Contemporary concerns of international maritime arbitration

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Abstract: The maritime industry has taken advantage of the benefits offered by arbitration and is where arbitration has found a very fertile field to grow and develop. However, the fast expansion of the maritime business and modern times, are constantly introducing new and more defiant challenges for those who work and bet for this alternative dispute resolution method. Indeed, we would just have to think about some unresolved problems such as the validity of the arbitral clauses inserted in the bill of lading, the so-called judicialization of arbitration that has driven to think about a process of denaturalization of it, the problems derived from the absence of a specific and uniform regulation of international maritime arbitration, or even in the adaptability of arbitration to the era of e-commerce, to start to understand the magnitude of the obstacles that arbitration is facing nowadays, and that are expectant of its reaction.

Keywords: Maritime arbitration, arbitration clause, e-contracts

Preocupaciones contemporáneas del arbitraje marítimo internacional

Resumen: *La industria marítima ha sabido sacar ventaja de los beneficios que ofrece el arbitraje y es donde el arbitraje ha encontrado un campo fértil para crecer y desarrollarse. Sin embargo, la rápida expansión del negocio marítimo y los tiempos modernos, están introduciendo constantemente nuevos y más desafiantes retos para quienes trabajan y apuestan por este método alternativo de resolución de disputas. En efecto, solo habría que pensar en algunos problemas no resueltos como la vigencia de las cláusulas arbitrales insertas en los conocimientos de embarque, la llamada judicialización del arbitraje que ha llevado a pensar en la posible desnaturalización del mismo, los problemas derivado de la ausencia de una regulación específica y uniforme del arbitraje marítimo internacional, o incluso en la adaptabilidad del arbitraje a la era del comercio electrónico, para comenzar a comprender la magnitud de los obstáculos que enfrenta el arbitraje en la actualidad, y que se encuentran a la espera de su reacción.*

Palabras Claves: *Arbitraje marítimo, cláusulas arbitrales, contratos digitales.*

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SUMMARY:

Generalities

In the last decades we have witnessed the development and glorification of arbitration as the monarch of the alternative dispute resolution methods, and it is a very well-earned position. Arbitration stands out as a prominent option among other ways to resolve a legal disagreement.

It is only a matter of thinking about how convenient it is to submit a case into arbitration to get its formal resolution. Arbitration offers the parties in conflict the possibility to resolve a disagreement, investing as little time, money, and effort as possible.

Indeed, comparing this method to the ordinary judicial process, arbitration will always be the quickest and the cheapest choice due to the parties having an enormous flexibility to opt for, or even design, the kind of process that they want, and obviously they will always choose the most financially viable and the swiftest one[1].

Additionally, this alternative dispute resolution method grants the parties the possibility to select who will have the duty of solving the conflict, which translates into the possibility of adjudicating the case to an arbitrator or a panel of arbitrators who has knowledge and experience in the specific matter under discussion and, furthermore, who is objective, impartial and with high moral standards; which is totally different from what happens in an ordinary judicial process where the judge is assigned randomly without taking into account their preparation, culture or knowhow.

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1 Simon Greenberg, Christopher Kee and J. Romesh Weeramantry. *International Commercial Arbitration: An Asia-Pacific Perspective.* (Cambridge, England: Cambridge University Press, 2011), p18.

> In litigation, a judge is assigned to the case by the court. The parties therefore cannot select the judge who will determine their dispute. In arbitration, however, the parties are free to choose the arbitrator(s), enabling them to choose people with the appropriate expertise, cultural neutrality, or other desired skills o characteristics[2].

Moreover, in those cases in which confidentiality is highly appreciated and required by the parties, usually in international commercial disputes where a leak of information could be fatal, arbitration appears as the best option to resolve those disputes since the process is not carried out in public and the participants are able to agree on which details can be published and which ones must remain private.

> [C]onfidenciality has always been considered, on the one hand, as a typical effect of arbitration proceedings and, on the other hand, as one of the main advantages of such an instrument as opposed to the cases brought before state courts. Scholars and case law that occasionally dealt with confidentiality justify its existence with various arguments, mainly qualifying it as an implicit effect of the arbitration agreement and therefore of the parties' intentions[3].

Arbitration not only offers the possibility to prosecute a case in a neutral venue, to withhold sensitive data and to be resolved by a specialized person or panel, it also grants certainty to the parties, due to the fact that the resolution of the conflict will be done in a definitive way. Certainly, since arbitral processes generally just have one stage, appellation is usually not an option[4], that is why after the award is released, the procedure is finished and the involved can proceed accordingly.

All those benefits flaunted by the arbitration, make of it a perfect way of settling maritime disputes, due this is a field where promptness, confidentiality, and expertise, more than highly appreciated, are vital; that is why it has become so popular among the stakeholders, which has prompted the creation of specialized centers to hold those processes and particular rules to be applied to them[5].

Just as an example we can name the London Maritime Arbitrators Association (LMAA), founded in 1960 at a conference of arbitrators on the Baltic Exchange Approved List[6]; the Society of Maritime Arbitrators of New York (SMA), a professional, non-profit organization created in 1963 to promote the practice of the arbitration by proficient and

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2 Simon Greenberg, Christopher Kee and J. Romesh Weeramantry. *International Commercial Arbitration: An Asia-Pacific Perspective.* (Cambridge, England: Cambridge University Press, 2011), p18.

3 Alberto Malatesta and Rinaldo Sali. *The Rise of Transparency in International Arbitration*. (New York, USA: JurisNet, 2013), p39.

4 "The question of whether or not an appeal (in addition to a setting-aside procedure) is available, notably England, do allow a limits form of appeal. The laws of several jurisdictions in the Asia-Pacific allow a limited form of appeal under their legislation applying to domestic but not international arbitrations". Simon Greenberg, Christopher Kee and J. Romesh Weeramantry. *International Commercial Arbitration: An Asia-Pacific Perspective.* (Cambridge, England: Cambridge University Press, 2011), p24.

5 Frank-Bernd Weigand, and Antje Baumann. *Practitioner's Handbook on International Commercial Arbitration.* (Oxford, United Kingdom: Oxford University Press), p.20.

6 The History of the LMAA. Available in: https://lmaa.london/history/

highly qualified maritime and commercial experts[7]; the *Chambre Arbitrale Maritime de Paris*, ranked as the third center in the world as a significant place of specialized arbitration[8].

There are also specialized centers in Singapore (the Singapore International Arbitration Center), Tokyo (the Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange), Rotterdam (The Netherlands Transport and Maritime Arbitration Rotterdam-Amsterdam "Tamara", India (The Indian Council of Arbitration in New Delhi), etc.

Despite maritime arbitration not being very different from other kinds in private law, especially from commercial arbitration[9], the practice has revealed some particularities and issues that are characteristic of it or that are more common in that type of arbitration, which motivates us to dedicate some thoughts to them, since they may influence the development of maritime arbitration in the contemporaneous time.

1. Validity of the arbitration clause

The general acceptance of arbitration in the maritime field, of which we have recently talked about, is also palpable with the more and more frequent inclusion of arbitration clauses, and with the proliferation of agreements where arbitration is chosen as the way to resolve any conflict that may arise from the execution, interpretation, or breach of a maritime contract.

Even in the bills of lading (B/L), issued as an expression of a charter-party or in any contract of carriage of goods by sea[10], it is very common to see arbitration clauses as an option for the parties to submit any contractual controversy.

Considering that the B/L is the most important and versatile commercial document in international maritime commerce[11], used to govern countless operations, it is very concerning to realize that many issues derive from the interpretation of an arbitration clause present in a B/L, especially regarding to its validity or effectiveness against the original contracting parties or against third party holders of the document but not signatories of the original agreement[12].

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7 About The SMA. Available in: https://www.smany.org/about.html

8 Jihane Khaldi. *L'arbitrage Maritime : Une Etude Comparative Entre Londres Et Paris.* (Marseille, France: Université De Droit, D'economie Et Des Sciences D'aix Marseille, 2014), p9.

9 Luís Cova Arria. *El Arbitraje Marítimo.* (Caracas, Venezuela: Academia de Ciencias Políticas y Sociales, 2014), p.119

10 Rosario Espinosa Calabuig. *Las Cláusulas Arbitrales Marítimas a la Luz de los "Usos" del Tráfico Comercial Internacional*. (La Rioja, Spain: Fundación Dialnet, 2007), p10.

11 Heiko Giermann. *The Evidentiary Value of Bills of Lading and Estoppel*. (Münster, Germany: Lit Verlag, 2004), p1.

12 Rosario Espinosa Calabuig. *Las Cláusulas Arbitrales Marítimas a la Luz de los "Usos" del Tráfico Comercial Internacional*. (La Rioja, Spain: Fundación Dialnet, 2007), p.2.

Undeniably, the keyword to be able to consider an arbitration as valid is "consent", and, unfortunately, due to the proper *sui generis* character of maritime operations, where promptness and dynamism are critical for the sector, consent does not always meet the general legal requirements, therefore its validity could be questioned and triggers the nullity of the arbitration clause or agreement.

> In the context of maritime arbitration, the question of consent has an additional dimension. An obligation to arbitrate can be imposed on those cargo interests who have not actually consented to arbitrate with their respective carriers. Under English law, it is possible for a cargo interest to be deemed to have consented to arbitrate, despite the absence of actual consent[13].

Specially, that happens very frequently when there is a B/L involved; firstly, because the non-signatory holders of the B/L do not participate in the dialectic of the creation of the original agreement, consequently the contract is not necessarily an accurate reflection of their will; what is more, some B/L, particularly in tramp trade, contain what is called an "incorporation clause" that refers to the terms of a charter party[14], however the B/L generally travels alone without the charter party linked to it, hence the holder of the B/L is not able to have a clear idea of the stipulations of the contract of carriage in their entirety[15].

Precisely, when one of those conditions, considered as included via an incorporation clause, is the submission to arbitration, we may be facing a genuine dare, since the consent given to go to arbitration was granted by the original signatories but not by the holders who, at the end, could be linked to pursue an arbitral process when that was not their real desire and were completely unaware of those conditions, which might originate a request to challenge the arbitration, which would surely be accepted due to the lack of consent of the parties that would have to face, *de facto*, that process.

The same problem is faced by insurers in cargo claims, who affirm that any clause about jurisdiction set by the insured in an agreement endorsed with a third party should not be applied to them.

> [T]he insurers have been judicially defending that the clauses inserted in maritime contracts signed by their insureds, do not apply to them. In short, the insurers allege that as they did not participate in the contract, they had no link to the limitation of values (package limitation) and/or jurisdiction, including arbitration clause[16].

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[13] Melis Özdel. *Enforcement Of Arbitration Clauses in Bills of Lading: Where Are We Now?* Paper presented paper at the 19th International Congress of Maritime Arbitrators. Online version available on: https://bit.ly/3CnjPrt.

[14] "Many bills of lading seek to incorporate the bulk of their governing terms by way of express reference to a particular charter party. One reason for incorporation is to give certainty to the question of what law and jurisdiction will apply between the carrier and the consignee". Erin Walton. *Incorporation of Charter Party Terms into Bills of Lading*. Online version available on: https://bit.ly/2VLZBbl.

[15] Melis Özdel. *Enforcement Of Arbitration Clauses in Bills of Lading: Where Are We Now?* Paper presented paper at the 19th International Congress of Maritime Arbitrators. Online version available on: https://bit.ly/3CnjPrt.

[16] Marco Sammarco. *Arbitration Clause in Brazil*. Online version available on: https://bit.ly/2Z7QlQ9

Being consent, as we already mentioned, a fundamental factor for an arbitration process, it is easy to understand why the validity of the arbitral clause may be, at least, questioned and, in the worst-case scenario, invalidated.

Thinking of a way to combine the particularities of the maritime traffic and the safeguard of the rights of third parties and their interests involved in these kinds of cases, the Court of Appeal of England in the sentence "The Channel Ranger" established a criterion of supreme value. In this opportunity was settled that a generic incorporation clause contained in a B/L is not enough to incorporate the arbitration as the method of solve the conflicts derived from the contract of carriage[17].

Regarding this topic, we believe that a solomonic solution, that responds to the material reality but also that shelters the rights and interests of thirds involved in these cases, is the one adopted by Court in the just referred sentence, where was established that, it is necessary to include special words of incorporation that, at least, alert the holder of the existence of a dispute resolution clause inserted in the main contract[18].

2. Denaturation of arbitration

As it was mentioned earlier, promptness, economy, and simplicity are some of the top-rated characteristics of arbitration. In fact, those attributes are considered inherent to it, and most people choose arbitration as a method of solving their problems hoping to experience those qualities.

Nonetheless, in the present timesit is increasingly frequent to hear how maritime arbitration processes are getting more and more complex, strict, and expensive, and are taking longer to arrive to a final resolution, which definitely does not match the initial promises of arbitration.

> A recent survey on the use of international commercial arbitration conducted among a number of major corporations, across different industry sectors (including shipping and commodities trading), shows that while, overall, arbitration remains the preferred dispute resolution mechanism for transnational disputes, many respondents express concern over the issues of costs and delays of international arbitration proceedings, as well as fear of 'judicialization' which results in a procedure more and more sophisticated and 'regulated', with control over the process moving towards law firms and away from the actual users of this process[19].

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[17] Same criterion is held by the Italian system. See Jaunch & Hubener c. Soc. Navigation Transocéanique (Cass. 1981), 1982 Rivista Di Diritto Internazionale Privato E Processuale 821, 1982 Dir. Mar. 391; Molini Lopresti S.P.A. C. Continentale Italiana S.P.A. (Cass. 1996), 1996 Rivista Dell'arbitrato 717. Compare with The Landmark Case of Soc. Granitalia C. Soc. Agenzia Maritt. Sorrentini (Cass. 2000), Rivista Di Diritto Internazionale Privato E Processuale 1003, 2002 Dir. Mar. 225.

[18] Melis Özdel. *Enforcement Of Arbitration Clauses in Bills of Lading: Where Are We Now?* Paper presented paper at the 19th International Congress of Maritime Arbitrators. Online version available on: https://bit.ly/3CnjPrt

[19] Marco Gregori. *Maritime Arbitration Among Past, Present and Future*. In book: New Challenges in Maritime Law: De Lege Lata et De Lege Ferenda. (Bologna, Italy: Bonomo Editore, 2015), p.341.

The phenomenon of 'judicialization' of the arbitration process, has been blamed on multiple factors such as:

- The tendency to not honour the arbitral agreement, impugning the arbitration awards or the process itself in front of domestic courts.
- The recurrent inclusion of procedural matters as part of a strategy to have a favourable outcome, like challenges of evidence and arbitrators, discoveries, objections, etc[20]; which significantly slowdowns the process and attempts against the concept of arbitration.
- The focus that most of the lawyers put on legal questions, when, in the past, the maritime arbitration was meant to solve factual or technical issues related to the transport of goods[21], which made of it an ideal space to discuss practical matters, and where the *bona fide,* and the interest and continuity of the business were the top priority on those kinds of processes.
- The overabundant number of cases assumed by some arbitrators. Indeed, "the major maritime corporations tend to refer every dispute to the same small number of professional arbitrators, who are highly qualified, experienced and trustworthy (and of course, sumptuously paid)"[22], which not only gives a sensation of a monopolised world, but also saturates those few arbitrators, who will not have enough time to dedicate to each case and to arrive to a formal resolution in due time.

These realities negatively impact the schedules and costs of the procedures, because the parties must increase the resources invested and wait longer to get a final decision that resolves the case, or even worse, keep on hold some business or situation, blocked by the course of the arbitration or a precautionary order inherent therein.

It is convenient to punctualize that arbitration is an expensive process. We only have to think about the high fees owed to legal advisors and arbitrators, and, if the arbitration is directed by an arbitral institution such as the ICC, the parties also have to pay the administrative expenditures of the institution; however the general conception about its "economy" was linked to the fact that the arbitral processes were much more quicker than the ordinary legal ones[23], that was why, at the end, the arbitration process ended up being more convenient, because it was the option that made the invertors and businessmen, to save a lot of time and, with that, to save a lot of money.

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[20] Rémy Gerbay. *Is the end nigh again? An empirical assessment of the "judicialization" of international arbitration*. (New York, USA: Columbia Law School, 2014), p.228.

[21] Marco Gregori. *Maritime Arbitration Among Past, Present and Future*. In book: New Challenges in Maritime Law: De Lege Lata et De Lege Ferenda. (Bologna, Italy: Bonomo Editore, 2015), p.342.

[22] Marco Gregori. *Maritime Arbitration Among Past, Present and Future*. In book: New Challenges in Maritime Law: De Lege Lata et De Lege Ferenda. (Bologna, Italy: Bonomo Editore, 2015), p.341.

[23] Jorge Silva. *Arbitraje Comercial Internacional en México*. (Oxford, United Kingdom: Oxford University Press, 2001), p.174.

If the advantages promised by arbitration like simplicity, specialization and economy in time and money, cannot be accomplished any longer, this dispute resolution method will become less attractive, which may prompt the parties to wonder about its real usefulness and efficacy, more if they contrast it against the judiciary process that does not possess some flaws exhibited by arbitration.

> If arbitration becomes indistinguishable from litigation, the benefits of opting for it will diminish, and corporations may find that the arbitration system is less advantageous to use. For some, the alleged loss of a competitive advantage once held by arbitration over litigation has already occurred, and new forms of ADR are now supplanting it. For Horvath, 'if [judicialization] continues to occur, the risk is that a highly effective and successful dispute resolution mechanism will be lost to the international business community.[24]

This issue is complex to face and demands the efforts of the most important actors in this field. Firstly, it is necessary that arbitrators embrace their role as directors of the process, this means that they have on their shoulders the responsibility to build up a procedure guaranteeing that it will not be stained by formalities or unjustified delays, which may denaturalize the arbitration and turn it into a cumbersome string of exceptions and procedural delaying tactics.

At the same time, lawyers must have an attitude oriented to the resolution of the problem the simplest way possible, understanding that quickness is not only fundamental for arbitration but also that it is intrinsic to the maritime world and the carriage of merchandise by sea.

It is not possible to be blinded to the material scope that is being discussed in the arbitration, much less in a sphere where there is no time to lose and where, traditionally, the simple word of a man was enough to compel him.

In general, it is necessary to rescue the real meaning and nature of arbitration, restoring and reinforcing those advantages that make of it a true option compared to ordinary litigation procedures.

3. Absence of a specific and uniform regulation of international maritime arbitration

The emergence of the maritime arbitration was not a mere coincidence, it came to satisfy the necessity of international trade operators to resolve any dispute that arose from the development of their businesses in the fastest and cheapest way and putting on the top the commercial interests behind the process. Along with that urgency, appears the big question about how we should regulate that procedure.

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[24] Rémy Gerbay. *Is the end nigh again? An empirical assessment of the "judicialization" of international arbitration*. (New York, USA: Columbia Law School, 2014), p.229.

In the beginning, it was settled that the best way to manage it was keeping apart substantive matters and procedural ones, including arbitration; this meant that it was advisable that international agreements were focused on one of those concerns to guarantee a better, specialized and more consistent set of rules in each ambit. But this initial approach "did not account for the difficulties of intergovernmental negotiations and treaty-making that result between States with differing political agendas"[25], which have crystalized in the absence, nowadays, of a specific and uniform guideline for international maritime arbitration processes.

This lack of a uniform regulation has triggered the proliferation of a wide range of international, regional, and local instruments that try to fill that void, but, at the same time, has resulted in a legal chaos due to the disparity of legal solutions which leads, in many cases, to irreconcilable and even contradictory solutions.

Indeed, having different regulations potentially applicable to the same case, the parties, naturally, will be tempted to present their problem to the jurisdiction that presents them the better chances to get a favorable response, and, in the worst scenario it may generate a forum shopping.

> Under these circumstances, all the advantages that we have seen that arbitration presents a priori over state justice vanish whenever one of the parties goes to a state judge to assess the existence or non-existence of the arbitration clause. Since its validity will be determined in accordance with the regulations established in the State to which the judge belongs, taking into account that there is no uniform regulation in this regard and the disparity of existing criteria in the legislation of each State, the decision may vary completely. depending on where the question arises.[26] [Author's translation].

Trying to overcome this situation, the international legislator has created some conventions that normalize procedural matters, including rules about both: ordinary jurisdiction and arbitration.

As an example, we can name The International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision, adopted at Brussels in 1952, in which it was stablished that courts have the authority to know and decide those sorts of cases, but at the same time it vindicates the right of the parties to refer to arbitration any action in the case of a collision occurring between seagoing vessels, or between seagoing vessels and inland navigation craft[27].

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[25] Fabrizio Marrella. *Unity and Diversity in International Arbitration: The Case of Maritime Arbitration.* (Washington, USA: American University International Law Review, 2005), p.1068.

[26] Rosa Lapiedra Alcamí. *El arbitraje marítimo internacional en las reglas de Rotterdam*. (Santa Cruz de la Sierra, Bolivia: Iuris Tantum, 2016), w/n.

[27] Arts. 1 and 2 of The International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision. Brussels, 1952.

A similar pattern is followed by the International Convention Relating to the Arrest of Sea-Going Ships of 1952, the International Convention on Arrest of Ships of 1999, The United Nations Convention on the Carriage of Goods by Sea of March 30, 1978, better known as the "Hamburg Rules", The United Nations Convention on International Multimodal Transport of Goods of May 23, 1980, and the International Convention on Salvage of April 28, 1989 (London Convention) that also regulates arbitration.

However, being the uniformity of regulation a pending assignment, the Committee Maritime International (CMI) and The United Nations Commission on International Trade Law (UNCITRAL), combined forces to create a treaty that encompassed a standardized regulation on international shipping, and that was able to end the problems caused by the fragmentation of the existent regulation.

This is how in March of 1978, were approved the Hamburg Rules, during the celebration of the International Convention on the Carriage of Goods by Sea, held by the United Nations.

> The Hamburg Rules improve the limit of liability, solve the question of the unit limitation value of packages stowed in containers, make certain the carrier's rights to unit limitation for the torts of his employees, eliminate litigation concerning the validity of choice of law and choice of forum clauses, develop the concept of arbitration, solve the question of on-deck cargo and cargoes for which no bill of lading has been issued, strengthen the carrier's fire exemption and remove the nautical faults defence[28].

Nevertheless, the main objective of the Convention, that is, uniformity of regulation, is still far from being achieved[29], more if we take into account the reduced number of signatory States of the treaty, and the concessions that had to be done to reach its entry into force. And even in the ideal scenario of homogeneous international arbitration rules, the possibility that the national judges interpret the norms in diverse ways and reach different results, would continue existing[30].

In the absence of a specific and standardized regulation on international maritime arbitration, it enters the scene the general rules existent in matters of international commercial arbitration: the Geneva Convention of 1961 and the New York Convention of 1958[31].

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[28] Marc Huybrechts. *The Hamburg Rules: A Choice for The E.E.C.? An Introduction to the Theme of the Antwerp Colloquium*. (Antwerp, Belgium: European Institute of Maritime and Transport Law, 1994), p.24.

[29] In fact, some allege that the Hamburg Rules will destroy the little degree of uniformity of law that we already had. See: Marc Huybrechts. *The Hamburg Rules: A Choice for The E.E.C.? An Introduction to the Theme of the Antwerp Colloquium*. (Antwerp, Belgium: European Institute of Maritime and Transport Law, 1994), p.25.

[30] Eva Litina. *Theory, Law and Practice of Maritime Arbitration*. (Alphen aan den Rijn, Netherlands: Kluwer Law International, 2020), w/n.

[31] Rosario Espinosa Calabuig. *Las Cláusulas Arbitrales Marítimas a la Luz de los "Usos" del Tráfico Comercial Internacional*. (La Rioja, Spain: Fundación Dialnet, 2007), p.5.

Certainly, the traditional method of entrusting to general arbitration treaties the specific questions of maritime arbitration, has revealed to be a sensible technique to avoid the proliferation of more fragmented regulations, that only increase the chances of conflict of laws and jurisdictions, and reduce predictability in the business[32].

4. Arbitration clause in e-contracts

Indubitably, we are living in the era of e-commerce, where the accelerated upgrowing in the volume of cross-border commercial transactions is perfectly understood by the digital field, which offers to traders the ideal tools to achieve their aims of dynamism, flexibility and effectiveness; being the electronical contracts one of the trendiest.

> The use of electronic means, now pervasive and ubiquitous, has opened the door to significant productivity gains. Electronic communications enable not only fast transmission of data, but also their re-use and analysis; moreover, they make new business models possible, reduce operational costs of many existing ones and have a significant impact in redistributing those costs[33].

The maritime industry is also taking advantage of this reality, and has started the process of dematerializing some procedures, negotiations and documents, being one of the most significative, the B/L. It has implied the consequent digitalization of arbitration agreements and arbitral clauses enclosed in those electronic contracts, from which arise a lot of questions regarding their validity and third-party opposability.

Concerning the form of these agreements to consider them valid, we already have a clue about it in the New York Convention of 1958 and in the UNCITRAL Model Law, revised in 1985, where it is mentioned that the arbitration agreement must be in writing[34], and even it is specified that the term "in writing" also refers to those agreements and clauses contained in an exchange of letters or telegrams[35].

Even so, we need to bear in mind that the final decision about the validity of the pact, and whether the electronic form is comparable to the *written form*, will depend on the rules concerning the form of the arbitration from the standpoint of the jurisdiction with the authority to know and judge the case.

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[32] Fabrizio Marrella. *Unity and Diversity in International Arbitration: The Case of Maritime Arbitration*. (Washington, USA: American University International Law Review, 2005), p.1072.

[33] Luca Castellani. *Understanding the Long March Towards Dematerialisation of Bills of Lading.* (Wellington, New Zealand: Te Herenga Waka-Victoria University of Wellington, 2016), p. 105.

[34] Art. 2 (1) New York Convention: "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen, or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration (…)".

[35] See art. 2, second paragraph of the New York Convention.

On the other hand, there is, additionally, another issue to consider, the proper form of manifestation of the parties' autonomy of will when we are in front of an e-contract that stipulates arbitration as a method to resolve a legal conflict.

Some sectors have proposed the e-signature as a possible solution to this issue, since it might be considered as a manifestation of the parties' will without interfering with the dynamic of the transport. It is propitious to mention that the art. 2 of the Convention of New York clarifies that the arbitral agreement in writing, refers to any arbitral clause signed by the parties or contained in an exchange of letters or telegrams.

> Article II of the New York Convention demands an arbitration clause that is 'signed by the parties' and, for the reasons outlined above, there is no doubt that electronic signatures (as well as e-commerce and e-arbitration) falls outside the New York Convention's sphere of application. The New York Convention can offer to e-traders and e-arbitrators only its most favourable legislation clause[36].

Regarding this point, the United Nations Commission on International Trade Law recommends taking into account that the content of the mentioned article is not exhaustive, and the texts of other international instruments are favorable to the validity of electronic commerce, signatures and contracts, such as the 1985 UNCITRAL Model Law on International Commercial Arbitration, the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures and the United Nations Convention on the Use of Electronic Communications in International Contracts .

In any case, that being a simple recommendation, at the end, in the validity of electronic signatures, the key role will be played by the domestic law of the *situs arbitri* and, more importantly, by the system of the State where the arbitral award will be executed.

Final Comments

The commercial sector is well conscious about the risks implied in getting involved in the shipping business, understanding that they not only could face the loss of large amounts of money but also to be forced to confront legal procedures.

The acceptance of that reality has pushed it to study, controlling and to minimize that risk, and, when its crystallisation is inevitable, to deal with it under the most favorable circumstances possible.

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[36] Fabrizio Marrella. Unity and Diversity in International Arbitration: The Case of Maritime Arbitration. (Washington, USA: American University International Law Review, 2005), p.1097.

Given that the advantages of arbitration are well known not only by academics, but also by businesspeople and investors in general, it is not rare that nowadays most of the contracts made in the maritime world, private and public, include an arbitration clause, even in the most popular model contracts.

Nevertheless, as we have seen in the development of these lines, in spite of the benefits that arbitration ostents as a method to solve a conflict, particularly in cases of transport of goods by sea, where generally several cargo interests are affected and more than one jurisdiction may claim the right to pass sentence on it, and arbitration could be a cheaper, easier and prompter way to deal with any issue generated by the contract; it is undeniable that the applicability and validity of arbitration in those cases arise a lot of questions and demands an specialized study taking into account the factual situation, the applicable legislation and the particularities of each case, more so taking into account the challenges that presents to us the globalised and, everyday changing, contemporary world.

The problem that represents the validity of the arbitral clauses included in one of the most popular and used documents in the maritime business, the B/L, which may question the processes established based on those agreements and the results derived from them; the recent tendency of including more frequently procedure incidences and legal technicisms in arbitration, resulting in the slowing down of the processes and negatively affecting the schedules and results of it; the multiple issues that come from the lack of a specific and uniform guideline of international maritime arbitration, which ends up putting in risk the legal security, among other legal rights; and the questions that arise from the ability of arbitration to adapt to the new technologies and the legal advances in e-commerce, are just a few of the challenges that modern arbitration is compelled to face.

The future of the arbitration will rest on its ability to provide with an answer that lives up to expectations of those defies, and of the upcoming ones.

We firmly believe that technological developments could be a crucial tool to keep arbitration on the track of the digital era, offering it efficiency, improving its cos-effectiveness and even reducing its environmental impact by minimizing the necessity of travelling thanks to the implementation of videoconferences, which has proven to be very much needed in these pandemic times, and by diminishing paper consumption by the employment of electronic documents[37].

[37] Eva Litina. Theory, Law and Practice of Maritime Arbitration. (Alphen aan den Rijn, Netherlands: Kluwer Law International, 2020), w/n.

Furthermore, it is critical to join efforts to break the monopoly that New York and London have over international maritime arbitration. Even though, those seats traditionally have been recognised as the most important and with the highest standards of quality and prestige, we cannot forget that congestion of courts is one of the biggest issues in litigation, and an excessive number of cases in hands of few arbitrators is a reality that we are facing in the present, which is risking its hardly earned title as a rapid dispute resolution method.

In this sense, it is meritorious to bring up the titanic labour that day to day lawyers, doctrinaires, professors, administrative officers, associations, centers and chambers of arbitration do in Latin America, to create an auspicious and secure environment to attract the celebration of more maritime arbitration to our countries.

For sure, there is a lot of work to do in front of us, but it is totally worth it, not only for the sake of arbitration as a legal institution, but also for the maritime world that is demanding changes and renewed solutions to problems that those traditional seats have not been able to prevent, nor give them a proper solution.

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