THE AGREEMENT TO ARBITRATE – A PRIMARY TOOL FOR THE RESOLUTION OF MARITIME DISPUTES[1]

BY

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Introduction

Arbitration is a process through which disputes are resolved with binding effect by a person or persons acting in a judicial manner rather than by a court of competent jurisdiction.[2]

The arbitral process is regarded as the traditional method of resolving maritime disputes and its origins can be traced as far back as voyages of ships owned by ancient Phoenicians carrying the cargoes of Greek traders.[3] What exactly do we mean by maritime arbitration? Maritime arbitration is simply the process of using the mechanism of arbitration to resolve maritime disputes. It has been defined thus: -

> *"An arbitration is usually described as a maritime arbitration if in some way it involves a ship. Most commonly, disputes will be referred under a charter party. This may be for the hire of a ship for a period of time (a time charter), or the contract may simply be one for a voyage (a voyage charter)*

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[2] See Halsbury's Laws of England, Fourth edition Reissue Vol. 2 (3) (Butterworths Lexis Nexis 2003) Chapter 1 paragraph 1. See also Encyclopedia of Forms and Precedents Vol. 3(1), paragraph 2(11) For a discussion on the problems of defining arbitration see Mustill and Boyd, Commercial Arbitration (2nd ed), pp38-50. See also Eric Lee, Dictionary of Arbitration Law and Practice (Mansfield Law Publishers, London 1986)

[3] See the Handbook of the Society of Maritime Arbitrators New York Fourth Edition page 1. See also Professor Tetley, Marine Cargo Claims (4th Edition to be published in 2008, Chapter 28 p.3 note 2) where the Professor suggests that maritime arbitration has been around since pre-historic times) culled from Chan Leng Sun "The Arbitration Chapter in the Unicitral Draft Transport Law" ICMA XVI Congress Papers Singapore 2007. See also Frederick Sandborn, Origins of Early English Maritime Commercial Law, (1930 Edition) p.268.

under which freight is paid, in which there are provisions as to the amount of time (laytime) allowed to the charterer for

loading and discharging, and liquidated damages (demurrage) to be paid if those times are exceeded…However, to limit a description of maritime arbitration to these agreement would be too narrow, for occasionally there are disputes under bills of lading, usually concerned with damage to or loss of cargo. Less frequently disputes may referred under memoranda of agreement for the sale of ships. Such disputes usually concern delay in delivery, failure altogether to deliver to take delivery, or technical issues as to the condition of the ship on delivery. There are also contracts of affreightment, under which a substantial exporter or importer may secure the agreement of a company for the supply of a number of ships to carry cargo over a period of time…In addition, there are disputes under shipbuilding contracts (which generally concern the specification of the ship, delay in delivery or failure to take delivery) and those which arise under contracts for the repair of ships. It also happens, for time to time, that maritime arbitrators are appointed in disputes involving other areas of commercial life, as, for example, oil trading contracts [and, I would add, conference agreements]. Finally, such arbitrators may sometimes deal with aspects of marine insurance, where they are asked to rule upon questions of protection and indemnity club cover"[4]

As indicated above maritime disputes cover a wide range of areas such as charter parties, bills of lading, sale of ships, ship financing, shipbuilding contracts, contracts of marine insurance

[4] See Bruce Harris, Michael Summerskill and Sarah Cockerill "London Maritime Arbitration" (1993) Arbitration International 275 – 88. See also Mario RiccoMagno "Maritime Arbitration" Vol. 70, No. 4, (Nov. 2004) JCIArb 267.

salvage contracts and collisions.[5] Such disputes usually span oceans and are international in nature. Parties to international contracts are normally reluctant to submit to national courts of other parties. Resolution of the dispute through the private process of arbitration other than before the state backed national courts offers a way out. International Conventions including the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards made in New York in 1958 provides a uniform framework for the Enforcement of International Arbitration Awards[6]. The United Nations Commission on International Trade Law (UNCITRAL) Model Law (Model Law) on International Commercial Arbitration which has been adopted by various countries allows for uniformity in arbitration laws world wide[7].

Other advantages of arbitration include party autonomy, choice of dispute resolver, privacy, confidentiality[8], flexibility and the resolution of the dispute by commercial persons skilled and experienced in the particular trade or commerce.

The arbitration agreement embodies the parties contract and is the source of the power and jurisdiction of the arbitral tribunal.[9] Arbitral tribunals may be conferred with power under the arbitration agreement to determine the dispute other than on the basis of strict legal principles but on commercial considerations thereby positively impacting on the preservation of the parties commercial relationships. The parties may agree that the arbitral tribunal shall decide ex aequo et bono (on the basis of natural justice or equity) or as amiable compositeur (friendly compromise). The agreement may confer power to determine the dispute on the principles of Lex Mercatoria (body of merchant made rules which has developed from trade customs and usages in international trade).

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[5] See Handbook of Society of Maritime Arbitrators, INC p. 7

[6] The Convention has been described as the corner stone of international disputes resolution. See David St. John Sutton, John Kendal and Judith Gill, Russell on Arbitration Twenty – First Edition (1997 Sweet & Maxwell) p. 19 Fn. 22. The Convention allows a simple regime for the enforcement of arbitration awards.

[7] United Nations General Assembly Resolution 40/72 (1985. See www……

[8] Some states reject the principle of confidentiality in arbitral proceedings. In such jurisdictions if confidentiality is desired parties are advised to put in express provisions of confidentiality in the agreement to arbitrate. See Denys Nicky, Rebecca Axe, Parties, and Jane Fitzgerald, Trainee Solicitors – Inc & Co, Privacy in Court proceedings and Confidentiality in Arbitration – A Comparison LMAA Law Review 2004 – 2007.

[9] The person or persons appointed or chosen to resolve the dispute is or are referred to as the arbitral tribunal. For the meaning of arbitral tribunal see UNCITRAL Model Law Article 2(a).

In this paper I shall examine issues relating to the arbitration agreement with particular reference to the resolution of maritime disputes. I shall highlight any factors which may encourage or militate against the effectiveness and growth of arbitration as the primary maritime dispute resolution mechanism.

2. The Agreement to Arbitrate.

The agreement to arbitrate is usually classified either as an "arbitration clause" or a "submission agreement". An arbitration clause is a clause in a contract whereby the parties agree to refer future disputes under that contract to arbitration. A submission agreement is a separate agreement usually entered into after a dispute has arisen whereby parties agree to refer such existing dispute to resolution by arbitration.[10] Article 7, chapter II of the Model Law defines an arbitration agreement as follows: -

> "1). *Arbitration agreement is an agreement by the parties to submit to arbitration all or certain disputes, which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*
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> *2). The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the*

[10] See Sutton, Kendal and Gill. Russell on Arbitration para 2 – 001. See also Robert Merkin Arbitration Law (2004 LLP) Chapter 4 for discussion of Submission Agreements under the English 1996 Arbitration Act.

contract is in writing and the reference is such as to make that clause part of the contract".

Under the New York Convention and the Model Law, the requirement in respect of the content of an arbitration agreement is minimal and subject to such agreement being in writing. However, it is essential that arbitration agreements be drafted with care[11]. The matters to be stated therein should include the following:

i). The scope of matters agreed to be resolved by arbitration.

ii) The place of arbitration

iii). The governing law of the arbitral proceedings

iv). The procedure to be adopted for appointing the arbitrators (i.e. who is to hear the dispute)

v). The procedural rules for the arbitration

Arbitration agreements are enforceable even if vague so long as the parties' intention to arbitrate as a final and binding mechanism for the resolution of their dispute can be evinced thereon. In ***Tritonia shipping Inc Vs South Nelson Forest Products Corporation***[12] a charter party stated merely "arbitration to be settled in London". The English Court of Appeal regarded the clause as sufficient to mean that disputes under the charter party should be arbitrated in London.

It is important that parties ensure that their arbitration agreement fulfill the minimum requirements to avoid losing the opportunity to have their disputes resolved by arbitration. In

[11] See Sutton, Kendal, Gill, Russel on Arbitration 21st edition (1997 Sweet & Maxwell) para 2 – 004 for a checklist of the ideal arbitration agreement.
[12] (1966) Lloyds Report 114. See also Swiss Bank Corporation Vs Novorossiysk Shipping. The Petr Schmidt [1966] I Lloyds Report 114. See also Merkin Arbitration Law p.116 para 5.11

the Australian case of ***Pan Australian Shipping Pty Ltd Vs the Ship Comandate (No.2)***[13] the Australian court refused the application to stay proceeding in the Federal Court to enable arbitration commenced in London. The application was refused interalia on the basis that the claims being pursued in court under the Trade Practices Act 1974 did not fall within the scope of the agreement in writing and that the arbitration agreement was not an agreement in writing within the meaning of section 7(2) of the International Arbitration Act 1974 or Article 11(2) of the New York Convention 1958[14]. On the facts of the case Pan Australia had accepted Comandate Marine's written offer to arbitrate not in writing but by having its bank provide a guarantee. The Federal court was also of the view that Comandate Marine by bringing an in rem proceeding to arrest the ship Boomerang had elected to litigate, not arbitrate, the whole of its dispute with Pan Australia.[15] Rares J. emphasized in the judgement that his conclusion on Comandate Marine having elected to litigate might have been different had it, when seeking the arrest of Boomerang I, invoked the support of the Federal Court expressly in support of the arbitral proceedings it had commenced. The statement of Rares J. in this respect is in recognition of the power of Admiralty courts in most jurisdictions to arrest vessels by way of security for judgment in arbitral proceedings. Hitherto, the power of arrest was limited to security for court judgements. However, Article 7 of the Brussels Convention which came into force on the 1st day of November, 1984 removed the distinction between the power to arrest a vessel for a judgement and for an arbitration[16].

Improperly or inconclusively drafted arbitration agreements delay arbitral proceedings. Parties should therefore ensure that the arbitration agreements are properly and conclusively drafted. Care should be taken against *pathological arbitration agreements*. A *pathological* agreement may be defined as an ambiguous agreement, which may lead to disputes in its interpretation. The Court of Appeal in Germany decided that an arbitration clause which read as follows was fatally ambiguous and void:

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[13] [2006] F.C.A. 112. See also Max Bonnell – How not to Arbitrate: Pan Australian Shipping Pty Vs The Ship "Comandate" (No. 2) [2006] 72 JCI Arb 4 p.391.

[14] Article II(2) provides that the term "agreement in writing shall include an arbitral clause in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegram".

[15] See Max Bonnell, How not to Arbitrate at page 395

[16] See section 26 of the English Civil Jurisdiction and Judgements Act 1982 (Section 11 of the English Arbitration Act of 1996). On the exercise of the discretion see Merkin Arbitration Law p. 569 para. 14.80. See also the Nigerian Admiralty Jurisdiction Act 1991 section 10. See also, NJJ Gaskell. C Debattista and Rj Swatton, Chorley and Giles' Shipping Law (Eighth Edition 1997 Pitman Publishing) p.4. See also, Clara Ambrose and Karen Maxwell London Maritime Arbitration (1996 LLP Ltd London New York and Hong Kong) p. 227.

> *"[The parties] shall proceed to litigate before the Arbitration Court of the International Chamber of Commerce in Paris with the seat in Zurich*[17]*."*

The court's decision was that it could not determine if the parties intended to submit to the ICC in Paris or to the Zurich Chamber of Commerce.

2.1 Incorporation of arbitration Clauses in Charter Parties into Bills of Lading

It is usual for shipping companies to seek to incorporate arbitration clauses in charter parties into bills of lading issued to shippers. The validity of such arbitration clause in bills of lading have come under considerable debate. The question is whether an arbitration clause in a charter party operates as part of the bill of lading. The determining factor appears to be the words used in the bill of lading. Are the words sufficient to incorporate the arbitration clause in the charter party? The principle that a narrow interpretation would be given to the words of incorporation used in the bill of lading has been long established.[18] The words in the bills of lading must specifically incorporate the arbitration clause in the charter party. General words such as terms and conditions are not sufficient as arbitration clauses have been held not to be terms and conditions but an independent and ancillary obligation. The cases of Rena K[19] and The Delos[20] illustrates the nature of the words required to incorporate the arbitration clause in the charter party into the bills of lading. The words in Rena K were stated thus: - *"All other terms, conditions, clauses and exceptions including the arbitration clause*). In the Delo's the words in the bills of lading seeking to incorporate the arbitration clause in the charter party stated thus "*This shipment is carried under and pursuant to the terms of the Charter dated July 7th 1998 at*

[17] C. A Candide – Johnson SAN. "Drafting an Arbitration Clause" Paper delivered at the official launch of the Young Members Group of the Chartered Institute of Arbitrators Nigerian Branch, October 2007.
[18] See Robert Merkin – Arbitration Law p.132 para. 5.29. See the decision of the House of Lords in T W Thomas & Co. Ltd V. Portsea Steamship Co. Ltd, the Portsmouth 1912 AC 1.
[19] [1976] 2 Lloyd's Rep 47.
[20] [2001] 1 Lloyd's Rep 703.

London and all the terms whatsoever of the said Charter except the rate and payment of freight specified therein apply to and govern the rights of the parties concerned in the shipment. Copy of the Charter may be obtained from the Shipper or Charterer. In that case Langley J. held that the failure of the bill to make reference to any arbitration clause meant that there could be no incorporation as the arbitration clause was not gemaine to the shipment carriage and delivery of the goods"[21]. In the Annefield Lord Denning MR interalia stated thus:

> *"if it is desired to bring in an arbitration clause,*
> *it must be done explicitly in one document or*
> *the other".*[22]

2.2 Arbitration Clauses in Bills of Lading and National Policy Considerations

National courts have evinced a reluctance to consider as valid arbitration clauses in bills of lading which stipulate foreign forums.

In the Nigerian case of ***MV Parnomous Bay Vs Olam Nig Plc*** the Nigerian Court of Appeal held that section 20 of the Admiralty Jurisdiction Act 1991 had modified section 2 and 4 of the Arbitration Act and limited enforceable arbitration agreements to those having Nigeria as a Forum[23]. The Court of Appeal upheld the decision of the lower court not to stay court proceedings pending reference to arbitration in London. This decision may be considered within the context of increasing criticisms by Nigerian parties against arbitration clauses in standard form contracts which provide for foreign forums. It would appear that the attitude of the court appears to have been influenced by the perception that arbitration clauses in standard form contracts are unfair and oppressive. The Hon. Justice Galadima JCA (as he then was) had this to say:

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[21] See also the Federal Bulker [1989] 1 Llodys Report 103 and Varenna [1983] 2 Lloyds report 592 Siboti K/S Vs BP France SA 2003 EWNC 1278 Comm.
[22] The Annefield [1971] 1 Lloyds Report 1
[23][2004] 5 NWLR pt. 865 1, See also Mr. Chidi Ilogu "Legislative restriction on jurisdiction/arbitration clauses and anti suit injunctions in Nigeria". Maritime and Transport Law Committee Newsletter Vol. 13, No. 1, Feb. 2006.

> *"It is the contention of the respondent that the clause inserted in the bill were done without any consultation whatsoever with the respondent or its predecessor in title as*
> *it is a standard form contract usually lopsided in favour of the carriers, which was not bonafide as its sole aim is to fabricate legitimate claims having underserved jurisdictional advantage. I am quite satisfied that the learned trial Judge, apart from the fact that he has given due consideration to section 5(2)(b) of the Arbitration and Conciliation Act, he has also considered the legality, genuiness and reasonableness of arbitration clauses in the bills of lading".*[24]

Arbitration clauses found in standard form contracts such as bills of lading are oftimes regarded as contracts of adhesion, which work injustice against the shipper or cargo interest. In some situations the claim may be minimal and having to arbitrate in foreign shores thousands of miles from the shipper's place of residence with attendant travel/other costs may completely defeat the claim.

The concern is not limited to the courts of developing countries like Nigeria, which are essentially cargo nations. The Courts of other jurisdictions including the United States have also considered the enforceability of such clauses.[25] American cases such as The ***Bremen v. Zapata, Off-Shore Co***[26]***, Carnival Cruise Lines Inc v Shute***[27] and the ***Sky Reefer***[28] reflect the attitude of the American courts which is – *"essentially a mid way position between the protection of domestic judicial authority on one hand and enforcement of contractual autonomy as a matter of policy on the other"*. The American courts would enforce the

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[24] Ibid page 15 paragraphs B – D. See also Lignes Aeriennes Congolese Vs Atlantic Nigeria Ltd 2005 II CLRN 55. See A.O. Rhodes - Vivour – "Maritime Jurisdiction in Nigeria" Newsletter Maritime and Transport Law Committee Vol. 14. No.1, May, 2007.
[25] See Hon Justice James Allsop "International Maritime Arbitration – Legal and Policy Issues". Paper presented to World Maritime University Malmo 14th May, 2007 and the Australian Maritime and Transport Commission on the 4th day of December, 2007.
[26] 407 US 1 (1971)
[27] 499 US 585 (1991).
[28] 515 US 528 (1995).

arbitration agreement unless it was unreasonable in the circumstances[29]. In the ***Sky Reefer*** the United States Supreme Court rejected the argument that the foreign arbitration clause was void on the basis that the inconvenience and costs of proceeding to arbitrate under a Tokyo Arbitration clause would lessen the liability of the carrier under the United States Carriage of Goods by Sea Act 1936. The majority of the Supreme Court favoured international comity and party autonomy. Hon. Justice Stevens dissenting expressed the view *"that in practical reality foreign arbitration clauses can provide such a cost barrier as to deny a remedy to a claimant, and so cut down the claimant's rights under COGSA, thereby being made void by the equivalent of Art 3 r 8 of the Hague/Hague – Visby Rules"*[30]. Various countries have enacted national legislation, which deal with exclusive jurisdiction in bills of lading cases thereby rendering null and void arbitration clauses in bills of lading.[31] By virtue of the provisions of sections 2c of the Australian International Arbitration Act foreign arbitration clauses in bills of lading do not prevent cargo claims being brought in Australia. Other countries with similar provisions include New Zealand, the Nordic countries and South Africa. There is a pending bill before the Nigerian National Assembly which if passed would render null and void foreign arbitration clauses in bills of lading. The UAE courts will not uphold a foreign jurisdiction clause or a foreign arbitration clause, which is contained on the reverse side of the bill of lading[32]. The essence of these provisions are to protect a country's cargo interest through providing a forum where their complaints can be resolved and protecting them from "contracts of adhesion". Some of the provisions essentially specify the place of delivery as the place of suit.[33]

Reflecting the competing interests in some jurisdictions, provisions of these nature are not recognized. The attitude of English courts may be discerned in ***OT Africa Line Ltd Vs Magic Sportswear***[34]**.** In the case through the use of an anti-suit injunction an English court enforced

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[29] Justice Allsop writes that this gave the court power to review the reasonableness of the circumstances of the entry into the contract i.e. was it a contract of adhesion or was it freely entered into?

[30] Justice Alsop, International Maritime Arbitration Legal and Policy issues p. 11

[31] See Australian Carriage of Goods by Sea Act, 1991 Section 11, See also relevant Acts in New Zealand, South Africa, Norway and Canada i.e New Zealand: Marine Transport Act 1994, 210(1) South Africa: Carriage of Goods by Sea Act 1986 S 3(1), Sweden Maritime Code C 1355 60 and 61, Canada, Marine Liability Act 2001 c6 s46.

[32] Publication on UAE Shipping Law Cargo Claims and other Related Issues by Al Tamini & Company.

[33] See New Zealand, South Africa, section 2(C) Australian International Arbitration Act 1974 Section 2(c) arbitration clauses in bills of lading are ineffective in Australia to prevent cargo claims being brought in Australia. See also section 310 and 311 of the Norwegian Maritime Act (1994).

[34] [2005] 1 Lloyds's Report 252 and [2005] 2 Lloyd's Report 170

an English arbitration clause in a bill of lading with an English choice of law clause despite the Canadian legislation, which gave the claimant a right to sue in Canada. Perhaps it is this type of unequivocal and robust "court support system" that continues to preserve London as a predominant locus for maritime dispute resolution

If maritime arbitration is to preserve its efficacy as a primary tool for resolution of maritime disputes the various competing interests and divergent national policies relating to the enforcement of arbitration agreement in bills of lading need to be reconciled. International Conventions may provide a way out.

2.3 Applicable Maritime Conventions

To what extents do existing International Conventions in the Maritime field seek to reconcile the competing interests? The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 25th August, 1924 (Hague Rules) as amended by the protocol of 23rd February 1968 (Hague Visby Rules) and the United Nations Convention or the Carriage of Goods by Sea (1978) Hamburg Rules are currently in force. The Conventions seek to cater to the needs of the various competing interests i.e. Cargo and shipper interests. Neither the Hague rules 1924 nor the Hague Visby Rules 1968 contain specific provisions on jurisdiction and arbitration of cargo claims[35]. The Hamburg Rules 1978 contain jurisdiction and arbitration provisions. The jurisdiction provisions are contained in Article 21 and the arbitration provisions in Article 22. The arbitration provisions states thus:

1. *"Subject to the provisions of this article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to carriage of goods under this Convention shall be referred to arbitration.*

2. *Where a charter party contains a provision that dispute arising thereunder shall be referred to arbitration and a bill of lading issued pursuant to the charter party does not contain special annotation providing that such*

[35] However see the dissenting judgement of Justice Stevens in the Sky Reefer to the effect that Article 3 Rule 8 of the Hague/Hague Visby Rules should be read broadly and perceived to deal with it.

provision shall be binding upon the holder of the bill of lading, the carrier may not invoke such provisions as against a holder having acquired the bill of lading in good faith.

3. The arbitration proceedings shall, at the option of he claimant, be instituted at one of the following places:

(a) a place in a state within whose territory is situated:

i. the principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or

ii. the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

iii. the port of loading or the port of discharging; or

(b) any place designed for that purpose in the arbitration clause or agreement.

4. The arbitrator or arbitration tribunal shall apply the rules of this Conventions.

5. The provisions for paragraphs 2 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith is null and void.

6. Nothing in this article affects the validity of an agreement relating to the arbitration made by the parties after the claim under the contract of carriage by sea has arisen".

The Hamburg Rules Article 21 give the claimant options on where to commence the matter. As provided by Article 21(1) the claimant may sue at the principal place of the business or in the absence thereof the habitual residence of the defendant, the place where the contract was made,

the port of loading and the port of discharge or any additional place designated for that purpose in the contract of carriage by sea. The Arbitration provisions in article 22(2) provides inter alia that where a charter contains a provision that disputes arising thereunder shall be referred to arbitration and a bill of lading issued pursuant to the charter – party does not contain special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier may not invoke such provision as against a holder having acquired the bill of lading in good faith. By virtue of the provisions of Article 22(4) the arbitrator or arbitration tribunal is bound to apply the rules of the Convention. Article 22 paragraphs 3 provides that the claimant may seek arbitration in any of the places mentioned in article 21(1). By virtue of article 22(5) the provisions of paragraphs 2 and 4 of Article 22 are deemed to be part of every arbitration clause or agreement and any term of such clause or agreement, which is inconsistent therewith, is null and void.

The United Nations Commission on International Trade Law (UNCITRAL) is presently working on a new draft law with the title "Draft Convention on the Carriage of Goods (wholly or partly by Sea)" with a view to ensuring greater uniformity in the area of the international carriage of goods by sea. There is a proposed arbitration chapter in the draft. This is meant to support the arbitration process and has as its priority the protection of the jurisdiction chapter in the bid to ensure that parties particularly carriers do not get round the jurisdiction provisions by inserting arbitration clauses into the bills of lading.[36]

The proposed draft chapter on arbitration has received various criticisms depending on whether the interest involved is that of a cargo or carrier. It is highly desirable that opposing interests be reconciled in a bid to maintain the attractiveness of arbitration as the preferred tool for the resolution of maritime disputes.

Policy initiatives aimed at encouraging a global network of maritime arbitration practitioners and maritime arbitration centres from different regions all linked together through a cooperative network may be the way out. Such initiatives should have as its aim capacity building worldwide in the field of maritime arbitration. The availability of a crop of highly

[36] See Chan Leng Sun "Arbitration Chapter in the UNCITRAL Draft Transport Law" ICMA XVI Congress papers Singapore 2007 p.297

trained and skilled maritime arbitrators worldwide as well as suitably administered and equipped centres supported by conducive legal frameworks may ease the tension caused by the divergent national policies/interests on "the place of arbitration". This development should engender confidence in the arbitral system irrespective of the place of proceedings subject to the place having a favourable legal framework for arbitral proceedings. Emphasis is thereby being shifted to be most cost effective place to conduct the proceedings given the circumstances of the parties.

3. Maritime Arbitration Centres

Presently, most international maritime arbitrations are conducted in the major arbitration centres, London, Paris or New York and under the rules of the major institutions.

Consequently, most maritime arbitration involving Nigerian parties or with close connection to Nigeria are conducted in London. Nigerian Cargo interests are of the view that they are being put to great financial loss and expense having to travel such distant mils particularly as these disputes may be arbitrated in Nigeria. Furthermore, the perception in some developing countries including Nigeria is that they are not accorded fair hearing nor treatment in most arbitration proceedings conducted in foreign lands and before foreigners with the added challenges of language and cultural differences.

Derek Hodgson former Chairman of the Maritime Committee of the International Bar Association observed thus:

> *"Arbitrators in London are chosen for Maritime Arbitrations from a very short list. There are, I think 33 full members of the LMAA. All of those who practice in this area of law know that the faces appear on almost every arbitration we have. Any day you can go down to Kusels and see the same faces delivering their Arbitration Awards to the same solicitors or barristers. And those same faces can publish their Arbitration Awards with impunity. They know that they will not be appealed against*

> *because the opportunities for appeal are so minimal. Furthermore they have become very skillful in ensuring that they are not appealed against by writing their Awards in terms that specifically exclude the possibilities of an appeal."*[37]

In his paper Derek observes the increasing costs of arbitral proceedings. It is necessary that the traditional maritime arbitration centres be responsive to the increasing criticism of arbitral activities especially that in the international maritime field. Many jurisdictions are pursuing the development of their countries into maritime arbitration centres as well as building capacity in the field through the availability of trained maritime arbitrators – Nigeria is one of such countries. The developed centres should support the present initiatives in this regard. No doubt the newer centres would benefit from the experience of the traditional centres and the practice of international maritime dispute resolution would thus enriched.

3.1 Maritime Arbitration Organizations

The Maritime Arbitrators Association of Nigeria (MAAN) was borne out of the need to ensure that the increasing demand for maritime arbitration in Nigeria is effectively and adequately met. Lawyers and other practitioners who have developed dispute resolution expertise in commercial and maritime arbitration came together to establish the Association. Its memberships are composed of maritime/commercial lawyers, shipping companies and other operators in the maritime field. The association is registered as an incorporated trust with the objectives of promoting and preserving standards in the practice of maritime arbitration, seeking to ensure that the enabling legal environment is arbitration-friendly and complies with international acceptable standards as well as creating a forum for interaction between persons qualified to act as arbitrators and those interested in furthering arbitration as the preferred mode of dispute resolution in the industry[38].

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[37] See Derek Hodgson, Arbitration p. 3

[38] See Dr. Ogbai Omoeboh "The Maritime Arbitrators Association of Nigeria". Paper delivered at the Association's First Practical Dispute Resolution held in Lagos Nigeria on 13th and 14th March, 2008 in collaboration with the Center for Law and Development Studies.

MAAN's mission is to advance professional knowledge of maritime alternative dispute resolution, create in Nigeria a crop of highly trained practitioners in the specialized field of maritime arbitration and pursue initiatives aimed at encouraging the development of Nigeria as a Maritime Arbitration Centre.

4. Features of Maritime Arbitration

Cedric Barclay is regarded as one of the founding fathers of maritime arbitration. He is also said to be one of the greatest maritime arbitrators the world has ever known. Cedric said to the Fifth International Congress of Maritime Arbitrators *"To be told expeditiously that you are right or wrong is of value in commercial dealings*[39]*. To the Rt. Hon. Lord Justice Haight Cedric's statement sums what arbitrators are supposed to do and how they are supposed to do it"* say who is right and say it quickly. The Rt. Lord Justice Haight gets the opinion that for Cedric the ideal arbitration takes place before a single arbitrator, with no lawyers in sight and ends with the briefest possible award[40].

Cedric discussing the arbitration of shipbuilding contracts stated thus:

> *"Its is imperative in order to reduce the cost and the duration of the Arbitration that the parties should agree on a single Arbitrator. To have three arbitrators only leads to haggling arising from the divergence of opinion…lengthy exchange between the Lawyers for the parties only leads to a waste of time, of paper of type writer ribbons"*[41].

The goal of arbitration is expeditious and cost effective dispute resolution. That is the expectation of the parties. Maritime arbitration conducted by commercial persons, skilled and experienced in maritime matters, applying their commercial knowledge in the resolution of

[39] Culled from Hon Judge Charles S. Haight Jr, "*Maritime Arbitration – The American Experience*". The Cedric Barclay Lectures ICMA XVI Singapore p. 38.
[40] Judge Haight *"Maritime Arbitration. The American Experience" p. 38*
[41] Judge Haight *"Maritime Arbitration. The American Experience" p. 38*

maritime disputes in a practical, expeditious and cost effective manner was regarded as the cornerstone of maritime arbitration.

Unfortunately, maritime arbitration is now perceived as not being as expeditious or cost effective as it then was. The involvement of lawyers has been blamed. The Rt. Hon. Judge Haight Junior stated thus:

"The more arbitration comes to resemble litigation, the less it resembles Cedric Barclays ideal arbitration, quick, inexpensive, uncluttered by lawyers. And the risk arises that arbitration may come to be disfavoured for the same reasons that litigation was disfavoured as a means of resolving commercial disputes"[42].

Need I add that ensuring the availability of skilled and well-trained arbitrators on a global basis who can be called upon at short notice to resolve disputes without the need for parties to transperse hundreds of miles is a sina qua non for the continuing popularity of maritime arbitration.

Conclusion

Arbitration enables resolution of disputes by persons with specialized skills, experience and training. The arbitration agreement is the bedrock of commercial arbitration proceedings. Parties need to pay great attention to the *arbitration agreement* if they are to avoid litigating disputes, which would have been preferably arbitrated. However, care must be taken to ensure that the role of arbitration as the primary tool for resolving maritime disputes is safeguarded. Different national policies should be reconciled as best as possible. The traditional maritime disputes resolution centres should encourage the growth and development of newer centres including those from developing countries and emerging economies. Maritime arbitration organizations should form themselves into networks on global and regional basis thereby engendering the development of trust, respect, and/confidence and moving a further step towards de-emphasizing national/jurisdictional barriers.

[42] Judge Haight Maritime Arbitration p.47

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