



EVERYTHING MATTERS

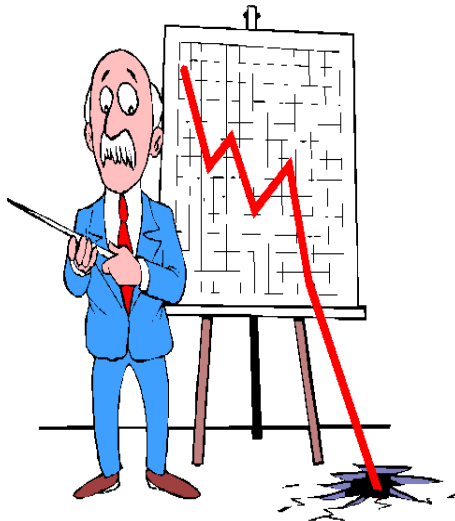
# Maritime Dispute Resolution in Asia

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*11th Asia-Pacific Maritime Expo, Singapore*

*26 March 2010*

Shipping and maritime industry directly related to and affected by state of economy and financial environment



- Shipping: Still the most economically viable mode of transportation for international trade
- Slump in consumer demand and industry output directly affected demand for shipping
- Over 75% of bulk shipping cargo relates to steel making – iron ore, coal, scrap metal
- Collapse of car making industry in Detroit
  - decline in demand of bulk carrier
  - decline in new ship building
  - further decline in demand for steel
  - further decline in demand for bulk carrier

## Effects observed:

- Increase in charterparty default
  - pre-mature redelivery
- Increase in instances of owners' default in ship building contracts
- Increase in instances of owners not taking delivery of completed ships
- Too many ships chasing too few cargo

## Distinction between *lex causae* and *lex fori*

**LEX CAUSAE:** Law applicable to the substance of the dispute

sometimes referred to as:

- the substantive law,
- the governing law, or
- the proper law of a contract

**LEX FORI:** Law of the forum for the adjudication of the dispute

sometimes referred to as:

- the procedural law

- Generally stipulated as the governing law in a contract
- If dispute does not relate to contract or contract is silent as to the governing law, then the law of the jurisdiction having the closest connection with the dispute or the contract

- Applies to the interpretation and validity of underlying contract
  - Formalities for formation of contract
  - Vitiating factors – Duress, Mistake, Misrepresentation
- Applies to determination of existence of legal causes of action
  - Extent of duty of care
  - Whether contract term is a condition or warranty
    - Eg Failure to berth vessel within narrowed laycan
- Applies to determination of merits of matter in dispute
  - whether perils of the sea existed
  - Limitation and exclusion of liability under bills of lading

## LAW OF THE FORUM

- determined by place where dispute is to be adjudicated

## MATTERS AFFECTED BY LEX FORI:

- whether claimant can arrest the vessel in respect of which the claim arose
- whether a vessel is a sister vessel that may be arrested
- Priority of different maritime claims
- Whether the claim attaches a maritime lien on the vessel
- Time bar
- Amount of shipowners' limitation of liability for maritime claims pursuant to Conventions
- Rules of evidence

## Basic Facts

1 Feb 2009: Goodwill Shipyard in Singapore was instructed to repair vessel “ANGEL” of Panama flag by owner Angel Shipping Inc, and Goodwill Shipyard commenced repair

20 Feb 2009: Angel Shipping Inc sold the vessel “ANGEL” to Angel 2 Shipping Inc, and vessel remains with Panama Ship registry, without the knowledge of Goodwill Shipyard

26 Feb 2009: Goodwill Shipyard completed repair of vessel “ANGEL” and requested payment from Angel Shipping Inc

28 Feb 2009: Angel 2 Shipping Inc caused vessel “ANGEL” to sail away from Goodwill Shipyard and left Singapore, without the knowledge or permission of Goodwill Shipyard, and without payment to Goodwill Shipyard

5 May 2009: Vessel “ANGEL” (under the ownership of Angel 2 Shipping Inc and flying Panama flag) returned to Singapore to take bunkers

### **QUESTION:**

**Can Goodwill Shipyard arrest the vessel “ANGEL” in Singapore on 5 May 2009 to obtain security for its claim for repair charges?**

### Claim for ship repair charges is a maritime claim under Singapore law

- Goodwill Shipyard can arrest the vessel “ANGEL” if her owner on 5 May 2009 is still Angel Shipping Inc
- Goodwill Shipyard can also arrest any other vessel belonging to Angel Shipping Inc as at 5 May 2009

Goodwill Shipyard cannot arrest the vessel “ANGEL” on 5 May 2009 in Singapore because her owner as at 5 May 2009 was Angel 2 Shipping Inc

**UNLESS**

Goodwill Shipyard has issued an Admiralty Writ in Rem in the Singapore Court before the change of ownership of the vessel “ANGEL”

Is the claim of Goodwill Shipyard against the vessel “ANGEL” for the recovery of repair charges hopelessly doomed to fail?

## Panama

Under the laws of Panama, a claim for repair charges attaches a maritime lien on the vessel which will survive the change of ownership

## South Korea

Under the laws of South Korea, the law of the flag of the vessel determines if a claimant has the legal right to arrest the vessel.

## FORUM SHOPPING FOR INTERNATIONAL MARITIME DISPUTES

- Pre-selection of forum and mode of dispute resolution for maritime disputes
  - Charterparties
  - Bills of lading
  
- Selection of forum for adjudication of maritime dispute after event
  - Fire
  - Collision



WHETHER THERE IS AN OPPORTUNITY TO DECIDE MODE OF DISPUTE RESOLUTION



# Shipowner's limitation of liability

- for maritime claims



- Limitation based on tonnage of offending vessel
- Limitation of shipowner's liability for all claims arising from one distinct occasion
- Amount of limitation depends on which convention is applicable

Convention on limitation of liability for maritime claims 1979  
(Lower amount of limitation)

- Singapore, India, Hong Kong

CLLMC – Protocol of 1996 (Higher amount of limitation)

- Malaysia, Australia, UK

- IMPACT OF LAW OF FORUM
- IMPACT OF LEGAL CULTURE



# Common Observation concerning Chinese Arbitration



- Oral testimony
  - generally assumed to be unreliable
- Heavy reliance on documentary evidence
- Disclosure of documents in discovery
  - almost non existent
- Cross examination of witness
  - almost non existent
  - regarded as culturally offensive
- Most common legal issue
  - that disputed contract was not signed by an authorised person

## PRINCIPAL FEATURES OF ARBITRATION

- Party Autonomy
- Neutrality
- Confidentiality
- Enforcement of award outside of state where award is made

- Arbitration is a voluntary private agreement between the parties for the resolution of disputes.
- Subject to the laws of the forum, parties are generally at liberty to agree to the manner in which they wish the resolution of disputes should be conducted.



## Parties are at liberty to agree on:

- (1) Scope of arbitration agreement
- (2) Place of arbitration
- (3) Governing law of contract
- (4) Arbitral procedure
- (5) Number/qualification of arbitrators
- (6) Powers granted to the arbitral tribunal
- (7) Whether award is subject to appeal
- (8) Nature of representation

**Parties can agree that arbitral award shall be final and not subject to appeal or review by court.**

However, right of appeal to court or review by court may be affected by:

- local law of seat of arbitration
- attitude of local judiciary at the seat of arbitration.



In Malaysia, under the 1952 Arbitration Act, an arbitral award may be set aside by the court on the following grounds:

- Award is bad on its face
- Misconduct by arbitrator
- Admitted mistake in award by arbitrator
- Acquisition of fresh evidence after making of award



Decisions of Malaysian Court on recourse against awards are disturbing:

“The Malaysian Court held that an award is bad on its face when a written contract refers to start of commissioning on 1 November 1994 and the arbitrators accepted oral evidence that commissioning started on 1 November 1995.”

The Govt. of India v Cairn Energy India Pty Ltd [2003] 1 MLJ 348

“The Malaysian Court held that an award may be set aside for misconduct if the arbitrators fail to properly analyse and appraise material and relevant evidence”

Future Heritage Sdn Bhd v Intelek Timur Sdn Bhd [2003] 1 MLJ 49

In arbitration, parties are generally at liberty (subject to the law of the seat of arbitration) to appoint representatives of their choice

- No restriction on foreign lawyers
- No need to appoint a new set of local lawyers
- No restriction on professional consultants / claim adjusters / in house lawyers



Important where parties are from different countries

- Neutrality of seat of arbitration
- Neutrality of arbitrators



Arbitration proceedings are by its nature private and hearings are held in private

**A party to an arbitration may not disclose evidence or documents produced in an arbitration without the consent of the other party to the arbitration.**

A party to an arbitration may not disclose the existence of the arbitration proceedings without the express consent of the other party to the arbitration unless required by law



In litigation, the hearings are generally held in public.

- The press is generally at liberty to report on the existence of the litigation, the identity of the parties, the nature of the claims and defences filed by the parties, the nature and content of the evidence submitted in court.

# Enforcement of Award

– Outside of state where award is made



## Key advantage of arbitration

- Enforceable in 144 signatory states of the New York Convention
- Upon registration – award enforceable as a judgment of local court of signatory state
- Local court of signatory state where registration of award is sought – not to re-examine merit of decision

# Enforcement of Award

– Outside of state where award is made



## COMMON GROUNDS FOR REFUSAL

- Contrary to public policy
  - Breach of rules of natural justice
  - Contrary to public morality / value
- Lack of mutuality



## YUKOS CAPITAL S.A.R.L. V ROSNEFT

- 4 loan agreements provides for ICC arbitration in Moscow
- Tribunal rendered awards in favour of Yukos Capital
- Awards were set aside by court in Moscow on application of Rosneft
- Notwithstanding setting aside, Yukos Capital sought recognition and enforcement of awards in the Netherlands

### Amsterdam Court of Appeal (28 April 2009):

That in cases involving Yukos the Russian Courts are unlikely to be sufficiently independent of the State and to uphold a Russian court judgment in such circumstances would be contrary to Dutch public policy

# Key statistics

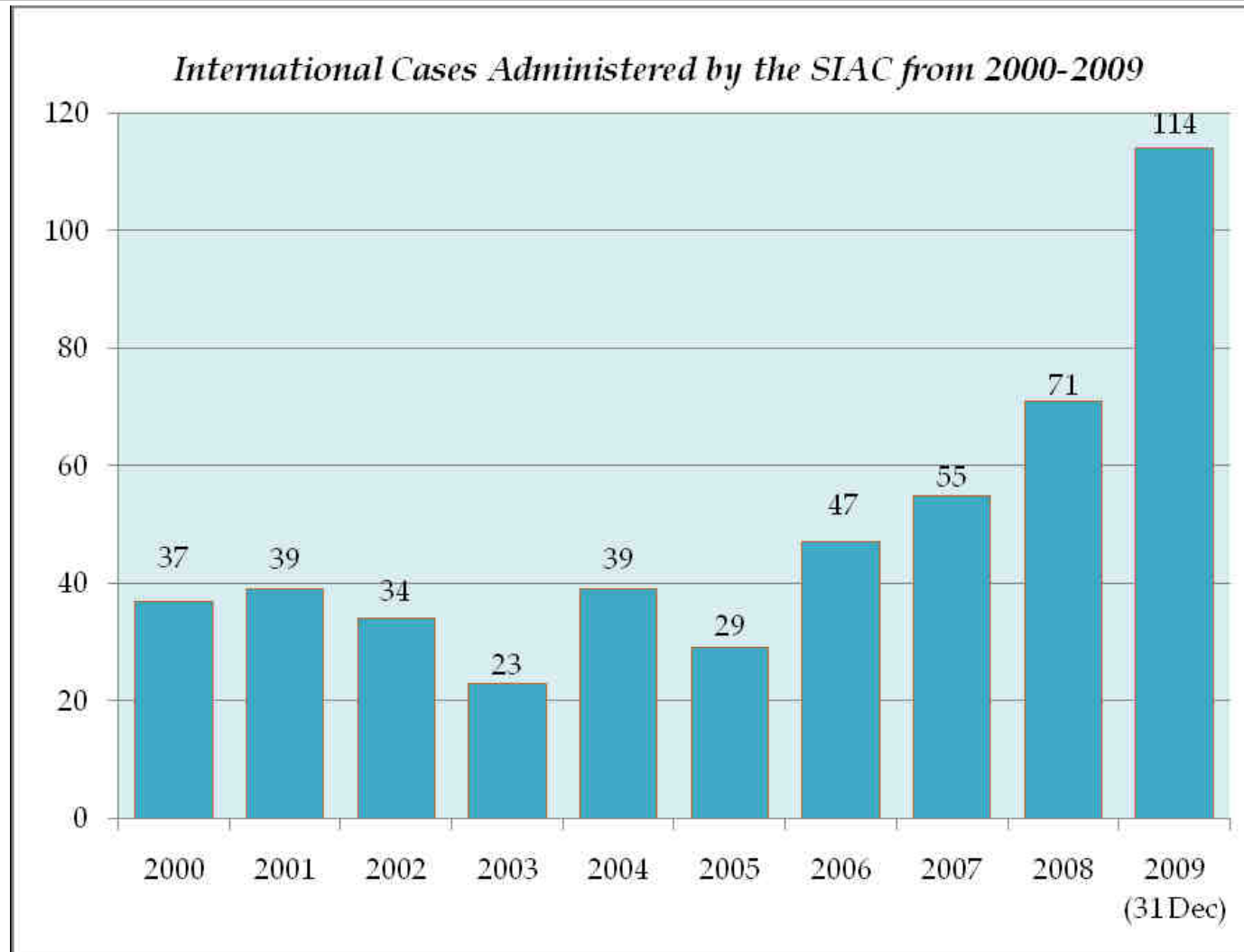
## - Major Arbitral Institutions



NUMBER OF <i>INTERNATIONAL CASES ADMINISTERED</i> BY ARBITRAL INSTITUTIONS										
Arbitral Institution	Yr 2000	Yr 2001	Yr 2002	Yr 2003	Yr 2004	Yr 2005	Yr 2006	Yr 2007	Yr 2008	Yr 2009
AAA-ICDR (USA)	510	649	672	646	614	580	586	621	703	836
ICC <sup>^</sup>	541	566	593	580	561	521	593	599	663	817
CIETAC (China)	543	562	468	422	461	427	442	429	548	560
LCIA (UK)	87	71	88	104	87	118	133	137	213	272
SIAC (Singapore)	41	44	38	35	48	45	65	70	71	114
BAC (China)	11	20	19	33	30	53	53	37	59	72
JCAA (Japan)	8	16	8	14	15	9	11	15	12	17
SCC (Sweden)	66	68	50	77	45	53	64	81	74	#
KCAB (South Korea)	40	65	47	38	46	53	47	59	47	#
KLRC (Malaysia)	20	3	3	5	3	7	1	2	8	#
PDRC (Philippines)	0	1	2	0	0	0	1	1	0	#
VIAC (Vietnam)	23	16	19	16	32	22	23	21	#	#
BCICAC (Canada)	3	4	4	4	4	2	5	3	#	#
HKIAC* (China)	NA	NA	NA	NA	NA	NA	NA	NA	#	#

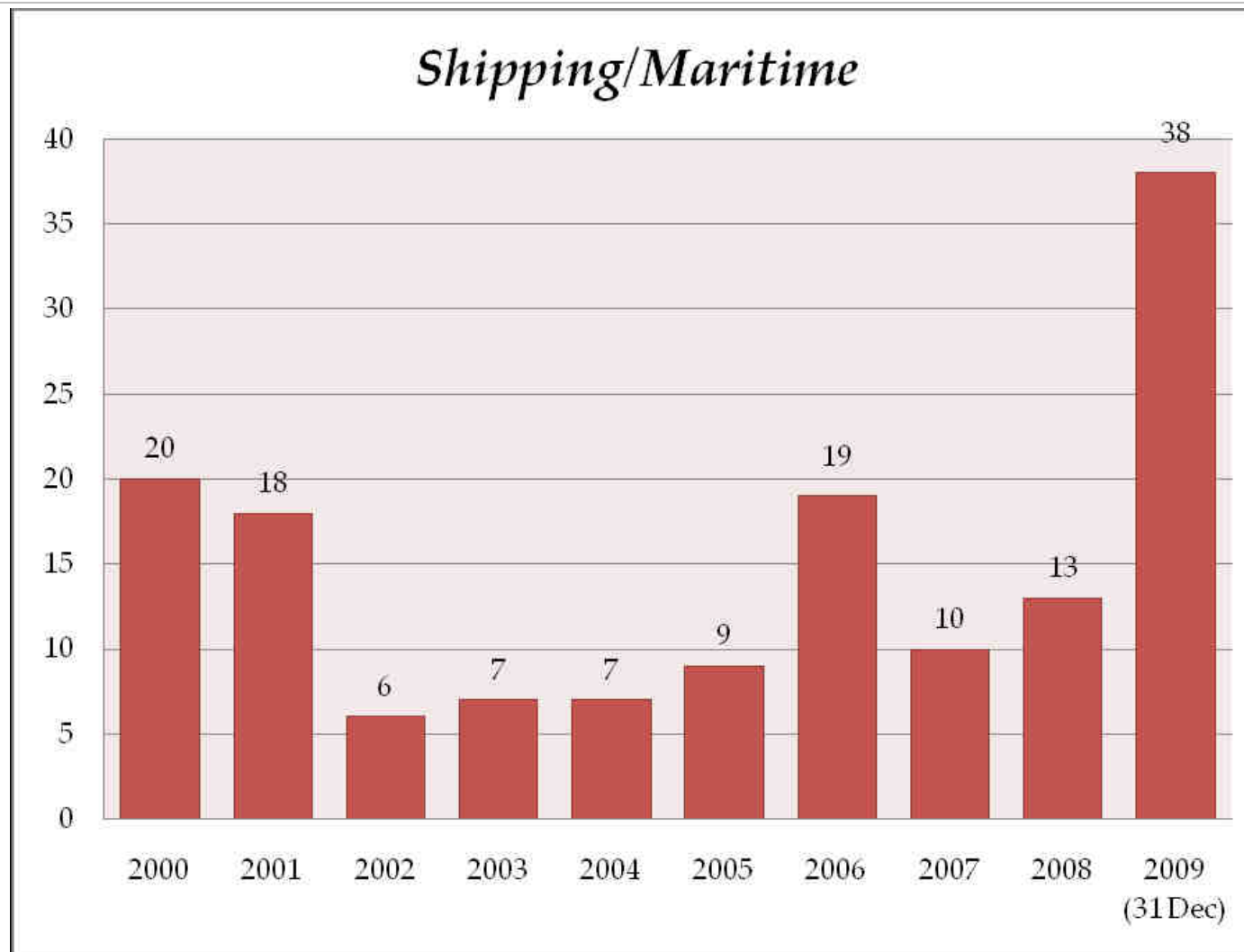
Source: SIAC

# International Arbitration Cases administered by SIAC



Source: SIAC

# Maritime Arbitration Cases administered by SIAC



Source: SIAC

# Comparison of Fees of Arbitrators (US\$)

- for a single arbitrator



Amt in Dispute	SIAC (Maximum)	ICC (Maximum)	HKIAC (Maximum)	KLRCA (Maximum)
100,000	9,428	14,900	12,000	5,500
500,000	29,285	41,500	32,000	13,500
1,000,000	43,571	60,500	45,000	18,500
4,000,000	75,714	120,500	73,000	41,500
10,000,000	98,571	176,000	100,000	56,500
25,000,000	136,071	209,750	130,000	79,000
100,000,000	212,142	332,000	246,000	156,500

**Thank You**



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