Arbitration, maritime

I. Definition and concept

Arbitration is the 'preferential instrument' for resolving international maritime disputes (Sergio Maria Carbone and Marco Lopez De Gonzalo, 'L'arbitrato marittimo' in Guido Alpa and Vincenzo Vigoriti (eds), *Arbitrato. Profili di diritto sostanziale e di diritto processuale* (UTET Giuridica 2013) 1293). This much can be seen from the widespread use of arbitration clauses in the contract forms that are most common in the maritime industry and from the significant development experienced over the last decades by arbitration institutions specializing in the resolution of maritime disputes. The significance of arbitration as a means of resolution of international maritime disputes has increasingly often led authors to speak of 'maritime arbitration' to indicate this circumstance (see, for example, Francesco Berlingieri, 'International Maritime Arbitration' [1979] J.Mar.L.& Com. 199; Clare Ambrose, Karen Maxwell and Angharad Parry, *London Maritime Arbitration* (Informa 2009), *passim*; Sergio Maria Carbone and Marco Lopez De Gonzalo, 'L'arbitrato marittimo' in Guido Alpa and Vincenzo Vigoriti (eds), *Arbitrato. Profili di diritto sostanziale e di diritto processuale* (UTET Giuridica 2013) 1293; Bruce Harris, 'Maritime Arbitrations' in John Tackaberry and Arthur Marriot (eds), *Bernstein's Handbook of Arbitration and Dispute Resolution Practice* (Thomson 2003) 743; Michael Mustill, 'Maritime Arbitration: The Call for a Wider Perspective' (1992) 9 J.Int'l Arb. 51). Nevertheless, maritime arbitration is not regulated either by the international uniform law conventions or by state legislations.

It is however necessary to specify that in this entry the expression 'maritime arbitration' will only refer to the so-called 'transnational arbitration' (involving private parties, concerning issues related to maritime law and featuring international elements), and not to the so-called 'interstate maritime arbitration' (ie arbitration between states, or between states and private parties, related to the law of the sea: Tullio Scovazzi, 'The Evolution of the International Law of the Sea: New Issues, New Challenges' (2000) 286 Rec. des Cours 53, 122; Tullio Treves, *Le controversie internazionali. Nuove tendenze, nuovi tribunali* (Giuffrè 1999) 35; Georgios Zekos, 'Competition or Conflict in the Dispute

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Settlement Mechanism of the Law of the Sea Convention' (2003) 56 R.H.D.I. 153), or to the 'internal' maritime arbitration (arbitration between private parties on issues related to maritime law which involve only one legal system). The expression 'maritime arbitration' (intended as above) still needs to be 'decoded', as it opens the doors to two series of misunderstandings. On the one side, one might affirm that a maritime arbitration exists simply when an international commercial arbitration 'in some way . . . involves a ship' (Bruce Harris, Michael Summerskill and Sara Cockerill, 'London Maritime Arbitration' (1993) 9 Arb.Int'l 275): such a statement might lead one to conclude that maritime arbitration is no legal institute in itself, and differs in nothing from 'common' international commercial arbitration (→ Arbitration, international commercial), apart from the fact that it concerns a maritime dispute. On the other side, conversely, one might argue that maritime arbitration is intrinsically different and, however autonomous with respect to international commercial arbitration insofar as the subject matter of such arbitration, namely maritime law, is an autonomous subject, different from 'ordinary' law and in particular from international commercial law (Charles Jarrosson, 'La spécificité de l'arbitrage maritime' [2004] Dir Marit 444).

Neither of these (opposing) approaches is satisfactory. In fact:

(i) not only is maritime arbitration characterized by the fact that it involves a ship, but it is a procedural phenomenon, directly shaped and influenced by the characteristics (and peculiarities) of substantive maritime law and

(ii) the autonomy of substantive maritime law is to be understood as a special nature, meaning that it necessarily implies continuing interaction with the principles of ordinary law (which principles may often be found in provisions of international origin or in the practices of international commercial operators), as it is not a self-sufficient and complete regulation, suitable to cover fully all aspects of the legal relationships relevant to maritime commerce (Sergio M Carbone, 'L'internazionalità e la specialità delle fonti del diritto della navigazione nel terzo millennio' [2005] Riv.Dir.Int'le Priv. & Proc. 889). The 'permeability' of maritime law with respect to the principles of ordinary law, and its indisputable international dimension clearly show that this subject is nothing else but an area of international commercial law (→ Civil and commercial matters).

Maritime arbitration, as a 'preferential' procedural instrument of maritime law, falls therefore under the broader genus of international commercial arbitration (→ Arbitration, international commercial), from where, essentially, it draws its legal regulation. This, however, would be an understatement. Because of the special nature of maritime law, the procedural dimension of arbitral maritime claims, too, must 'fit in with' their features: in other words, there is a strong need in this domain, for the relationship between substantive law and procedural law to be a symbiosis, and not a hiatus. Maritime arbitration should therefore become (and – as we will see – is actually becoming) an 'instrument' for a more effective implementation of maritime law. This means that certain specific characteristics of the maritime subject impact on the shape of maritime arbitration, which thus 'departs' from the model of 'general' international commercial arbitration.

For instance, there is generally little room in this area for questions relevant to conflicts of applicable substantive laws, as maritime arbitrators decide the disputes submitted to their examination on the basis of a set of rules defined as → *lex maritima* or 'general maritime law', which, although comprised, *inter alia*, by the so-called → *lex mercatoria*, consists of special principles mostly developed through the practices of the maritime industry and the uniform transport law (Russel J Cortazzo, 'Development and Trends of the Lex Maritime from International Arbitration Jurisprudence' (2012) 43 J.Mar.L.& Com. 255) (→ Transport law (uniform law)).

As regards specifically procedural aspects, it is more frequent in the maritime sector to consolidate connected arbitration proceedings. This allows the participation of 'third parties' who, while remaining formally outside the arbitration agreement, are substantive 'parties' in the maritime relationships submitted to arbitration. For example, such consolidation often occurs in controversies concerning the construction of ships or disputes relating to charter parties that are linked with each other. Moreover, where arbitration clauses are transferred to other parties, they normally do not circulate through contract assignments, but through endorsements on the bills of lading (→ Bill of lading). Finally, arbitrators dealing with these

matters are mainly 'businessmen' (rather than lawyers) and the proceedings are mostly carried out within specialized arbitration institutions (and not, generally, decided by panels of the International Chamber of Commerce (ICC) or other institutions of commercial arbitration); they apply flexible rules taking into account, first of all, the will of the parties.

It is precisely this greater 'flexibility' of the procedural rules that marks the specificity of maritime arbitration in relation to the other sectors of international commercial arbitration and highlights those 'customs' that are emerging in international maritime commerce: such uses require in fact greater flexibility of interpretation in approaching various significant facets of this kind of arbitration including, in particular, the issue of the validity of arbitration clauses from a formal standpoint (→ Formal requirements and validity).

It thus becomes clear that maritime arbitration should be seen as a special procedure with respect to international commercial arbitration (→ Arbitration, international commercial). A few of the latter's institutes should be adapted not only to meet specific needs of the international maritime industry, but to take into account the specific, well-established 'commercial customs' in this matter (Andrea La Mattina, *L'arbitrato marittimo e i principi del commercio internazionale* (Giuffrè 2012) 14). The speciality of the maritime sector therefore entails the speciality of maritime arbitration with respect to the general model of international commercial arbitration (→ Arbitration, international commercial), and demonstrates in particular a sort of *status mercatorius* that characterizes maritime industry operators and (in part at least) differentiates them from other international commercial operators (see *infra*, IV.).

II. The 'expansive force' of party autonomy

The relevance of → party autonomy is particularly strong in maritime arbitration. In fact, unlike in other sectors of international commercial law, there is no room in this context for any form of so-called 'mandatory' arbitration (where the submission of a dispute to the arbitrators is not the result of an agreement, but of a law or regulation or an international convention). In the maritime area, the choice of arbitration for the settlement of disputes is always left to the will of the parties. Moreover, a large majority of maritime arbitrations (unlike other international commercial arbitrations), even when conducted in accordance with the rules of arbitration institutions, are *ad hoc* arbitrations not administered arbitrations, which means that the parties maintain a stronger control over the proceedings. The greater relevance of private autonomy in the context of maritime arbitration also permits the identification of an interpretation principle that is fundamental not only for arbitration agreements contained in standard forms used by operators in the international maritime industry, but also, more generally, for the approach that should characterize the 'reconstruction' of maritime arbitration as a legal phenomenon. In this commercial area the will of the parties takes a central role, and therefore, the laws applicable to the various aspects of maritime arbitration must first of all take into account the way in which the parties intended to regulate a specific aspect of the arbitration procedure. In this sense, it has been affirmed that in this area 'there is the imperative of giving effect to the wishes of the parties unless there are compelling reasons of principle why it is not possible to do so' (*Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1992] 1 Lloyd's Rep 81) and that it is important to understand the 'commercial purpose of the arbitral clause' which has to be interpreted taking into account the will of the parties 'as rational businessmen' (*Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40, [2008] Lloyd's Rep 254).

III. The form of the arbitration clause in maritime arbitration

The formal aspects of the arbitration clauses required by the various legal systems are the means for uncovering the intention of the parties to avail themselves of arbitration (Franco Bonelli, 'La forma della clausola compromissoria per arbitrato estero' [1984] Dir Marit 480). In this respect, art II of the New York Convention (New York Convention of 10 June 1958 on the recognition and enforcement of foreign arbitral awards, 330 UNTS 3) stipulates that the arbitration agreement has to be reflected in writing and that it has to be 'signed by the parties' or 'contained in an exchange of letters or telegrams'. Article II is the fundamental rule to evaluate the formal validity of arbitration clauses relevant to the relationships of international maritime law, and – in principle – it gives no room for questions relevant to conflicts of laws related

to the form of the arbitration clause. But a certain national law may be applied on the basis of the 'most favourable right provision' contained in art VII of the New York Convention: as a matter of fact, art VII regards the recognition and enforcement of arbitral award, but it has been affirmed that its field of application also includes the matter of the formal validity of arbitration clauses (*XL Insurance Ltd v Owens Corning* [2000] 2 Lloyd's Rep 500).

Case-law has (and, in particular, the decisions of Italian judges (→ Italy) have) often 'overestimated' the formal requirements (→ Formal requirements and validity) of arbitration clauses, and omitted to verify the actual consent of the parties to depart from the jurisdiction of state courts in favour of arbitration (Albert J Van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Wolters Kluwer 1981) 177). In this respect, although it has been stated that arbitration clauses neither have to be specifically approved pursuant to s 1341 of the Italian Civil Code (Codice Civile, Gazz.Uff. 4 April 1942, No 79 and 79bis, edizione straordinaria; Cass. S.U. 22 May 1995, no 5601, *Micheletti c. Ditta Jazirah Marble Company Ltd.* [1995] Riv.Dir.Int. 817), nor that they have to be separately underwritten (Cass. S.U. 18 May 1978, no 2392, *Soc. Atlas c. Soc. Concordia Line* [1978] Dir Marit 658), the Italian Supreme Court has affirmed that arbitration clauses shall be interpreted in a 'narrow way' and that, if the judge has doubt regarding the compliance of a certain arbitration clause with the above-mentioned formal requirements (→ Formal requirements and validity), he or she cannot dismiss the case in favour of an arbitral tribunal, to avoid 'evolutive interpretations' of art II of the New York Convention based on the praxis of the international commercial operators (Cass. S.U. 19 May 2009, no 11529, *Louis Dreyfus Commodities s.p.a. c. Cereal Mangimi s.r.l.* [2010] Riv.Dir.Int'le Priv. & Proc. 443). On the contrary, English decisions (→ United Kingdom) affirm that in this particular field the 'centre of gravity' is → party autonomy and that – in particular – the interpretation of the arbitral clauses in the shipping context has to be based on their 'commercial purpose' (*Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40, [2008] Lloyd's Rep 254).

Bearing those facts in mind, we have to focus our analysis on the issue of the incorporation of an arbitration agreement contained in a different contract by reference. This is very common in shipping practice; in particular the incorporation of the terms and conditions of the charter party into the bill of lading by reference is often used. Despite its relevance for commercial operators, this topic is not regulated by the New York Convention, when the validity of incorporation by reference of an arbitration agreement is explicitly affirmed by s 6(2) of the English Arbitration Act 1996 (c. 23; whose wording is similar to that of art 7(6), 1st option, of the UNCITRAL Arbitration Model Law (United Nations Commission on International Trade Law, UNICITRAL Model Law on International Commercial Arbitration as adopted on 21 June 1985, and as amended on 7 July 2006, UN doc A/40/17 and A/61/17); → Arbitration, (UNCITRAL) Model Law). National courts approach the matter in different ways, combining some rigid and flexible approaches in its regard (Carlos Esplugues Mota, 'Some Current Developments in International Maritime Arbitration' in Jürgen Basedow, Ulrich Magnus and Rüdiger Wolfrum (eds), *The Hamburg Lectures on Maritime Affairs 2007 & 2008* (Springer 2010) 128).

For example, Italian case-law considers valid an incorporation by reference of an arbitration clause contained in a charter party only if the → bill of lading contains a specific reference to such an arbitration clause (*relatio perfecta*), and not also if the bill of lading just makes a generic reference to the charter party (*relatio imperfecta*): see Cass. S.U. 1 March 2002, no 3029, *UMS Generali Marine s.p.a. c. Clerici Agenti s.r.l. e Lombardi* [2002] Riv.Dir.Int'le Priv. & Proc. 1047; App Torino 8 May 2007, *UMS c. Meridian Shipping* [2008] Diritto dei trasporti 565; Trib. Genova 23 April 2008, *Superbeton S.p.A. c. Panamax Jupiter Maritime Company Ltd.* [2010] Dir Marit 132. On this topic see Mario Riccomagno, 'The Incorporation of Charter Party Arbitration Clauses into Bills of Lading (a comparison between authorities of the Courts of Italy, England and the United States)' [2004] Dir Marit 1187. But the distinction between *relatio perfecta* and *relatio imperfecta* does not find any link to the text of art II of the New York Convention. As has been affirmed it 'does not seem to exclude that a general reference' to an arbitration clause contained in another document 'can be taken as a valid consent to arbitration, even if there is no explicit reference to the clause itself' (Riccardo Luzzatto, 'International Commercial Arbitration and Law of States' (1977) 157 Rec. des Cours 41).

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Also English courts take a 'fairly strict approach' on this topic (*Dornoch Ltd v Mauritius Union Assurance Co Ltd* [2006] Lloyd's Rep 127), the general rule being that an arbitration clause in a charter party does not bind the holder if such clause is not specifically mentioned in the bill of lading (*TW Thomas & Co Ltd v Portsea Steamship Co Ltd* [1912] AC 1; *Rena K, The* [1978] 1 Lloyd's Rep 545; *Federal Bulk Carriers Inc v C Itoh & Co Ltd (The Federal Bulker)* [1989] 1 Lloyd's Rep 103; *Daval Aciers D'Usinor et de Sacilor v Armare Srl (The Nerarno)* [1996] 1 Lloyd's Rep 1; *Owners of Cargo Lately Laden on Board the MV Delos v Delos Shipping Ltd* [2001] 1 Lloyd's Rep 703; *Welex AG v Rosa Maritime Ltd (The Epsilon Rosa) (No. 2)* [2003] 2 Lloyd's Rep 509; *Verity Shipping SA v NV Norexa (The "Skier Star")* [2008] 1 Lloyd's Rep 652). But the true English courts' attitude in respect of this topic is 'to ascertain the intention of the parties' (*Siboti K/S v BP France SA* [2003] 2 Lloyd's Rep 364) and – in certain cases – it has been affirmed that also a *relatio generica* is sufficient to considering validly incorporated an arbitration clause of a charter party into a bill of lading, in cases where the consent of the parties to the arbitration agreement was demonstrated taking into account a particular commercial context (*Africa Express Line Ltd v Socofi SA* [2009] EWHC 3223 (Comm)) or 'the arbitration clause or some other provision in the charter makes it clear that the clause is to govern disputes under the bill as well as under the charter' (Thomas E Scrutton and others (eds), *Scrutton On Charterparties and Bills of Lading* (19th edn, Sweet & Maxwell 1984) 68).

Finally, US courts (→ USA) have a flexible approach and – in extreme synthesis – they affirm the validity of the incorporation by reference of an arbitration clause contained in a charter party into a → bill of lading through a clause of incorporation drafted in general words (*Son Shipping Co Inc v De Fosse & Tanghe* 199 F.2d 687 (2d Cir 1952)). But such validity is subject to the fulfilment of two different conditions: (i) a clear identification of the 'incorporated' charter party; (ii) an actual or constructive notice of the incorporation by the holder of the bill of lading (*Midland Tar Distillers, Inc v M/T Lotos* 362 F.Supp. 1311 (SDNY 1973); *Continental Florida Material, Inc v M/V Lamazo* 334 F. Supp.2d 1294 (SDFla 2004)). Of course, the latter condition (under (ii)) is truly dependent on the particular facts and it requires the judges to analyse all of the surrounding circumstances of the particular case (Carlos Esplugues Mota, 'Some Current Developments in International Maritime Arbitration' in Jürgen Basedow, Ulrich Magnus and Rüdiger Wolfrum (eds), *The Hamburg Lectures on Maritime Affairs 2007 & 2008* (Springer 2010) 138).

What has been said above suggests a more general question. We wonder whether a formalistic approach interpreting maritime arbitration clauses is consistent with the context at stake. The answer is no for two reasons. (i) It does not seem reasonable to 'bridle' international commercial operators with formal → prescription that collides with the need for expeditiousness that characterizes their relationships. (ii) The fundamental function satisfied by the formal requirement is to verify that the arbitration clause was actually consented to (Cass. 14 November 1981, no 6035, *Jauch & Huebener c. S.té de Navigation Transocéanique* [1982] Dir Marit 391, with observations by M Maresca). The issue of the validity of maritime arbitration clauses from the formal standpoint should therefore be solved through the realization of the instrumental nature of formalities with respect to the existence of a (substantive) consent of the parties to stipulate the arbitration agreement. In this sense we may 'reinterpret' art II of the New York Convention in the perspective of maritime arbitration. In other words, the question of the form of arbitration clauses can (indeed, it must) be solved taking into account the context in which international maritime industry operators act. This means:

- on the one side, that the formal requirements (→ Formal requirements and validity) under the provision in question should be interpreted in a flexible manner, to meet the needs of international maritime operators (who, for instance, are unlikely to sign transport contracts and/or documents containing arbitration clauses, but, if anything, they exchange – mostly through brokers – extremely terse e-mails or faxes) and
- on the other side, that particular attention will have to be paid to the 'status' of the contracting parties, and to the practices followed in a given commercial environment, in order to verify, 'in good faith', the actual consent of each party to the arbitration clause.

In conclusion, in a context, such as that of international maritime commerce transactions, where arbitration is considered as 'the preferential instrument' to resolve disputes, the 'formalistic' approach seems to be entirely misplaced, although it is often adopted by certain judges who, with a rigid interpretation of art II of the New York Convention, essentially obstruct the access to arbitration justice by operators, without, however, protecting the (really) 'weaker' parties, or simply those who are not so used to the contractual practices of a specific commercial sector. This is not meant to question the relevance (and reasonableness) of the formalities required by art II of the New York Convention: as has been rightly highlighted, 'formalism has nothing to do with form and the criticism of formalism cannot be understood as an inconceivable and absurd criticism of legal forms' (Salvatore Satta, *Il mistero del processo* (Adelphi 1994) 86). In other words, we do not intend to censure art II of the New York Convention, but to underline the need to adopt a reasonably 'evolving' interpretation of the formality requirements under such provision.

IV. The applicable law: *lex maritima* and *status mercatorius*

One of the most interesting issues to be dealt with in studying maritime arbitration is the → choice of law, as in this type of arbitration the international dimension is a matter of course, and legal relationships here will seldom fall under one single legal system (Bruce Harris, 'Maritime Arbitrations' in John Tackaberry and Arthur Marriot (eds), *Bernstein's Handbook of Arbitration and Dispute Resolution Practice* (Thomson 2003) 744). From this point of view, maritime arbitration is no different from other sectors of international commercial arbitration (→ Arbitration, international commercial). The speciality of maritime arbitration in relation to choice of law is marked and evidenced by two fundamental aspects. In the first place maritime law is a '*jus commune mercatorum*' (*The Lottawanna* 88 U.S. 558, 573 (1875)) (→ *Lex mercatoria*) that originates from custom and is largely included in international conventions or 'codified' in national laws: this ensures essentially similar legal solutions, although the wording is not always identical due to the difference of the doctrines from which each of them took inspiration (Sergio Carbone and Lorenzo Schiano di Pepe, *Conflitti di sovranità e di leggi nei traffici marittimi tra diritto internazionale e diritto dell'Unione europea* (Giappichelli 2010) 3). This aspect – that differentiates and characterizes this subject with respect to all other areas of international commerce – makes clear that within maritime arbitration, the question of what regulation applies to the merits of the dispute gives rise not only to a choice-of-law issue, but also (or, perhaps, rather) to the need for the arbitrator to reconstruct the most appropriate legal rule to decide the case at issue, by interpreting conventions and/or state laws as a 'uniform' system, taking into account the relevance of the practices of international maritime operators. In this sense, maritime arbitration only accentuates something that is true for all international commercial law, namely the inadequacy of the traditional choice-of-law method to solve problems concerning the identification of the law governing a specific legal relationship: this inadequacy is even more evident when the solution of a dispute is submitted to arbitration. In the second place, → party autonomy also takes greater relevance in the maritime area as a tool of 'material justice' aimed at governing a given set of facts directly (without the filter of the provisions of private international law). In short, as regards the conflict-of-law issue, the maritime area confirms its 'speciality' in relation to other sectors of international commercial law. It compels arbitrators to determine the law applicable to a specific case having regards not only to the practices of international maritime industry operators (which is a proper 'filter' through which maritime law should be interpreted even by state courts), but also to the will of the parties, which – in this area, and in particular in the context of the legal regulation of maritime carriage – takes the decisive role of a 'material justice' standard, capable of outlining the actual legal background of each legal relationship (see above II.).

In this perspective we can appreciate the importance and meaning of the indication of English law (→ United Kingdom) as the applicable law by arbitrators in the forms most frequently used by international maritime operators: with such indication the parties certainly intend to 'rely' on the system that is, among all, the one that has contributed most to the development and the correct interpretation of the principles of the so-called → *lex maritima*, which represents – even when the parties make no choice – the corpus of provisions on which maritime arbitrators will have to found their

decisions. With such expression we mean, in particular, that the law applied by arbitration institutions called to decide international maritime disputes is based on a corpus of legal principles which – even when they are included or 'codified' in national legislations – have a common origin and are comprised of two 'constitutive elements': on the one side, the → *lex mercatoria* (which includes both the international conventions on maritime transports: Aboubacar Fall, 'Defence and Illustration of *Lex Mercatoria* in Maritime Arbitration' (1998) 15 J.Int'l Arb. 83), and the uses and customs commonly accepted in such industry (*Stolt-Nielsen v AnimalFeeds Intern Corp* 559 U.S. Supreme Court 559 (2010); *Samsun Corp v Khozestan Mashine Kar Co* 926 F.Supp. 436, 439 (SDNY 1996); *Great Circle Lines, Ltd v Matheson & Co, Ltd* 681 F.2d 121, 125 (2d Cir 1982)), and on the other side, the contractual forms and templates which are most frequently used by international maritime operators (William Tetley, 'The General Maritime Law – The Lex Maritima' [1996] Eur.T.L. 497). Thus, clearly, the 'state-based' approach is increasingly losing weight in the context of maritime dispute solution.

This, however, should not be intended to mean that international maritime commerce relationships are completely impenetrable to state laws. In this regard it should be considered in the first place that the *lex maritima* can only find fertile ground to the extent that a state law allows its development and application. Moreover, as has been underlined even recently, the uniform transport law (→ Transport law (uniform law)), like the commercial usages generally accepted by international maritime commerce operators, need (i) constant 'additions' by internal law provisions to fill their gaps or permit their actual implementation, and (ii) the enforcement by national judges (also when recognizing and implementing arbitration decisions). Furthermore, although shipping operators generally insert in their forms and contracts choice-of-law clauses (→ Choice of law) indicating English law as the applicable law, maritime arbitrators have to resolve choice-of-law issues when parties have not made such choice. In that case, different solutions have been proposed in order to determine the law applicable to the substance of the dispute. In particular, it has been affirmed that maritime arbitrators may: (i) apply the choice-of-law rules they consider applicable to the case, as has been provided for by s 46.3 of the English Arbitration Act 1996; (ii) apply the choice-of-law rules provided for by the *lex arbitri*; (iii) make a 'cumulative' application of the choice-of-law rules of all the countries with which the dispute is connected; (iv) directly apply the substantial law they consider applicable to the case (Clare Ambrose, Karen Maxwell and Angharad Parry, *London Maritime Arbitration* (Informa 2009) 64; Francesco Berlingieri, 'The Law Applicable by the Arbitrators' [1998] Dir Marit 617). Finally, (v) with specific reference to the maritime arbitrations decided by the German Maritime Arbitration Association (GMAA), it should be noted that s 12 of the GMAA Rules (available at <www.gmaa.de>) provides that 'unless the parties have expressly agreed on the application of a specific law, German law shall be deemed to have been chosen to apply, including to the agreement to arbitrate' (Klaus A Gerstenmaier, 'The "German Advantage" – Myth or Model?' [2010] SchiedsVZ 21).

These considerations lead to a more general conclusion. International maritime commerce increasingly takes 'centrifugal' directions with respect to state laws. The existence and the application in international maritime arbitrations of a modern → *lex maritima* confirm the progressive shift from a 'state-centric perspective' in regulating the relationships among maritime industry operators and, consequently, confirm that the techniques based on choice of law are less and less significant to identify the legal provisions aimed at governing such relationships. Business operators of the maritime commerce industry see their relationships as not subject to a single national law, but to a different legal treatment, with peculiar group statutes (consisting of the *lex maritima*), which come into play to meet the needs of such operators. In other words, in transnational maritime law, the law, intended as the mandatory regulation, whereby a single state affirms its sovereignty, is replaced (in a large part at least) by a *ius commune mercatorum*, represented by the *lex maritima*, which applies in the relationships among international maritime commerce operators, as a consequence of their status (Andrea La Mattina, 'Clausole di deroga alla giurisdizione in polizza di carico e usi del commercio internazionale tra normativa interna e disciplina comunitaria' [2002] Dir Marit 473–4). This phenomenon that I have once called '*status mercatorius*' thus appears as a 'balancing element' of the legal regulation applying to international maritime commerce operators 'on a personal

basis': that is, it allows them to benefit from a flexible treatment following the principles of the *favor commercii* and, in particular, to satisfy the needs for expeditiousness and promptness which are typical for maritime traffics.

V. The procedure

The relevance of private autonomy in maritime arbitration is confirmed – and, indeed, reinforced – if we consider the 'procedural' aspects, broadly defined, of this kind of arbitration. It is true that, as scholars have highlighted, 'the liberty enjoyed by the parties in fashioning the proceedings' represents 'the most basic hallmark' of all international commercial arbitrations (→ Arbitration, international commercial) (Jack J Coe, *International Commercial Arbitration: American Principles and Practice in a Global Context* (Transnational Pub 1997) 59); however, it is with reference to maritime arbitrations that the parties (either directly or through their arbitrators) keep stronger control over the proceedings, shaping it in such manner as to support their needs as far as possible with respect to the characteristics of the subject dealt with (Carlos Esplugues Mota, *Arbitraje Marítimo Internacional* (Thomson 2007) 510). Thus, a large majority of maritime arbitrations (unlike other international commercial arbitrations), even when conducted in accordance with the rules of arbitration institutions, are *ad hoc* arbitrations and not administered arbitrations, which means that arbitration procedures regarding maritime disputes are generally conducted with considerable procedural flexibility and – basically – under the constant control of the parties.

This aspect of maritime arbitration has historic reasons. In fact, for a long time (and up until a few decades ago) it was characterized as a dispute resolution tool largely detached from schemes of a 'procedural' nature: maritime arbitrators were, in large part, brokers associated with the Baltic Exchange of London, who decided on the basis of their own sense and experience, in a context where formalities were absent and therefore there was no need to use procedural rules. Starting around 1960, the evolution of maritime arbitration took an increasingly 'technical-legal' direction, and the resulting increasing involvement of lawyers, or people experienced in the legal sector, certainly increased the 'procedural complexity' of this dispute resolution tool, but nonetheless, the same has remained less 'procedural-minded', compared to other kinds of international commercial arbitration. In light of this, it becomes clear why the London Maritime Arbitrators Association (LMAA), the main maritime arbitration institution in the world, did not adopt procedural rules for a long time. Such rules were introduced only in 1999 (with the publication of the LMAA Procedural Guidelines (available at <www.lmaa.org.uk>) and were fully systematized in the LMAA Terms of 2002 (available at <www.lmaa.org.uk>) which are regularly updated.

In this regard, however, it should be highlighted that the recent evolution is aiming to reduce the control of the parties over the proceedings conducted on the basis of the LMAA Terms. It was fully recognized until the 2006 issue of such Terms which stated that – apart from the default use of the provisions under Schedule 2 to the Terms – the procedural rules were fixed by the Arbitration Panel, 'subject to the right of the parties to agree any matter' (s 12), so that the parties had a direct say on the regulation of the arbitration procedure. On the contrary, the last version of the LMAA Terms 2012 (available at <www.lmaa.org.uk>) lays down the principle that it is (only) the Arbitration Panel that has the power to decide 'all procedural and evidential matters', even though taking account of the agreements possibly stipulated by the parties in that regard. However, the parties keep the power to decide whether the preliminary investigation is to be based only on documents, or is to include a hearing (s 12). This progressive 'erosion' of the powers of the parties to organize 'at their discretion' the arbitration procedure conducted under the aegis of the LMAA Terms is the natural consequence of the already mentioned greater complexity of maritime arbitrations, and of the increasing 'sophistication' of the parties involved, who – in recent times – are less inclined to take a collaborative approach on the issues relevant to procedure. Therefore, reasons of procedural economy (in particular, saving time in the proceedings) made it necessary to give arbitrators 'the last word' with respect to 'all procedural and evidential matters', as LMAA did with reference to the so-called Intermediate Claims Procedure (conceived in 2009 in collaboration with the Baltic Exchange for claims not exceeding a value of USD 400,000, which has rarely been used by operators so far). More rigid rules, on the other

hand, are fixed by the LMAA for other, 'minor' / 'fast track' proceedings, ie the Small Claims Procedure – SCP (conceived in 1989 for claims not exceeding a value of USD 50,000, which have been used fairly often over time) and the so-called Fast and Low Cost Arbitration – FALCA (created in 1997 for claims of a value ranging from USD 50,000 and USD 250,000, virtually never used in practice): in this kind of proceedings – in order to 'smooth' their conduct – the parties cannot modify the regulation of the procedure and the powers of arbitrators to act in that regard are extremely limited. This approach, aimed at balancing the principle of autonomy with the necessity of expeditiousness in the proceedings, has also inspired the provisions on maritime arbitration proceedings conducted pursuant to the Rules of the Society of Maritime Arbitrators of New York (SMA, available at <www.smany.org>). In such context, the parties are entitled to 'alter or modify' the procedural rules, except for those that entrust the arbitrators with the power to 'administer' the arbitration procedure (s 1). It is not easy to infer, by examining the rules, what procedural provisions are 'mandatory' for the parties, but it is reasonable to conclude that such provisions are only those relevant to (i) the determination of the dates and places of the hearings and (ii) the identification of the claimant in the (rare) cases in which this is in doubt (s 21), as well as the provisions (iii) on the relevance of evidence for the purposes of its admission and assessment (s 23) and (iv) on the possible reopening of the discovery stage (s 26).

The Rules of Arbitration of the German Maritime Arbitration Association (GMAA Rules, available at <www.gmaa.de>) also allow the parties to intervene in the regulation of the procedure. In this regard, however, it should be noted that the power of the parties to modify procedural rules is not limited while the arbitrators have not yet been appointed; after such appointment, it is still possible to bring modifications, but – in this case – the consent of the arbitrators is required, in addition to the consent of the parties (art 1).

The rules of the Association of Maritime Arbitrators of Canada (AMAC, available at <www.amac.ca>), on the contrary, do not lay down similar limitations, but just state that 'The Rules may only be varied by the agreement of all parties to the arbitration' (s 3). This is the same wording used in the rules of the other Canadian maritime arbitration institution, the Vancouver Maritime Arbitrators Association (VMAA, available at <www.vmaa.org>) (s 2).

Likewise, with specific reference to procedural rules, the Arbitration Rules of the Singapore Chamber of Maritime Arbitration (SCMA, available at <www.scma.org.sg>), as amended in 2009, provide that the procedure is established by the Arbitration Panel, 'subject to the right of the parties to agree any matter' (art 25.2), therefore similar to the provision contained in the LMAA Terms 2006.

Conversely, the relevance of → party autonomy in the 'administered' arbitrations conducted in accordance with the *Règlement d'Arbitrage de la Chambre Arbitrale Maritime de Paris* (available at <www.arbitrage-maritime.org>) is extremely limited: the choice of the parties can only regard the applicability of the regulation in force at the time of the stipulation of the arbitration agreement, rather than the one in force when the dispute was initiated (art I).

A similar approach is also followed in relation to arbitrations subject to the Rules of Arbitration of the Tokyo Maritime Arbitration Commission (TOMAC, available at <www.jseinc.org/en/tomac/arbitration/rules_index.html>) of the Japan Shipping Exchange (JSE), which provide, on the one side, that reference to the rules by an arbitration clause implies that they 'shall be deemed to constitute part of such arbitration … clause' (art 3) and, on the other side, that the rules may only be modified by the TOMAC on an initiative of its Chairman. The joint provisions of such rules make it clear that it is not possible for the parties of arbitrations subject to the TOMAC Rules to intervene on the procedure.

The regulation provided by the China Maritime Arbitration Commission Arbitration Rules (available at <www.cmac-sh.org/en/home.asp>) for arbitrations 'administered' thereunder, on the other hand, is much less rigid: not only are the parties entitled – generally speaking – to modify such rules 'subject to consent by the Arbitration Commission', but, moreover, they may, without any consent being necessary from the Arbitration Commission, 'shorten or extend by an agreement the procedural deadlines stipulated in these Rules or modify the arbitration procedural matters concerned to meet the special needs of their specific case' (art 7). In short, although they regulate an administered maritime arbitration, these rules – in theory at least – give the parties full control over the rules governing the development of the proceedings.

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In conclusion, while it is indisputable that, in comparison with the early 1960s, maritime arbitration is now taking a less informal shape and is gaining ground even in new centres where it is increasingly 'institutionalized' (if not even 'administered'), it is also true that – at the moment – 90 per cent of maritime arbitrations are conducted with *ad hoc* procedures, within the LMAA and the SMA, where the parties maintain (either directly or through the arbitrators appointed by them) extensive powers to manage the proceedings. This certainly confirms the speciality of maritime arbitration compared to other types of international commercial arbitration. Of course, the powers of the parties to have influence over the maritime arbitration proceedings eventually depend on the existence of a mandatory procedural law applicable to such an arbitration (if any). Furthermore, the rules of arbitration provided for by the above-mentioned maritime arbitral institutions may contain gaps which need to be filled. In this respect, we must underline the central role of the so-called 'curial law', which may be defined as a body of rules which sets a standard external to the arbitration agreement and the wishes of the parties, for the execution of the arbitration. As has been affirmed in general, in maritime arbitration, too, curial law usually corresponds to the law of the seat of arbitration (*Naviera Amazonica Peruana SA v Compania Internacional de Seguros de Peru* [1988] 1 Lloyd's Rep 116).

VI. Maritime arbitration and liner transport

We have seen in the preceding sections that, as concerns maritime commerce, party autonomy and international customs have considerable weight in the regulation of arbitration, with regard both to the issues related to the validity of arbitration clauses (III.), and to the applicable law (IV.), as well as to the rules governing procedure (V.).

This not only allows one to refer to maritime arbitration as a 'special procedure' compared to international commercial arbitration (→ Arbitration, international commercial), but, moreover, makes it possible to reinterpret the set of legal relationships involving international maritime commerce operators within the scope of what I have called *status mercatorius*. In this latter regard, the analysis carried out in this entry permits the conclusion that when a person belongs to the 'social group' of maritime operators, this implies that – in the relationships held *inter pares* with other members of the same 'group' – those rules should find a more 'flexible' application aimed at better meeting the needs of expeditiousness and promptness that are typical of maritime commerce. And again, we can say that a general *favor arbitratus* can be found in international maritime commerce relationships, considering both the diffusion of arbitration in such relationships and the fact that arbitration seems to be the only tool capable of ensuring the application of legal rules in line with the business transaction which the parties intended to put in place (Sergio Maria Carbone and Marco Lopez De Gonzalo, 'L'arbitrato marittimo' in Guido Alpa and Vincenzo Vigoriti (eds), *Arbitrato. Profili di diritto sostanziale e di diritto processuale* (UTET Giuridica 2013) 1293).

However, this interpretation cannot be accepted unconditionally and without certain specifications in the sector of liner shipping, as its characteristics make it significantly different from tramp shipping (usually documented by charter parties). In the first place, in fact, arbitration clauses in liner transport do not have the typical marks of, for instance, charter parties. In a context where arbitration is not the means of dispute resolution normally used by business operators, it would seem rather difficult to invoke the 'practices' of international commerce to argue that the controls over the validity of the arbitration clauses should be more 'flexible' and free from that 'formalism' that characterizes the approach of courts in this matter. In the second place, the legal relationships associated with liner transport are almost exclusively regulated by the mandatory uniform law provisions of the Hague–Visby Rules (the Hague Rules (International Convention of 25 August 1924 for the unification of certain rules relating to bills of lading, 120 LNTS 155), as amended by the 1968 Visby Protocol (Protocol of 23 February 1968 to amend the International Convention for the unification of certain rules of law relating to bills of lading signed at Brussels on 25 August 1924 (Hague Rules), 1412 UNTS 128) and the 1979 Brussels Protocol (Protocol of 21 December 1979 to amend the International Convention for the unification of certain rules to bills of lading (Hague Rules) as modified by the Amending Protocol of 23 February 1968 (Visby Protocol), 1412 UNTS 146)) (or of the Hague Rules, or – again – of the Hamburg Rules (United Nations Convention

of 31 March 1978 on the carriage of goods by sea, 1695 UNTS 3), as the case may be), as it is considered that in this sector of international maritime commerce the position of the cargo interest is 'weak' and should be protected under law (Sergio M Carbone, *Contratto di trasporto marittimo di cose* (Giuffrè Editore 2010) 169). This has even raised doubts with regard to the possibility for the parties to the relationships involved in liner transport to avail themselves of arbitration as a means of dispute resolution (Sergio M Carbone, *Il trasporto marittimo di cose nel sistema dei trasporti internazionali* (Giuffrè Editore 1976) 98–9). In fact, whereas in *inter pares* commercial relationships arbitration is certainly the most suitable procedural tool, in a context where the bargaining power of one party is 'unbalanced' compared to the other (as is the case in liner transport), arbitration is not necessarily the best means to resolve disputes, as it might turn into a mechanism aimed at hindering access to justice for the 'weaker party'. Especially when the latter stipulates an agreement regulated on the basis of general conditions unilaterally issued by the other party and written on the back of the → bill of lading, the weaker party might not even be fully aware of having consented to an arbitration (Andrea La Mattina, *L'arbitrato marittimo e i principi del commercio internazionale* (Giuffrè 2012) 305). In light of these considerations, it might seem that maritime arbitration is not a unitary phenomenon: on the one side, we find maritime commerce relationships where arbitration is commonly used, where exigencies of expeditious conduct dominate and where the control of state judges on arbitration agreements is less rigid (tramp transport contracts documented by charter parties); on the other side, there are relationships where arbitration conventions are not generally used and within which the possibility to have recourse to arbitration is even put in doubt by the presence of mandatory international laws protecting the parties to the cargo interests (liner transport contracts documented by bills of lading).

In this perspective, liner transport seems to be a 'critical point' in maritime arbitration, insofar as it leads to reflection on whether the latter can be seen as a 'system' and suggests a control of the results of the analysis carried out in this entry. The legal relationships relevant to the so-called 'liner' maritime services are certainly critical for the institute of maritime arbitration, because the presence of a 'weak party' to be protected (the person interested in the cargo) might seem to prejudice the possibility to accept the flexible interpretation of the formal requirements of arbitration clauses we have suggested before in this sector earlier (III.). However, in practice, even in this sector we should reject a 'rigid' assessment of the formal requirements of arbitration clauses under art II of the New York Convention of 1958. On the contrary, far-sighted judges (especially English and American case-law) have accepted the importance of carrying out verifications based on reasonableness and on the common practices of business operators, which are the most suitable means to ensure the protection of the weaker party with regard to relationships relevant to liner maritime transports: in fact, they are the only tools capable of verifying that the person interested in the cargo had actually consented to the arbitration agreements (*The "Fehmarn"* [1957] 1 WLR 815; *Owners of Cargo Lately Laden on Board the Eleftheria v Owners of the Eleftheria* [1969] 1 Lloyd's Rep 237; *Trafigura Beheer BV v Mediterranean Shipping Co SA* [2007] 2 Lloyd's Rep 622; *Carbon Black Export, Inc v The Monrosa* 254 F.2d 297 (5th Cir 1958); *Indussa Corp v S. S. Ranborg* 377 F.2d 200 (2d Cir 1967); *M/S Bremen v Zapata Off-Shore Co* 407 U.S. 1 (1972)).

Moreover, the mandatory uniform laws (→ Uniform substantive law and private international law) protecting the cargo interests do not limit the possibility to submit the disputes relevant to liner transport to arbitration: they only put limits (and have thus been rightly interpreted by judges) aimed at preventing arbitration from 'bypassing', in practice, the mandatory contents of such laws. That has already been affirmed by English and American case-law (→ United Kingdom; → USA) (*Owners of Cargo on Board the Morviken v Owners of the Hollandia* [1983] 1 Lloyd's Rep 1; *Vimar Seguros y Reseguros, SA v M/V Sky Reefer* 515 U.S. 528 (1995)) and has recently been confirmed by the rules regarding arbitration contained in ch 15 of the Rotterdam Rules (United Nations Convention of 11 December 2008 on contracts for the international carriage of goods wholly or partly by sea, UN Doc A/RES/63/122, 63 UNTS 122; Francesco Berlingieri, 'Arbitrato marittimo e Regole di Rotterdam' [2011] Dir Marit 387). Even from a substantive viewpoint, it does not seem necessary to exclude the 'maritime arbitration system' for relationships relevant to liner transports. The uniform laws applying to

this kind of transport are undoubtedly part, in fact, of the → *lex maritima*, and moreover – notwithstanding their mandatory contents – they do not prevent enhancing the relevance of the *status mercatorius* in this context as well. Lastly, the procedural rules of the main arbitration institutions seem capable of ensuring an easy 'access to justice' and are shaped in such a manner as to ensure not only compliance with the adversarial principle, but also a shorter length of time for the resolution of the controversy, certainly faster than resolving the dispute in court in any legal system whatsoever.

In conclusion, in light of the above, we can say that even in liner transport, maritime arbitration maintains its characteristics as a 'preferential tool' aimed at ensuring 'suitable' legal protection for the rights of the parties to transactions in international maritime commerce. Therefore, we can say that maritime arbitration is a 'unitary' phenomenon, where the features of liner transport can be inserted without causing any cracks in the system. In this context, moreover, the peculiarities of liner transport transactions confirm, once again, the speciality of maritime arbitration compared to other kinds of international commercial arbitration.

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