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The Role of Arbitration in Shipping Law

THE ROLE OF ARBITRATION IN SHIPPING LAW

Edited by

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OXFORD
UNIVERSITY PRESS

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UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

First Edition published in 2016

Impression: 1

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2016936871

ISBN 978–0–19–875794–8

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

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FOREWORD

Much of transnational commercial law evolved from maritime law, in particular through rules dealing with cargo claims, the transfer of goods while afloat, the localization of payment through the development of precursors of the modern banking system, and marine insurance and joint ventures. From time to time, practices were embodied in codes such as the Rhodian Sea Laws, the Rolls of Oléron, and the Consulate of the Sea. In England in the time of Elizabeth I the government strongly favoured arbitration as the means of dispute resolution, preferring to have disputes resolved by panels of experienced merchants rather than by the common law judges. The international character of shipping law, with its emphasis on commercial usage as the foundation of the mediaeval *lex mercatoria*, has always made arbitration a particularly suitable means of resolving shipping disputes.

This new work, skilfully edited by Professor Loukas Mistelis and Dr Miriam Goldby of the Centre for Commercial Law Studies, Queen Mary University of London, who have also contributed to it, is based on papers presented at the inaugural International Shipping Law Roundtable organized by the CCLS in 2014. *The Role of Arbitration in Shipping Law* provides a rich harvest of ideas from leading scholars and practitioners around the globe. It is a matter for regret that—in contrast, for example, to ICSID awards on investment disputes—most awards in shipping arbitrations remain unpublished. Papers such as those contained in this book therefore perform an invaluable service in revealing the thinking and experience of those involved in shipping arbitrations.

As these essays show, debate continues to rage over the nature, and even the existence, of a modern delocalized *lex mercatoria* and, as a subset, a *lex maritima*, a subject of never-ending fascination both to academics and to practitioners and one which features in several of the papers. But this is only part of the rich bill of fare we are offered. One of the many strengths of this book is its combination of rigorous theoretical analysis with attention to highly practical issues, such as the impact on national law of a substantial reduction in recourse to the courts and the use of private law-making techniques and standard-term contracts; the factors influencing the choice of seat; and arbitration under the Rotterdam Rules.

This is a book which should be widely welcomed by all those involved in shipping arbitration, providing an invaluable reference point for modern thinking on the resolution of maritime disputes.

Roy Goode
Oxford
11 March 2016

PREFACE

The rules governing shipping developed transnationally over a number of centuries. They are in the main non-state in derivation, originating in the agreements, practices and usages of the mercantile community. Historically, transnational norms relating to shipping were absorbed into domestic laws through legislative processes, and/or, in the case of the common law, through judicial decision-making. Thus as nation states emerged as the primary agents of law-making and law-enforcement, the shipping industry remained to a large extent self-governing and able to adapt the legal framework within which it operated to the demands of the times.

Today, arbitration has emerged as the dominant choice for resolving disputes in the world of shipping, with the establishment of maritime arbitration centres in major cities such as London and New York. At the same time, the immense advances that have been made and continue to be made in engineering, technology and communications have led to the emergence of innumerable new standard agreements, trade practices, common understandings and usages within the framework of which goods are carried by sea across the world, but which, in view of the widespread use of private and confidential processes for the resolution of disputes, may be invisible to and unrecognized by domestic laws.

This state of affairs led to the questions explored in this book, namely, what are the implications of widespread use of arbitration for the continued development of shipping law? Are national laws on shipping destined to become ossified and obsolete? Is a new *lex maritima* emerging? And would it be beneficial to introduce a system of 'soft precedent' in maritime arbitration to bring emerging rules to light?

The research that ultimately led to the writing of this book developed from the Centre for Commercial Law Studies' inaugural International Shipping Law Roundtable held at the Baltic Exchange in 2014. Thus we owe a debt of gratitude to many people who participated in and contributed to the organization of this event. First among them are the event's sponsors, the Baltic Exchange, Oxford University Press and 20 Essex Street Chambers, to whom we are extremely grateful for their generous support. In particular, Jeremy Penn at the Baltic Exchange, Rachel Holt and Faye Mousley at OUP and Sir Bernard Rix and Marie Sparkes at 20 Essex Street were unstinting in their support and encouragement. We would also like to thank all of the speakers at the event, including those who, for various reasons were unable to develop their conference contribution into a chapter for this book. They include Tomotaka Fujita, David Martin-Clarke, Jan Ramberg and Alexander Von

Ziegler. We would also like to thank Katherine Zaim and Vivian Marangoni, the Events Team at CCLS, and Jill Bradford at the Baltic Exchange, who provided us with invaluable organizational support for the event.

In addition to contributors who spoke at the event, we are also very lucky to be able to add to the list of contributors to this book, Leng Sun Chan, Yu Guo, John D. Kimball, Annika Klopp and Michael Sturley.

Finally, we are extremely grateful to Jamie Berezin at OUP and Jeevitha Sivasankaran at Newgen KnowledgeWorks for their understanding, patience and assistance.

Miriam Goldby and Loukas Mistelis
Centre for Commercial Law Studies, Queen Mary, University of London
May 2016

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Clare Ambrose is a barrister and arbitrator practising from 20 Essex Street in commercial law with particular emphasis on international trade, embracing shipping, commodities, energy, insurance, and banking. She has appeared before the High Court, Court of Appeal and arbitral tribunals, including LMAA, LCIA, ICC, and UNCITRAL tribunals. In recent years, Clare has acquired extensive experience as a commercial arbitrator, with more than seventy appointments in international arbitrations. She frequently lectures on arbitration and is author of *London Maritime Arbitration* (4th edn, forthcoming).

Professor Yvonne Baatz obtained a first class degree at the Oxford University before qualifying as a solicitor with Clifford Chance (formerly Coward Chance). She practised in the field of shipping litigation before she moved to academia in 1991 and has been at the University of Southampton, where she is Professor of Maritime Law. She served as Director of the Institute of Maritime Law from 2003 to 2006. Yvonne publishes widely on the topics of arbitration, conflict of laws, carriage of goods by sea, and marine insurance. She edits *Maritime Law*, now in its third edition, and has contributed the chapters on conflict of laws and charter parties.

Professor Olivier Cachard graduated in 1997 from Université Paris Panthéon-Assas, where in 2001, he obtained his PhD cum laude for his doctoral thesis. After his success at the agrégation de droit privé, he was appointed Tenured Professor of Law at the Faculty of Law of Nancy in 2003, where he is Emeritus Dean of the Faculty of Law, Head of the International and European Business Law program, and Head of the IDIC-Institute François Geny. He lectures in International Arbitration Law, Admiralty and Transportation Law, and Conflict of Laws. He is an active arbitrator in international commercial disputes and in admiralty law

disputes. He takes regular appointments as an arbitrator under the ICC Rules and under those of the Chambre Arbitrale Maritime de Paris. He is a member of the board of the Association française de droit maritime and a member of the Maritime Cluster of Luxembourg. In the English language, he has recently published *Luxembourg Maritime Code* (Editions larcier-Promoculture, 2014) and 'Maritime Arbitration under the ICC Rules of Arbitration', *ICC International Court of Arbitration Bulletin* (2011) 22(1). In the French language he has published casebooks in *International Private Law* (2014) and *International Trade Law* (2011).

Professor Gralf-Peter Calliess holds the chair of Private Law, Comparative and International Economic Law, and Legal Theory and is Director of the Centre for Transnational Studies at the University of Bremen. His research focuses on transnational commercial law and dispute resolution, including maritime law. With Peer Zumbansen, he co-authored *Rough Consensus and Running Code. A Theory of Transnational Private Law* (Hart, 2010). He is editor of *Rome Regulations. Commentary* (2nd edn, Wolters Kluwer, 2015).

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Dr Miriam Goldby is Senior Lecturer in Shipping, Insurance, and Commercial Law at the Centre for Commercial Law Studies (CCLS) at Queen Mary University of London (QMUL), Director of the Centre's LLM in International Shipping Law in London, of its Dual LLM in Commercial Law (Singapore and London) offered in association with Singapore Management University, and of its MA in Law by Research. She is also Deputy Director of the Centre's Insurance Law Institute. Prior to joining Queen Mary, Miriam conducted research as a Visiting Scholar at George Washington University in Washington, DC, USA. Between September 2007 and December 2010, she held a lectureship post at the University of Surrey, where she taught Contract Law, Commercial Law, and Banking Law. She read for her PhD degree at University College London, where she also held the post of teaching fellow between January 2004 and August 2007, and taught on the LLM Banking Law and LLM International Trade Law courses. She has published extensively on various areas of commercial and financial law. Since November 2012, she has participated in the work of UNCITRAL's Working Group IV (Electronic Commerce) as delegate and as a member of the Experts Group and contributed to the drafting of an instrument on Electronic Transferable Records.

Dr Yu Guo is an Associate Professor and Director of the Maritime Law Research Centre of Beijing University. She obtained her master's degree from Shanghai Maritime University, PhD from Beijing University, and LLM from Cambridge University. She joined the faculty at the Law School of Beijing University, where she has taught since 1996. Her main research interests are in the fields of maritime law and international commercial law. Dr Guo is the author of numerous titles, including: *A Study on the Bill of Lading* (1997), *The Law of International Sale of Goods* (1999), *The Law of International Economic Organization* (1999), *Carriage of Goods by Sea* (2000), and *The Spirit of Maritime Law: Theory and Practice in China* (2006). She is also the Editor-in-Chief for *Maritime Law Research*, a quarterly periodical published in Chinese.

John D. Kimball is a partner of Blank Rome LLP, an international law firm, where he co-chairs the Maritime and International Trade Practice Group. Mr Kimball is also an Adjunct Professor at New York University School of Law. He is a co-author of *Voyage Charters* (4th edn, 2014); co-author of *Time Charters* (7th edn, 2014); co-author of *Benedict on Admiralty, The Law of Salvage*, Volume 3A (2015); and has authored numerous other publications. Mr Kimball also serves on the Editorial Board of the *Journal of Maritime Law & Commerce*.

Annika Klopp is research assistant at the chair of Professor Gralf-Peter Calliess at the Centre for Transnational Studies at the University of Bremen.

Jonathan Lux decided to specialize independently in Mediation after a career with Ince & Co, where he was latterly Senior Partner. He was subsequently called to the Bar and joined Chambers in 2013. He is one of the founder members of CEDR, has lectured widely and written numerous articles on the subject of mediation, and is co-author of *ADR and Commercial Disputes*. Jonathan was awarded Global Shipping & Maritime Lawyer of the Year for both 2010 and 2011 by *Who's Who Legal*. In December 2011, he featured in Lloyd's List of Top Ten Legal Personalities and was a finalist for the Lloyd's List Global Shipping & Maritime Lawyer of the Year award 2012. In 2015, Jonathan was elected titulary member of the CMI. He is also fully accredited by and a member of the International Mediation Institute, and has received regular appointments as Arbitrator and Mediator both in relation to maritime disputes and international commercial law disputes more widely.

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Professor Loukas Mistelis is an acknowledged authority on international dispute resolution. In 2006 he was listed as one of the 'leading lights in international arbitration', has been listed on the *Who's Who Commercial Arbitration* since 2007, and is also a member of the ICSID Panel of Arbitrators and recipient of the GAR Award for best arbitration lecture of 2013. He is the Clive M. Schmitthoff Professor of Transnational Commercial Law and Arbitration and Director, School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London. He is a member of the Academic Committee of the Institute of Transnational Arbitration, an academic member of the Investment Treaty Forum, a member of the Advisory Board of the EFILA, a member of the Academic Committee of AIPN, Chair of Academic Committee of the Civil Mediation Council, and President of the Court of CEDRAC (Cyprus Eurasia Dispute Resolution and Arbitration Centre). Professor Mistelis was educated in Greece, France, Germany, and Japan. He has been a member of the Athens Bar since 1993. He is fluent in English, German, and Greek, and has good knowledge of French, and basic knowledge of Polish, Russian, and Spanish. His substantial arbitration experience includes more than sixty-five arbitrations and covers ad hoc and ICC, ICSID, LCIA, LMAA, UNCITRAL, SCC, Swiss Chambers, and Moscow cases. His publications include seventy-five referred articles and thirteen books.

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