code*, *supra* note 44, art.35 [translated by author].

<sup>82</sup> *Ibid.*, art.35(2).

<sup>83</sup> *Ibid.*, [translated by author].

<sup>84</sup> *Ibid.*, art.35(3).

## 2.6 Arbitration

### 2.6.1 Definition

Macfarlane has written that arbitration has its roots in commercial practices in England in the 18<sup>th</sup> century. At that time, business persons in England chose to use arbitration because they preferred to use their own customs and practices in resolving disputes instead of having those disputes settled by the law of another country.<sup>85</sup> Primarily, the privacy of this process made it different from court proceedings. Parties to an arbitration agreement exploited the advantages of applying customs and appointing arbitrators on their own. With the development of trade and commercial activities, the application of arbitration in a commercial context has gained popularity.

According to Tetley:

Arbitration is the settling of disputes between parties who agree not to go before courts, but to accept a final decision of experts of their choice, in a place of their choice, usually subject to laws agreed upon in advance and usually under rules which avoid much of the formality, niceties, proof and procedure required by the courts.<sup>86</sup>

In addition, by means of arbitration, disputes are conclusively resolved in a judicial manner. The arbitrators are recognized by law and their decisions enforced by courts as judgements of the court.<sup>87</sup> As far as maritime claims are concerned, the shipping community is mindful that there are certain types of maritime claims that are better suited for arbitration than admiralty proceedings, namely maritime cargo claims which arise during the performance of the carriage of goods by sea.

In the carriage of goods by sea context, arbitration can be defined as a dispute settlement process, in which the parties involved agree to conclusively resolve

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<sup>85</sup> J. Macfarlane, *Dispute Resolution: Readings and Cases* (Toronto: Emond Montgomery Publication, 1999) at 533.

<sup>86</sup> W. Tetley, & R.C. Wilkins, *International Conflict of Law: Common, Civil and Maritime* (Montreal: Yvon Blais, 1994) at 390.

<sup>87</sup> P.L. D'Ambrumenil, *What is Dispute Resolution ?* (London: LLP, 1998) at 53-54.

disputes having connection with the performance of the carriage contract by arbitrators of their choice, in an agreed place and according to agreed procedures.

In Vietnam, maritime arbitration is considered as a specialized branch of commercial arbitration and is defined as a device, agreed by parties to the dispute, to resolve the dispute arising from the contract of carriage of goods by sea and is conducted according to procedures provided for by the *Ordinance on Commercial Arbitration*.<sup>88</sup>

### **2.6.2 Parties to maritime arbitration**

For the purposes of this dissertation and as far as maritime carriage claims are concerned, it is necessary to identify some parties that may be involved in maritime arbitration. They can be shipowners, beneficial owners, voyage or time charterers, shippers, consignees and the holders of the bills of lading.

The term “business persons”<sup>89</sup> is used in Vietnam to cover all possible parties who may be involved in the maritime arbitration process. They may be parties to the contract of carriage or someone who acts as an agent for the shipowner or shipper.

However, it is noteworthy that in the maritime business, the shipowners or charterers are usually members of a defence club or Protection & Indemnity (P&I) Club. When there are disputes, it is common practice that the shipowners or charterers entrust their clubs to represent them in dealing with claims. In this situation, if the disputes cannot be settled between the club and the claimant, they will be settled before a court of law rather than arbitration.<sup>90</sup>

## **2.7 Admiralty proceedings compared to Arbitration**

Arbitral procedures and court litigation are different ways to come to a final decision. However, arbitration has a number of advantages that outweigh the adjudicative

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<sup>88</sup> *Arbitration Ordinance*, *supra* note 47, art.2(1).

<sup>89</sup> *Ibid.*, art.2(3) [translated by author].

<sup>90</sup> R. Bernstein, *Handbook of Arbitration Practice* (London: Sweet & Maxwell, 1987) at 267.

method. Even so, arbitration may still need the assistance of the court. This assistance can be provided at any stage of the arbitral process, from pre-arbitration to post-arbitration. As far as the former is concerned, the court may enforce an arbitration agreement by allowing a stay of court proceedings and uphold the agreement, thus parties are requested to submit their disputes to the chosen arbitration. The court then provides parties to arbitration with security for their claims or counterclaims. On the other hand, once the arbitral award is rendered, the court enforces the award or may allow the parties to appeal the arbitral decision.

### **2.7.1 Pre-arbitration assistance**

#### **2.7.1.1 Stay of court proceedings**

It is often the case that one of the parties to a contract for the carriage of goods by sea refers their disputes to court in spite of the existence between them of an agreement to arbitrate disputes arising out of the contract. In these situations, the other parties may apply for a stay of the court proceedings and require that the arbitration agreement must be upheld and implemented.

In *Williams & Glyn's Bank PLC v. Astodinamico Compania Naviera S.A.*,<sup>91</sup> which involved the question of the court's jurisdiction where the defendant had instituted law suits in both Greece and England. The House of Lords in the UK ruled that there were two kinds of court jurisdiction; the first was the jurisdiction to decide the action on its merits and the second was to decide whether the court had jurisdiction on the first kind.<sup>92</sup> Moreover, by virtue of the *Supreme Court Act 1981*,<sup>93</sup> the courts in the UK are enabled to entertain a stay where the matter is within the court's inherent jurisdiction.<sup>94</sup> The House of Lords decided that the Court of Appeal's decision

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<sup>91</sup> *Williams & Glyn's Bank PLC v. Astodinamico Compania Naviera S.A.* [1984] Lloyd's Rep. 453 (H.L.) [*Williams & Glyn's Bank*].

<sup>92</sup> *Ibid.*

<sup>93</sup> *Supreme Court Act 1981*, *supra* note 5.

<sup>94</sup> *Ibid.*, s.49(3).

should be upheld and the action in England should be stayed.<sup>95</sup> It is worth mentioning that the stay of the action in England in this case was not the same as a stay of action on the ground of forum inconvenience.<sup>96</sup> The former is the inherent power of court vested by the *Supreme Court Act 1981*, and the latter is a doctrine of the conflicts of laws.

The power of the court to grant a stay of court proceedings where there is a valid arbitration agreement has been stipulated in the *Arbitration Act 1996*,<sup>97</sup> which reads:

A party to an arbitration agreement, against whom, legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceeding so far as they concern that matter.<sup>98</sup>

It is a regulatory requirement that the court must grant a stay if there is a valid arbitration agreement. In addition, the *UNCITRAL Model Law on International Commercial Arbitration*<sup>99</sup> also stipulates that the court, before which an action is brought in a matter that is the subject of an arbitration agreement, must refer the parties to arbitration unless it finds that the arbitration agreement is “null and void, inoperative or incapable of being performed”.<sup>100</sup>

#### 2.7.1.2 The power of the court to appoint arbitrators

The appointment of an arbitrator or arbitrators in an arbitral process is important as it creates the necessary institutional framework. Arbitrators are conductors of the process. When parties to an arbitration agreement are unwilling or delay appointing the arbitrator(s), the court can enforce the arbitration agreement by making the

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<sup>95</sup> *Williams & Glyn's Bank*, *supra* note 91.

<sup>96</sup> See part 2.8.1 below.

<sup>97</sup> *Arbitration Act 1996* (U.K.), 1996, c.23; Online: <<http://www.legislation.hmsso.gov.uk/acts/acts1996/1996023.htm>> (accessed on June 01 2004).

<sup>98</sup> *Ibid.*, s.9(1).

<sup>99</sup> *UNCITRAL Model Law on International Commercial Arbitration*, 21 June 1985; Online: <<http://www.uncitral.org/en-index.htm>> (accessed on 01 June 2004) [*UNCITRAL Model Law*].

<sup>100</sup> *Ibid.*, art.8(1).

necessary appointments and the arbitral process can thus continue.<sup>101</sup> It is also the case that when an arbitrator is appointed by one party, and the other party fails to appoint his arbitrator, the former (upon due notice to the party in default) could propose his arbitrator as a sole arbitrator. The party in default may apply to the court to set aside the appointment.<sup>102</sup> Moreover, in cases where parties to an arbitration agreement agree that there should be a tribunal of three arbitrators, and they appoint their own arbitrators, but then the two arbitrators fail to appoint the third one to act as chairman of the tribunal, either party can apply for the court to appoint a chairman of the tribunal.<sup>103</sup>

#### 2.7.1.3 Arrest as security for the enforcement of arbitral award

In the UK, when the court grants a stay of action because of a valid arbitration agreement, it has no power to entertain, as between the parties to that agreement, an action *in rem*. In other words, once the stay is granted, the *in rem* claim cannot be exercised as a security for the claims. Justice Sheen ruled in *The "Tuyuty"*<sup>104</sup> that the court has no power to arrest a ship as a security for the arbitration proceedings. This has been confirmed by the Court of Appeal, in which Lord Justice Robert Goff cited *The "Rena K"*<sup>105</sup> that "the security should be provided not for an arbitration award but for a judgement in the action *in rem* itself, should the stay of the action subsequently be lifted after failure by the shipowners to satisfy an award in the arbitration".<sup>106</sup>

However, when the ship has already been arrested in an action *in rem* and a court order for a stay is granted, the ship can remain arrested as a security for the arbitration award. This has been stated in the *Civil Jurisdiction and Judgement Act*,

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<sup>101</sup> *Arbitration Act 1996*, *supra* note 97, s.16. See also ss.17-18, *ibid*.

<sup>102</sup> *Ibid.*, s.17(2). See also s.17(3), *ibid*.

<sup>103</sup> *Ibid.*, s.16(5).

<sup>104</sup> *The "Tuyuty"* [1984] 2 Lloyd's Rep. 51.

<sup>105</sup> *The "Rena K"* [1978] 1 Lloyd's Rep. 545.

<sup>106</sup> *Ibid.*, at 549.

1982.<sup>107</sup> In *Greenmar Navigation Ltd. v. The Owners of the Ships Bazias 3 and Bazias 4*,<sup>108</sup> the defending shipowners commenced arbitration proceedings against the charterers claiming unpaid hire and damages arising out of the charter of their vessels *Bazias 3* and *Bazias 4*. The shipowners served a defence and counterclaim in the arbitration. The charterers subsequently instituted proceedings *in rem* against these vessels. The Court of Appeal in England ruled that the vessels should remain under arrest while the stay of action was granted.<sup>109</sup>

The UK *Arbitration Act 1996* stipulates the same stance towards the arrest of the ship *in rem* to secure an award made by arbitration proceedings. It provides:

Where Admiralty proceedings are stayed on the ground that the dispute in question should be submitted to arbitration, the court granting the stay may, if in those proceedings property has been arrested or bail or other security has been given to prevent or obtain release from arrest:

- (a) order that the property arrested be retained as security for the satisfaction of any award given in the arbitration in respect of that dispute, or
- (b) order that the stay of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award.<sup>110</sup>

Similarly, admiralty practice in the US also provides parties to an arbitration agreement with an action *in rem* to secure the enforcement of an arbitration award. An action *in rem* can be brought regardless of the existence of an arbitration agreement. The court will then arrest the ship as security and direct parties to arbitrate. In *Castelan v. M/V Mercantil Parati*,<sup>111</sup> in answering the question whether a plaintiff is entitled to maintain the arrest of a vessel in America as security for the arbitration claim in London, Judge Alfred M. Wolin stated that the pre-arbitration

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<sup>107</sup> *Civil Jurisdiction and Judgement Act 1982* (U.K.), 1982, c.27; Online: <<http://www.hmso.gov.uk/cgi-bin/search.pl?DB=hmso-new>> (accessed on 01 June 2004).

<sup>108</sup> *Greenmar Navigation Ltd. v. The Owners of the Ships Bazias 3 and Bazias 4* [1993] 1 Lloyd's Rep. 101.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Arbitration Act 1996*, *supra* note 97, s.11.

<sup>111</sup> *Castelan v. M/V Mercantil Parati*, 1991 WL 83129 (D.N.J.), 1991 A.M.C. 2141 [*Casterlan*].



vessel arrest is not prohibited and the *Federal Arbitration Act*<sup>112</sup> preserves the right of a party to employ traditional admiralty procedures including the arrest of a vessel, even though that party had agreed to arbitration.<sup>113</sup> The Judge also cited such cases as *EAST Inc. v. M/v Alaia*<sup>114</sup> and *McCreary Tire & Rubber Co. v. C.E.A.T.*<sup>115</sup> to strengthen his argument.

In Vietnam, both *Civil Procedures*<sup>116</sup> and *Economic Procedures*<sup>117</sup> allow the arrest of a ship as security only for those maritime claims that have been brought before the court. These *Procedures* are silent on the provision of arresting a ship as security during the arbitration process. Thus the arrest of a ship as security for arbitration proceedings is not allowed in Vietnam except in the case of arresting a ship to enforce an arbitration award, which is presented in part 4 of this work.

#### 2.7.1.4 Court's power in taking evidence

The *UNCITRAL Model Law* states that the court should facilitate arbitration by providing a framework for the collection of evidence as follows:

Arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this States assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.<sup>118</sup>

This is an important provision and has created legal grounds for the court to assist in the arbitration process. Though the *UNCITRAL Model Law* is not mandatory, it is recommendable that countries should apply the model and implement these recommendations into national legislations.

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<sup>112</sup> *Federal Arbitration Act*, U.S.C. tit.9 (1947); Online: <[http://www.globalarbitrationmediation.com/us\\_arbitration.shtml](http://www.globalarbitrationmediation.com/us_arbitration.shtml)> (accessed on 01 June 2004).

<sup>113</sup> *Casterlan*, *supra* note 111.

<sup>114</sup> *EAST Inc. v. M/v Alaia*, 876 F.2d 1168 (1989)

<sup>115</sup> *McCreary Tire & Rubber Co. v. C.E.A.T.*, 501 F.2d 1032 (1974)

<sup>116</sup> *Civil Procedures*, *supra* note 46, art.41.

<sup>117</sup> *Economic Procedures*, *supra* note 41., art. 41. See also art.42, *ibid.*

<sup>118</sup> *UNCITRAL Model Law*, *supra* note 99, art.27.

## 2.7.2 Post-arbitration assistance

### 2.7.2.1 Enforcement of arbitral award

An arbitral award itself is not automatically enforceable because arbitrators are not empowered to enforce their awards and parties losing in the arbitration process are not willing to perform their duties and obligations as requested by the award. Parties to an arbitration agreement must seek a judicial authority to enforce the awards rendered by the arbitrators. The court is the only competent authority that is capable of enforcing arbitral awards.

In *The “Saint Anna”*<sup>119</sup> which involved the enforcement of an arbitral award, the plaintiff applied to the court for that enforcement and Justice Sheen decided that an action based on the arbitration award fell within the UK admiralty jurisdiction<sup>120</sup> and the court would enforce the award.<sup>121</sup>

The *UNCITRAL Model Law* provides that an arbitral award shall be recognized and enforced by a competent court.<sup>122</sup> There are two separate procedures involved in giving effect to an arbitral award; recognition and enforcement. However, the notion of recognition and enforcement of arbitral awards will be discussed in greater detail in part 4.

### 2.7.2.2 Appeal

The finality of the award by arbitrators in resolving maritime disputes may be challenged in spite of the fact that parties to an arbitration agreement, who have agreed to submit their disputes to arbitrators, wish to find a conclusive solution for their disputes. Arbitrators are not judges, they are experts in the maritime business and are usually regarded as honourable by the maritime community because of their

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<sup>119</sup> *The “Saint Anna”* [1983] 1 Lloyd’s Rep. 180.

<sup>120</sup> *Supreme Court Act 1981*, supra note 5, s.20.

<sup>121</sup> *The “Saint Anna”*, supra note 119.

<sup>122</sup> *UNCITRAL Model Law*, supra note 99, art.36. See also art.37, *ibid.*

specialized knowledge in such matters as carriage of goods, sale of goods, bills of lading or chartering practices. Generally, the legal provisions of such countries as the United Kingdom and the United States provide room for appealing the arbitral award, however, legal grounds for the appeal are very strict and the courts are very cautious in deciding on this question.

It is the customary law that paves the way for the appeal against an arbitral award. A well-known case involving an appeal from arbitrators' award is *Pioneer Shipping Ltd. & ors. V. BTP Tioxide Ltd. (The "Nema")*,<sup>123</sup> in which, the House of Lords in the United Kingdom indicated two grounds for the appeal, that are:

1. The arbitrator had misdirected himself in point of law, or
2. The decision was such that no reasonable arbitrator could reach.<sup>124</sup>

It is the fault of arbitrators "in point of law" that made the award appealable, however, in order to appeal the award, there must be a strong argument that the arbitrators were wrong,<sup>125</sup> otherwise parties to the arbitration agreement must take the risk. The underlying philosophy is that they have appointed arbitrators for them, thus they must bear the risk that justice has not been done properly. The important legal implication of *The "Nema"* precedent has made it part of the *Arbitration Act 1996* of the UK as a principle in the law of arbitration.<sup>126</sup>

The *UNCITRAL Model Law* does reserve the right of parties to an arbitration agreement to recourse to a court against the award<sup>127</sup> and this will be discussed at length in part 4 of this research.

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<sup>123</sup> *Pioneer Shipping Ltd. & ors. V. BTP Tioxide Ltd. (The "Nema")* [1981] 2 Lloyd's Rep. 239.

<sup>124</sup> *Ibid.*, at 245.

<sup>125</sup> *Ibid.*, at 241.

<sup>126</sup> *Arbitration Act 1996*, *supra* note 97, s.69.

<sup>127</sup> *UNCITRAL Model Law*, *supra* note 99, art.34.

## **2.8 Conflicts of law in commercial maritime dispute resolution**

### **2.8.1 Choice of forum**

Normally, parties to an arbitration agreement name the place where the arbitration process should take place. They are free to choose the place that is most suitable for them. In the carriage of goods by sea it may be the country of departure, country of destination, where the parties have their offices, or in a third country. The freedom of contract gives parties to an arbitration agreement a wide range of choices. Convenience is always the determining factor that affects their decision.

### **2.8.2 Choice of law**

Because of the international nature of shipping, at times, more than one legal system is applicable to a specific matter, this situation also exists in maritime arbitration. The situation where more than one legal system can be applied to a specific legal matter is called conflicts of law.<sup>128</sup>

As far as maritime arbitration is concerned, each arbitration centre has its own set of procedures that govern the arbitration process conducted at that centre. This is the procedural framework and is considered to be distinctive and individual. Such arbitration centres as the London Maritime Arbitration Association in the UK, the Society of Maritime Arbitrators in the US, Singapore International Arbitration Centre in Singapore and the Vietnam Commercial Centres have published their own procedures and each of them sticks to their procedural law. Parties to an arbitration agreement are restricted in their choice of procedural law that governs the conduct of arbitrators. Rarely does one find a specific centre that allows the application of the procedural law of another center.

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<sup>128</sup> *Compendium on International Law* (Hanoi: Laodong Publishing House, 1995), at 47 [translated by author].

However, there is another aspect that parties may decide and agree upon, that is the choice of law that governs the substance of the dispute. Parties may choose which carriage law should be applied by arbitrators when they consider the rights and obligations of claimants and defendants to the dispute.

The *Maritime Code* stipulates the conflicts of law rule as follows:

1. In cases of legal disputes, the law to be applied shall be determined on the basis of the following principles :
2. In cases which involve: the ownership of property on board the ship; charter parties; contracts for the hire of crewmen and for the carriage of passengers and their effects; the division of rescue fees between the owner and the crew of the rescue ship; and the salvaging of wrecked property from the open sea; the laws of the country whose flag is displayed on the ship will prevail.
3. In cases which involve general average, the laws of the port of call immediately after the occurrence of general average shall prevail.
4. In cases which involve a collision, payment for rescue and for the salvage of wrecked property from the sea, the laws of the country having sovereignty over the inland or territorial waters where the casualty took place shall prevail.
5. In cases which involve a collision or salvage taking place in open sea, the laws applied by the arbitrator who, or court which hears the case shall prevail.
6. In cases which involve freight contracts, the laws of the country where the headquarters of the freight agency are located shall prevail.<sup>129</sup>

Parties to the contract for carriage of goods by sea may agree that foreign law may apply to their contract provided that it is not contrary to Vietnamese law.<sup>130</sup> Thus, parties may choose to apply foreign carriage law to their contract if that law is not contrary to Vietnamese laws. However, the *Maritime Code* does not define when and how a foreign law can be considered contrary to Vietnamese law. It is an open-ended contractual provision and it can be challenged at any time by any party to the contract.

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<sup>129</sup> *Maritime Code*, *supra* note 44, art.5 [translated by author].

<sup>130</sup> *Ibid.*, art.7.

The *Ordinance on Commercial Arbitration* of Vietnam stipulates principles for the choice of law to be applied to the substance of the dispute as follows:

1. Regarding disputes between Vietnamese parties, Vietnamese laws shall be applied.
2. If the dispute involved foreign factors, arbitrators shall apply foreign laws, according to the choice of parties, provided that the chosen laws are not contrary to basic principles of Vietnamese law. If parties could not reach an agreement on the applicable law, the arbitrators shall decide which law applies to the dispute.<sup>131</sup>

These basic principles of Vietnamese law are not clearly defined. However, the purpose of an arbitration agreement is to conclusively terminate the dispute, thus it is convincing enough to argue that the intention of parties to an arbitration agreement should be respected and upheld by law. In Vietnam, there has not been any arbitration agreement rejected or declared to be invalid as far as the choice of law is concerned.

## **2.9 Conclusion**

Both admiralty proceedings and arbitration provide parties to a dispute with methods to resolve their dispute. Arbitration is informal, or at least less formal than court proceedings, but nonetheless an effective way to resolve disputes in the maritime context, providing parties with the autonomy to appoint arbitrators, choosing the venue for the arbitration and choosing substantive law that can be applied by the arbitrators. Moreover, by using arbitration, parties to a maritime dispute can reserve the privacy and avoid the adverse affects on their names in the maritime field.

On the other hand, admiralty proceedings effectively assist maritime arbitration both before and after the arbitration process. Although procedurally simpler than admiralty proceedings, the success of maritime arbitration still depends largely on admiralty jurisprudence. But there is a close relationship between admiralty proceedings and arbitration, which has been noted by Judge Charles S. Haight as

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<sup>131</sup> *Arbitration Ordinance*, *supra* note 47, art.7 [translated by author].

“Judges and arbitrators work[ing] together as laborers in the same vineyard of Justice. The procedural differences are less important than the substantive common purpose”.<sup>132</sup>

In Vietnam, where admiralty proceedings are not specialized and the maritime legal framework is under construction, maritime arbitration may be a good alternative to resolve maritime disputes in general as well as disputes involving the carriage of goods by sea in particular.

In the next Chapter, the author will analyse maritime arbitration in greater detail by conducting a study of different aspects of arbitration clauses in standard contracts for the carriage of goods by sea.

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<sup>132</sup> Charles S. Haight, “Arbitration – A Judicial Perspective” (2001) *The Arbitrator* 33; Online: <[http://www.smany.org/sma/Arbitrat\\_Oct2001.html](http://www.smany.org/sma/Arbitrat_Oct2001.html)> (accessed on 01 June 2004).

## CHAPTER 3

### THE ARBITRATION CLAUSE IN THE CONTRACT OF CARRIAGE

#### 3.1 Introduction

Because of the convenience and popularity of maritime arbitration, charterparties and bills of lading usually contain arbitration clauses. Parties to the carriage contract agree that disputes arising out of, or in connection with the contract should be settled by arbitration in an agreed place and in a certain manner.

This chapter will examine arbitration clauses in some commonly used standard contracts of carriage, their validity and construction, tribunal structure and composition. The incorporation of an arbitration agreement in the bill of lading, which is an interesting aspect of arbitration law, will be studied.

#### 3.2 Arbitration clauses in standard contracts

The application of standard contracts for the carriage of goods by sea helps to reduce the time and cost for parties to the carriage in drafting, and negotiating the terms and conditions of the contracts. There are a number of standard contracts that have been proposed by various institutions involved in international maritime affairs. Arbitration and jurisdiction clauses can be found in such standard charterparties as “AMWELSH 93”,<sup>1</sup> “AUSTWHEAT 1990”,<sup>2</sup> “COAL-OREVOY”,<sup>3</sup> “FERTIVOY 88”,<sup>4</sup>

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<sup>1</sup> Americanized Welsh Coal Charter, code name: “AMWELSH 93”, issued by the Association of Ship Brokers and Agents (U.S.A.), Inc. (New York: 1953), as amended in 1979 and revised in 1993; Online: <[http://www.bimco.dk/upload/amwelsh\\_93\\_001.pdf](http://www.bimco.dk/upload/amwelsh_93_001.pdf)> (accessed on 01 July 2004).

<sup>2</sup> Australian Wheat Charter 1990, code name: “AUSTWHEAT 1990”, licensed by the Australian Wheat Board of Melbourne and recommended by the Baltic and International Maritime Council, as revised in 1991; Online: <[http://www.bimco.dk/upload/austwheat\\_1990\(2\).pdf](http://www.bimco.dk/upload/austwheat_1990(2).pdf)> (accessed on 01 July 2004).

<sup>3</sup> Standard coal and ore charter party, code name: “COAL-OREVOY”, recommended by BIMCO; Online: <[http://www.bimco.dk/upload/coal-orevoy\(1\).pdf](http://www.bimco.dk/upload/coal-orevoy(1).pdf)> (accessed on 01 July 2004).

<sup>4</sup> North American Fertilizer Charter Party 1978/88, code name: “FERTIVOY 88”, issued by Campotex Shipping Service Ltd., Vancouver, first edition: 1978 as revised in 1988; Online: <[http://www.bimco.dk/upload/fertivoy\\_88.pdf](http://www.bimco.dk/upload/fertivoy_88.pdf)> (accessed on 01 July 2004).



“GENCON”,<sup>5</sup> “GRAINCON”,<sup>6</sup> “NIPPONCOAL”,<sup>7</sup> “NORGRAIN 89”,<sup>8</sup> “SCANCON”,<sup>9</sup> and “WORLDFOOD 99”.<sup>10</sup> Standard bills of lading also contain arbitration and jurisdiction clause. Some of these standard documents are “COMBICONBILL”,<sup>11</sup> “CONLINEBILL 2000”,<sup>12</sup> “NORGRAINBILL”<sup>13</sup> and “SCANCONBILL”.<sup>14</sup>

Most of the standard contracts provide arbitration in London, New York or “ad hoc” arbitration as mutually agreed between the parties. An example of a standard arbitration clause is found in the Standard General Charter (GENCON) at article 19 as follows:

#### 19. Law and Arbitration

(a) This Charter Party shall be governed by and construed in accordance with \* English law and any dispute arising out of this Charter Party shall be referred to arbitration in London in accordance with the Arbitration Acts 1950 and 1979 or any statutory modification or re-enactment thereof for the time being in force. Unless the parties agree

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<sup>5</sup> Uniform General Charter, code name: “GENCON”, recommended by BIMCO as revised 1922, 1976 and 1984; Online: <[http://www.bimco.dk/upload/gencon\\_94.pdf](http://www.bimco.dk/upload/gencon_94.pdf)> (accessed on 01 July 2004).

<sup>6</sup> BIMCO Standard Grain Voyage Charter Party, code name: “GRAINCON”, issued by BIMCO in 2003; Online: [http://www.bimco.dk/upload/graincon\(1\).pdf](http://www.bimco.dk/upload/graincon(1).pdf) (accessed on 01 July 2004).

<sup>7</sup> Coal Charter Party, code name: “NIPPONCOAL”, recommended by the Documentary Committee of the Japan Shipping Exchange, Inc. in 1983; Online: <<http://www.bimco.dk/upload/nipponcoal.pdf>> (accessed on 01 July 2004).

<sup>8</sup> North American Grain Charterparty 1973, code name: “NORGRAIN 89”, issued by the Association of Ship Brokers and Agents (U.S.A.), Inc., first issue: 1973 as amended in 1989; Online: <[http://www.bimco.dk/upload/norgrain\\_89.pdf](http://www.bimco.dk/upload/norgrain_89.pdf)> (accessed on 01 July 2004).

<sup>9</sup> Scandinavian Voyage Charter 1956, code name: “SCANCON”, recommended by BIMCO; Online: <<http://www.bimco.dk/upload/scancon.pdf>> (accessed on 01 July 2004).

<sup>10</sup> Voyage Charter Party, code name: “WORLDFOOD 99”, recommended by the United Nations World Food Programme in 1986 as revised in 1999; Online: <[http://www.bimco.dk/upload/worldfood\\_99.pdf](http://www.bimco.dk/upload/worldfood_99.pdf)> (accessed on 01 July 2004).

<sup>11</sup> Combined Transport Bill of Lading, code name: “COMBICONBILL”, adopted by BIMCO in 1971 as revised in 1995; Online: <http://www.bimco.dk/upload/combiconbill.pdf> (accessed on 01 July 2004).

<sup>12</sup> BIMCO Liner Bill of Lading, code name: “CONLINEBILL 2000”, adopted by BIMCO in 1974 as revised in 1950, 1952, 1973, 1974, 1976, 1978 and 2000; Online: <[http://www.bimco.dk/upload/onlinebill\\_2000.pdf](http://www.bimco.dk/upload/onlinebill_2000.pdf)> (accessed on 01 July 2004).

<sup>13</sup> North American Grain Bill of Lading, code name: “NORGRAINBILL”, issued by the Association of Ship Brokers and Agents (U.S.A.), Inc.; Online: <[http://www.bimco.dk/upload/norgrain\\_bill\\_of\\_lading\\_as\\_amended\\_1989.pdf](http://www.bimco.dk/upload/norgrain_bill_of_lading_as_amended_1989.pdf)> (accessed on 01 July 2004).

<sup>14</sup> Bill of lading, code name: “SCANCONBILL”, recommended by BIMCO; Online: <<http://www.bimco.dk/upload/scanconbill.pdf>> (accessed on 01 July 2004).

upon a sole arbitrator, one arbitrator shall be appointed by each party and the arbitrators so appointed shall appoint a third arbitrator, the decision of the three-man tribunal thus constituted or any two of them, shall be final. On the receipt by one party of the nomination in writing of the other party's arbitrator, that party shall appoint their arbitrator within fourteen days, failing which the decision of the single arbitrator appointed shall be final.

For disputes where the total amount claimed by either party does not exceed the amount stated in Box 25\*\* the arbitration shall be conducted in accordance with the Small Claims Procedure of the London Maritime Arbitrators Association.

(b) This Charter Party shall be governed by and construed in accordance with \* Title 9 of the United States Code and the Maritime Law of the United States and should any dispute arise out of this Charter Party, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for purpose of enforcing any award, this agreement may be made a rule of the Court. The proceedings shall be conducted in accordance with the rules of the Society of Maritime Arbitrators, Inc..

For disputes where the total amount claimed by either party does not exceed the amount stated in Box 25\*\* the arbitration shall be conducted in accordance with the Shortened Arbitration Procedure of the Society of Maritime Arbitrators, Inc..

(c) Any dispute arising out of this Charter Party shall be referred to arbitration at \* the place indicated in Box 25, subject to the procedures applicable there. The laws of the place indicated in Box 25 shall govern this Charter Party.

(d) If Box 25 in Part 1 is not filled in, sub-clause (a) of this Clause shall apply.

(a), (b) and (c) are alternatives; indicate alternative agreed in Box 25. \*

*Where no figure is supplied in Box 25 in Part 1, this provision only shall be void but \*\* the other provisions of this Clause shall have full force and remain in effect.*<sup>15</sup>

In addition to those standard contracts for carriage, there are recommended arbitration clauses drafted and provided by such institutions and model laws as the International Chamber of Commerce<sup>16</sup> and the *UNCITRAL Model Law on International Commercial Arbitration*.<sup>17</sup> These clauses were drafted for the purpose of reducing time and cost for

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<sup>15</sup> "GENCON", *supra* note 5, cl.19.

<sup>16</sup> The recommended arbitration clauses by the International Chamber of Commerce have been changed several times, at present, the clause in force was adopted in 1998. Online: <[http://www.iccwbo.org/court/english/arbitration/word\\_documents/model\\_clause/mc\\_arb\\_english.txt](http://www.iccwbo.org/court/english/arbitration/word_documents/model_clause/mc_arb_english.txt)> (accessed on 01 July 2004).

<sup>17</sup> *UNCITRAL Model Law on International Commercial Arbitration*, 21 June 1985; Online: <<http://www.uncitral.org/en-index.htm>> (accessed on 01 June 2004) [*UNCITRAL Model Law*].

parties to the carriage. They are also aimed at a unified maritime arbitration practice by providing clear, precise and undisputable terms for arbitration.

### 3.3 Validity of an arbitration clause

#### 3.3.1 In writing

An agreement to arbitrate has a special legal effect. It binds parties to the agreement to a final decision that is normally not appealable. Therefore, terms of the agreement must clearly define the intention of parties involved to be bound by it.

Regarding the requirement that an arbitration agreement must be signed, Mustill and Boyd have written:

It was at one time doubtful whether the words “written” or “in writing” involved a requirement that the agreement shall be signed. But it is now settled that no signature is necessary provided there is a document or documents recognizing the existence of an arbitration agreement between the parties.<sup>18</sup>

In *Excomm Ltd. v. Ahmad Abdul-Qawi Bamaodah (The “St Raphael”)*<sup>19</sup>, which involved the question of whether the arbitration agreement must be signed by the parties, the Court of Appeal in London looked at specific provisions in the UK *Arbitration Act 1950* and Judge Lloyd ruled that:

There is certainly no express requirement to that effect in the definition of an arbitration agreement in the 1950 Act. I would hold that an arbitration agreement need not be signed and that the definition in Section 32 of the Act is satisfied provided there is a document or documents in writing which recognize, incorporate or confirm the existence of an agreement to submit.<sup>20</sup>

The position of a court in this respect depends on the substantive law governing arbitration. On the other hand, the development and application of e-commerce imply that the requirement of a signed arbitration agreement is not always practical. This is

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<sup>18</sup> J. M. Mustill, & C. S. Boyd, *Commercial Arbitration*, 2d ed. (London: Butterworths, 1989) at 55.

<sup>19</sup> *Excomm Ltd. V. Ahmed Abdul-Qawi Bamaodah (The “St Raphael”)* [1985] 1 Lloyd’s Rep. 403.

<sup>20</sup> *Ibid.*, at 405.

further recognized in the UK *Arbitration Act 1996*,<sup>21</sup> according to which a written arbitration agreement is not required to be signed by the parties.<sup>22</sup>

On the other hand, the *UNCITRAL Model Law*<sup>23</sup> requires that the arbitration agreement must be evidenced in writing and signed by the parties. However, means of communication such as the exchanging of letters, telexes, and telegrams are also considered as written evidence if they provide a record of the agreement.<sup>24</sup>

### 3.3.2 Arbitration clause vs. proper law of the contract

Subject to the freedom of contract, parties are free to negotiate terms and conditions for the carriage that include the arbitration agreement. However, these terms are bound by the governing law of the carriage contract. For example, parties to those bills of lading issued pursuant to the *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading*<sup>25</sup> or *Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*<sup>26</sup> are not allowed to agree on terms that may “relieve” or “lessen” the carrier’s liability, otherwise those terms shall be null and void.<sup>27</sup> Read together with article 3(6) of *Hague-Visby Rules*, which states that the carrier should be discharged from all liability unless a suit is brought within one year, one could conclude that the time for arbitration contained in the contract of carriage under the *Hague Rules* or *Hague-Visby Rules* should not be

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<sup>21</sup> *Arbitration Act 1996* (U.K.), 1996, c.23; Online: <<http://www.legislation.hmso.gov.uk/acts/acts1996/1996023.htm>> (accessed on June 01 2004)..

<sup>22</sup> *Ibid.*, s.5(2).

<sup>23</sup> *UNCITRAL Model Law*, *supra* note 17.

<sup>24</sup> *Ibid.*, art.7(2).

<sup>25</sup> *International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, 25 August 1924, Online: <<http://www.admiraltylawguide.com/conven/haguerules1924.html>> (accessed on 01 July 2004). [*Hague Rules*].

<sup>26</sup> *Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, 23 February 1968, Online: <<http://www.admiraltylawguide.com/conven/visbyrules1968.html>> (accessed on 01 July 2004) [*Hague-Visby Rules*].

<sup>27</sup> *Ibid.*, art.3(6). See also *Hague Rules*, *supra* note 25, art.3(6).

shorter than the one year period, otherwise, the arbitration agreement shall be null and void. Vietnam is not a party to the *Hague Rules* or *Hague-Visby Rules*; however, it has integrated article 3(6) of the *Hague-Visby Rules* into its *Maritime Code*.<sup>28</sup> As a result, if a bill of lading is governed by the *Maritime Code*<sup>29</sup> of Vietnam, the arbitration agreement in that bill of lading must not specify a time to commence arbitration that is longer than one year, otherwise, that agreement may be null and void.

### **3.3.3 Independent from the carriage contract**

Because of its nature, an arbitration clause in a contract provides a stand-alone method to deal with disputes. Thus, a question may be raised concerning the legal effect of an arbitration agreement in case it is part of an invalid carriage contract. In the author's opinion, an arbitration agreement is a contract within a contract, i.e., contract for the carriage of goods by sea. The validity of an arbitration agreement is by no means affected by the terms of the carriage contract, and it is valid even in case the carriage contract itself is invalid. In Vietnam, the independence of an arbitration agreement from its parental contract has been confirmed by the *Ordinance on Commercial Arbitration*.<sup>30</sup> Further, the agreement is not affected by the changes, extensions, liquidation and validity of the contract.<sup>31</sup>

## **3.4 Main clauses**

### **3.4.1 Scope**

The scope of the arbitration agreement is important; it states what types of claims fall within the agreement and should be arbitrated. There are several ways to specify the

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<sup>28</sup> *Maritime Code*, dated 12 July 1990, by the National Assembly of Vietnam, art.65(2), CD-ROM: Vietnam's Lawdata (CD\_ROM FORMAT: 92/QD-CXB, 2003).

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ordinance on Commercial Arbitration*, dated 25 February 2003, by the Standing Committee of the National Assembly of Vietnam, CD-ROM: Vietnam's Lawdata (CD\_ROM FORMAT: 92/QD-CXB, 2003).

<sup>31</sup> *Ibid.*, art.11.

scope of disputes under the arbitration agreement, such as “all disputes arising out of”,<sup>32</sup> “all disputes arising in connection with”,<sup>33</sup> “all disputes arising under”,<sup>34</sup> and “all disputes arising from”.<sup>35</sup>

Such claims that are “arising out of” and “arising under” give the arbitration a narrow scope of application. These claims should have direct connections with the contract. On the other hand, the scope of the arbitration may be widened if the parties agreed to submit claims that have “connection with” the contract. The plain meaning of the phrase suggests that there should be a link between the claims and the contract; it is not necessary to have a direct connection between the two.<sup>36</sup>

However, the attitude of courts regarding this aspect of the arbitration agreement is not uniform. In *Ethiopian Oilseeds and Pulses Export Corp. v. Rio Del Mar Foods Inc.*<sup>37</sup>, the parties agreed to refer to arbitration any disputes “arising out of or under the contract”. Justice Sirst decided that “the words ‘arising out of’ should be given a wide interpretation covering disputes other than one as to the very existence of the contract itself”.<sup>38</sup> He added further that “I find it very difficult to make any distinction between the words ‘arising out of’ and ‘arising in connection with’, the two phrases appearing to me to be virtually synonymous”.<sup>39</sup> Consistently, in “FERTIVOY 88” the phrases “arising under” and “arising out of” are used interchangeably.<sup>40</sup>

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<sup>32</sup> See “AMWELSH 93”, *supra* note 1, cl.32. See also “COAL-OREVOY”, *supra* note 3, cl.26. “FERTIVOY 88”, *supra* note 4, cl.37. “GRAINCON”, *supra* note 6, cl.42. “WORLDFOOD 99”, *supra* note 10, cl.43. “CONLINEBILL 2000”, *supra* note 12, cl.4. “NORGRAINBILL”, *supra* note 13, cl.12.

<sup>33</sup> See “COAL-OREVOY”, *ibid.* See also “GRAINCON”, *ibid.* “WORLDFOOD 99”, *ibid.* “CONLINEBILL 2000”, *ibid.*

<sup>34</sup> See “AUSTWHEAT 1990”, *supra* note 2, cl.33. See also “FERTIVOY 88”, *supra* note 4, cl.37. “COMBICONBILL”, *supra* note 11, cl.5.

<sup>35</sup> See “NIPPONCOAL”, *supra* note 7, cl.28.

<sup>36</sup> See *e.g.* *The “Delos”* [2001] 1 Lloyd’s Rep. 703 at 705-706.

<sup>37</sup> *Ethiopian Oilseeds and Pulses Export Corp. v. Rio Del Mar Foods Inc.* [1990] 1 Lloyd’s Rep. 86.

<sup>38</sup> *Ibid.*, at 97.

<sup>39</sup> *Ibid.*

<sup>40</sup> See “FERTIVOY 88”, *supra* note 4, cl.37.

### 3.4.2 Place

Parties to an arbitration clause may agree on the place where the arbitration will take place. A standard arbitration clause is usually of the multiple-choice type. The important point is that the parties must indicate their choices. Nevertheless, this is not always the case. In *Intercontinental Natural Resources Ltd. V. Hunter Shipping Co. (The "Michael L")*,<sup>41</sup> there was an arbitration agreement in the charterparty between the shipowner and the charterer. The agreement specified that disputes should be submitted alternatively to arbitration in New York or London. Nevertheless, the parties did not delete either "New York" or "London" and the problem arose regarding the place of arbitration where the agreement to arbitrate was ambiguous. Both the shipowner and the charterer appointed arbitrators in New York. However, the shipowner subsequently argued that the arbitration should be instituted in London. The court decided that the arbitration should take place in New York regardless of the shipowner's submission that London was the place which had a closer connection with the performance of the charterparty.<sup>42</sup> In this case, the court's decision was made based upon acts of the parties prior to the dispute. It was the appointment of arbitrators in New York that made New York the venue for arbitration.

### 3.4.3 Applicable law

This is the governing law of the carriage that may be specified in the arbitration agreement. Normally, it is the carriage law applicable at the place where the arbitration takes place, i.e., the *lex loci contractus*. In some other situations, parties to the agreement may agree on the law of another country. The choice of applicable law depends very much on the decision of the parties involved.

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<sup>41</sup> *Intercontinental Natural Resources Ltd. V. Hunter Shipping Co. (The "Michael L")* District Ct. (S.D.N.Y.) 23 December 1982, as reported in Lloyd's Maritime Law Newsletter No. 87, 03 March 1983.

<sup>42</sup> *Ibid.*

### 3.4.4 Procedure

Each arbitration centre has its own set of procedures that guides the process of arbitration. In addition, the arbitration procedural law of each country varies according to the specific legal system of the country. Procedural law not only deals with the conduct of arbitration, but also relates to other branches of law that facilitate the arbitration process, i.e., maritime law, law of contract and property law. The choice of procedure by the parties seems to be restricted. For example, the arbitration agreement between two Vietnamese parties can be declared inoperative if the agreement calls for arbitration at the Vietnam Commercial Arbitration Centre and is subject to the procedural law of the United Kingdom. It is so because the *Ordinance on Commercial Arbitration* does not allow the application of foreign procedural law to resolve disputes between Vietnamese parties.<sup>43</sup>

### 3.4.5 Qualification of arbitrators

There are requirements regarding the qualification of arbitrators in most of the standard arbitration clauses. If the arbitration is in London, arbitrators are preferably to be “members of the Baltic Mercantile & Shipping Exchange and engaged in shipping”<sup>44</sup> or simply be “commercial men, conversant with shipping matters”<sup>45</sup> if it is to take place in New York. In another standard clause, arbitrators are simply required to be “commercial men normally engaged in the shipping industry”<sup>46</sup> regardless where the arbitration takes place. The qualification simply ensures that those arbitrators are experts in the maritime sector and are capable of resolving the disputes in question.

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<sup>43</sup> *Ordinance on Commercial Arbitration*, *supra* note 30, art.1.

<sup>44</sup> See “AMWELSH 93”, *supra* note 1, cl.32(b). See also “NORGRAIN 89”, *supra* note 8, cl.45(b).

<sup>45</sup> See “AMWELSH 93”, *ibid.*, cl.32(a). See also “NORGRAIN 89”, *ibid.*, cl.45(a).

<sup>46</sup> See “AUSTWHEAT 1990”, *supra* note 2, cl.33(c).



Nonetheless, it is important to be aware that a lawyer who only has experience in commercial law is not considered qualified as a commercial person in US law.<sup>47</sup>

### **3.4.6 Time**

There are two time stipulations that can be found in the arbitration agreement. These are the time to appoint arbitrators and the time limit for the commencement of the arbitration procedure.

Regarding the time to appoint arbitrators, the 14-day period is commonly found<sup>48</sup> if the arbitration is to take place in the UK.<sup>49</sup> Upon the appointment of an arbitrator by one party, the other party has a 14-day period to appoint an arbitrator of his own.

A problem may arise regarding the time to commence arbitration. Parties to the arbitration agreement may lose their rights to arbitrate because the agreement is time-barred. “FERTIVOY 88” explicitly states that the arbitration process “must commence within one year of final discharge or from the date of cancellation if the voyage is not performed”.<sup>50</sup> For those charterparties and bills of lading that do not impose any limitation of time to commence the arbitration process, such limitation can be found in the specific governing law of the carriage.<sup>51</sup>

### **3.4.7 Fast and shortened procedures**

Though arbitration is considered an alternative to court proceedings, the fast and shortened procedures help to reduce further the time and cost for arbitration. These procedures are applicable by agreement of the parties and follow procedures provided

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<sup>47</sup> “Guide to Maritime Arbitration in New York” Online: <<http://www.smany.org/sma/maritimefaq.html>> (accessed on 10 July 2004).

<sup>48</sup> See “COAL-OREVOY”, *supra* note 3, cl.26(a). See also “FERTIVOY 88”, *supra* note 4, cl.37(1).

<sup>49</sup> *Arbitration Act 1996*, *supra* note 21, art.16.

<sup>50</sup> “FERTIVOY”, *supra* note 4, cl.37.

<sup>51</sup> See part 3.4.3 above.

by certain arbitration centers.<sup>52</sup> The fast and shortened arbitration can be conducted by a sole arbitrator and it proceeds on document without an oral hearing.

### **3.5 Tribunal structure and composition**

#### **3.5.1 Sole arbitrator**

An arbitration tribunal that is made up of a sole arbitrator is not common to maritime arbitration practice. In standard carriage contracts, the sole arbitrator is applicable in case parties have agreed forthwith. A sole arbitrator does not require much time and cost in arranging the hearing as well as the circulation of the document for the arbitration process. Arbitration proceedings with a sole arbitrator are less expensive than with two or more arbitrators and it seems to be suitable for small and simple disputes. However, before the dispute arises, it is difficult for the parties to anticipate the size as well as the complexity of their possible dispute. Therefore, it is quite possible for the parties to decide the appointment of a sole arbitrator after the dispute arises, given the nature of each specific dispute.

#### **3.5.2 Tribunal with a Chairman**

Most of the recommended arbitration clauses call for an arbitration tribunal of two or more arbitrators. Though there is no limitation for the number of arbitrators appointed, the three-arbitrator tribunal is preferred to the tribunal consisting of more than three arbitrators. The reason for this is that in most of the carriage contracts there are two parties, the carrier and the cargo owner. One ship may carry cargoes of different owners, but the carrier individually enters into the contract of carriage with the owner of each shipment.

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<sup>52</sup> E.g.: Small Claims Procedure, Fast and Low Cost Arbitration (FALCA) of the London Maritime Arbitrators Association, Online: <<http://www.lmaa.org.uk/default.html>> (accessed on 01 July 2004); Shortened Arbitration Procedure of the Society of Maritime Arbitrators in New York, Online: <<http://www.smany.org/sma/about6-2.html>> (accessed on 01 July 2004).

Particularly in the United States, the arbitration tribunal is usually composed of three arbitrators.<sup>53</sup> Each party to the contract of carriage appoints one arbitrator, and then two arbitrators will appoint a third arbitrator.<sup>54</sup> The tribunal with three arbitrators is called the “Panel”, where the third arbitrator acts as Chairman.<sup>55</sup> The award will be rendered based on the majority opinion of the Panel.<sup>56</sup>

### **3.5.3 Tribunal with an Umpire**

Parties to the arbitration agreement may agree on a tribunal of two arbitrators and an Umpire.<sup>57</sup> The two arbitrators are appointed by each party and they are empowered to appoint an Umpire at any time after they themselves are appointed.<sup>58</sup> The two arbitrators present their opinion and document on the matter in dispute to the Umpire.<sup>59</sup> The Umpire will then replace the two arbitrators and act as a sole arbitrator to decide on the unresolved matter.<sup>60</sup> However, an Umpire is preferably appointed if the two arbitrators are unable to reach an agreement on a matter relating to the arbitration.<sup>61</sup> This type of tribunal composition is very common in the UK.<sup>62</sup>

### **3.5.4 “Ad hoc” arbitration**

Parties to the carriage contract may agree on an *ad hoc* arbitration. This is an arbitration tribunal instituted on case-by-case, and solely for resolving the dispute at hand. The tribunal is dissolved after the award is rendered. For example, parties to a charterparty may agree on an arbitration in Singapore and apply English maritime law.

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<sup>53</sup> “Guide to Maritime Arbitration in New York”, *supra* note 47.

<sup>54</sup> *Arbitration Act 1996*, *supra* note 21, art.20. See also *Federal Arbitration Act*, U.S.C. tit.9 § 5 (1947); Online: <[http://www.globalarbitrationmediation.com/us\\_arbitration.shtml](http://www.globalarbitrationmediation.com/us_arbitration.shtml)> (accessed on 01 June 2004).

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *Arbitration Act 1996*, *supra* note 21, art.21. See also *Federal Arbitration Act*, *supra* note 54, § 5.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> “Guide to Maritime Arbitration in New York”, *supra* note 47.

<sup>62</sup> *Ibid.*

The use of *ad hoc* arbitration is convenient. It allows parties to choose the place, time, and applicable law (both substantive and procedural) for the arbitration process. It should be used when the parties have sufficient knowledge of the laws that apply to the arbitration process; they should be well aware of every aspect of the arbitration agreement. Otherwise, they may face the situation where the agreement is inoperative; for example, where the substantive laws of the dispute are not applicable or recognized at the place of arbitration.

### **3.5.5 The use of lawyers in arbitration**

Parties to the arbitration agreement may employ legal advisors. It is not a requirement, because arbitrators are only required to be impartial. However, if one party is represented by a lawyer, it is advisable for the other party to have a legal advisor on his behalf.<sup>63</sup>

## **3.6 Incorporation of an arbitration clause in a bill of lading**

### **3.6.1 Charterparty vs. bill of lading**

It is often the case that a bill of lading is issued under a specific charterparty. It incorporates terms and conditions, including the arbitration clause, as per the charterparty. Nevertheless, variation in drafting the incorporation clause has caused problems concerning the arbitration agreement.

At times, the incorporation clauses are held insufficient to cover arbitration agreements and courts are unwilling to enforce those clauses that are too general. As far as the incorporation of the arbitration agreement is concerned, it is required that the incorporation clause in the bill of lading must be express, specific and precise. The *UNCITRAL Model Law* provides an international standard for the incorporation of an arbitration agreement, as follows:

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<sup>63</sup> *Ibid.*

The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.<sup>64</sup>

In *Astro Valiente Compania Naviera S.A. v. Government of Pakistan Ministry of Food and Agriculture (The “Emmanuel Colocotronis”)*,<sup>65</sup> there was a dispute over the incorporation of an arbitration clause from the charterparty into the bill of lading. The incorporation clause read: “All other conditions, exceptions, demurrage, general average and for disbursements as per above named charterparty”. The named charterparty called for all disputes arising out of the carriage contract should be settled by arbitration in London. Relying on the terms “condition”, “exception” in the bill of lading, the cargo receiver (Pakistani Ministry of Food and Agriculture) contended that the arbitration clause was not incorporated, that it was an arbitration clause rather than an “exception” clause. Judge Staughton held that the arbitration clause in the charterparty was incorporated in the bill of lading.<sup>66</sup> He added further that the court reviewed the charterparty and found that it clearly incorporated conditions of the charterparty.<sup>67</sup>

However, the position of Judge Staughton was subsequently challenged in *Skips A/S Nordheim v. Syrian Petroleum Co. (The “Varennna”)*.<sup>68</sup> Judge Hobhouse ruled that “a charter-party arbitration clause was not normally germane to the bill of lading contract and therefore a clear intention to incorporate it had to be found”.<sup>69</sup> According to the judge’s opinion, a general incorporation of all “conditions” from the charterparty into the bill of lading was insufficient to cover the agreement to arbitrate.<sup>70</sup> In addition, he

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<sup>64</sup> UNCITRAL Model Law, *supra* note 17, art.7.

<sup>65</sup> *Astro Valiente Compania Naviera S.A. v. Government of Pakistan Ministry of Food and Agriculture (The “Emmanuel Colocotronis”)* (No. 1) [1982] 1 Lloyd’s Rep. 297.

<sup>66</sup> *Ibid.*, at 299.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Skips A/S Nordheim v. Syrian Petroleum Co. (The “Varennna”)* [1983] 1 Lloyd’s Rep. 416.

<sup>69</sup> *Ibid.*, at 417.

<sup>70</sup> *Ibid.*, at 423.

considered agreement to arbitrate was a “term” or a “clause”, rather than a “condition”.<sup>71</sup>

The wordings of the incorporation clause may appear vague and unclear as to the court’s perception. In *Beacham Commodities Inc. v. Navigazione Alta Italia SpA (The “Nai Carla”)*,<sup>72</sup> there was an incorporation clause in the bill of lading which specified that “all terms whatsoever of the said charter ... apply to and govern the rights of the parties concerned in this shipment”. The clause was held to be invalid to incorporate an arbitration agreement from the charterparty into the bills of lading. Judge Bingham considered the incorporation was too general because it did not expressly refer to the arbitration clause. A similar judgment can be found in *The “Delos”*<sup>73</sup>, which involved two incorporation clauses in the “OCEAN” and “CONGEN” bill of lading. Judge Langley held that in order to give effect to the incorporation, the bills of lading should have an exact and precise description of the arbitration clause as it was in the charterparty.<sup>74</sup> The incorporation clause in the “OCEAN” bill of lading was too general and thus, it did not incorporate the arbitration agreement from the charterparty.<sup>75</sup> An example of the correct incorporation is found in the “CONGEN” bill, where the bill of lading provided that “all terms and conditions, liberties and exceptions to the charterparty... including the Law and Arbitration Clause are herewith incorporated”.<sup>76</sup>

The difficulty concerning the incorporation of the arbitration agreement from the charterparty into the bill of lading issued thereunder may be avoided if the parties to the contract of carriage use one complete set of standard charterparty and bill of lading, for

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<sup>71</sup> *Ibid.*, at 421.

<sup>72</sup> *Beacham Commodities Inc. v. Navigazione Alta Italia SpA (The “Nai Carla”)*, as reported in Lloyd’s Maritime Law Newsletter No. 123, 19 July 1984..

<sup>73</sup> *The “Delos”*, *supra* note 36.

<sup>74</sup> *Ibid.*, at 705.

<sup>75</sup> *Ibid.*, at 706.

<sup>76</sup> *Ibid.*, at 705.

example by combining “NORGRAIN” and “NORGRAINBILL”, or “SCANCON” and “SCANCONBILL”.

### **3.6.2 Legal effect on third parties**

There would be no problem for parties to the charterparty if they are also parties to those bills of lading issued thereto. However, because bills of lading function as the documents of title, the original bill of lading holders may sell the goods in transport by transferring the bill of lading to third party.

This has significant legal consequences that may cause disputes. Logically, the subsequent holders are not parties to the arbitration agreement in the bill. They did not negotiate the terms and conditions of the agreement. However, the question whether the new holder is bound by the arbitration agreement can only be determined by looking at the specific terms of the agreement.

In *Continental U.K. Ltd. V. Anagel Confidence Compania Naviera S.A. (The “Common Venture”)*,<sup>77</sup> the arbitration clause in the charterparty specified that disputes between the shipowner and the charterer should be settled by arbitration in New York. In the bills of lading issued under that charterparty, there was an incorporation of all terms, conditions and exceptions from the charterparty. The question was whether the third party holder of those bills of lading was bound by the arbitration agreement clause in the charterparty. Judge Tenney held that the scope of the arbitration agreement was limited only to the shipowner and the charterer, and that therefore, the third party bills of lading holder was not party to the arbitration agreement.<sup>78</sup> Judge Tenney ruled further that the expression “all disputes arising out of this charter” had a much broader

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<sup>77</sup> *Continental U.K. Ltd. V. Anagel Confidence Compania Naviera S.A. (The “Common Venture”)* 658 F. Supp. 809, 1987 AMC 1202 (S.D. N.Y.), as reported in Lloyd’s Maritime Law Newsletter No. 200, 04 July 1987.

<sup>78</sup> *Ibid.*

scope of application and it was not limited to the disputes between the shipowner and the charterer.<sup>79</sup>

However, there may be a situation where an arbitration agreement is broad in its scope of application. It may use such expressions as ‘all disputes arising out of or in connection with’ or ‘all disputes arising under’ and therefore is not specifically limited to those parties to the agreement. A third party to the carriage contract may be forced to comply with such a provision. In addition, the scope of the incorporation clause in the bill of lading issued under the charterparty plays an important role in deciding whether a third party is bound by the arbitration agreement. In *Midland Tar Distillers Inc. v. M/T Lotos*,<sup>80</sup> the incorporation clause in the bill of lading expands the scope of the arbitration agreement. It explicitly covers persons other than the two parties to the charter. The court found that the expansion was valid and thus, the third party holding the bills of lading was bound by the arbitration agreement.

### 3.7 Conclusion

The use of arbitration clauses in the standard carriage contract has the advantage of reducing the time and cost incurred in the contract negotiation and drafting process. In addition, these standard clauses contribute to uniformity in arbitration practice.

However, the standard arbitration clause should be used with proper caution, otherwise the clause itself may cause potential discrepancies in implementation and interpretation. Parties to the carriage contract are recommended to take into account such aspects as the form and scope of the arbitration agreement, its validity, the appropriate composition of the arbitration tribunal and the applicable procedural as well as substantive laws for the arbitration process. In particular, the incorporation of the

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<sup>79</sup> *Ibid.*

<sup>80</sup> *Midland Tar Distillers Inc. v. M/T Lotos* 362 F. Supp. 1311, 1314 (S.D. N.Y. 1973), as cited in Lisa B. Chessin, “The Applicability of An Arbitration Clause Contained in A Bill of Lading to Third Parties: *Steel Warehouse Co. v. Abalone Shipping Ltd.*” (1999) 23 Tulane Maritime Law Review 578.



agreement from the charterparty into the bill of lading should be carefully considered and worded to clearly spell out the intention of parties to the agreement.

The legal result regarding the incorporation of an arbitration clause in a bill of lading and the effect of the clause on third parties may be viewed differently by the courts, i.e., the court may rule that the clause either is incorporated from the charterparty into the bill of lading or it is not. However, the courts recognize the importance of commercial efficiency in the maritime industry and the need to “move away from legal interpretation that results in lengthy litigation of commercial matters”.<sup>81</sup>

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<sup>81</sup> *Ibid.*, at 583.

## CHAPTER 4

### MARITIME ARBITRATION IN VIETNAM

#### 4.1 Introduction

Maritime arbitration in Vietnam has been practised since the 1960s under the Maritime Arbitration Council. The Foreign Trade Arbitration Council has also functioned in parallel with the Maritime Arbitration Council as a dispute resolution venue in Vietnam. In the early days, most of the international trade activities were between Vietnam and the communist countries of Eastern Europe and the former Soviet Union. At that time, the Vietnamese economy was highly centralized with all foreign trade activities being strictly controlled by the government according to the country's national economic policy. As a result, foreign trade activities were regarded as a matter of inter-governmental relations instead of private international ones. The choice of a dispute resolution venue was centralized and directed by the government. In effect, the two arbitration Councils appeared as governmental organizations.

Vietnam implemented the open-door policy in 1986 and initiated new international trade relations with many other countries. However, the arbitration regime still remained unchanged. It was not until 1993 that the Maritime Arbitration Council and the Foreign Trade Arbitration Council were merged to form the Vietnam International Arbitration Center (VIAC) in accordance with *Decision 204-TTg on the Organization of the Vietnam International Arbitration Center*<sup>1</sup> to become the dispute resolution organization under the Vietnam Chamber of Commerce and Industry. VIAC provides

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<sup>1</sup> *Decision 204-TTg on the Organization of the Vietnam International Arbitration Center*, dated 28 April 1993, by the Prime Minister of Vietnam, CD-ROM: Vietnam's Lawdata (CD-ROM FORMAT: 92/QD-CXB, 2003).

arbitration services to resolve disputes arising from international commercial relationships, including the carriage of goods by sea.

In parallel with VIAC, there are four other Arbitration Centers in Hanoi (2 centers), Hochiminh City and Bacgiang Province, pursuant to the *Decree 116/CP on the Organization and Operation of Economic Arbitration*.<sup>2</sup> However, these centers only have jurisdiction over economic disputes between Vietnamese nationals. Thus, VIAC is the only institution dealing with international disputes.

Nevertheless, the commercial arbitration regime in Vietnam in general, and maritime arbitration in particular, does not fully function as an alternative dispute resolution process. This is evidenced by the fact that there were a mere 90 arbitrators practising under the five arbitration Centers, and the number of cases referred to VIAC over the 10 years after its creation was only 70.<sup>3</sup> Thus, there was an urgent need for the creation of a comprehensive arbitration regime to deal with economic development in Vietnam.

## **4.2 Ordinance on Commercial Arbitration**

### **4.2.1 Introduction**

The *Ordinance on Commercial Arbitration*<sup>4</sup> was adopted in 2003, repealing previous legal instruments; namely the *Decision 204-TTg* and the *Decree 116/CP*, to provide the legal basis for the conduct of commercial arbitration in Vietnam which includes maritime arbitration. The *Ordinance* lays out principles related to the organization and procedure for the conduct of commercial arbitration. Supplementing the *Ordinance*,

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<sup>2</sup> *Decree 116/CP*, No 116//ND-CP, on the Organization and Operation of Economic Arbitration, dated 05 September 1994, by the Government of Vietnam, CD-ROM: Vietnam's Lawdata (CD-ROM FORMAT: 92/QD-CXB, 2003).

<sup>3</sup> Online: <<http://www.vcci.com.vn>> (accessed on 01 July 2004).

<sup>4</sup> *Ordinance on Commercial Arbitration*, dated 25 February 2003, by the Standing Committee of the National Assembly of Vietnam, CD-ROM: Vietnam's Lawdata (CD-ROM FORMAT: 92/QD-CXB, 2003), hereinafter referred to as the *Ordinance*.

there is *Decree 25/2004*,<sup>5</sup> which specifies certain provisions of the *Ordinance* on the jurisdiction of arbitration, organizational procedures and arbitration fee.

#### **4.2.2 General features of the *Ordinance***

Pursuant to the *Ordinance*, commercial disputes, which include those arising out of the contract for the carriage of goods by sea<sup>6</sup>, can be resolved by arbitration provided that before or after the occurrence of such disputes, there exists between the parties involved a valid arbitration agreement.<sup>7</sup> According to the *Ordinance*, an arbitration agreement must be in writing. Such means of communication as letter, telex, fax or electronic mail are considered in writing provided that they clearly identify the intention of the parties to submit their disputes to arbitration.<sup>8</sup> An arbitration agreement can be in the form of a separate document or it can be integrated as a clause in the parental contract.<sup>9</sup> The independence of an arbitration agreement from its parental contract has been confirmed by the *Ordinance*. It is expressly provided that the arbitration agreement is independent from the contract, and it is not affected by the changes, extensions, liquidation and validity of the contract.<sup>10</sup> The court may be involved in the arbitration process to the point that it is requested to stay the action by one party, if there is a valid arbitration agreement, and refer the parties involved to arbitration.<sup>11</sup>

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<sup>5</sup> *Decree 25/2004*, No 25/2004/ND-CP, on the Implementation of the *Ordinance on Commercial Arbitration*, dated 15 January 2004, by the Government of Vietnam, CD-ROM: Vietnam's Lawdata (CD-ROM FORMAT: 92/QD-CXB, 2003).

<sup>6</sup> *Ordinance on Commercial Arbitration*, supra note 4, art.2(3).

<sup>7</sup> *Ibid.*, art.3.

<sup>8</sup> *Ibid.*, art.9(1).

<sup>9</sup> *Ibid.*, art.9(2).

<sup>10</sup> *Ibid.*, art.11.

<sup>11</sup> *Ibid.*, art.5.

The arbitration process is conducted by an arbitration tribunal consisting of three arbitrators or a sole arbitrator.<sup>12</sup> The former involves the appointment of two arbitrators by each party and the two arbitrators have the power to appoint the third one, who acts as chairman of the tribunal.<sup>13</sup> The sole arbitrator tribunal can be formed simply by the mutual appointment of an arbitrator by the parties.<sup>14</sup> Regarding the time limit for the commencement of arbitration, the *Ordinance* excludes application to those disputes for which there are specialized legal provisions on the time to commence arbitration; otherwise, arbitration must be commenced within two years from the date that the dispute arose.<sup>15</sup> This provision was drafted in order to avoid possible conflict with other legislation in the matter of time bar. Specifically, the time bar for the commencement of maritime arbitration is governed by the *Maritime Code of Vietnam*,<sup>16</sup> this time being one year.<sup>17</sup>

#### **4.2.3 Organizational features**

Arbitration Centers can be established in Vietnam pursuant to the *Ordinance*. However, those Arbitration Centers established prior to the adoption of the *Ordinance* are still operational, provided that they review their rules and procedures so as to comply with the *Ordinance*. Besides publishing the arbitration rules that govern the conduct of arbitration, each Arbitration Center also produces its List of Arbitrators. There is a procedural requirement that arbitrators, in case the tribunal is constituted at an

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<sup>12</sup> *Ibid.*, art.19.

<sup>13</sup> *Ibid.*, art.19.

<sup>14</sup> *Ibid.*, art.19.

<sup>15</sup> *Ibid.*, art.21.

<sup>16</sup> *Maritime Code*, dated 12 July 1990, by the National Assembly of Vietnam, CD-ROM: Vietnam's Lawdata (CD-ROM FORMAT: 92/QD-CXB, 2003).

<sup>17</sup> *Ibid.*, art.65(2).

Arbitration Center, must be in its List of Arbitrators. However, this requirement is not compulsory if the tribunal is constituted by the parties themselves (*ad hoc* arbitration).<sup>18</sup>

Arbitration centers are non-governmental institutions. The operation of an arbitration center is governed by its Board of Managers, which comprises a Chairman, Vice Chairman(s) and/or a Secretary.<sup>19</sup> Commercial arbitration in Vietnam is under state management, but is administered by both the Vietnam Lawyers' Association<sup>20</sup> and the Vietnam Ministry of Justice.<sup>21</sup> At present, there are three Arbitration Centers established under the *Ordinance*, located in Hanoi, Danang and Hochiminh City. New Arbitration Centers can be established based on the socio-economic situation of each geographical region in Vietnam.<sup>22</sup>

#### **4.2.4 Procedures**

Arbitration in Vietnam must be conducted according to procedures set out by the *Ordinance on Commercial Arbitration*. Vietnam does not allow the application of foreign procedural law to arbitration in the country.<sup>23</sup>

Regarding the conflict of law rules, Vietnamese law will be applied by the arbitration tribunal provided that parties to the arbitration are Vietnamese persons or legal entities.<sup>24</sup> However, in case the arbitration involves foreign factors, the applicable laws will be selected by the parties involved; if the parties cannot agree on the applicable law, the arbitration tribunal has the power to choose the law that applies to resolve the

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<sup>18</sup> *Ordinance on Commercial Arbitration*, *supra* note 4, art.26(4).

<sup>19</sup> *Ibid.*, art.16.

<sup>20</sup> The Vietnam Lawyers' Association, which was established in 1955, is a socio-professional organization with its members are legal practitioners, the Association aims at consolidation and strengthening of the legal expertise among its members to better serve the country's policy.

<sup>21</sup> *Ordinance on Commercial Arbitration*, *supra* note 4, art.60.

<sup>22</sup> *Decree 25/2004*, *supra* note 5, art.4.

<sup>23</sup> *Ordinance on Commercial Arbitration*, *supra* note 4, art.1.

<sup>24</sup> *Ibid.*, art.7(1).

dispute.<sup>25</sup> In addition to this, foreign procedural law may be applied in accordance with the agreement of the parties<sup>26</sup> and foreign arbitrators may be appointed accordingly.<sup>27</sup> These provisions reflect the international outlook of Vietnam regarding arbitration involving foreign factors. Today, there are several foreign law firms providing legal services in Vietnam. In effect, the *Ordinance* has enabled the practice of foreign arbitrators in the country and added international features to the arbitration process.

There are two ways to form the arbitration tribunal; it can be constituted either at an Arbitration Center or by the parties themselves.<sup>28</sup> It is worth mentioning that an arbitration process is deemed to commence from the time the Request for Arbitration containing the description of the dispute and the appointment of the claimant's arbitrator is received by the Arbitration Center (in case the arbitration tribunal is constituted at the Arbitration Center), or when it is received by the defendant (if the tribunal is constituted by the parties themselves).<sup>29</sup>

Provided that there is no prior agreement between parties on the time limit for the arbitration process, the *Ordinance* does provide certain requirements to ensure that the arbitration process will be conducted in a timely manner and avoid unnecessary delay for the parties. In the three-arbitrator tribunal, upon the reception of the Request for Arbitration, the defendant has thirty days to appoint his arbitrator; if the defendant fails to appoint his arbitrator within the said period, the Chairman of the Arbitration Center (if the tribunal is constituted at an Arbitration Center) or the People's Court at the provincial level (if the tribunal is constituted by the parties themselves) is vested with

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<sup>25</sup> *Ibid.*, art.7(2).

<sup>26</sup> *Ibid.*, art.49(2).

<sup>27</sup> *Ibid.*, art.49(3).

<sup>28</sup> *Ibid.*, art.4.

<sup>29</sup> *Ibid.*, art.20.

the power to appoint the arbitrator for the defendant within seven working days.<sup>30</sup> There is a fifteen-day period for appointment of the third arbitrator by the two chosen arbitrators; however, if they fail to do so, the Chairman of the Arbitration Center or the People's Court will assume the power to appoint an arbitrator for this vacancy within seven working days.<sup>31</sup>

One significant and unprecedented provision in the *Ordinance on Commercial Arbitration* is the consolidation of arbitration. This comes into play when there exists more than one claimant, then the arbitration process can be consolidated with the procedure for the appointment of an arbitrator similar to that of the three-arbitrator tribunal.<sup>32</sup> The time limit for the appointment of a sole arbitrator tribunal in the case of default by the parties is fifteen days, upon the receipt of the Request for Arbitration<sup>33</sup>.

Once established, the arbitration tribunal is empowered to decide on not only the substance of the dispute but also procedural matters such as the validity of the arbitration agreement and the competency of the tribunal.<sup>34</sup> Procedural power will be invoked by a letter of complaint, challenging either the validity of the arbitration agreement or the competency of the tribunal or both issues, submitted by one party to the tribunal.<sup>35</sup> The decision of the tribunal on the matters in question can subsequently be reviewed by the court. In case of disagreement with the decision of the tribunal, within five working days parties may apply to the People's Court at the provincial level, where the arbitration tribunal is constituted, to have it reviewed for the tribunal's decision. The decision of the court in this matter is final and binding for the parties

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<sup>30</sup> *Ibid.*, art.25(1). See also art.26(1), *ibid.* In Vietnam, Saturday and Sunday are holidays and thus excluded from computing working days.

<sup>31</sup> *Ordinance on Commercial Arbitration*, *supra* note 4, art.25(3). See also art.26(3), *ibid.*

<sup>32</sup> *Ibid.*, art.25(2). See also art.26(3), *ibid.*

<sup>33</sup> *Ibid.*, art.25(4). See also art.26(4), *ibid.*

<sup>34</sup> *Ibid.*, art.30(1)

<sup>35</sup> *Ibid.*, art.30(1).



involved.<sup>36</sup> The question relating to the validity of the arbitration agreement is not simple to answer. The *Ordinance on Commercial Arbitration* expressly describes situations where the arbitration agreement is considered invalid under Vietnamese law as follows:

1. Disputes other than those described in article 2(3) of the *Ordinance*;
2. The agreement was signed by a person having no authority as provided by law;
3. Either party to the arbitration agreement has no legal capacity to do so;
4. The arbitration agreement does not clearly specify the scope of the dispute to be arbitrated, does not name the competent arbitration tribunal and subsequently the parties do not have additional agreement on these matters;
5. The arbitration agreement is not in conformity with article 9 of the *Ordinance*;
6. The arbitration agreement was established under fraud or threat, provided that the party suffering from these deficiencies, within 6 months from the date of the agreement, must apply to the arbitration tribunal to have it declared null and void according to article 30 of the *Ordinance*.<sup>37</sup>

The court is further involved in the arbitration process by providing parties with security measures to protect their legitimate interests. At the request of parties to the arbitration, the Provincial Court where the arbitration tribunal is constituted may decide on the application for such security measures as follows:

1. Protection of evidence in case evidence is being or will be being destroyed;
2. Attachment of property in dispute;
3. Restriction on the mobility of the property in dispute;
4. Freezing of property in dispute;
5. Attachment of property in its deposition place;
6. Freezing of bank account.<sup>38</sup>

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<sup>36</sup> *Ibid.*, art.30(2).

<sup>37</sup> *Ibid.*, art.10 [translated by author].

<sup>38</sup> *Ibid.*, art.33 [translated by author].

In return, the requesting party is required to deposit a certain amount of money, as determined by the court, into a bank account.<sup>39</sup> Should the request for application of security measures turn out to be wrongful and cause damages to the other party or third parties, the requesting party is made liable for such damages.<sup>40</sup> It seems that these security measures are very much related to the property in dispute. In the carriage of goods by sea context, the only direct and obvious property is the ship, however, it hardly considers the ship as the property in dispute. Supposing that the dispute between the cargo receiver “A” and the carrier “B” is being arbitrated in Vietnam, and “A” requests the court to apply security measures as provided by the *Ordinance on Commercial Arbitration*. The only possible measure available to “A” in this case is the “freezing of bank account”<sup>41</sup> of “B”. Nevertheless, it is unlikely for foreign carriers to open bank accounts in Vietnam, unless they have long-term and frequent business with Vietnamese partners. On the other hand, foreign ocean carriers always appoint shipping agents in Vietnam to represent them in dealing with the consignor or consignee. Therefore, under the existing legal scheme as provided in the *Ordinance*, it is very difficult to flush out the shipowner once there is dispute concerning the contract of carriage.

Though the *Ordinance* does not have any provision on the fast and shortened arbitration, it does provide legal ground for the conduct of arbitration on document upon the agreement of the parties.<sup>42</sup>

On the other hand, the *Ordinance* acknowledges that conciliation is an alternative dispute resolution method.<sup>43</sup> Parties may come to a successful conciliation either by means of self-conciliation or conciliation within the arbitration tribunal. The legal result

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<sup>39</sup> *Ibid.*, art.34(3).

<sup>40</sup> *Ibid.*, art.36.

<sup>41</sup> *Ibid.*, art.33(6) [translated by author].

<sup>42</sup> *Ibid.*, art.40(2).

<sup>43</sup> *Ibid.*, art.37.

of these two conciliation processes is different. There is no enforcement device for the former, whereas the latter is deemed final and binding because the Successful Conciliation Record contains the signatures of the arbitrators and it is considered to be the award made by the tribunal.<sup>44</sup> The legal implications of conciliation are important. Though arbitration is considered an ideal alternative to court proceedings, a successful conciliation promises to be even more cost- and time-effective for the parties. In the maritime context, where the parties intend to have a long-term relationship, a final and binding conciliation result is the best resolution for these parties.

#### **4.2.5 The award**

In order to render the award, a hearing or series of hearings will be held by the arbitration tribunal. Upon the final hearing, the award is made based on the majority of the arbitrators, except where the arbitration is conducted by a sole arbitrator, and it is the made by that arbitrator.<sup>45</sup> The award contains elements such as the date of issuance, identification of the parties, description of the dispute, legal basis for the award, reasoning of the tribunal, content of the award, arbitration fee, time limitation for the enforcement of the award and signature(s) of the arbitrator(s).<sup>46</sup> Nevertheless, in order to preserve privacy, the parties may request that such matters as the description of the dispute, legal basis for the award and reasoning of the tribunal be excluded from the award.<sup>47</sup>

#### **4.2.6 Recourse against the arbitral award**

Though the arbitral award is final and binding, it can be cancelled by judicial process. At the request of either party, the court at the provincial level where the arbitration tribunal is constituted may review the award with the attendance of the parties involved

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<sup>44</sup> *Ibid.*, art.37(2).

<sup>45</sup> *Ibid.*, art.42.

<sup>46</sup> *Ibid.*, art.44(1).

<sup>47</sup> *Ibid.*, art.44(3).

and the People's Prosecutor.<sup>48</sup> The legal bases for the court to make the cancellation are the following:

1. Lack of an arbitration agreement;
2. The arbitration agreement is invalid as provided by article 10 of the Ordinance;
3. Composition of the arbitration tribunal, the arbitration procedures are not in accordance with the Ordinance;
4. The arbitration tribunal does not have the jurisdiction to settle the dispute, if part of the award falls outside the tribunal's jurisdiction, only that part to be cancelled;
5. The requesting party successfully proves that the arbitrators violated obligations of arbitrators as provided in article 13(2) of the Ordinance;
6. The arbitral award is contrary to the public interest of Vietnam.<sup>49</sup>

It is worth mentioning that error of law by the arbitrators is not a basis for the annulment of the arbitral award. In effect, the correctness of the award is very much dependent on the legal capacity of the arbitrators. This is especially true where the resolution of commercial maritime disputes requires an in-depth knowledge of the law. Moreover, the judicial process to review the arbitral award is complicated. The parties involved must take extra precautions in choosing arbitrators in order to avoid the risk that the award may be cancelled or made with error of law.

#### **4.2.7 Enforcement of the arbitral award**

In the case where the arbitral award is not voluntarily implemented by the parties within the time limit as stated in the award, the parties have thirty days to request the enforcement of the award.<sup>50</sup> The arbitral award is enforced by means of the *Ordinance on the Enforcement of Civil Judgments* through the Judgement Execution Authority.<sup>51</sup> The *Enforcement Ordinance* provides measures to enforce the award, namely:

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<sup>48</sup> *Ibid.*, art. 53.

<sup>49</sup> *Ibid.*, art. 54 [translated by author].

<sup>50</sup> *Ibid.*, art. 57.

<sup>51</sup> *Ordinance on the Enforcement of Civil Judgments*, dated 14 January 2004, by the Standing Committee of the National Assembly of Vietnam; Online: <[http://www.nhandan.org.vn/vietnamese/phapluat/220204/vbmoi\\_luat.htm](http://www.nhandan.org.vn/vietnamese/phapluat/220204/vbmoi_luat.htm)> (accessed on 01 June 2004).

garnishment from bank account or withdrawing valuable notes of the debtor, garnishment from the income of the debtor, attaching and disposing of assets, forcing the handover of houses or the transfer of land use rights, freezing of bank account of the debtor, and prohibiting the debtor from undertaking certain actions.<sup>52</sup> However, in the author's opinion, the enforcement of an arbitral award in the maritime context should be governed by specialized maritime legislation. Where the *Maritime Code* of Vietnam contains specific provision regarding maritime lien, ship detention and ship arrest,<sup>53</sup> it is desirable to develop these existing devices to enable a better enforcement regime for maritime claims as well as for maritime arbitral awards.

### **4.3 Enforcement of foreign arbitral awards in Vietnam**

#### **4.3.1 The context**

The most important aspect of the arbitration process is the enforcement of the arbitral award which is the end result of the dispute settlement process. However, if the arbitral award is made in a foreign country, it is necessary for the parties to perform certain procedures to have it enforced in Vietnam, viz., the recognition procedure. Being a party to the *Convention on Recognition and Enforcement of Foreign Arbitral Awards* ("New York" Convention)<sup>54</sup> since 1995, Vietnam has implemented this instrument through the *Ordinance on Recognition and Enforcement of Foreign Arbitral Awards*.<sup>55</sup> This part of the dissertation focuses on the recognition of foreign arbitral awards, which once recognized, will be enforced. This section also takes into account the legal implications of an arbitral award that is not recognized in Vietnam.

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<sup>52</sup> *Ibid.*, art.37.

<sup>53</sup> See part 2.4.3.2 above.

<sup>54</sup> *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (10 June 1958); Online: <<http://www.uncitral.org/en-index.htm>> (accessed on 01 August 2004) ["New York" Convention].

<sup>55</sup> *Ordinance on Recognition and Enforcement of Foreign Arbitration Awards in Vietnam*, dated 27 September 1995, by the Standing Committee of the National Assembly of Vietnam, CD-ROM: Vietnam's Lawdata (CD-ROM FORMAT: 92/QD-CXB, 2003) [*Recognition Ordinance*].

### 4.3.2 Recognition and enforcement of foreign arbitral awards in Vietnam

#### 4.3.2.1 Basis in international law

The “*New York*” *Convention* provides that an arbitral award shall be recognized and enforced on the basis of reciprocity.<sup>56</sup> Recognition of the arbitral award is a procedure and it is applicable only when the award is made outside the country where it is to be enforced. The recognition step reinforces the legally binding characteristic of the award. More than 120 countries have become parties to the Convention which means that an arbitral award made in Vietnam may be recognized and enforced in the territories of more than 120 member countries and vice versa.<sup>57</sup>

On the other hand, the “*New York*” *Convention* provides certain legal bases for the refusal of recognition and enforcement of the award.<sup>58</sup> These grounds are: the lack of capacity of parties to conclude the arbitration agreement; the incapacity of a party to present his case; the lack of a valid arbitration agreement; the lack of notice of the appointment of the arbitrator or the arbitration proceedings; the composition of the arbitration tribunal or the conduct of arbitration is not in accordance with the arbitration agreement or law of the country where the award is made; the award deals with a matter beyond the scope of the arbitration agreement; and the award has not become binding or it has been annulled by the law or competent authority of the country where it was made.<sup>59</sup> Moreover, the recognition and enforcement of an award may also be refused if the law of the country where the recognition and enforcement is sought specifies that the subject matter of the dispute is not capable of being settled by

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<sup>56</sup> “*New York*” *Convention*, *supra* note 54, art.I.

<sup>57</sup> Online: <<http://www.uncitral.org/en-index.htm>> (accessed on 01 August 2004).

<sup>58</sup> “*New York*” *Convention*, *supra* note 54, art.V.

<sup>59</sup> *Ibid.*, art.V(1).

arbitration, or such recognition or enforcement is contrary to the public policy of that country.<sup>60</sup>

It is noticeable that most of these grounds relate to procedural failure. In effect, there is a genuine link between the legal capacity of the parties and the validity of the arbitration agreement. Most countries, including Vietnam, do not recognize the validity of an arbitration agreement made by persons who are under some legal incapacity, i.e., mental illness.<sup>61</sup> Other procedural failures can include failure of the parties in appointing arbitrators and improper conduct of the arbitration tribunal itself, i.e., the content of the award goes beyond the scope of the arbitration agreement. These procedural failures can be avoided by exercising caution and ensuring application of the proper law. However, it is almost impossible for the parties to control the risk that an award is not recognizable or enforceable, possibly of because of non-arbitrability of the dispute or non-compliance with public policy.

#### 4.3.2.2 Domestic law

The *Recognition Ordinance* defines a foreign arbitral award as an award rendered outside the territory of Vietnam by arbitrators chosen by the parties involved, and includes an arbitral award made in Vietnam by foreign arbitrators.<sup>62</sup> This provision implies that an award made by foreign arbitrators in accordance with the *Ordinance on Commercial Arbitration* must be “recognized” in order to be enforced in the country. Questions may be raised if not all members of the tribunal are foreign arbitrators; may the award be considered a foreign arbitral award or a domestic one ? The legal results are not the same since each type of arbitral award has a different status and requires different enforcement procedures, i.e., the former is required to be “recognized”,

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<sup>60</sup> *Ibid.*, art.V(2).

<sup>61</sup> *Ordinance on Commercial Arbitration*, *supra* note 4, art.10(3).

<sup>62</sup> *Recognition Ordinance*, *supra* note 55, art.1.

whereas the latter is not. Both the *Recognition Ordinance* and *Ordinance on Commercial Arbitration* are silent on this matter.

Regarding the recognition procedure, the party seeking to enforce the foreign arbitral award in Vietnam invokes the recognition procedure by sending to Vietnam's Ministry of Justice the Request for the recognition of the foreign arbitral award.<sup>63</sup> This Request must contain substantial information, such as the identities and addresses of the parties involved, content of the award and a copy of the arbitration agreement.<sup>64</sup> Within a seven-day period upon receiving the Request, the Ministry of Justice sends it to a court at the provincial level and the Request is considered in a formal court hearing with the attendance of the parties involved and the People's Prosecutor.<sup>65</sup> In the hearing, the Court reviews the award on the basis of Vietnam's law and related international legal instruments.<sup>66</sup> Thereby, the Court may grant or refuse the recognition of the foreign arbitral award.

The legal bases for refusing recognition in Vietnam's law<sup>67</sup> are the same as those in the "*New York*" *Convention*. However, the decision of the Court may be challenged by the parties and the People's Prosecutor.<sup>68</sup> The Ministry of Justice is involved in the recognition process to the extent that it is the obligation of the Ministry to specify a suitable court where the debtor's property can be secured for the enforcement of the award.<sup>69</sup>

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<sup>63</sup> *Ibid.*, art.10.

<sup>64</sup> *Ibid.*, art.11.

<sup>65</sup> *Ibid.*, art.15.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*, art.16.

<sup>68</sup> *Ibid.*, art.18.

<sup>69</sup> *Ibid.*, art.10. See also art.4 *ibid.*.



In general, Vietnam has developed a comprehensive legal basis for the enforcement of foreign arbitral awards in accordance with international law. It is thus possible to conclude that a foreign arbitral award is recognizable and enforceable in Vietnam.

#### **4.4 Conclusion**

Though maritime arbitration is not a new concept in Vietnam, its application has not done justice to its significance as an alternative to court proceedings. For more than 40 years since the establishment of the Maritime Arbitration Council, the Council functioned as a state organization with judicial power. Parties referred their disputes to the Council according to the directives of the government, rather than to the arbitration of their own choice.

With the adoption of the *Ordinance on Commercial Arbitration*, it is fair to say that maritime arbitration in Vietnam has undergone a significant transformation. The *Ordinance* provides the legal basis for the conduct of commercial arbitration in the country. Moreover, the role of the court in assisting and facilitating the arbitration process is confirmed by the *Ordinance*. As has been seen, the court may be involved at any stage of the arbitration process and the enforcement of the award.

The *Ordinance on Commercial Arbitration* also creates the legal basis for the conduct of fast and shortened arbitration. This is especially significant in the maritime context, where time is money and parties wish to resolve their disputes in a timely manner whilst preserving their privacy.

However, the distinctive characteristics of maritime disputes make it necessary to have specialized procedural rules applicable to maritime arbitration cases. Such matters as the incorporation of an arbitration clause from the charterparty into the bill of lading and the legal effect of the arbitration agreement on third parties, are not addressed by

the *Ordinance*. This shortcoming in the legal instrument may cause disputes over the implementation of the *Ordinance* as well as the conduct of maritime arbitration in Vietnam. Moreover, the legal consequence of an arbitral award made by a tribunal consisting of both Vietnamese and foreign arbitrators in Vietnam is not clear; is it a foreign arbitral award or a domestic one ? This question must be addressed in order to strengthen the maritime arbitration regime in Vietnam.

Finally, it must be highlighted that such instruments as the *Ordinance on Commercial Arbitration*, the *Ordinance on the Recognition and Enforcement of Foreign Arbitral Awards* and the *Ordinance on the Enforcement of Civil Judgments* contain various time limitations for the conduct of the court as well as the arbitrators. These provisions aim at resolving disputes in a timely manner. However, one weakness of Vietnam is the realization of these provisions. A party could hardly challenge the court or arbitrators for the violation of such time limitation, even though it is a violation of procedure.

The experiences of such countries as the United States, the United Kingdom, Hong Kong and Singapore show that maritime arbitration is considered as an effective alternative to court proceedings. These countries encourage the resolution of maritime disputes by means of arbitration. This is evidenced by the fact that there are specialized maritime arbitration centers with competent arbitrators, and these arbitration centers are among the busiest ones.

Vietnam has the advantage that it has developed a relatively comprehensive legal framework for the conduct of arbitration. The requisite factor for Vietnam is to implement these legal provisions properly in order to strengthen the maritime arbitration regime of the country.

## CHAPTER 5

### CONCLUSIONS AND RECOMMENDATIONS

Since maritime disputes are settled either in the Economic Court or Civil Court, it seems that Vietnam does not yet fully appreciate the distinctive nature of maritime law. This notwithstanding that it is a specialized branch of law within the legal system of the country. It has its own scope of application, with reference to maritime activities, and frequently in relation to the carriage of goods by sea. The special nature of admiralty proceedings is evidenced from the substantive and procedural characteristics of the action *in rem*, maritime lien and other securities, ship arrest or ship detention, and maritime injunctions. Moreover, experience shows that the courts in Vietnam are not fully capable to deal with maritime disputes and they interpret the *Maritime Code*<sup>1</sup> inconsistently.

In the international maritime trade, it is necessary for Vietnam to establish an admiralty court, which would specialize in maritime matters and would develop its own set of procedural rules to deal with maritime disputes. A specialized admiralty court would surely facilitate the conduct of arbitration. The admiralty court could be established at the provincial level and the People's Supreme Court, side-by-side the Economic Court and the Civil Court.

Assuming that the *Draft on the Amendment of the Maritime Code of Vietnam* will be adopted with the content as discussed in this dissertation, various maritime matters will be modernized, such as maritime lien, ship arrest and related procedures. Even so, there will still remain a number of legal issues to be addressed in order to strengthen the legal framework for the conduct of maritime arbitration in Vietnam, as well as admiralty jurisdiction.

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<sup>1</sup> *Maritime Code*, dated 12 July 1990, by the National Assembly of Vietnam, CD-ROM: Vietnam's Lawdata (CD\_ROM FORMAT: 92/QD-CXB, 2003).

Firstly, on conflicts of law, both the existing *Maritime Code* and the *Draft* do not specify the criteria to ascertain when and how foreign law can be applied to the contract of carriage. The general rule that foreign law may be applied to the carriage contract only if it is not contrary to the law of Vietnam<sup>2</sup> provides an opportunity for arbitrary interpretation by the court. In the author's opinion and in view of applying the proper law of the contract, this provision should be revoked in the interest of clarity in the maritime legal system.

Secondly, ship arrest by order of court should be extended to enable provision of security for the enforcement of the arbitral award. This could be incorporated either in the *Maritime Code* or be part of the security measures stipulated in the *Ordinance on Commercial Arbitration*.<sup>3</sup> The former seems to be a preferable solution because it reinforces the specialized nature of admiralty jurisdiction. The point to emphasize is that the arrest should be allowed at any stage of the arbitration process. Such provision will greatly facilitate as well as create a firm legal basis for the conduct of maritime arbitration.

Thirdly, taking into consideration recommendations in the *UNCITRAL Model Law on International Commercial Arbitration*,<sup>4</sup> there should be provision on the power of court to take evidence as may be requested by an arbitration tribunal. This is a practical recommendation. In Vietnam, the arbitration tribunal itself does not have such authority and sometimes it is very difficult to collect necessary evidence related to the dispute in question. For example, a tribunal may have no means to verify the authenticity of the document presented by the parties. This difficulty could be overcome by extending the use of this judicial power to the arbitration tribunal.

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<sup>2</sup> *Ibid*, art.7.

<sup>3</sup> *Ordinance on Commercial Arbitration*, dated 25 February 2003, by the Standing Committee of the National Assembly of Vietnam, art.30, CD-ROM: Vietnam's Lawdata (92/QD-CXB, 2003).

<sup>4</sup> *UNCITRAL Model Law on International Commercial Arbitration*, 21 June 1985, art.27; Online: <<http://www.uncitral.org/en-index.htm>> (accessed on 01 June 2004) [*UNCITRAL Model Law*].

Fourthly, the incorporation of the arbitration agreement from a charterparty into a bill of lading, and its legal effect on third parties needs to be addressed in the *Ordinance on Commercial Arbitration*. It may appear peculiar that third parties, though not party to the arbitration agreement, are still bound by the original agreement. However, this is a special feature of maritime business, where the bill of lading at times incorporates terms from the charterparty, and the original holder of the bill of lading may endorse the bill to third parties. Thus, in the maritime contract, there should be explicit provision in the *Ordinance on Commercial Arbitration* that recognizes the incorporation of the original arbitration agreement into a secondary document, i.e., the bill of lading.

As seen in this dissertation, the *Ordinance on Commercial Arbitration* allows arbitration with the participation of foreign arbitrators.<sup>5</sup> However, it also requires that arbitrators must have Vietnamese citizenship,<sup>6</sup> otherwise the arbitral award may be annulled.<sup>7</sup> This contradiction is a drafting failure. Clearly, the requirement of Vietnamese nationality should be revoked.

Fifthly, in order to simplify the enforcement of arbitral awards, the *Ordinance on Recognition and Enforcement of Foreign Arbitral Awards in Vietnam*<sup>8</sup> should be amended. In particular, the definition of foreign arbitral award should not include an award made in Vietnam by a non-Vietnamese national.<sup>9</sup> When the *Ordinance on Recognition and Enforcement of Foreign Arbitral Awards in Vietnam* was adopted in 1995, the arbitration law in Vietnam was not sufficiently developed. Today, however, there is a need to recognize the competence of foreign arbitrators to ensure the legality

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<sup>5</sup> *Ordinance on Commercial Arbitration*, *supra* note 3, art.49(2).

<sup>6</sup> *Ibid.*, art.12(1).

<sup>7</sup> *Ibid.*, art.54(3).

<sup>8</sup> *Ordinance on Recognition and Enforcement of Foreign Arbitral Awards in Vietnam*, dated 27 September 1995, by the Standing Committee of the National Assembly of Vietnam, CD-ROM: Vietnam's Lawdata (92/QD-CXB, 2003).

<sup>9</sup> *Ibid.*, art.1, second para.

of the award. There appears to be little, if any, reason to retain the above mentioned restriction. To achieve this change, it is sufficient to revoke article 1(second paragraph) of the *Ordinance on Recognition and Enforcement of Foreign Arbitral Awards in Vietnam*.

Legal transparency in Vietnam is the subject of much criticism. This is partly because of legislative uncertainties. However, there is also inefficiency in the cooperation between relevant institutions. As far as maritime arbitration is concerned, it is necessary to identify the relationships between these institutions, namely: the courts, arbitration centers and arbitration tribunals;<sup>10</sup> the courts and port authorities;<sup>11</sup> and the Vietnam Lawyers' Association, the Ministry of Justice and arbitration centers.<sup>12</sup> There should be better defined processes to strengthen the relationships between these institutions, ideally through legislative measures. For example, a court should be capable of being involved at any stage of the arbitration process, especially in the provision and application of security measures. However, this function can hardly be realized in the absence of a good cooperation between the court and the arbitration center as guided by law.

At times, courts have refused the application for security measures, possibly because of insufficient knowledge of the maritime industry and that the ship can be arrested even when it is not the actual property in dispute. As has been seen, the establishment of a specialized admiralty court and the exchange of information with arbitration centers may go some way in addressing this deficiency and in addressing criticism regarding lack of transparency.

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<sup>10</sup> This can be called a neutral relationship, where both the court and the arbitration center exercise their own authorities aiming at a better arbitration service.

<sup>11</sup> The port authority is expected to implement the order of the court. The port authority is considered as an "extended-hand" of the state because it interacts with the ship and is authorized to enforce a court's decision.

<sup>12</sup> This is the state-management relationship, between authorized bodies and the object of the state management, i.e., the arbitration center.

Moreover, in addition to learning from the experiences of other international maritime arbitration centers, it is necessary for arbitration centers in Vietnam to publish their arbitration rules and procedures. Information on arbitration in Vietnam is not readily available. These centers should take into account special rules for fast and low cost arbitration, which are commonly found in other well-known arbitration centers. Clarification of arbitration rules enhances clarity, confidence and predictability for the arbitration itself and will in turn encourage choice of arbitration as an effective dispute resolution method.

Arbitration centers in Vietnam should interact with the world maritime community. Established arbitration centers in Vietnam do not pay sufficient attention to make themselves known outside the country, but should do so as part of a network of regional and global maritime dispute resolution centers.

Taking into account the above recommendations, the author believes that Vietnam can be a potential venue for maritime arbitration. However, achieving this goal will very much depend on how effective it is in modernizing legislation and relevant institutions.

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