

Singapore Chamber of Maritime Arbitration
10th Anniversary Keynote Address
The Race to Relevance

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I. The sea-change: a shift in the centre of gravity to Asia

1. More than a century ago, in 1886, Thomas Scrutton wrote in the preface to the first edition of his seminal text, *Charterparties and Bills of Lading*, that the preceding 20 years had witnessed a “great commercial change” in the shipping industry. He spoke then of the introduction of steamers in place of sail ships and how that would improve the predictability of voyages; the invention of telegraph and the use of ocean cables as a means for transoceanic communications; and the change from “simple” bills of lading to those containing “50 or 60 lines” of terms and conditions.¹

2. The great commercial changes have not abated since then. Instead, the pace of change in the maritime trade industry has only hastened. The advent of containerisation and satellite and marine propulsion technologies has completely revolutionised the carriage of goods by sea. With these and other

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developments, the volume of seaborne trade across the world has increased almost fivefold since 1970.² But it is from the new patterns of global maritime trade that one glimpses what is perhaps the most significant commercial change of the last decade, namely, the shift of the global economic centre of gravity to Asia.³ Today, intra-Asian trade accounts for the majority of the world's volume of container shipping, and it continues to grow steadily.⁴

3. The growing concentration of shipping activity in Asia is driven by a confluence of factors, four of which appear to be the most salient:

(a) One, the emergence over the last few years of economic powerhouses in the region, such as China—which is projected to remain the world's top exporter in 2030—and India—which is projected to become the world's 2nd largest exporter by 2030 and the top exporter by 2050;⁵

(b) Two, the lowering of economic barriers to facilitate trade with and within Asia, through landmark global and regional initiatives such as the ASEAN Economic Community, the Trans-Pacific Partnership Agreement, and the proposed Regional Comprehensive Economic Partnership;

(c) Three, the strategic geographical location of many Asian countries along major shipping routes, and the development of infrastructure to make the best use of this significant asset. It may be noted that the Line

Shipping Connectivity Index compiled in 2018 by the United Nations Conference on Trade and Development (“UNCTAD”) reported that the five best-connected countries for seaborne trade were all situated in Asia;⁶ and

(d) Four, China’s ambitious Belt and Road Initiative, which has already seen China invest in the construction and expansion of more than 40 seaports across more than 30 countries, many of them in Asia, such as Myanmar, Sri Lanka, Cambodia, Malaysia, and Thailand.⁷

4. Against the backdrop of these shifting economic tides, Singapore, in particular, has emerged as a significant beneficiary, and one does not have to search far to realise how much we have achieved in the short history of our nation. Over the course of the five decades following our independence, Singapore has become one of the world’s leading maritime centres.⁸ Today, a ship enters or departs our waters every two or three minutes.⁹ The maritime sector contributes around 7% of Singapore’s Gross Domestic Product and employs over 170,000 persons.¹⁰ In recent years, we have been recognised as the world’s busiest bunkering port¹¹ and the world’s busiest transshipment port.¹² Singapore has also had the unique distinction of having thrice topped the charts of the Leading Maritime Capitals of the World, in 2012, 2015, and 2017.¹³ These are achievements in which Singapore and our maritime industry can justly take great pride.

5. And there are substantial efforts underway to ensure that the future of our maritime industry is as promising as has been its illustrious past. One significant development is the upcoming implementation of two key international documents, being firstly the Protocol of 1996 (“1996 Protocol”) which amends the Convention on Limitation of Liability for Maritime Claims of 1976 (“1976 Convention”), and secondly the International Convention on Salvage 1989 (“Salvage Convention”).¹⁴ The 1996 Protocol and the Salvage Convention are expected to bring Singapore in line with other leading maritime jurisdictions. Amongst other things, the 1996 Protocol raises the limits of liability of a shipowner for maritime claims covered under the 1976 Convention, and ensures that Singapore’s limitation regime reflects the current value of life and property.¹⁵ The Salvage Convention introduces a set of criteria for fixing the remuneration for salvors, and a regime of special compensation for salvors who prevented or minimized environmental damage even if their salvage operations failed to save the ship or its cargo.¹⁶ Another significant game-changer is the Tuas Megaport, which when completed in around 2040 is expected to handle up to 65 million Twenty-Foot Equivalent Units (“TEUs”) of cargo annually, up from some 40 million TEUs today. The Megaport will be the largest container terminal in the world.¹⁷ This mammoth undertaking is yet another piece in Singapore’s long-term plan to ensure the continued growth and relevance of our maritime sector.

II. The birth and evolution of the SCMA

6. This is the exciting context in which the SCMA operates. The SCMA is an organisation born of humble beginnings at a time of significant change, adversity, and opportunity. It began as a small department within the Singapore International Arbitration Centre (“SIAC”) in 2009.¹⁸ Within the relatively short span of a decade, the SCMA has established itself as one of the leading maritime arbitral institutions in the region and, I dare say, in the world. In the past 5 years alone, the caseload managed by the SCMA has more than doubled to a record 56 in 2018. The value of the disputes referred to the SCMA has also increased steadily over the years. A recent study conducted by the international law firm Holman Fenwick Williams reveals that Singapore is the second most used arbitration seat for maritime disputes, with something over 120 SCMA, SIAC, London Maritime Arbitrators Association (“LMAA”), and International Chamber of Commerce (“ICC”) cases seated in Singapore in 2016.¹⁹

7. There is no doubt, of course, that the SCMA has been aided by the rise in economic activity in the region which has led naturally to more maritime disputes and a higher demand for legal services within this sector. But as those of you here would undoubtedly agree, while the macro-economic factors are important, the success of the SCMA has also much to do with the efforts and innovation of its membership and staff, and the vision of its leadership. It is these factors that have led the SCMA to far exceed anyone’s expectations. I will

mention just four examples.

8. First, in November 2012, the SCMA succeeded in persuading the Baltic and International Maritime Council (“BIMCO”) to adopt Singapore as a default seat of arbitration on all BIMCO forms. As many have observed, this is truly a remarkable achievement. Around 70% of the world’s contracts for maritime trade use BIMCO forms, and Singapore now sits alongside New York and London as one of the designated arbitral seats available in these forms.²⁰

9. Second, in 2013, the SCMA introduced the Expedited Arbitral Determination of Collision Claims Rules, or the SEADOCC Rules, which are specifically tailored to deal with collision claims arising from tortious acts.²¹

10. Third, in 2017, the SCMA entered into an agreement with a prestigious industry publication, the Lloyd’s Maritime Law Newsletter, to publish redacted SCMA arbitral awards accompanied by a brief commentary prepared by the SCMA Secretariat.²² This is a valuable contribution to international maritime jurisprudence and will certainly enhance the influence and standing of the SCMA over the longer term.

11. Fourth, the SCMA just last year entered into a Cooperation Agreement with the China Maritime Arbitration Commission (“CMAC”) to promote maritime arbitration as a means for the effective resolution of maritime disputes.²³

12. These innovations have contributed significantly to the SCMA’s

impressive achievements over the past decade. As a result, few would disagree that the SCMA has played an outsized role in promoting the interests of the maritime industry and in improving the resolution of maritime disputes. On the back of these efforts, the SCMA stands today, at its 10th anniversary, on a much stronger foundation to take on the challenges and opportunities of the next decade.

III. The race to relevance: A new relationship between courts and arbitration

13. The popularity and success of the SCMA is cause for celebration. However, even as arbitration solidifies its position as the leading dispute resolution mechanism of choice for international maritime disputes, one issue that is ripe for consideration is the possibility of drawing upon the complementary strengths of other dispute resolution mechanisms to buttress the strength and profile of maritime arbitration. One possibility is the combination of some form of mediation with arbitration. I will say more on that later; but my immediate focus is on the role that courts might play, and specifically, the question of whether parties to an arbitration should have a limited right of appeal to a national court on a point of law.

14. This topic is admittedly controversial and, in recent years, has attracted significant attention from leading legal figures. In 2016, the Lord Chief Justice of England and Wales, Lord Thomas, expressed the concern in a lecture he

delivered that the prevalence of private, confidential, and final arbitrations was stifling the development of the common law, in particular, the commercial common law. As Lord Thomas put it, the consequence of arbitration's rise in popularity is that the common law is at risk of being transformed "from a living instrument into ... an 'ossuary'", with a real "danger" of the frameworks underpinning international markets, trade and commerce being eroded.²⁴ The same point was made a little differently by Sir Bernard Rix, one of the International Judges of the Singapore International Commercial Court ("SICC"), in his Jones Day Lecture in 2015, where he stated that "as more and more international commercial cases go to arbitration rather than the courts, we are more and more losing sight of the basic feedstock of our commercial law".²⁵ To the same end, Professor Martin Davies made the point in 2009 that the narrowness of the grounds for setting aside of an arbitral award has resulted in "an almost complete atrophying of US maritime law in relation to charterparties because almost all charterparty disputes go to arbitration rather than litigation".²⁶

15. In response to this concern, Lord Thomas suggested that a new balance might be struck between adjudication and arbitration by expanding the scope for appeals from an arbitral award on a point of law.²⁷ Such a right of appeal is presently available under s 69 of the English Arbitration Act 1996 ("1996 Act"), which has no equivalent in Singapore.

16. Lord Thomas' proposal drew strong criticism from other members of the English judiciary. Sir Bernard Eder, who also sits on the panel of International Judges of the SICC, made the point that private litigants ought not to be forced to “finance the development of the common law” by pursuing appeals to the courts.²⁸ Lord Saville, the architect of the 1996 Act, also opposed the proposal. In his view, “[p]eople use arbitration to resolve their disputes, not to add to the body of English commercial law”, and expanding the right of appeal would be a “wholly retrograde step”.²⁹

17. Whether the right to appeal from an arbitral award on a point of law in the English legislation should be made broader and more flexible is not the subject of my address today. Instead, I propose to focus on the anterior question—which is more relevant to Singapore—of whether there should be such a right in the first place, and to use that as a lens through which to examine the larger question of the relationship between the courts and arbitration.

A. The case for a right of appeal on points of law

18. I start by setting out the case for having a limited right of appeal from an arbitral award on points of law.

19. First, as I have alluded to, one advantage of such a right is that it facilitates the development of a robust and cohesive body of maritime law. For all its benefits, arbitration has been criticized for its opacity³⁰ and the absence of arbitral *stare decisis*.³¹ One arbitral tribunal may reach a view on the

interpretation of a certain term, and another tribunal may reach quite a different view. Neither of those views binds the other, nor anyone else, and indeed no one other than the parties to a specific arbitration may even be aware of them because arbitral awards are often kept confidential.³²

20. Efforts have been made by various arbitral institutions to stimulate the development of arbitral “case law” by making available redacted copies of arbitral awards,³³ similar to SCMA’s arrangement with the Lloyd’s Maritime Law Newsletter which I mentioned earlier. But even so, an arbitral tribunal is not bound by what another tribunal has determined. Indeed, it has been observed that there is little evidence that arbitrators make much if any reference to past awards.³⁴ There can, therefore, be a variety of approaches on any given point of law. Commercial parties are thus left in a state of persistent ambiguity, with the resolution of an interpretive or legal issue seemingly dependent on the constitution of the tribunal in the specific case. This is unsatisfactory, and in the long run, it is likely to result in diminished confidence in the integrity of the arbitral regime.³⁵

21. I suggest a strong case may be made that the provision of a limited right of appeal and the concomitant development of a robust body of maritime jurisprudence would in fact enure to the benefit of the arbitral regime. In a speech given at an earlier edition of this conference, I expressed the view that authoritative court rulings on specific points of law arising from arbitral disputes

form a type of “legal commodity” that can play a central role in the smooth operation of the commercial markets. It appears that Lord Diplock had in mind similar considerations when he formulated guidelines for the statutory appeal mechanism in the UK in *The Nema*,³⁶ which were later enshrined in s 69 of the 1996 Act. As he quite rightly put it, “[i]t is only if parties to commercial contracts can rely upon a uniform construction being given to standard terms that they can prudently incorporate them in their contracts without the need for detailed negotiation or discussion.”³⁷

22. Court judgments therefore give parties assurance about the meaning of important terms in their contracts, and dispel doubt and ambiguity surrounding those terms for the benefit of similarly situated parties. In a common law system such as ours, a definitive court ruling also binds future courts and tribunals called upon to address that same question. This in turn enhances certainty, lowers the costs of doing business, and reduces the risk of similar disputes occurring.

23. A second advantage of a right of appeal is that rather than undercutting the key advantages of arbitration, permitting judicial recourse from an arbitral award to correct obvious errors of law would in fact strengthen users’ confidence in arbitration.

24. In this regard, one of the perceived attractions of arbitration is its finality, and critics of the right of appeal often argue that permitting such a right would

compromise the hallowed finality of an arbitral award. There are several responses that one may make. For one thing, the finality of arbitral awards is not in fact considered to be a significant advantage of arbitration. In the latest Queen Mary survey, only 16% of respondents said that finality was one of international arbitration's most valuable characteristics, trailing far behind other characteristics such as the enforceability of awards (64%), the ability to avoid specific legal systems or national courts (60%), and the flexibility of the arbitral process (40%).³⁸

25. Further, while finality has its value in some situations, it equally has its disadvantages. As I have observed elsewhere,³⁹ the absence of an appellate mechanism in arbitration has paradoxically led to rising costs by incentivizing parties to throw in the proverbial kitchen sink and raise as many arguments and authorities as conceivable in the "one shot" that they have at prevailing in the arbitration. Arbitrators, in turn, feel obliged to allow parties to do so, lest allegations of breach of natural justice be levelled against them. The result is often unnecessarily lengthy proceedings and exorbitant front-loaded costs. If, however, it was made known at the outset that a court may re-examine specific points of law on appeal, parties may be more inclined to streamline their cases. This might aid in restoring the efficiency of the arbitral process.

26. A right of appeal on points of law will also address the understandable grievance that a party may have at any evident misapplication of the law by an

arbitral tribunal. In these situations, finality is unlikely to trump the grave misgivings of the party who must live with the consequences of the tribunal's error, and on whom the perceived benefits of finality will be entirely lost. In that light, rather than acting as a compulsion on private parties to "finance" the common law as Justice Eder puts it, an appeal mechanism provides a meaningful remedy to address the grievances of the parties themselves. Indeed, the possibility of judicial scrutiny may reduce the risk of such situations arising in the first place, if it incentivised arbitrators to approach decision-making in a manner more consistently faithful to the law.⁴⁰ Viewed in this way, the provision of a right of appeal on points of law would promote the accountability of arbitrators and enhance the legitimacy of the arbitral regime as a whole. It would also allow the courts to complement the role and relevance of arbitral institutions, address the perceived weaknesses of the arbitral regime, and contribute jointly to the vitality of commercial dispute resolution.

27. The third advantage of the right of appeal, which is perhaps the most fundamental point to make, is that instead of *detracting* from the parties' intentions as some critics are prone to argue, the creation of an appropriately-scoped right might actually *promote* party autonomy. If parties are given the freedom to contractually exclude the right of appeal, either on an opt-out or opt-in basis, they can address their minds to the issue and contractually provide for a mutually agreeable position. This broadens the range of options available to parties, who might otherwise find themselves hamstrung by the limited

options available under the existing law, which fails to envisage any opportunity to review the legality of an arbitral award.

B. Especial relevance of the right of appeal to the maritime sector

28. The value of such a right of appeal as I have outlined applies to arbitrations generally. But it must be said that such a right has been and will remain of especial relevance to maritime disputes.

29. A quick survey of the LawNet repository of Singapore court decisions will reveal that there has been a sharp decline in the number of judgments falling within the category of “Admiralty and Shipping” since the 1990s. The repository records that there has been a total of 191 “Admiralty and Shipping” judgments since 1990.⁴¹ The peak decade for this category of judgments was between 1990 and 1999, when 88 such judgments were released. This dropped markedly to about 55 judgments in the 2000s, and appears to have somewhat stabilised at around 48 judgments thus far in the 2010s. There are three months left in the 2010s, but it seems reasonable to expect that the final figure for the most recent decade will be slightly lower, or at best close to, that for the 2000s. Maritime arbitration, in the meantime, has risen to prominence. The decline in the number of shipping law judgments suggests that there may be some truth to Lord Thomas’ concerns, even on our shores, that an unintended consequence of arbitration’s rise in popularity is the risk that this poses to the common law framework that underpins international commerce.

30. But there is no need to see court litigation and maritime arbitration as rivals in a zero-sum game. Indeed, one might instead find a complementary and symbiotic relationship between these two dispute resolution mechanisms. Ian Gaunt, the President of the LMAA, explained in an interview that “[s]pecifically in the maritime field, the availability of a right of appeal to the Commercial Court from arbitration awards on points of law ... is generally welcomed by the international maritime community”.⁴² Similarly, Justice Eder noted in a recent speech, defending the relevance of the English appeal mechanism in s 69 of their 1996 Act, that “there is a strong tradition in the shipping industry of proceeding by way of appeal to the Court to resolve important issues of law affecting the industry generally”.⁴³ This comports with the results of an empirical study undertaken a decade ago in 2009, where the Advisory Committee on s 69 of the 1996 Act stated in its interim report that the “majority of arbitration applications for leave under Section 69 concern maritime awards”.⁴⁴ Indeed, it is noteworthy that of the few cases to have reached the UK Supreme Court via s 69 of the 1996 Act since its inception, at least four were shipping cases.⁴⁵

31. This willingness of the maritime sector to accept some degree of judicial supervision is unsurprising given the transnational nature and historical underpinnings of shipping law and trade. For so long as mankind has engaged in trade, shipping has been one of the chief means of doing so, at least as far as coastal and riparian states are concerned.⁴⁶ The need for stability in

commercial trade, coupled with the international character of shipping, has required that a body of principles, procedure, and practice be developed to guide the behaviour of its participants. This has coalesced over the centuries into what has been described as the “*lex maritima*”, or general maritime law.⁴⁷ Thus, as early as 1759, it was said that “the maritime law” is not the law of a particular country, but the “general law of nations”.⁴⁸ The maritime sector’s greater interest in certainty and clarity of legal principles, and its consequent willingness to seek controlling judicial precedent rather than risk the fragmentation of shipping law and the concomitant destabilization of maritime trade, is a feature that persists to this day.⁴⁹

32. It is of course the case that the jurisprudence contributed by maritime disputes does not simply benefit the maritime sector. One only has to conduct a brief survey of commercial law to find that shipping cases have historically made profound contributions to the development of commercial law in general.⁵⁰ Taking contract law as an example, shipping cases have resulted in a significant number of landmark judgments across a spectrum of issues, from the interpretation of contracts (eg, *The Moorcock*,⁵¹ which introduced the concept of implied terms into English law), to the concepts of breach and termination (eg, *Hong Kong Fir Shipping*,⁵² which introduced the distinction between conditions, warranties and innominate terms), and to damages (eg, *The Heron II*⁵³ and *The Achilleas*,⁵⁴ which have helped develop the principles of remoteness of damages). Maritime cases have also contributed significantly

to other areas of law, including tort law (eg, *The Wagon Mound (No 1)*⁵⁵ on the foreseeability of damage) and private international law (eg, *Spiliada*,⁵⁶ on the doctrine of *forum non conveniens*).

33. An example closer to home is the judgment in *Diablo Fortune Inc v Duncan, Cameron Lindsay*,⁵⁷ delivered in 2018 by a five-judge bench of the Court of Appeal. That concerned a lien imposed by a shipowner on a charterer over all cargoes, sub-hires, and sub-freights belonging or due to the charterer or any sub-charterers. The question before the Court of Appeal was whether liens over sub-freights and sub-hires were registrable charges. The court answered that question in the affirmative, and held that the lien should be characterised as a floating charge. Its effect was to give the shipowner a security interest in the sub-freights earned by the charterer.

34. Framed in this way, the issue and the court's answer would seem to be of concern only to those in the shipping industry. But in order to answer the question, the court had to consider and come to a view on the juridical basis and nature of a floating charge.⁵⁸ That is of relevance to the larger commercial world, as it deals with a fundamental question of credit and security. Bearing the outsized impact of maritime jurisprudence in mind, it would not be an exaggeration to say that the judicial determination of points of law arising from maritime arbitral awards would significantly contribute to the breadth and depth of our commercial jurisprudence and to the vitality of our broader economy.

C. Appropriately scoping the appeal mechanism

35. Having outlined the advantages of an avenue of appeal on points of law in arbitral proceedings generally, and the particular benefits of such an option in the context of the maritime sector, I turn to make some brief observations on how this right may be appropriately defined and scoped.

36. A useful starting point is s 69 of the 1996 Act in the UK. Section 69 allows appeals on a point of law to be brought to the courts if parties have not opted to exclude it. In such circumstances, an appeal may be brought but only if the parties both agree *or* if the leave of court is obtained. The statute provides for four cumulative requirements that must be satisfied before leave of court will be granted, these being (i) firstly, that the determination of the question will substantially affect the rights of one or more of the parties; (ii) secondly, that the question is one which the tribunal was asked to determine; (iii) thirdly, that the arbitral award is either obviously wrong, or open to serious doubt and raises a question of general public importance; and (iv) fourthly, that despite the parties having agreed to resolve the dispute by arbitration, it is just and proper in all the circumstances for the court to determine the question.⁵⁹

37. At the appeal proper, the court is empowered to confirm or vary the award, remit the award to the tribunal in whole or in part, or to set aside the award. This last power to set aside, however, is subject to the express caveat that the court “shall not exercise its power to set aside an award ... unless it is

satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration”.⁶⁰

38. A few observations may be made. The first is that it is evident that the right to appeal under s 69 of the 1996 Act is restrictive and narrowly circumscribed. Indeed, the statistics of the English courts confirm this. In a report to the Commercial Court Users’ Group,⁶¹ Mr Justice Popplewell, Judge in charge of the Commercial Court, reported that in 2015, only 20 out of 60 applications for leave were granted. In 2016, none of the 46 applications was granted. And in 2017, only 10 out of 56 applications were granted. Fears of excessive judicial intervention in the sphere of arbitration have therefore proved unwarranted.

39. The second point is that the appeal framework under s 69 has been structured in a deliberate and calibrated manner to preserve and indeed promote party autonomy. It is not intended to give parties in an arbitration an automatic right of appeal on any point of law, for “that would be to drive a coach and horses through the fundamental principle of party autonomy” and detract from the fundamental attraction of arbitration.⁶² Rather, it affords a narrowly circumscribed avenue for appropriate issues in appropriate cases to be pursued on appeal. Parties retain the option of contractually excluding it altogether. On the other hand, they may choose to omit the leave requirement by agreeing that an appeal may be brought as of right. The short point is that

the parties remain firmly in control of their dispute resolution mechanism and process.

40. The third observation is that the appeal mechanism is consciously designed to circumscribe judicial intervention in the arbitration. This is evidenced by the strict cumulative requirements that must be satisfied before leave to appeal will be granted. It is also illustrated by the fact that the court is constrained from exercising its power to set aside an arbitral award unless it is satisfied that remittance to the tribunal is inappropriate.

41. I therefore suggest that the appeal mechanism in s 69 of the 1996 Act is one that repays close examination. There are significant advantages to be had in allowing the parties the option of pursuing an appeal, while the disadvantages raised by the opponents can be mitigated by appropriately scoping the appeal mechanism. I suggest that with the appropriate calibration, a limited right of appeal will only serve to strengthen the mutually beneficial relationship between the courts and arbitration.

42. In June this year, the Singapore Ministry of Law launched a public consultation on proposed amendments to the International Arbitration Act. One of the proposed amendments is precisely to permit the parties to appeal to the Singapore High Court on a question of law arising out of an arbitral award. The proposal requires the parties to *opt-in* to this mechanism by expressly reflecting in writing their agreement that such a right will be available, which differs from

the English *opt-out* system. Further, even if all parties opt-in, there is an *additional* requirement that leave of court must be obtained. The proposed appeal mechanism is therefore even narrower than its counterpart under the 1996 Act, and the aims of preserving party autonomy and the consensual basis of arbitration are placed on an even firmer footing in the Ministry's proposal.

IV. Looking forward to the next decade

43. As I approach the end of my address, let me take the opportunity to highlight two areas in which I think the SCMA can have a significant role to play in the coming years.

44. First, I urge SCMA's leadership to look more closely at the case for and against a right of appeal on a point of law arising out of maritime arbitration. If the view is taken that there is utility in such a right, and if this were introduced in Singapore pursuant to the consultation that I have just referred to, then the SCMA should take steps to educate its members and other industry stakeholders of the benefits and availability of such a right. Appropriate marketing and education is important because the standard rules of arbitral institutions, such as the SIAC Rules 2016 and the ICC Rules 2017,⁶³ often automatically exclude a right of appeal. There would be little utility in having an appeal mechanism provided for by statute if the parties remained unaware of it, or indeed, unwittingly contracted out of it by default. If the SCMA thinks it appropriate, it might further wish to actively encourage its members to adopt

terms of arbitration that do not automatically exclude the right of appeal.

45. Next, I would encourage the SCMA to more closely explore the use of mediation as a complementary form of dispute resolution amongst its members. Mediation has as its central aim the amicable settlement of disputes between the parties. It is much less adversarial than litigation and arbitration, and it is designed to be fast, confidential, and cost-effective. There is also good reason to believe that mediation may be uniquely suited to users in the Asian context. My colleagues and I have noted elsewhere that mediation is a deeply-embedded practice in Asian cultures, where social order, harmony and face-saving are highly valued.⁶⁴ As the world's economic centre of gravity shifts to Asia and the economic might of Asian maritime players strengthens, one can expect that the popularity of mediation will increase. Further, it should also be noted that mediation is particularly suited to those in the maritime sector for at least two reasons: first, because mediation is often faster than arbitration or litigation, and time is of the essence in this sector; and second, because the less adversarial and more collaborative nature of mediation is well suited to those in this sector who, as one general counsel of a leading shipping firm noted, are "generally far more interested in continuing positive business relations, rather than in preserving legal rights".⁶⁵

46. While commendable steps have been taken by the SCMA in this direction, such as by the introduction in 2015 of SCMA's Arb-Med-Arb

Protocol,⁶⁶ there is perhaps more that can be done. On this note, it is timely to note that the legal architecture underpinning mediation has been given fresh wind with the recent introduction of the UN Convention on International Settlement Agreements Resulting from Mediation, otherwise known as the Singapore Convention.⁶⁷

47. The significance of the Singapore Convention should be assessed in the light of the reason why some have thus far viewed mediation as the poor cousin of the more established modes of dispute resolution. In 2016, the Singapore Academy of Law conducted a survey of 500 commercial law practitioners and in-house counsel dealing with cross-border commercial transactions in Singapore and the region, and asked the respondents to indicate their preferred mode of dispute resolution. 71% of them chose arbitration and 24% selected litigation; in contrast, a mere 5% preferred mediation.⁶⁸ The most commonly cited reason for respondents who chose arbitration or litigation over mediation was enforceability.⁶⁹ The same concern as to enforceability was reflected in the 2016 Global Pound Survey,⁷⁰ and a 2014 survey of in-house counsel and senior corporate managers conducted by the International Mediation Institute.⁷¹

48. As I elaborated in a recent speech,⁷² the Singapore Convention directly addresses these concerns and marks a watershed in the development of international commercial mediation. The primary obligation on member states to the Singapore Convention is to enforce settlement agreements arising out of

mediation. A settlement agreement is, in turn, defined in the Convention to refer to one that arises out of an international commercial dispute.⁷³ The Convention is not prescriptive about the modality of enforcement, leaving that to the discretion of the member states by providing that enforcement be “in accordance with [the State’s] rules of procedure and under the conditions laid down in [the] Convention.”⁷⁴ Signatories to the Singapore Convention, which is still in its infancy, already include such economic powerhouses and major maritime jurisdictions as the USA, China, India, and Korea.⁷⁵

49. The Singapore Convention gives added impetus to the attractiveness of mediation as a means of maritime dispute resolution, and I strongly encourage the SCMA to consider how it may be incorporated as one of its complementary offerings. In this regard, it may also be appropriate for the SCMA to work with the Singapore Mediation Centre and the Singapore International Mediation Centre, and ensure that there are sufficient mediators with the necessary technical expertise to assist in the wide variety of maritime disputes that will no doubt come before the SCMA.

V. Conclusion

50. As I have suggested elsewhere, arbitral institutions “not only have a special role, but a duty, to shape the future of arbitration”.⁷⁶ In looking ahead to the best path forward for the arbitration community, however, there is value in looking laterally at other mechanisms for dispute resolution, aspects of which

may be synergistically harnessed to complement the strengths and address the weaknesses of arbitration. The future of dispute resolution is unlikely to be dominated by any single mode. Instead, a complementary suite of dispute resolution methods, tailored to the specific needs of the parties and the industry, is far more likely to emerge triumphant. In this regard, arbitral institutions around the world have been improving and innovating, and so too will the SCMA as it looks to maintain its leading position in this race for relevance.

51. At the 10th anniversary of the SCMA's inception, there is much to celebrate in the achievements of the past decade. But what is truly exciting is the potential and opportunities that remain. At a time when the tide of economic activity is unmistakably shifting to Asia, the SCMA can look to a very bright future as long as it remains agile, responsive, and alive to the opportunities that can be seized to boost the profile of the institution and of Singapore. These are values that have served the SCMA well in the past, and I am confident that they will continue to serve it well as we look forward together to the next decade of its development.

52. Thank you.

¹ TE Scrutton, *The Contract of Affreightment as Expressed in Charterparties and Bills of Lading* (William Clowes & Sons, 1886); See also Kate Lewins, "A view from the crow's nest: maritime arbitrations, maritime cases and the common law", AMTAC Annual Address 2015 (16 September 2015).

2 The volume of global seaborne trade, measured by cargo loaded, was 2,605 million tons in 1970 and
10,287 million tons in 2016: see the UNCTAD “Developments in International Seaborne Trade”
report at Table 1.3 at p 5, accessible at https://unctad.org/en/PublicationChapters/rmt2017ch1_en.pdf.

3 Since the turn of the century, Asia’s total trade volume has risen from some \$3 trillion to more than
\$11 trillion, and its share of global trade has risen almost 10%: see the HKTDC Research article,
“Changing Global Production Landscape and Asia’s Flourishing Supply Chain” (3 October 2017),
accessible at <http://economists-pick-research.hktdc.com/business-news/article/Research-Articles/Changing-Global-Production-Landscape-and-Asia-s-Flourishing-Supply-Chain/rp/en/1/1X000000/1X0ABHUR.htm>. It has also been projected that, by 2050, Asia’s GDP will
have increased from \$16 trillion in 2010 to \$148 trillion – or half the world’s global GDP: see the
2011 report by the Asian Development Bank, “Asia 2050: Realizing the Asian Century” at p 2,
accessible at <http://www.iopsweb.org/researchandworkingpapers/48263622.pdf>.

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accessible at <https://fairplay.ihs.com/markets/article/4296096/intra-asia-container-shipping-market-intensifies>.

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accessible at <https://www.weforum.org/agenda/2014/12/the-worlds-changing-trade-patterns/>.

6 These five countries or territories are China, Singapore, Korea, Hong Kong, and Malaysia. See The
Maritime Executive, “Asia leads in container shipping connectivity” (10 October 2018), accessible at
<https://www.maritime-executive.com/article/asia-leads-in-container-shipping-connectivity>.

7 See the GB Times article, “China invests in 42 overseas ports under Belt and Road project) (27 July
2018), accessible at <https://gbtimes.com/china-invests-in-42-overseas-ports-under-belt-and-road-project>.

8 “Maritime Singapore: from trading post to global maritime hub”, in *Nautilus Maritime Port of
Authority* (2019) Issue 43, at p 14.

9 “Maritime Singapore: from trading post to global maritime hub”, in *Nautilus Maritime Port of
Authority* (2019) Issue 43, at pp 14–15.

10 “Maritime Singapore: from trading post to global maritime hub”, in *Nautilus Maritime Port of
Authority* (2019) Issue 43, at pp 14–15.

11 “Maritime Singapore: from trading post to global maritime hub”, in *Nautilus Maritime Port of
Authority* (2019) Issue 43, at p 14.

12 “Maritime Singapore: from trading post to global maritime hub”, in *Nautilus Maritime Port of
Authority* (2019) Issue 43, at pp 14–15.

13 Menon’s *Leading Maritime Capitals of the World Report*, developed by the Norwegian consultancy
firm Menon Economics and DNV GL. The report benchmarks and determines the world’s top 30
leading maritime cities.

14 Speech by Senior Minister of State for Transport Dr Lam Pin Min on the second reading of the
Merchant Shipping (Miscellaneous Amendments) Bill (14 January 2019) at para 2.

15 Speech by Senior Minister of State for Transport Dr Lam Pin Min on the second reading of the
Merchant Shipping (Miscellaneous Amendments) Bill (14 January 2019) at para 4.

16 Speech by Senior Minister of State for Transport Dr Lam Pin Min on the second reading of the
Merchant Shipping (Miscellaneous Amendments) Bill (14 January 2019) at para 6.

17 “Maritime Singapore: from trading post to global maritime hub”, in *Nautilus Maritime Port of
Authority* (2019) Issue 43, at p 17.

18 See, generally, the Singapore Maritime Foundation press release, “Over 300 maritime leaders joined
the Guest-of-Honour, Mr Lui Tuck Yew, Minister for Transport, at the Singapore Maritime
Foundation (SMF) New Year Cocktail Reception 2015 at Conrad Centennial Singapore to usher in
the new year (16 January 2015), accessible at point 2 of Appendix A, accessible at
<https://www.smf.com.sg/wp-content/uploads/2018/11/52-20150116-press-releases-maritime-leaders-at-smf-new-year-cocktail-reception.pdf>.

19 Holman Fenwick Williams, “The Maritime Arbitration Universe in Numbers: Will Brexit impact
London’s Standing?” (March 2018).

20 See Singforms Press Release, “Singapore to represent the Asia region as new arbitration seat in
BIMCO Contracts” (21 November 2012), accessible at <https://www.singforms.com/media->

[centre/press-releases/singapore-to-represent-the-asia-region-as-new-arbitration-seat-in-bimco-contracts/](http://www.scma.org.sg/centre/press-releases/singapore-to-represent-the-asia-region-as-new-arbitration-seat-in-bimco-contracts/).

- 21 Hakirat SH Singh, “A Fusion of Principles and Rules: Expedited Arbitral Determination of Collision Claims and its Potential Application in Cases involving Ships Crossing the Singapore Straits” Paper delivered at 19th International Congress of Maritime Arbitrators, Hong Kong, 11 to 15 May 2015 at para 1.
- 22 See the Chairman’s message in SCMA’s 2017 Year in Review, accessible at <https://www.scma.org.sg/SiteFolders/scma/387/YIR/2017YearInReview.pdf>.
- 23 See the SCMA press release, “SCMA signs Cooperation Agreement with the China Maritime Arbitration Commission”, accessible at <https://scma.org.sg/SiteFolders/scma/387/Events/MediaRelease20181113.pdf>.
- 24 See the BAILII Lecture 2016 delivered by the Right Honourable Lord Thomas of Cwmgiedd, “Developing commercial law through the courts; rebalancing the relationship between the courts and arbitration” at para 22.
- 25 Sir Bernard Rix, “Confidentiality in International Arbitration: Virtue or Vice?” Jones Day Professorship in Commercial Law Lecture (12 March 2015).
- 26 See also Martin Davies “More Lawyers but Less Law: Maritime Arbitration in the 21st Century” AMTAC Annual Address 2009 (2 July 2009).
- 27 See the BAILII Lecture 2016 delivered by the Right Honourable Lord Thomas of Cwmgiedd, “Developing commercial law through the courts; rebalancing the relationship between the courts and arbitration” at paras 32 to 34.
- 28 Sir Bernard Eder, “Does arbitration stifle development of the law? Should s 69 be revitalised?” Chartered Institute of Arbitrators (London Branch) AGM Keynote Address (28 April 2016).
- 29 Lord Saville, “Reforms will threaten London’s place as a world arbitration centre” *The Times*, 28 April 2016.
- 30 See the BAILII Lecture 2016 delivered by the Right Honourable Lord Thomas of Cwmgiedd, “Developing commercial law through the courts; rebalancing the relationship between the courts and arbitration” at para 23: “[t]here are other issues which arise from the resolution of disputes firmly behind closed doors – retarding public understanding of the law, and public debate over its application.... Such lack of openness equally denudes the ability of individuals, and lawyers apart from the few who are instructed in arbitrations, to access the law, to understand how it has been interpreted and applied. It reduces the degree of certainty in the law that comes through the provision of authoritative decisions of the court.”
- 31 Gabrielle Kaufmann-Kohler, “Arbitral Precedent: Dream, Necessity or Excuse?” (2007) 23 *Arbitration International* 357; see also Nigel Blackaby and Constantine Partasides, eds, *Redfern and Hunter on International Arbitration* (5th ed, OUP, 2009) at paras 1.113 and 1.114, noting the “problem of conflicting awards”.
- 32 Sir Bernard Rix, “Confidentiality in International Arbitration: Virtue or Vice?” Jones Day Professorship in Commercial Law Lecture (12 March 2015): “In arbitration, however, the position is almost entirely reversed. The basic philosophy is that of confidentiality, and it is only in exceptional circumstances, albeit again founded in public interest (or of course in the consent of the parties) that confidentiality is lifted.”
- 33 See Nigel Blackaby and Constantine Partasides, eds, *Redfern and Hunter on International Arbitration* (5th ed, OUP, 2009) at para 9.212: “A conflict emerged during the 1990s between the ‘inherent confidentiality’ of the arbitral process and the desire for publication of awards in the interests of establishing a body of precedent that might guide – if not bind – other arbitrators. The prevailing trend appears to favour publication.”
- 34 Chief Justice of Australia Robert French AC, “Arbitration and Public Policy”, 2016 Goff Lecture, Hong Kong (18 April 2016) at p 4; see also Gabrielle Kaufmann-Kohler, “Arbitral Precedent: Dream, Necessity or Excuse?” (2007) 23 *Arbitration International* 357 at 362.
- 35 See also Martin Davies, “More Lawyers but Less Law: Maritime Arbitration in the 21st Century” AMTAC Annual Address 2009: “Of course, arbitral awards have no precedential effect. Precedent can only come from courts. As a result, the availability of judicial review becomes a pressing question, particularly judicial review for errors of law. Unless at least some cases can find their way to court for

judicial review, there will be no possibility of correcting errors of law and no possibility of developing and honing legal principles that do have precedential effect.”

36 *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (No 2)* [1982] AC 724 (“*The Nema*”).

37 *The Nema* at 737F–G.

38 See the *Queen Mary and White & Carter* 2018 International Arbitration Survey: The Evolution of International Arbitration at Chart 3, accessible at <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf>.

39 Sundares Menon, “International Commercial Courts: Towards a Transnational System of Dispute Resolution”, Opening Lecture for the DIFC Courts Lecture Series 2015 at para 48; see also Lucy Reed, “International Dispute Resolution Courts: Retreat or Advance” John C Brierley Memorial Lecture (NUS) (11 September 2017) at p 20.

40 Alexandros-Catalin Bakos, “The Benefits of a Single-Tier Judicial Court Review of Arbitral Awards” Kluwer Arbitration Blog (20 December 2018), accessible at: <http://arbitrationblog.kluwerarbitration.com/2018/benefits-of-a-single-tier-judicial-court-review-of-arbitral-awards/>.

41 Search term “Shipping” in Lawnet Repository, catchword “Admiralty and Shipping”, in “Judgments” and “Singapore Law Reports” Categories.

42 See “Ian Gaunt Explains the Benefit of London Arbitration”, interview given in *Maritime Strategy* (10 June 2018), accessible at <https://www.maritime-executive.com/features/ian-gaunt-explains-the-benefits-of-london-arbitration>.

43 Sir Bernard Eder, “London Arbitration: The Future in Context”, The Worshipful Company of Arbitrators, Master’s Lecture (9 April 2019) at para 34.

44 See Lord Mance’s Advisory Committee on Section 69 of the Arbitration Act 1996, *First Interim Report on the Workings of Section 69 of the 1996 Act in regard to Maritime Arbitrations in London before the Commercial and Admiralty Court* (24 May 2009) at para 5; see also Robert Merkin, *The Arbitration Act 1996* (5th Ed, InformaLaw, Routledge, 2014) at p 322, on s 69: “As it happens, the reported decisions tend to be confined to arbitrations in the following spheres: (a) shipping (by far the greatest number of reported cases are maritime-related); (b) commodities; (c) construction; (d) rent review; and (d) miscellaneous *ad hoc* cases.... In the Commercial Court, all section 69 applications issued during the calendar years 2006 to 2008 were collated by the Advisory Committee on Section 69 of the Arbitration Act 1996, chaired by Lord Mance ... The Mance Committee’s analysis shows that, in those years, the number of maritime awards varied, remitted or set aside under section 69 made up, respectively, 75%, 100% and 100% of all awards. Also, successful challenges for all awards only happened on average in just over 9 percent of all cases for those years, of which on average 93% were shipping-related.”

45 *Bunge SA v Nidera BV* [2015] UKSC 43; *NYK Bulkship (Atlantic) NV v Cargill International SA* [2016] UKSC 20; *PST Energy 7 Shipping LLC and another v OW Bunker Malta Ltd and another* [2016] UKSC 23; *Fulton Shipping Inc of Panama v Globalia Business Travel SAU (formerly TravelPlan SAU) of Spain* [2017] UKSC 43; see also similar comments made by Clive Aston, “Keynote Speech at UCL Commercial Maritime Law Conference” (May 2016); see also Dr Kate Lewins, “A view from the Crow’s Nest: maritime arbitrations, maritime cases and the common law” AMTAC Annual Address 2015: “For the maritime market, the cases springing from arbitrations have set down key principles and statements absolutely critical for their day to day operations”.

46 Justice James Allsop, “International Maritime Arbitration: Legal and Policy Issues”, AMTAC Annual Address 2007 (4 December 2007).

47 William Tetley, “The General Maritime Law – the Lex Maritima” (1994) 20 *Syracuse Journal of International Law & Commerce* 105 at 107.

48 Lord Mansfield in *Luke v Lyde* (1759) 2 Burr 882 at 887.

49 See Albert Lilar and Carlo Van Den Bosch, “Le Comité Maritime International 1897-1972”: “The history of maritime law bears the stamp of a constant search for stability and security in the relations between the men who commit themselves and their belongings to the capricious and indomitable sea. Since time immemorial the postulate which has inspired all the approaches to the problem has been the establishment of a uniform law”.

50 See the speech delivered by Steven Chong at the launch of the NUS Centre for Maritime Law,
“Maritime Law in Singapore and Beyond – Its Origins, Influence and Importance” (3 September
2015) at para 9.
51 (1889) 14 PD 64.
52 *Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha* [1962] 2 QB 26.
53 *C Czarnikow Ltd v Koufos (“The Heron II”)* [1969] 1 AC 350.
54 *Transfield Mercator Inc v Mercator Shipping Inc (“The Achilles”)* [2008] 3 WLR 345.
55 *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (“Wagon Mound (No 1)”)* [1961]
AC 388.
56 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460.
57 [2018] 2 SLR 129.
58 [2018] 2 SLR 129 at [49] and [52].
59 Section 69(3) of the 1996 Act.
60 Section 69(4) of the 1996 Act.
61 *Commercial Court User’s Group Meeting Report* (13 March 2018), see p 1.
62 See the Keynote Address delivered by Sir Bernard Eder “Does arbitration stifle development of the
law? Should s 69 be revitalised?” Chartered Institute of Arbitrators (London Branch), AGM Keynote
Address (28 April 2016) at para 12.
63 See SIAC Rules 2016, Rule 32.11: “The parties also irrevocably waive their rights to any form of
appeal, review or recourse to any State court or other judicial authority with respect to such Award
insofar as such waiver may be validly made”; ICC Rules 2017, Art 35(6): “Every award shall be
binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake
to carry out the award without delay and shall be deemed to have waived their right to any form of
recourse insofar as such waiver can validly be made”.
64 See Andrew Phang, “Mediation and the Courts – The Singapore Experience”, 4th Asian Mediation
Association Conference Keynote Speech (20 October 2016) at para 9: “Mediation is not an unfamiliar
concept in the Singapore context. It is, in fact, deeply embedded in Asian culture, especially in
countries like China, South Korea and Japan where Confucianism has had a certain influence and
social order, harmony and face-saving are highly-valued. Migrants from South China, for example,
brought along with them the practice of settling disputes according to their rules and customs, at times,
in Chinese clan associations. At the same time, Malays in Singapore valued personal relationships and
trust, preferring non-confrontational solutions consistent with Islamic principles, and the informality
of mediation conducted by village headmen in accordance with customary standards and etiquettes of
social interaction. In the Indian communities, disputes were also resolved by their community councils
and Hindu temples”; see also Chief Justice Sundaresh Menon, “Building Sustainable Mediation
Programmes: the Singapore Perspective”, speech delivered at the Asia-Pacific International Mediation
Summit, New Delhi, India (14 February 2015) at para 3: “mediation is particularly suited to many
traditional Asian cultures, where despite cultural differences, concepts of social order, harmony and
honour are highly regarded”.
65 Nicholas Fell, General Counsel, BW Group Ltd, “The Age of Mediation is Here”, in WAVES
Magazine (Issue 59, Q3 2018) at 23 (a publication of the Singapore Shipping Association).
66 See the SCMA Arb-Med-Arb Protocol, annexed as Schedule C to the SCMA Rules 2015 (3rd Ed).
67 Ministry of Law Press Release, “Singapore clinches bid for UN Convention on Mediation to be named
after Singapore” (21 December 2018) at para 1, accessible at
[https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/UN-convention-on-mediation-to-
be-named-after-Singapore.html](https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/UN-convention-on-mediation-to-be-named-after-Singapore.html).
68 Singapore Academy of Law, “Study on Governing Law & Jurisdictional Choices in Cross-Border
Transactions” (2016) (“SAL Mediation Survey”), accessible at [http://www.ciarb.org.sg/wp-
content/uploads/2016/02/SAL_Singapore_Law_Survey.pdf](http://www.ciarb.org.sg/wp-content/uploads/2016/02/SAL_Singapore_Law_Survey.pdf).
69 SAL Mediation Survey at p 3.
70 Global Pound Conference Series, Herbert Smith Freehills and PwC, “Global Pound Conference
Series: Global Data Trends and Regional Differences” (2018) at p 20, accessible at
[https://www.immediation.org/download/909/reports/35507/global-data-trends-and-regional-
differences.pdf](https://www.immediation.org/download/909/reports/35507/global-data-trends-and-regional-differences.pdf).

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- ⁷¹ Nadja Alexander and Shouyu Chong, “An Introduction to the Singapore Convention on Mediation – Perspectives from Singapore”, SIDRA Selected Papers, page 5.
- ⁷² See Sundaresh Menon, “The Singapore Convention on Mediation & The Coming of a New Age”, Address at the Supreme People Court of Vietnam Workshop on Mediation (17 September 2019).
- ⁷³ Art 1(1) Singapore Convention on Mediation.
- ⁷⁴ Art 3(1) Singapore Convention on Mediation.
- ⁷⁵ See the List of Signatory Countries on Singapore Convention on Mediation website, accessible at <https://www.singaporeconvention.org/official-signatories.html>.
- ⁷⁶ See Sundaresh Menon, “The Special Role and Responsibility of Arbitral Institutions in Charting the Future of International Arbitration”, Keynote Address, SIAC Congress 2018 (17 May 2018) at para 4.