MARITIME MEDIATION

ROBERTA MOURÃO DONATO

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More information on eeagrants.gov.pt.

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Contacts:
medimare@uc.pt
https://medimare.eu/

Graphic Design and Layout
Ana Paula Silva
apsilva.design@gmail.com

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ROBERTA MOURÃO DONATO

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Roberta Mourão Donato is a PhD Candidate in Business Law at the Faculty of Law of the University of Coimbra and a Collaborative Researcher at the University of Coimbra Institute for Legal Research (Portugal). Scholarship holder on the MediMARE Project (Mediation in Maritime Affairs). Roberta holds an LL.M. in International Legal Studies from Georgetown Law (USA), a Master of Arts in International Affairs from Ohio University (USA), a Bachelor of Laws from Milton Campos (Brazil) and a Bachelor of Business with an emphasis in Foreign Trade from Centro Universitário Una (Brazil). Her previous positions include working as a Professor of International Law, International Private Law, and International Business, coordinating the Law Course and the Legal Clinic at Centro Universitário Una, where she implemented a mediation program in conjunction with Tribunal de Justiça de Minas Gerais and has organized numerous academic and scientific events. She has had experience as an in-house and as an attorney, being legally admitted to practice law in Brazil, New York and Portugal.

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SUMMARY

INTRODUCTION

Maritime Mediation is an area under development. Maritime disputes have an intrinsic international nature, as we will see, and most of its actors have long used arbitration as their preferred method of solving disputes. Lately, this reality is changing, and mediation is becoming a common form of conflict-solving. This work intends to frame maritime disputes, understand their classifications, actors and the most common types of conflicts. It will also differentiate the appropriate dispute resolution means, comparing mediation to arbitration and litigation, highlighting its benefits. We discuss how mediation is evolving and evidencing it through the development of maritime mediation associations, clauses, and rules. Examples of cases in which one could use maritime mediation, as well as their classification according to the taxonomy developed in the MediMARE Project is in Chapter Three. In the annex, we present a maritime mediation glossary and important links one can access to deepen their studies in specific areas of maritime mediation.

This book was elaborated in the Mediation in Maritime Affairs MediMARE Project framework. The MediMARE Project is a project that aimed to research the perception of the importance of mediation for consensus-oriented conflict management in maritime disputes, and, with this input, produced several outcomes. This book is one of them. Other outcomes were an interview report, a taxonomy for maritime disputes, an online course on maritime mediation, an intensive training on maritime mediation, several workshops with specialists in mediation and in the maritime area, papers developed and presented by the project team, a maritime mediation curriculum and a Final Symposium, in which there was also an international call for papers.

The project (PT-INNOVATION-0065) was funded by the EEA Grants, which is an agreement between European Union, Iceland, Liechtenstein, and Norway. It had four partners: among which three were Portuguese: the University of Coimbra Institute for Legal Research (UCILeR), the Polytechnic of Leiria, MARE Nova University, and one was Norwegian: NTNU Social Research. The project's leadership was under the responsibility of Professor Doctor Dulce Lopes from the University of Coimbra Institute for Legal Research (UCILeR). The project had a duration of fourteen months. All the outcomes are available on the project's webpage, which we invite you to visit at medimare.uc.pt.

This writing intends on being a brief introductory contribution to the field. It has been a great opportunity and honor to be a part of this project and work on advancing an area that is of great importance and in need of more development. I am very grateful for having participated in it. I greatly thank Professor Dulce Lopes for the incentives, the lifelong learning process lived during these months and the friendship and care, as well as for the orientation and detailed review of this book. To all the project partners I have most interacted with, Professors Catia Marques Cebola, Maria José Capelo, Fernando Borges, Lia Vasconcelos, Kristine Størkersen, Torgeir Haavik, Stian Antonsen, Silvia Nolan, João Costa e Silva and my colleagues Niedja Santos, Luiza Barbosa, Ana Paula Alves and Francisco Libreiro, it was an honor working with you all. To Ana Paula Silva, thank you for the graphic design and layout work.

To my family, thank you for the love and care. You are my world. My special thanks to my husband, Pedro and my parents, Jorge, and Paula, for always being there for me.

CHAPTER 1

INTRODUCTION TO MARITIME CONFLICTS

1.1 Maritime conflicts

To initiate the study of maritime conflicts, it is essential to understand what is included in this concept. Maritime disputes are those that have one common point: the oceans and, more broadly, the seas.

Maritime conflicts have an intrinsic international nature. Commercial, State, labor and civil relations happen on the seas, and this is what we will clarify in this chapter (criminal issues are beyond the scope of this book). What kind of relationships are included as maritime relationships and the concept of maritime conflicts is the central theme of this chapter.

Given that most of the international trade of goods is made through maritime transportation means, crossing borders of two or more States, the nature of such disputes is inherently international. This increases the perspective of analysis since it is necessary to understand the nature of such relationship, the legislation applicable to it, and what jurisdiction would be bound to solve emerging conflicts. When a conflict is international, there are more matters to be analyzed than when it is a domestic situation. In a domestic situation, it is presumably known to be applied the legislation of the State where the parties are located, and if needed, request that State's jurisdiction to decide on possible conflicts.

The network of international transportation is made through several international contracts, and as in what happens eventually in relationships, commercial or not, conflicts may rise. Disputes that may be caused by contractual disagreements due to misunderstandings, lack of performance, misinterpretation of what one party understood as given and the other interpreted differently regarding the same agreement, or even confusion as to what is the applicable legislation. Conflicts may also be caused by accidents and incidents in the ocean and at the Port, such as Collisions. Even minor incidents may give rise to substantial disputes.

These could be contracts related to the chartering of ships, the international transportation of goods, cargo damage, vessel expenses, crew relations, provision of services to maintain the vessel running efficiently and even unexpected situations, such as general average.

There can also be conflicts related to the continuous flow of vessels and ships across the oceans and alongside coasts. Also, other conflicts deriving from the relationship of States with the ocean, such as disputes for boundaries, fishing quotas, and recreational relationships.

In the vessels and ocean platforms, there are several workers, and labor relationships may lead to labor and disciplinary disagreements, incidents related to workplace conditions, conflicts associated with the prolonged time workers spend at sea, disputes related to discriminatory practices and harassment, as well as to *force majeure* events (as we have recently saw with the workers who were not able to leave the vessels where they worked due to contingencies related to the COVID-19 Pandemic, the illness itself, lack of vaccination, fear of contamination, among others). Imagine hundreds of workers in a confined area (the vessel or platform) for several days, weeks or even months…

Also, there are situations related to the safety management of the crew and the cargo.

The sea enables the earning of the livelihood of several persons. Fishing and extracting marine resources are very profitable and can be labor intensive. This may lead to conflicts due to domain interests, environmental disturbances, and the discussion regarding fishing quotas.

Pollution is also a vast area of concern, and the debate regarding how to diminish pollution and its implications has been developing in the past decades. Shipwrecks, pollution due to transport, leaking fuel, emissions or dangerous cargoes, and the materials used to fabricate ships are just some of the main concerns. In a more general manner, environmental incidents can lead to intense conflicts that may include several States and communities' interests.

Seismic and natural activities and weather-related incidents may damage ships and maritime properties. Salvage at sea is also another critical area due to the costs involved to prevent disasters of other vessels, and save persons and cargo. The compensation of the rescuer is legally and customarily foreseen.

Also, the sea is used as a scaping route for migrants. Mainly the Mediterranean Sea is used by many migrants willing to escape the dangerous conditions they live in, thus searching for better life conditions. Conflicts in this area may be regarding the rescue of such immigrants and how it impacts commercial and civil obligations.

All these conflicts have the seas as a common point and thus are classified as maritime conflicts. We will classify these conflicts into private, public or of mixed nature. This classification is presented as maritime law is a very multifaceted area, and, as one can see, it encompasses private and public matters involving different domestic and international legislation due to its international character.

But first, an introduction is needed regarding the actors involved in maritime conflicts. These are the natural or legal persons who are part of the relationships and situations described above (examples will follow in Chapter 3, with possible cases that could be solved by maritime mediation).

There are several actors involved in the maritime conflicts. Legal and natural persons are mingled in different types of relationships in the maritime sector, which may include acting in commercial vessels (shipping), fishing vessels, aquaculture, salvage, oil platforms bunkers, cruise ships, and small leisure boats, among others.

Ship owners, ship operators, traders and cargo owners are the parties involved in chartering contracts. Crewmembers (and their representatives, trade unions) who are responsible for operating, maintaining, cleaning, and providing all the necessary conditions for the vessel to travel. On land, there are insurers, banks and classification societies to provide financial support to the operations. The P&I clubs are included as critical actors in the maritime area, as they provide guarantees to maritime operators.

One could also add passengers, the public, associations, and non-governmental associations. The first ones use the ships, and the latter regulates the maritime activities through *lex mercatoria* means, or they are the ones to demand the fulfillment of their obligations prescribed by law.

Finally, the States and, in some situations the international organizations, such as the European Union, emerge as very relevant actors in the maritime field since they legislate on the use of maritime resources, as well as because they scrutinize compliance with their regulations by private actors and allow (or do not allow) for specific activities (in some cases new activities, such as hydropower facilities) to take place at sea. Thus, these public entities are very relevant actors in the maritime field and could be involved in the disputes either by omitting to enforce the applicable regulations (so, by omission) or by authorizing the practice of dangerous activity which could lead to environmental damage (therefore, by commission)[1].

a. Public conflicts

Public conflicts are the ones that involve States and International Organizations[2]. Due to the international and public nature of the conflicts, as well as the involvement of international public parties, we classify these conflicts as public conflicts. Also public are the legal instruments that are provided for the resolution of such conflicts.

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[1] These concepts were first introduced in chapter three of the MediMARE Maritime Mediation Online Course (LOPES, Dulce and DONATO, Roberta Mourão. **Module 03- Maritime Disputes as a Field for Mediation** in MediMARE Online Course. University of Coimbra Distance Learning Unit, 2023).

[2] It is important to note that the MediMARE Project's definition of Maritime law was very broad, not circumscribed to the Law of the Sea or Commercial Maritime Law. As we have studied conflicts that were part of several different areas, the preferred form was to use maritime law as the area of law relating to conflicts that happened, having acts and facts connected to the ocean and the seas as a common point. One of them would be shipping law, which is a term used to reflect the private operations on maritime law, since this term also refers to the public side of it. ROGERS, Anthony, CHUAH, Jason & DOCKRAY, Martin. **Cases and materials on the carriage of goods by sea**. Fifth edition. London and New York: Routledge Taylor & French Group, 2020.

Public conflicts which relate to conflicts that are solely composed by States or International Organizations are not the subject of our studies, although we understand it is essential to include them in this classification for it to be completed and for one to understand the different types of maritime conflicts that may exist. Public maritime conflicts will not be addressed in the MediMARE Project since they happen in a diverse framework.

In its Article 33, the United Nations Charter addresses possible means of peacefully solving disputes. There is an understanding that disagreements must be solved since disputes may, if continue, "endanger the maintenance of international peace and security". Article 33 expressly refers to negotiation, mediation, conciliation, and arbitration (among others) as means of dispute resolution. The United Nations Charter is the general framework, and, specifically within the maritime law area, the United Nations Convention on the Law of the Sea (UNCLOS) is the treaty that regulates the boundaries of maritime areas among States, establishing important concepts, such as territorial sea, contiguous zone, exclusive economic zone, and the right of innocent transit. It intends to harmonize matters related to the boundaries and types of activities that may be performed in each area. All very important for peaceful navigation and the economic use and exploitation of the ocean, which, in some cases, is the basis of the whole State's economy.

UNCLOS has been ratified by 168 parties, including, for example, the countries of the European Union, United Kingdom, Brazil, Norway, Angola, Ghana, Singapore and Korea. Please check here for a list of countries that have ratified the convention and, thus, have the convention is in force.

In Article 279 of UNCLOS, there is a determination of a system of peaceful conflict resolution, through which the States must solve their conflicts, restore their relationships, and prevent future disputes. Article 279 of UNCLOS determines the States must settle disputes peacefully and thus refers to Article 33 of the United Nations Charter, indicating, therefore, mediation as one of its conflict resolution means.

Examples of public conflict resolution through mediation may be found since they are publicized in the news. A very successful mediation was conducted by the Vatican as a mediator. This mediation was concluded in 1984 in a conflict between Argentina and Chile and regarded a dispute over Cape Horn and the Beagle Channel Island. Another situation was the conflict between Israel and Lebanon regarding a maritime border dispute (reaching an area of 860 km2) which was recently mediated by the United States of America[3]. One more example of an unofficial mediation regards a conflict on the maritime border harbors of Kenya and Tanzania. Mediation has been used to sup-

[3] SVETLOVA, Ksenia. The Israel-Lebanon maritime deal is an example of successful US-led mediation. Can it be copy-pasted to other Middle Eastern arenas? **Atlantic Council**. October 28th, 2022. Available at https://www.atlanticcouncil.org/blogs/menasource/the-israel-lebanon-maritime-deal-is-an-example-of-successful-us-led-mediation-can-it-be-copy-pasted-to-other-middle-eastern-arenas/ Access on July 1st 2023.

port transboundary conservation, so it is important to prevent the degradation climate changes bring into the fisheries scenario[4].

b. Private conflicts

Private conflicts are the ones that have private actors as subjects and involve private parties in civil, commercial, and labor matters. Several international conventions regulate maritime issues (we exemplify them in annex two, for reference). We do not have examples of settlement agreements of private conflicts since they are confidential in nature and, thus, not publicized by the parties. Some international conventions expressly mention the need to mediate conflicts. So, it is important to mention the United Nations Convention on International Settlement of Disputes Resulting from Mediation (known and hereinafter referred to as the "Singapore Convention on Mediation"). In its article 1, the convention defines that it "applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreement") which, at the time of its conclusion, is international in that:

(a) At least two parties to the settlement agreement have their places of business in different States; or

(b) The State in which the parties to the settlement agreement have their places of business is different from either:

  (i) The State in which a substantial part of the obligations under the settlement agreement is performed; or

  (ii) The State with which the subject matter of the settlement agreement is most closely connected"[5].

Therefore, the Singapore Convention on Mediation applies only to international commercial or civil disputes. It cannot be applied to a mediation settlement agreement deriving from consumer, family, personal, inheritance or employment law (number 2 of Article 1). It does not apply to settlement agreements that have a mingled existence with arbitration or litigation procedure (per Article 1 number 3).

> Maritime private disputes are dominantly commercial. So, the Singapore Convention on Mediation could be applied in such frameworks, although there is national and European legislation supporting mediation settlement agreements as well (and

[4] TEFF SEKER, Yael et al. Do alternative dispute resolution (ADR) and Track two processes support transboundary marine conservation? Lessons from six case studies or maritime disputes. **Frontiers in Marine Science**. Vol 7, 30 November 2020. Available at https://sapientia.ualg.pt/handle/10400.1/14944.

[5] UNCITRAL. United Nations Convention on International Settlement of Disputes Resulting from Mediation. Article 1.

> within those legal frameworks, mediation would be accepted even in the exceptions of the Singapore Convention on Mediation)[6].

Some examples of private maritime conflicts for which we could apply mediation would be collision, contractual disagreements, breach of shipping contracts, general average, chartering contracts, insurance claims, disputes regarding bills of lading, and bunkers.

In recent years, the use of mediation has been growing. There are no statistics as to the number of mediation proceedings and settlement agreements as they are private and strictly confidential. Still, evidence of such growth is how recent maritime international conventions are using the term mediation as one of the forms of peaceful dispute resolution. The Hong Kong International Convention For The Safe And Environmentally Sound Recycling Of Ships, dated 2009, mentions, in Article 14, mediation as one of the means of peacefully solving disputes. The Nairobi International Convention on the Removal of Wrecks, dated 2007, also expressly mentions mediation as one of their means of solving disputes peacefully on its article 15. Note that these are international conventions directed to States, although, in the meaning we are analyzing them, international conventions from earlier dates do not always mention mediation expressly.

On the private side, evidence is the growing use on International Associations, such as the ICC, UNCITRAL, BIMCO, the LMAA and SMA. Also, they refer to mediation as an appropriate means through their Rules of Mediation and indicate for private parties to include on their contract's mediation clauses. Such associations have even updated their terms and are currently using the term mediation instead of other appropriate dispute resolution terms.

There is also an important European Directive, the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. In Article 1, number 2 of this Directive, it states that it applies:

> "in cross-border disputes, to civil and commercial matters except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)".

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[6] Such as regarding the Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast). The Regulation establishes, in its article 25, that "As early as possible and at any stage of the proceedings, the court either directly or, where appropriate, with the assistance of the Central Authorities, shall invite the parties to consider whether they are willing to engage in mediation or other means of alternative dispute resolution, unless this is contrary to the best interests of the child, it is not appropriate in the particular case or would unduly delay the proceedings".

A European Union Directive is an instrument used by the European Parliament, the Commission and the Council to coordinate and harmonize the internal law of the Member States. The States must achieve the goals listed in the Directive, with discretion to choose the format they will use internally and must therefore adopt internal measures to ensure the implementation of the Directive in the time frame it sets[7]. Directives are within one of the secondary sources of law of the European Union per Article 288 of the Treaty on the Functioning of the European Union and require implementation from Member States. Thus, it is possible to find some legislative differences regarding mediation between the Member States. Nevertheless, the legislative essence should be the same across the European Union, in the areas covered by the Directive.

The European Union Directive 2008/52/EC determines, in its article 2, that "For the purposes of this Directive a cross-border dispute shall be one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which:

(a) the parties agree to use mediation after the dispute has arisen;
(b) mediation is ordered by a court;
(c) an obligation to use mediation arises under national law; or
(d) for the purposes of Article 5 an invitation is made to the parties".

This directive applies to international maritime mediation since maritime disputes are primarily international and derive from civil or commercial matters, as in the private disputes.

In Portugal, the Directive was transposed by Law 29/2013, which frames the general regime on mediation. As it is possible through the Directive's implementation, Portugal has extended the spectrum of application of its law and applies its legislation to all mediation procedures, internal, cross-border or international, even the ones that are not related to civil or commercial matters[8] (differently than what is demanded by the Directive).

c. Mixed nature conflicts

The conflicts of a mixed nature are the ones involving either States or International organizations and private parties. The subject matter of these disputes is also mixed, and the conflict will have particular features since there is the involvement of a public party, usually related to the situation (as an authorizing or supervising authority), and private parties with several interests at stake.

Mixed nature cases have several particularities since the parties and interests involved are not solely private, including public parties and public interests. There are three

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[7] MACHADO, Jónatas E. M. **Direito da União Europeia**. 4th edition. Gestlegal. Coimbra, 2022.

[8] LOPES, Dulce and PATRÃO, Afonso. **Lei da Mediação Comentada**. 2nd edition. Coimbra: Almedina, 2016.

main concerns related to achieving full voluntariness in the participation of public entities and their representatives, the need for the mediator to respect and balance all parties and their respective interests in the mediation process and to have an equilibrium with confidentiality and transparency, due to the involvement of public interests in the process.

Example of mixed nature conflicts could be conflicts involving fisherman and their individual fishing quotas (which are State administered). The conflict could be as to how the quotas are allocated among fishermen. It could also involve other parties, such as fishing cooperatives and non-governmental organizations, interested in solving the conflict for the fisherman to have the most benefit within the possible quota levels as well as for maintaining sustainable fishing levels.

Another example would be the existence of a domain conflict in a legally protected area for the use of this maritime area for recreational purposes. The main concerns are the environmental consequences, which will involve non-governmental organizations. The State will be entangled as regulator of those areas, as well as the private parties who have invested in them.

1.2 Sources of international maritime law and leading organizations

International maritime law relates to maritime transportation and several other activities which are inherently international, having international connecting elements, such as foreign parties from different States, place of signature, of execution of contract, an incident happening overseas, different sites of loading and of discharge, the different nationalities from the ship, the carrier, and the shipper, among others.

To understand the sources of international maritime law, it is essential to separate among public and private sources. The reason being maritime law has been intrinsically connected to *lex mercatoria*. For more efficiency in creating legislation adequate for solving their interests, merchants have found better means of legislating where private interests are at stake[9].

Maritime commerce has been a key to the development of *lex mercatoria* and *lex maritima*[10] since the explorative navigation years:

[9] More on these topics may be found in DONATO, Roberta Mourão. Solving Maritime Disputes: Mediation as the preferred method. In SUBTIL, Leonardo de Camargo; TOLEDO, A. P. (Org.); ZANELLA, T. V. (Org.). **Direito do Mar: O Papel das Instituições nos 40 anos da Convenção das Nações Unidas sobre o Direito do Mar**. 1. ed. Belo Horizonte: D'Plácido, 2022. v. 1. pp. 673-707.

[10] *Lex maritima* is the part of *lex mercatoria* specialized in navigation and maritime commerce.

> 'Alongside the 'globalisation' of trade, navigation and maritime commerce of the Middle Ages, *lex mercatoria* and *lex maritima* was developed as a commonly trusted merchant and maritime system of customary law based on centuries-old codes of conduct and enforced through a system of merchant courts of adjudication set up along the main trade routes. These rules -which were autonomous, a-national and universal – were founded on customs and usages and served the needs of merchants for a fair and quick resolution of disputes, but also for the monarchs – because the system induced trade, and, therefore, taxes. The *lex mercatoria* and *lex maritima* were eventually codified and incorporated into domestic legislation and in common law jurisdictions through judicial decisions, for instance, of the Court of Admiralty in the United Kingdom'[11].

Lex mercatoria and *lex maritima* have several advantages, which may be summarized into five: First, rules are transnational, thus, leading to a uniform result. Within the application of the same rules, it is more probably to have uniformity for the same outcome (contrary than to when different rules apply). Rules could be, therefore, adopted in several jurisdictions without needing State intervention, unless in open conflicts. Second, the rules had a common origin and were created according to the merchant's uses and costumes. Third, they are applied through the merchants, chosen through the corporations or the commercial courts that were constituted in their markets and fairs. There were not State judges the responsible ones for applying such norms. As a consequence, there would be better and more adequate judgments since the merchants chosen to be the ones deciding those situations were familiarized with the rules of the *lex mercatoria*, with no need for State intervention. Fourth, the process was faster and more informal, as characteristic and a requirement of speedier commercial transactions. And finally, the fifth characteristic, which is contractual freedom and decision based on previous cases (legal precedents), which increases predictability in the field[12].

This was the system previously applied, in the Middle Ages, with increase of maritime navigation and commerce. The system was slowly changed by the State's intervention. The State incorporated into its legislative and judiciary powers the activities applied by the merchants, and their codes and decisions became part of civil and common law instruments. In the 20th century, members of the international trade area started a movement for new or renewed mechanisms to regulate their trade. The International Chamber of Commerce of Paris (the ICC) played a significant role in developing the new *lex mercatoria*[13]. The new *lex mercatoria* constitutes a group of principles and customary rules

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[11] SAMPANI, Constantina. "The impact of Culture in Online Dispute Resolution for Maritime Disputes". **Cambrian Law Review**. Vol. 44, Issue 6, 2013, pp. 6-32. HeinOnline.

[12] MAGALHÃES, José Carlos de; TAVOLARO, Agostinho Toffoli. "Fontes do Direito do Comércio Internacional: *a lex mercatoria*". In: AMARAL, Antônio Carlos Rodrigues do (coord.) **Direito do Comércio Internacional: Aspectos fundamentais**. 3ª. ed. rev. atual. e ampl. São Paulo: Lex Editora, 2014.

[13] Ibid.

applied in the foreign trade sphere, without any references to specific legislation of one or another State. There are "positivized" instruments of these norms published by the ICC, and to which the parties might adhere, if they want, by incorporating or referring to those rules into their contracts.

The principle of freedom of choice allows for the incorporation into their contract of the instruments used by the merchants, thus formalizing them into rules valid among the contracting parties. It is the application of these rules by groups of merchants in diverse sectors of the international commerce, with the belief from the involved parties that such rules are mandatory and must be applied by the members of those sectors that turns them into mandatory norms. These are main conditions for the rules to be enforceable among such members. To mention some of these groups that are relevant to the maritime field: the ICC, UNCITRAL, the BIMCO, the London Maritime Arbitrators Association (LMAA), the Society for Maritime Arbitrators (SMA), the Hong Kong International Arbitration Group (HKIAG), the Germany Maritime Arbitration Association (GMAA), and the Singapore Mediation Centre (SMC).

The application of *lex mercatoria* is independent of the State legislation. State courts will usually prefer the application of legislation, and there is a risk *lex mercatoria* may not be applied by the State judge[14]. To ensure the chosen rules will be applicable, parties usually choose an extrajudicial means of solving disputes, such as arbitration and mediation, in which there is more freedom to choose the procedural rules and the applicable legislation. Therefore, there is more freedom of applying, uses and customs or model rules, as well.

Luís de Lima Pinheiro defends uses and customs may be used, although they are not unanimous in the doctrine. Uses and customs may not be applied in case they are *contra legem*[15]. The scholar explains that there is an inclination towards the acceptance of the uses of international commerce, which can be exemplified by number 2 of article 9 of the United Nations Convention on Contracts for the International Sale of Goods, which mentions expressly:

> 'The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned'[16].

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[14] Ibid.

[15] PINHEIRO, Luís de Lima. **Direito Internacional Privado. Volume II: Direito de Conflitos – Parte Especial.** 4ª. ed. refundida (reimpressão). Lisboa: AAFDL, 2021.

[16] UNITED NATIONS. **United nations convention on contracts for the international sale of goods.** November 2010. Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09951_e_ebook.pdf. Accessed on June 11th, 2023.

The use of the word impliedly in number 2 of article 9 is understood to mention the uses of international trade to which the parties should know, considering the area they operate in. This is also part of the uses and customs of *the lex mercatoria* system.

Luís de Lima Pinheiro additionally explains the possible forms through which uses and customs of international trade may be incorporated in a contract by (1) business gaps grounded on what hypothetically the parties would want (as a form of interpretation); (2) the incorporation by stipulation of the parties (in which case they would add those uses in the contract, expressly); and (3) the relevance of the uses as a mediate source of law (in this situation, the legal regime would have to allow the application of such uses and customs to the contract). We understand the second situation is the prevailing one: as parties include a stipulation in the contract, this will lead to a safer contractual and legal environment for all the parties involved in the commercial transaction.

To the sources of *lex mercatoria*, José Carlos de Magalhães and Agostinho Toffoli Tavolaro, include presently, besides uses and customs, model laws, uniform laws, model contracts, and general conditions of purchase and sales[17]. All of these latter ones are incorporated into contracts.

States have, with time, accepted more the application of these rules and even positivized them into their legislation. One of the examples would be arbitration as well as Incoterms[18]. Both were used by merchants and the ICC codified such instruments into rules that the parties could add into their contracts by reference. Most countries have already adopted such rules into their domestic legislation, allowing their use by the Parties and regulating how, for instance, the decisions of an arbitral court could be ratified to be enforced domestically.

Several private and intergovernmental international associations, such as UNCITRAL, currently use the new *lex mercatoria.* They present model rules for arbitration and mediation as well as arbitration and mediation clauses. Model rules are the ones to be incorporated by the Parties into a contract to gain effectiveness and enforceability. And mediation clauses are the ones to be used to foresee, in advance, what will be the mechanism of dispute solving to be used in case of an emerging conflict. The subjects regulated by the model rules are usually the most important to the business area. They are so important and commonly used that Intergovernmental organizations have negotiated treaties to turn such rules into positive mandate rules, such as the Singapore

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[17] MAGALHÃES, op. cit.

[18] Through Resolução n. 16 de 2 de março de 2020 from Comitê Executivo de Gestão da Camara de Comércio Exterior Brazil has expressly determined the acceptance and use of Incoterms in the Brazilian territory. BRAZIL. **Resolução n. 16, de 2 de março de 2020. Dispõe sobre Incoterms e estabelece que nas exportações e importações brasileiras serão aceitas quaisquer condições de venda praticadas no comércio internacional, desde que compatíveis com o ordenamento jurídico nacional.** Available at http://www.camex.gov.br/resolucoes-camex-e-outros-normativos/58-resolucoes-da-camex/2669-resolucao-n-16-de-2-de-marco-de-2020. Access on June 11th, 2023.

Convention on Mediation, under which States will adopt national legislation to regulate mediation of international transactions.

International maritime disputes have contributed significantly to the formation of the "old" *lex mercatoria,* and it is one of the areas where the new *lex mercatoria,* as well as several model rules are created and applied. It needs agility and an excellent level of freedom for the parties to decide what rules to use (choice of law) and what is the forum they want to decide on possible conflicts on (choice of venue). The international nature of maritime disputes gives rise to a wide range of possibilities, so it is of extremely most importance for the parties to choose the material law to be applied to a possible future conflict, as well as where they would want that conflict to be decided, and in what manner: at the state courts (through litigation), by arbitration or by mediation. There are several international treaties regulating maritime international law. The main problem with international maritime treaties and, thus, international maritime regulation is that it is sparse and not adopted unanimously by the countries. So, in a commercial relationship, it is important to refer to what legislation the parties are adopting, to avoid future conflicts with such basis.

So, *lex mercatoria* regulates primarily private interests and private conflicts. Those conflicts may be solved by litigation, arbitration, mediation or other appropriate dispute resolution forms[19], and we will deepen the analysis in Chapter 2.

There is a need to mention the international intergovernmental organization responsible for regulating and solving conflicts in the maritime area, and some of the treaties that regulate it.

The **International Maritime Organization (IMO)** is a specialized agency of the United Nations. It is a permanent international maritime body responsible for improving the safety and security of international shipping and preventing pollution from ships[20]. In 1889 there was the first attempt to create an international organization to regulate shipping matters (which was not approved due to non-explicit concern of the shipping industry to be regulated and have their commercial freedom inhibited by any means). The organization was then created on March 6th, 1948, under the auspices of the creation of several other international organizations, in particular the United Nations, with the name Inter-Governmental Maritime Consultative Organization (IMCO). In 1982 its name was changed to IMO. Only on March 17th, 1958, the treaty that created the organization entered into force, and the organization met for the first time in 1959.

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[19] The term Alternative dispute resolution is also commonly used. We prefer the term appropriate dispute resolution since it is a more suitable form, and litigation should be the exception, not the rule. Another important term to be used is extrajudicial means of resolution of conflicts, as all "alternative" means to litigation are extrajudicial (in LOPES and PATRÃO, 2016, op. cit.).

[20] INTERNATIONAL MARITIME ORGANIZATION. **Frequently asked questions.** Available at https://www.imo.org/en/About/Pages/FAQs.aspx. Access on June 11th, 2023.

IMO's responsibility is the prevention of marine and atmospheric pollution of ships, supporting the UN Sustainable development goals. The IMO has 175 Member States, and there are currently 50 conventions adopted under the auspices of the IMO[21]. The three main IMO Conventions are the International Convention for the Safety of the Sea (known as SOLAS, and dated 1974 with amendments), the International Convention for the Prevention of Pollution from Ships (known as MARPOL, dated 1973 and modified by Protocols dated 1978 and 1997); and International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW, with amendments, in special the 1995 and 2010 Manila Amendments).

The other conventions are classified under three key categories: maritime safety, prevention of marine pollution and liability and compensation (related to damages caused by pollution). Some sparce conventions, do not fit into any of these three categories, which are regarding tonnage measurement of ships, unlawful acts against shipping, and salvage.

This framework is essential for setting the primary standards shipping companies have to comply with, avoiding that companies search for more profitable means of performing their obligations by lowering standards. So, the IMO states

> "Its role is to create a level playing field so that ship operators cannot address their financial issues by simply cutting corners and compromising on safety, security and environmental performance. This approach also encourages innovation and efficiency. Shipping is a truly international industry, and it can only operate effectively if the regulations and standards are themselves agreed, adopted and implemented on an international basis. And IMO is the forum at which this process takes place""[22].

One of the most important international treaties in the maritime area is the **United Nations Convention on the Law of the Sea** (UNCLOS). Until the emergence of UNCLOS, the sea was regulated by the "Freedom-of-the-Seas Doctrine"[23] [24]. According to this doctrine, national rights and jurisdiction over oceans were limited to a narrow sea belt which surrounded the nation's coastline. On the rest of the sea and ocean, the States were free to act as they desire since it belonged to no one. With the beginning of the development of technologies that allowed for the exploitation of offshore resources,

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[21] A list of IMO's conventions can be found on their webpage. INTERNATIONAL MARITIME ORGANIZATION. **List of IMO Conventions.** Available at https://www.imo.org/en/About/Conventions/Pages/ListOfConventions.aspx Access on June 11th, 2023.

[22] INTERNATIONAL MARITIME ORGANIZATION. **Introduction to IMO.** Available at https://www.imo.org/en/About/Pages/Default.aspx. Access on June 11th, 2023.

[23] UNITED NATIONS OCEANS & LAW OF THE SEA**. The United Nations Convention on the Law of the Sea (A Historical perspective)**. Available at https://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm#Historical%20Perspective. Access on June 11th, 2023.

[24] This subject matter was taught on the course Maritime law and mediation, by Dulce Lopes and Roberta Mourão Donato, at the MediMARE Intensive Training in Leiria, Portugal, on June 20th, 2023.

the increase in numbers of ships that could stay for months harvesting distant waters, as well as hazardous pollution deriving from transport ships and oil tankers, some States started self-proclaiming part of the Ocean as their territory. The first one was President Harry S. Truman, in 1945, who unilaterally extended United States' jurisdiction over natural resources to the nation continental shelf. He was followed by other nations who did not maintain a pattern of unilateral acts. Several disputes among the nations were emerging, and there was a need to promote a stable order, generating a better use and management of ocean resources, with harmony and goodwill among States.

In 1967, Arvid Pard, who was Malta's Ambassador to the United Nations, called the States to reflect on the rivalry that was spreading to the oceans, the pollution poisoning the seas, the several conflicts (and thus, legal claims) among States and the potential wealth of the seabed. His speech was a call for "an effective international regime over the seabed and the ocean floor beyond a clearly defined national jurisdiction", and he started a process that ended in the creation of UNCLOS, passing through the creation of the United Nations Seabed Committee, regulations on Seabed, and all these efforts turned into a world effort to regulate the ocean areas, leading to the Third United Nations Conference on the Law of the Sea. This conference, held in New York in 1973, ended nine years later, in 1982, with the adoption of what is called "a constitution for the seas": UNCLOS. During that timeframe, several negotiations were held between State's representatives to reach an agreement and produce the Convention.

Currently, UNCLOS has 169 signing parties, including Palestine and the European Union.

Regarding seas and their use, UNCLOS delimits the Territorial Sea, Contiguous Zone, and the right of innocent passage in the territorial sea (among which the rules applicable to merchant ships and governmental ships operating for commercial purposes and rules applicable to warships and other government ships operated for non-commercial purposes). It also regulates international navigation, transit passage, archipelagic States, the Exclusive Economic Zone, Continental Shelf, and High Seas. UNCLOS regulates, as well, conservation and management of the living resources of the high seas, and the regime of the islands, the protection and preservation of the marine environment through global and regional cooperation, technical assistance and the monitoring and environmental assessment, and means to reduce and control pollution of the marine environment. There are provisions regarding marine scientific research and the development and transfer of marine technology.

Furthermore, in case of emerging disputes regarding the interpretation or application of UNCLOS, the Parties to the convention must first attempt to solve it by amicable means (by Article 33 of the UN Charter). In case this attempt fails, non-amicable means shall be used. Within the UNCLOS framework, article 287, there are four means of solving disputes (in non-amicable manners). One of them is the International Tribunal of the Law of the Sea; the second is the International Court of Justice, the third is to constitute an arbitral tribunal in accordance with annex VII of UNCLOS, and the fourth is a special arbitral tribunal constituted by Annex VIII for the categories of disputes listed in such annex. When States sign, ratify or accede to UNCLOS, they can choose among one or all of those forms.

The arbitration of Annex VII is the default choice of procedure, being the preferred one in case the States choose to arbitrate. The arbitration of Annex VIII is a particular

procedure for technical issues or disputes related to protecting and preserving of the marine environment, navigation, pollution, marine scientific research and fisheries. As it is very specific, it has not been very used[25].

The **International Tribunal of the Law of the Sea** (ITLOS) is in Hamburg. Annex VI of UNCLOS presents the Statute of the International Tribunal of the Law of the Sea, providing its organization, competence, and the procedure of actions within the tribunal. The constitution of the arbitral tribunal, in accordance with Annex VII, provides for a more flexible procedure, according to Article 5, through which 'the arbitral tribunal will determine its own procedure, assuring each party a full opportunity to be heard and present its case"[26]. The ITLOS has jurisdictional and advisory competence regarding several matters, including the interpretation of UNCLOS. The Tribunal's decisions are final and binding.

UNCLOS is, undoubtedly, the most crucial treaty regulating maritime affairs. Nevertheless, there are other very relevant international treaties, and the link to some of them can be found in Annex 2 of this work as well as some of its very specific terminology can be found in the Glossary in Annex 1.

1.3 Implications of the intrinsic international nature of the maritime disputes

As maritime disputes have an intrinsic international nature, it is essential to analyze the implications of such nature. When a dispute with international connecting elements is presented (a conflict in which there are foreign parties, with different nationalities, with a contract signed in one location and to be executed in another, and with incidents happening overseas), more than one jurisdiction may be called upon to litigate. It will depend on which parties will start a lawsuit and where. If more than one party initiate a procedure in different countries, the confusion is settled. Since there is generally no *lis pendens* in the international sphere, both (or even more than two) States will judge the case, which may have different outcomes. This is reasoned by the fact that if the parties have not chosen an applicable legislation in their contract, States will apply their conflict of law legislation, and international private laws may lead to different material legislation being applied to the case. The result of the same conflict, judged by two different courts from various States, can be completely diverse.

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[25] RISHIK, Parth & SHARMA, Malvika. Arbitration under UNCLOS: An Analysis of Arbitration in Law of the Sea. **International Journal of Law Management & Humanities**, 5, 2022, 1423 – (cxxiv). HeinOnline.

[26] UNITED NATIONS. **United Nations Convention on the Law of the Sea.** Available at https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Access on June 11th, 2023. Article 5, Annex VII.

As the subject matter of shipping disputes is private, and the principle of private autonomy of freedom of choice is applied, it is understood that Parties are allowed to choose what law they want to rule the contract and in what jurisdiction they want it solved, in case of an emerging conflict, and in case litigation is the preferred method (it is actually better to choose a jurisdiction even if litigation is not the preferred method, since that jurisdiction will decide on primary situations related to mediation and arbitration, as well.

Regarding the choice of law, the parties may choose a State's law, a treaty from the international public law, new *lex mercatoria*, general principles and even equity. What is important is for their choice to be voluntarily, consensually, and expressly written in the contract. The same for a choice of jurisdiction. Choosing applicable law and jurisdiction is a very proactive and positive decision, and we dare to say, especially in the maritime area, in which legislation is sparce and fragmented.

Several international treaties have been created, but only some are adopted by most of the States. Specially in the Shipping area. In this regard, we may exemplify with the Rotterdam Rules (dated 2008)[27], created as an update of the previous Hague 1924, Hague-Visby 1968 and Hamburg Rules 1978. It is still not yet into force, as ratification has not reached the required minimum parties. As the international framework is not very precise, the parties need to handle matters to create a legally safer environment.

Parties may choose, in international contract (with foreign connecting elements), a domestic law (theirs or the one from their contracting party), may choose to integrate into their contract international legislation (from the international associations – a system of a-national rules), and may determine the specific contents (clauses) of their contracts, to determine the most appropriate set of rules to their needs[28].

For the maritime law sphere, specific points need to be analyzed regarding choice of law. The choice of legislation may significantly change the parties' obligation, especially due to the different maritime conventions signed, adhered and ratified by the States. In a very summarized form, Yvonne Baatz explains:

> 'For example, different limits of liability for a cargo claim may apply in different jurisdictions depending on whether the Hague, Hague Visby or Hamburg Rules apply. In the future the Rotterdam Rules may come into force but may be incorporated voluntarily. A second example is that different tonnage limits may apply depending on which convention on tonnage limitation, if any, applies. In any case, whether maritime or not, one court may award more interest; award more legal costs; have

[27] SILVEIRA, Henrique Suhadolnik. Uniformização no Direito dos Contratos Marítimos de Transporte Internacional de Carga. In CAPUCIO, Camila (et.al.) **Direito internacional no nosso tempo: relações jurídicas privadas, comerciais e dos investimentos**. Volume 3. Belo Horizonte: Arraes Editores Ltd., 2013.

[28] BORTOLOTTI. Fabio. **Drafting and negotiating international commercial contracts**. France: ICC Services, 2008.

> more favourable procedural rules, for example, in relation to disclosure of documents; proceed to judgment faster, and so on'[29].

The same is true regarding choice of forum. Parties may choose the forum in which they want the case decided. In maritime contracts, a choice of venue/choice of jurisdiction might be in a formal contract, as well as in a contract of smaller formalities, such as a bill of lading. What is essential is the consent of both parties, usually by posing their signature on the document. There might be situations in which a contract is not signed, but consent is formed, such as when there is a chain of emails that prove the parties have agreed to that choice of jurisdiction, and also with electronic documents that were viewed and consented on by the other contracting party[30]. In a Bill of Lading or other standard contracts, there is the concern that, since it is a transactional document, consent of the other party might not be expressed (it might have been expressly given by the party who transferred the bill of lading to the buyer of the goods, for example). So, in such cases, with a lack of express consent, the validity of such clauses may be questioned.

In England, there has been some understanding that the choice of venue would lead to the choice of law. There is a strong presumption that English law is the chosen one when arbitration of disputes deriving from maritime transport and insurances takes place in London[31]. This is a rebuttable presumption, since the Chamber of Lords decided it in the case Compagnie Tunisienne de Navigation SA v Compagnie d'Armement Maritime SA

> 'He claimants, through their counsel, have said, clearly and forcefully, everything which I think can be said on behalf of the respondents. He relies for his proposition that the proper law of the contract here is English law upon the authority of the recent decision of the Court of Appeal in Tzortzis v. Monark Line A/B [1968] 1 W.L.R. 406 . In that case the Court of Appeal, upholding the decision of Donaldson J., decided that although, apart from the arbitration clause in the contract, the contract had its closest and most real connection with Sweden, nevertheless the parties, by choosing the City of London as the place of arbitration, had impliedly chosen English law as the proper law of the contract'[32].

Therefore, there was a misunderstanding regarding what the parties thought they were choosing when they read the contract. They felt they chose the law of the ship's

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[29] BAATZ, Yvonne. "The conflict of laws". In BAATZ, Yvonne (coord.). **Maritime Law**. 5. ed. Oxon: Informa Law, 2021, pages 2 and 3.

[30] Ibid.

[31] PINHEIRO, 2021, op. cit.

[32] QUEEN'S BENCH DIVISION. **Compagnie Tunisienne de Navigation SA v Compagnie d'Armement Maritime SA**, [1969] 1 W.L.R. 449

flag as a choice of law, although the jurisdiction chosen were London Courts. As a rebuttable presumption, the "rule" that whenever the London Courts are chosen, the English law is also chosen is not a rule. As, in our understanding, it is not for any State. It is essential to distinguish between choice of law and choice of jurisdiction. Choice of law determines what material law will be applied to the dispute. Some courts even allow the application of the material law of a different State. This happens mostly when the parties so choose and when there is a connecting element and private international legislation leads to applying of a foreign law. For example, Brazil uses as a main connecting element for international contracts the place of its signature, according to article 9 of Lei de *Introdução às normas do direito brasileiro*[33].

Within the European Union's legal framework, there are two regulations that harmonized this matter. Rome I (Regulation (EC) n. 593/2008 on the law applicable to contractual obligations) and Rome II (Regulation (EC) n. 864/2007 on the law applicable to non-contractual obligations) are, currently, the applicable regulations concerning contractual and non-contractual obligations. Rome I has a universal nature, and, therefore, it does not limit its range of application to contracts which have a connection with EU Member States[34] (just like the Brussels I Bis regulation, to be analyzed below). Rome I, article 3 number 1, regulates the freedom of choice of legislation by the Parties. This choice must be expressly made or result clearly by contractual terms or case circumstances[35].

It is the legislation applicable in case of conflicts of law, when the case is heard by a European court (even if the parties are not domiciled in the EU, for instance, if a conflict is between an African company and an American company to determine which of their laws will apply. It is the conflicts of law legislation of the European Union). Rome I does not apply to arbitration agreements and choice of court agreements. There is also a conflict on whether it is applied to the negotiable character of the bill of ladings[36]. Rome II, also of universal nature, applies to non-contractual obligations and allows the freedom of choice in its article 14[37]. It will enable the parties to agree on the choice of law after the event that gave rise to the damage or when it is related to a commercial activity, and the parties agree on the choice of law before the event.

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[33] BRAZIL. **Decreto-lei n. 4657 de 4 de setembro de 1942. Lei de introdução às normas do Direito Brasileiro.** Available at http://www.planalto.gov.br/ccivil_03/decreto-lei/del4657compilado.htm. Access on May 28th, 2023.

[34] BAATZ, op. cit.

[35] OFFICIAL JOURNAL OF THE EUROPEAN UNION. **Regulation (EC) n. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). July 4th, 2008.** Available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:En:PDF. Access on May 28th, 2023.

[36] BAATZ, op. cit., pages 58 and 59.

[37] OFFICIAL JOURNAL OF THE EUROPEAN UNION. **Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II). July 31st, 2007.** Available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007R0864&from=en. Access on May 28th, 2023

From all that was analyzed, we conclude that expressly defining the choice of law and choice of forum is the best alternative for the parties that could improve legal sureness. Parties may either choose arbitration or other form of ADR to solve their disputes or **select a jurisdiction** to litigate. If such choices are not made, one might be obliged to litigate where one of the parties commences proceedings as a respondent.

In either case, the court must have jurisdiction over such case[38], and jurisdictional rules are according to its domestic law (which might be, as in the case of British law, "sufficient connection between the subject matter of the dispute and a particular court[39]"). There isn't only one particular convention to regulate jurisdictional matters worldwide. As legislation in the maritime area is diverse and sparse several international treaties regulate jurisdictional competence on maritime issues. The initial step is to check the international conventions if there are any in the specific maritime subject matter[40].

It is important to mention some of them, which Yvonne Baatz cites to determine specific jurisdiction clauses:

The International Convention on the Arrest of Ships 1999, in its article 7, determines the State's jurisdiction in case of a ship's arrest, even if the shipowner is domiciled in another European State. The International Convention for the Unification of Certain Rules Concerning Civil Jurisdiction in Matters of Collision 1952 predicts jurisdiction for collision lawsuits in the courts where the ship or sister ship has been arrested or could have been arrested but has bailed or provided security. And lastly, in article 21 of the Hamburg Rules[41], it is established that the cargo claimant can choose the court (and this choice surpasses the choice of jurisdiction of article 25 of Brussels I Bis).

The 2005 Hague Convention on the Choice of Court Agreements[42] apply as well as Regulation (EU) 1215/2012[43] to people domiciled in the EU on commercial matters (and other special provisions which are not in the scope of this paper). Regarding the 2005

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[38] In the European Union, after January 10th, 2015, when Brussels I Bis came into force, if the parties choose a court, the court has no discretion, it will have jurisdiction. BAATZ, op. cit.

[39] BAATZ, op. cit., page 17.

[40] Ibid.

[41] Hamburg Rules is how the United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978) is known.

[42] HCCH. **Convention on Choice of Court Agreement.** Concluded 30 June 2005. Available at https://www.hcch.net/en/instruments/conventions/full-text/?cid=98. Access on June 13th, 2023. The Convention is not applicable, according to article 2(2) to "the carriage of passengers and goods" (f) and "marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage" (g) but it still may be applied to all other commercial matters related to the maritime area.

[43] OFFICIAL JOURNAL OF THE EUROPEAN UNION. **Regulation (EU) no 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).** Available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF. Access on June 13th, 2023

Hague Convention on the Choice of Court Agreements, its main scope is to allow parties in an international case to decide where they want to litigate in case of present and future conflicts, preventing any of the parties from unilaterally taking jurisdiction. Only judgments from the chosen court are to be recognized and enforced[44].

According to Regulation (EU) 1215/2012 (or Regulation Brussels I Bis, as it is also known), it applies to international conflicts to uniformize jurisdictional rules with the European Union and to ease the procedure of recognition of courts award within the Union. The general competence of the regulation is the domicile of the defendant in a State member of the EU, independently of their nationality (and of the claimant's domicile), as per Article 4. Relevant rules applied to maritime disputes would be special (for example, where the contract is to be performed or based on tort claims), exclusive competences, and rules regarding prorogation of Jurisdiction (choice of courts).

Article 7 has a rule of special jurisdiction by which a person domiciled in a member state may be sued in another member state regarding a "dispute concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight, in the court under the authority of which the cargo or freight in question: has been arrested to secure such payment or could have been so arrested, but bail or other security has been given; provided that this provision shall apply only if it is claimed that the defendant has an interest in the cargo or freight or had such an interest at the time of salvage" (article 7, number 7). If the defendant is domiciled in a State that is not a member of the EU, the case may be started in the State court, following State rules. Article 25 defines rules of the prorogation of jurisdiction with the requirements for the choice of jurisdiction. The agreement must be in writing or evidenced in writing; in a form which accords with practices that the parties have established between themselves; or, in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned (Article 25 of the Brussels I Bis). As per requirements of Article 25, the parties do not need to be domiciled in one of the EU member States to choose the applicable law. They will both be bound by the agreement, per the principle of freedom of contract.

[44] BAATZ, op. cit.

CHAPTER 2

ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute resolution, or appropriate dispute resolution (ADR) as we prefer, refers to any means of solving disputes out of state courts and, therefore, not litigating. This concept may include arbitration, mediation, negotiation, conciliation, and early neutral evaluation, among others. The term ADR is used mainly in procedures decided by the parties, with the assistance of a neutral third party[45]. It is principally used for extrajudicial proceedings, and it is very common for international commercial and maritime disputes to use these forms as conflict resolution means. Mediation, among them, is the most commonly used and has been growing in number in the past years (compared to other forms). Although no formal statistics may be provided, there is evidence of the growing legislation passed on States and the increased referral in International commercial associations, their mediation rules and clauses.

ADR methods, different from litigation, require for the parties to consensually decide to use them, and, moreover, require an effort for an effective settlement agreement to be reached (for mediation). For arbitration, an initial agreement on the use of arbitration as a means of solving disputes is sufficient to make the method compulsory for the parties involved (and it will only not be mandatory if all the involved parties decide not to give up).

UNIDROIT principles recognize the use of negotiation, conciliation and mediation as alternative dispute resolution means, as per article 10.7:

> The provisions of Articles 10.5 and 10.6 apply with appropriate modifications to other proceedings whereby the parties request a third person to assist them in their attempt to reach an amicable settlement of their dispute.[46]

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[45] AMBROSE, Clare; MAXWELL, Karen; COLLETT, Michael. **London maritime arbitration**. 4th edition. Oxon: Informa Law from Routledge, 2018.

[46] UNIDROIT. **UNIDROIT principles of international commercial contracts 2016**. Rome:

There is a concern with the suspension of the statute of limitation when parties choose to attempt mediation, which is foreseen in articles 10.5 and 10.6 (which also refer to arbitration and judicial proceedings).

Other methods of ADR (which we will not analyze in depth) are early neutral evaluation, executive tribunal, and neutral fact finder. **Early neutral evaluation** involves a Judge, an arbitrator or an independent third party, who will hear the parties for one day and check the written evidence they present. It is a proceeding that can be structured at any stage. With these inputs, he or she will give a non-binding view as to what the probable outcome of that dispute will be. The independent third party who provides the non-binding view may not participate of any further procedures with the same parties.

Executive tribunal is a method where a senior manager attends with case handlers before a mediator. Case handlers exhibit their case and leave the procedure, letting the mediator and senior managers to discuss how the issue can be solved.

Neutral fact finder is a procedure where a neutral third party investigates the facts of the case and reports it to the parties. There is no addressing of legal issues (nor liability nor quantum), and he or she does not make any assessments on the case's merits[47].

2.1 Arbitration and its advantages

Arbitration is a method of dispute resolution where parties in a contract or a conflict choose (previously or after the conflict emerges) a private method of solving disputes. If previously, the parties can already put into their contract an arbitration clause and will know the mandatory form of conflict solving in case a conflict arises. If after the conflict emerges, the parties will celebrate an arbitration agreement to decide all the details on how to proceed with arbitration. There is a predominance of the principle of private autonomy for choosing arbitration as the method of solving dispute since when choosing arbitration, the parties will decide that either one, three or five impartial arbitrators will decide their conflict. Parties are free to choose where the arbitration will take place (the country, the city, and the specific location), what is the applicable law or if equity is the chosen form (which is not the best choice for State courts – not all of them accept it) and what is the language the procedure will be in. It is essential for full consent to be given by the parties, so existence of a written agreement is, in most cases, essential.

In international arbitration, the parties may choose the applicable law and venue where the arbitration will take place. That is important since the applicable law will indicate

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UNIDROIT, 2016. Available at https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-i.pdf. Access on May 23rd, 2032. Article 10.7.

[47] CLIFT, Noel Rhys. **Introduction to Alternative Dispute Resolution: A Comparison between Arbitration and Mediation**. February 1, 2006. Available at SSRN: https://ssrn.com/abstract=1647627 or http://dx.doi.org/10.2139/ssrn.1647627. Access on May 27th, 2023.

the legal framework for specific legal situations related to the arbitration (there is domestic legislation regulating arbitration, the role of arbitrators and its relationships with the judiciary) and be the applicable law to solve any matters related to the arbitration. These situations might need to be solved by the State judiciary power, and it will use the applicable legislation. As we saw above, in London courts, the choice of venue indicated the choice of law. Some arbitration courts even determine that, within their rules, the arbitrator and the arbitral court will decide the case according to the legislation they judge adequately.

The parties are the ones to pay the costs of arbitration (which are high depending on the amount at stake), and usually, the winning party pays less or does not pay. Arbitrators are typically appointed by the parties and chosen by their notorious area of expertise.

Arbitration is, for maritime law, preferrable to State Courts, essentially for the following reasons. State Courts are overwhelmed with several lawsuits and will take a long time to finish a case, not to mention the possibility of having several appeals.

Maritime law is a very specialized area, so, it is preferable to have an expert in such area deciding the case. Thus, having an arbitrator appointed by the parties is very positive. They are usually "chosen for their familiarity with the commercial, technical or legal aspects of the dispute"[48]. Having an expert decide the case will increase the odds of having a very technical decision. Judges might not have so much contact (and technical knowledge) regarding the maritime and international commercial areas, making it very hard for the judge to decide on technical and precise manners, unless specialized Maritime Courts are established for certain disputes[49]. In an arbitration procedure, the parties may choose the procedure to be followed or may refer to existing rules.

Arbitration is a confidential procedure, which is very important to keep commercial and secret information from the company private. The downside is that, unless the parties allow for the publication of arbitration awards (which is permitted in some cases, for example, at SMA's[50] website, one can find several decisions), there is no formation of a jurisprudential bases.

Arbitration is a faster means of solving disputes since that arbitral tribunal is formed solely for that case. And, in maritime law, "time is money". A ship stopped at the port could cost enormous money in demurrage, not to mention other costs, such as labor, and losses of gains.

Brian Pappas notices that one of the reasons why arbitration has been so widespread is its similarity to litigation and, therefore, to what is familiar to maritime operators

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[48] AMBROSE; MAXWELL; COLLETT, op. cit., page 1.

[49] The complexity of maritime law is such that is the area uses a specific language and terms. Without any intention of being exhaustive, in Annex 1, there is a Glossary with some of the terms used and studied during the development of this project.

[50] SOCIETY OF MARITIME ARBITRATORS. **The Arbitrator.** Available at https://smany.org/arbitrator/. Access on June 12th, 2023.

and their lawyers. He also mentions a general dissatisfaction with arbitration, which may be caused by the increasingly use of mediation and the "enforcement of binding arbitration clauses in standardized adhesion contracts"[51]. Arbitration has become a very legalized and formal procedure, having close characteristics with court litigation, including possible long discovery processes. In the author's position, the main goals of arbitration, which were to be faster and least expensive than litigation, is not, therefore, being reached.

Several arbitral associations exist and have procedures of arbitration the parties may refer to, as well as a vast list of arbitrators to choose from. There are administered arbitrations (which are the ones conducted according to the rules of an arbitral institution and with the support of its staff) and non-administered arbitrations (also called *ad hoc* arbitrations).

London has traditionally been the favored place for the arbitration of maritime disputes, holding several associations and organizations. London Maritime Arbitrators Association (the LMAA)[52] is a professional association established in the 1960s by a group of brokers at the Baltic Exchange, listed as available to be appointed arbitrators. LMAA makes available the LMAA Terms 2021 for full arbitrations, Intermediate Claims Procedure (ICP) and Small Claims Procedure (SCP), revised until 2021. Previous editions and the most updated one are available on the association's website (also translated into Chinese). The LMAA does not administer arbitrations; it does, however, appoint arbitrators if the arbitration agreement so determines.

Most of the maritime arbitrations in London are conducted by the members of LMAA. There are some particularities to specific procedures. For instance, arbitration concerning the salvage of ships typically takes place in London in a two-tiered process established by the Salvage Arbitration Branch of the Council of Lloyd's in the form determined by the Lloyd's Standard Salvage and Arbitration Clauses and Lloyd's Procedural Rules. The London Court of International Arbitration (LCIA) is referred to when the issues are "shipbuilding, ship finance and energy-related contracts"[53]. It is an arbitration court that administers arbitrations for interested parties.

In New York, maritime arbitrations are mainly conducted under the rules of the Society of Maritime Arbitrators, Inc (SMA Rules). SMA has specific rules and a list of qualified arbitrators (who are SMA members). SMA does not administer arbitrations. As per procedural rules, before an arbitral procedure, an SMA arbitrator is entitled to order preaward security and may also "issue subpoenas to compel third parties to produce documents or testify; there is no right to pre-hearing disclosure", which may only be ordered

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[51] PAPPAS, Brian A. Med-Arb and the Legalization of Alternative Dispute Resolution. **Harvard Negotiation Law Review**. 20, 2015, pp. 157-204, page 161.

[52] LONDON MARITIME ARBITRATORS' ASSOCIATION (LMAA). **Procedural rules Et guidelines**. Available on https://lmaa.london/the-lmaa-terms/. Access on May 26th, 2023.

[53] AMBROSE; MAXWELL; COLLETT, op. cit., page 10.

by the court, and arbitral may "consolidate disputes under two or more contracts"[54]. This is specific to New York procedure since in most jurisdiction the arbitrator is not entitled to order securities or issue subpoenas.

One can also mention other important arbitral institutions throughout the world, such as the Hong Kong Maritime Arbitration Centre (HKIAC), the Singapore Chamber of Maritime Arbitrations (SCMA), the China Maritime Arbitration Commission (CMAC), the Germany Maritime Arbitration Association (GMAA Rules), the Tokyo Maritime Arbitration Commission (TOMAC), the *Centro Brasileiro de Arbitragem Marítima* (CBAM), the Chambre Maritime Arbitrale de Paris (CMAP), and, arbitration chambers not specialized in maritime law, but in international commerce in general (which would also be able to support parties on maritime law matters): the International Chamber of Commerce (ICC), the *Câmara de Arbitragem e Mediação – Câmara de Comércio Brasi-Canadá* (CAM-CCBC), the *Câmara de Mediação e Arbitragem Empresarial – Brasil* (CAMARB), and the American Arbitration Association (AAA).

But even with all these advantages, arbitration is still an adversarial means of solving conflicts. The parties will have to accept the arbitrator's decision takes, which is a third-party decision. There will be a winner and a loser in the process if not two *very* unsatisfied parties. Consequently, it involves more risks. However, mainly due to its similarities to litigation, arbitration is the alternative dispute resolution form that is mostly used and widely known, especially in international contracts.

2.2 Mediation and its advantages

In the past decades, mediation has gained importance with the passing of legislation in several countries. Some of the several examples are the UK the new Civil Procedure Rules dated 1999; the European Union Mediation Directive published in 2008[55] (prompting the implementation of legislation in European Union Member States); the Brazilian Civil Code dated 2015; and the Mediation Bill from India (introduced in 2021, and not yet in force).

All these diplomas have represented a movement emerging from society, claiming for a "de-litigation" of the resolution of conflicts means. The courts are overwhelmed with lawsuits, many of which could be solved by amicable means had the parties been instructed and stimulated to do so. The legal environment is now developing the means necessary to structure new forms of solving conflicts, which were formerly so focused on litigation. One can see that simply by analyzing past law school curricula. How many

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[54] Ibid., page 11.

[55] OFFICIAL JOURNAL OF THE EUROPEAN UNION. **Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters**. May 24th, 2008. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008L0052. Access on May 27th, 2023.

semesters students have passed studying litigation, civil procedure and other forms of conflict management and solving through a litigant form. New courses are emerging with this differentiated culture which stimulates the use of mediation and other alternative/appropriate dispute resolution means (e.g., extrajudicial forms) claiming for the maintaining and restoring of relationships and providing more cost-effective solutions.

Proof of this wave is the increase in institutional norms referring dispute resolution means to mediation, as well as the development of model clauses (to be included in contracts, in special transnational contracts). International contracts are the ones that most benefit from using of mediation as a means of dispute-solving. Parties customarily refer to and choose the legislation they want to be applied to the contracts since it is essential to avoid conflicts related to the choice of legislation and choice of forum, as we have already seen.

So, new *lex mercatoria* rules created by international associations have been growingly referring to ADR means, especially to mediation (as we will see in the following chapters), since it has gained importance in the past decades and has been more used each time. Remembering that *lex mercatoria* simply reflects market's practices. The reasons for such growth will be detailed but can be summarized as: mediation is a win-win game. When the parties have a long-term commercial relationship (focusing on commercial relationships since it is the subject of our work, but very notably on family and consumer matters, as well), it is preferrable to have conflicts solved in an amicable manner. The parties may decide to enter a mediation procedure and, if not pleased, leave at any time – the principles of freedom of choice, party autonomy and of voluntariness regulate mediation.

The parties may already include, in their contract, a Mediation clause or mediation agreement. In case of an emerging conflict, parties will enforce such clause start the mediation procedure.

Mediation may happen during a judicial action (some countries regulate it is mandatory to attempt mediation at the beginning of a law procedure) before any judicial procedure starts. Rhys Clift understands it is essential to spread compulsory mediation at the beginning of judicial proceedings and explains:

> 'For all sort of good reasons mediation before the commencement of proceedings is relatively unusual (at least for the present). These reasons include (with a particular eye on maritime disputes) preservation of time bar, securing an advantageous jurisdiction, obtaining security for a claim or preserving evidence (including by search and seizure in suitable cases).'[56]

As we have already mentioned, and it is important to emphasize that mediation is voluntary. Differently from an arbitration agreement, if parties commit to using arbitration

[56] CLIFT, Noel Rhys. The Phenomenon of Mediation: Judicial Perspectives and an Eye on the Future. **JIML**, 15, 2009. May 3rd, 2010. Available at SSRN: https://ssrn.com/abstract=1599420 or http://dx.doi.org/10.2139/ssrn.1599420. Access on May 15th, 2023, page 511.

as dispute resolution means in their commercial contract, and when the conflict emerges, they must arbitrate, in mediation, one or both parties may decide not to go through mediation. So, what about the situations in which legislation obliges parties to have a mediation at the beginning of the lawsuit? When the court refers the parties to initiate a mediation procedure, the parties may decide whether or not they want to do it. Suppose resort to mediation is established by law as a prerequisite to access courts. In that case parties may only show up at the mediation attempt and state they have no intention in pursuing it or stop the procedure at any moment they desire[57]. The principle of freedom of choice is not affected. And it is different from arbitration and court litigation – once agreed by the parties to use arbitration or one choice of jurisdiction, as one of the parties takes one step towards that sense, there is not possibility of regretting and changing their mind. They must follow what they have previously committed.

Important to mention that the parties can, in commercial mediation, take the fullest of the essential principles of civil and commercial mediation. Using party autonomy, good faith, flexibility, facilitation of security interests and the encouragement of self-help.

The maritime area is an area with few participants. As such, it is essential to maintain positive relationships among all the stakeholders. The informality and rapidity of the mediation procedure (compared to an arbitration or litigation process) is an added value worth noting to all involved parties. This leads to less time to solve the conflict, fewer costs, less contentious among the involved parties and fewer risks.

Mediation has several advantages as it creates added value in maritime situations. It has several advantages over arbitration as a means of solving disputes. Since it does not have a contentious nature, in mediation, there is no winning party. The parties will have to work together to reach a consensual agreement that will constitute a better outcome for them. This does not mean they will share 50/50 gains, and split losses. Parties will understand what the demands of each other are and, using such income, negotiate. “In ADR the parties remain in control of the outcome so that its success depends on the parties’ cooperation and genuine willingness to compromise”[58]. Since the parties are the ones to construct a decision consensually, there are fewer risks. Whenever a decision is taken by a third party, such as in an arbitral or litigation case, there is the probability of either or even both parties being discontent with the decision. Therefore, it is better to have a mutually built agreement.

The mediator, as an impartial third party involved in the process, will support the parties in reaching the agreement. He or she will conduct the procedure without, at any stage, interfering with the decisions of the parties. Parties usually choose a mediator with experience and notorious knowledge in the area to understand what the parties are going through and be able to help.

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[57] CLIFT, 2006.

[58] AMBROSE; MAXWELL; COLLETT, op. cit., page 31.

Also, as the parties decide to move with mediation and create their agreement, they save precious time when they could be arguing on what would the applicable legislation to the contract be, as well as the competent jurisdiction. Parties will choose what legislation they want to be applied, construing what is better for them. This will enable the parties to consider more the practical matters of the agreement, and also a broader range of negotiation possibilities, since they may resort to the construction of settlements without having to analyze different complex foreign legislation or discuss regarding them. Parties will focus on what is really important, to find the best alternative to their conflict, looking for means of adding more value to their relationship and for solving that problem.

For Rhys Clift, mediation is not to be chosen only for easy-fix situations, and explains how it can be effective in harder cases:

> 'Mediation is even effective in resolving disputes involving allegation of fraud or dishonesty, where a soft compromise or 50/50 split may have no place. Significantly it can preserve not only relationships between the parties in the dispute, but the reputations of the individuals involved (which can be important in relation to maritime matters where there may be substantial 'repeat business')'[59].

Also, mediation does **not prevent parties** from submitting their dispute to another dispute resolution means (ADR or litigation) since they can try other forms in case of a failed mediation. They are not barred, and some State legislation even foresee the interruption of the time bar while parties attempt to mediate (such as demanded by Article 8 of the Directive 2008/52/EC).

The **flexibility** of mediation makes it adequate for procedures in which there are several differing factors, such as the type of dispute, actors involved in the disputes, the interests and amounts at stake, parties' relationships, expectations and mindset. It is even adequate for multiparty claims, as well as for disputes involving power imbalance, such as the ones with corporations with very diverse economic power, and disputes among persons and corporations.

> "The mediation will be an opportunity to assess the likely overall cost of the dispute (taking into account legal fees and possible damages, but also management time and commercial reputation) and to explore potential settlement options. The mediator will usually liaise between the parties and facilitate direct discussion between them. If the parties draw closer to settlement proposals, he may assist in drawing up a settlement agreement"[60].

As mediation may help parties deal with technical and scientific issues more than legal discussions regarding the dispute, this may be a great asset, especially in dealing with parties that lack knowledge and information on legal technicalities, which could trig-

[59] CLIFT, 2010, page 510.

[60] AMBROSE, MAXWELL, and COLLETT, op.cit., page 36.

ger an escalation of the conflict. In mediation, the focus would be on problem-solving, rather than on creating legal obstacles to win a lawsuit.

Mediation has a more flexible procedure, which may be adopted by the parties even for online procedures. Also, due to its more flexible nature, parties usually consent to use less evidence. The production of documents, witnesses and experts will be previously submitted to the mediation and other parties before mediation. This will allow for the least spent of time and money in producing evidence. There is also increased confidence among the parties that they will know what to expect, since the evidence is already submitted. And will avoid lengthy evidence procedures of arbitration or litigation.

One of the most essential characteristics of mediation is that it is **confidentia**l. Parties participating in mediation will sign non-disclosure agreements (NDA), committing themselves not to disclose any information or communication that happen during the process[61]. Confidentiality problems may arise in two situations: if a party participates in a mediation procedure but does not actually intend settles the case and if the party intends to find more details about the other party's demand during the mediation procedure; this is called litigation breaches[62]. There is also the situation of when the parties attempted mediation and, during litigation, made statements that the mediation procedure "went wrong" as if they were "forced" to remain in a mediation procedure. For Dwight Golan and Jay Folberg, the sources of mediation confidentiality may be rules of evidence that prohibit what is disclosed during a mediation procedure to be made public; holders of privileges (attorney-client privilege, for example); confidentiality from statutes and rules; and mediation agreements[63].

One must also consider another instance of confidentiality: which is during caucusing. Caucusing are the private sections with the parties that happen during the mediation procedure, and they may communicate to the mediator issues they do not want the other party to know. These caucusing sections have an additional layer of privacy, as expected[64]. The mediator will keep all the information received as confidential and shall not disclose to one party what the other communicates during the private sections. The parties may determine together with the mediator what will be the mediation procedures, and this determination will happen as they understand what is necessary due to the circumstances of the dispute.

Mediation **costs** are usually shared among the parties, who have to pay the costs of the mediator fee, agreed in advance by the parties, and charged in an hourly fee[65].

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[61] GOLAN, Dwight; FOLBERG, Jay. **Mediation: the roles of advocate and neutral.** New York: Aspen Publishers, 2006.

[62] Ibid.

[63] Ibid.

[64] Ibid.

[65] AMBROSE; MAXWELL; COLLETT, op. cit.

Parties will also share costs related to the rental of a space for the mediation to happen, or administration fees it is an administered mediation.

Important to mention, regarding compliance, that it is more likely the parties will usually voluntarily **comply** with a mediation agreement since it is an agreement they have construed and agreed with[66]. Also, in case there is any problem related to the execution of the settlement agreement, it might be enforced "by a court or other competent authority in a judgment or decision or in an authentic instrument"[67].

The parties are the ones to decide the outcome of their mediation consensually. The mediator's role is to control the process of mediation. He or she cannot and will not determine the outcome of the dispute or even mandate the parties to behave in a specific way or fulfill an order (such as to produce evidence, and documents, among others). The mediator is the one to decide the order of the meetings (full group meetings or private caucus sections), or prepare summaries, being this his/her only role[68]. Mediation is a form of collaboratively reaching a settlement and terminating a dispute. As such, it involves less risks, since the parties will create a settlement agreement, and they will have control over what is decided (in comparison to a third party deciding). When a third party decides, it may displease both of the parties.

There are downfalls in choosing mediation to solve the conflict, and those are the mediation's limitations[69]. Not all legislations regulate the time bar of the statute of limitation as parties attempt to mediate[70]. The solution would be to start a mediation procedure connected to a judicial procedure, when the time bar is ending, or even in case a judicial action is required, such as the requirement of a guaranteeing procedure, in case of an emerging bankruptcy or vast selling of corporations' assets.

In our understanding, mediation is the preferred means of solving disputes, and with its use and development, the mentioned downfalls will be overturned. It is essential to understand the scholars' views on the matter. Their analyzes are complementary and in some situations, diverging. For Clare Ambrose, Karen Maxwell and Michael Collett[71]

> 'Mediation in shipping disputes was relatively slow to become established. This reflected a view that if compromise were a realistic possibility, then this could usually be achieved without resorting to a formal procedure. Parties sometimes considered

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66 CLIFT, 2006.

67 OFFICIAL JOURNAL OF THE EUROPEAN UNION. **Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters**. May 24th, 2008. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008L0052. Access on May 27th, 2023, Article 6, 2.

68 CLIFT, 2006.

69 Ibid.

70 Ibid.

71 AMBROSE; MAXWELL; COLLETT, op. cit.

> that if they could not reach a commercial settlement by themselves the mediation would be unlikely to succeed – it would be a waste of further time and money. However, perceptions have changed and parties are finding mediation increasingly attractive. Parties now have more experience of mediation and recognize that a formal procedure may be effective to resolve apparently unbridgeable differences. A reasonable settlement will generally be preferable or commercial parties to resolving a dispute by arbitration. In particular, the parties will have agreed on the outcome rather than having had a decision imposed on them and where successful, mediation is invariably cheaper, quicker and less damaging to commercial relations than arbitration. The costs consequences of refusing to mediate (…) have also become a further incentive for parties to attempt mediation"[72].

In their understanding, mediation agreement in shipping contracts is still somewhat unused, and shipping contracts usually contain a simple arbitration clause. Parties usually conclude a mediation agreement when they decide to mediate, instead of doing it previously, with the institutional clauses mentioned below in Chapter 6.

To Charles Measter and Peter Skoufalos[73], mediation does not have an increased use in the past decades due to the lack of will to include a mediation clause together with an arbitration clause in the contracts, and the parties have the belief that mediation would be more challenging to be achieved since for a mediation procedure to be successful, parties with decision making power need to be gathered in the same room, and some of these people are in different States. These arguments are being overruled since there is currently a wider use of mediation clauses in the contracts (which can be proven by the high number of mediation agreements being updated by the international associations). There are also forms of holding a mediation through electronic means (fomented during the past years, during COVID-19).

Shray Mehta elucidates that, in India, the main reason maritime mediation has not been used with the same intensity and is not growing at a faster rate is due to the lack of framework[74]. Arbitration has a framework, but the Mediation Bill in India was introduced in 2021 and is still not yet in force[75].

To Carlo Corcione[76], there are some reasons mediation does not have a widespread use in the shipping industry. First. because litigation is a significant business for lawyers,

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[72] Ibid., page 32.

[73] MEASTER, Charles L; SKOUFALOS, Peter. The increasing role of mediation in resolving shipping disputes. **Tulane Maritime Law Journal**. Vol. 26 n 2, Summer 2002. Pp. 515-562.

[74] MEHTA, Shray. Mediation for maritime disputes in India. **International Journal of Law Management & Humanities**. Vol. 1 n. 4. October-November 2018. Pp. 176-180.

[75] PRS LEGISLATIVE RESEARCH. **Legislative Brief: the Mediation Bill, 2021**. Available at https://prsindia.org/billtrack/prs-products/prs-legislative-brief-3962. Access on May 28th, 2023.

[76] CORCIONE, Carlo. **Mediation in shipping: a practical insight**. MediMARE Workshop, May 26th, 2023. Available at https://medimare.eu/workshops/

they make more money litigating than mediating so, they start to litigate and then attempt to mediate after calculating the risks. The second point is that mediation is tough to be reached because the parties making the agreement are afraid of taking the responsibility of accepting a settlement of only a percentage of what they could have potentially won in a lawsuit.

2.3 The complementary character of mediation and arbitration

Despite the differences presented above, mediation and arbitration have complementary characteristics and, to some extent, similar features.

They are both extrajudicial means of solving disputes and, for such reason, will give the parties more freedom to the choice of law, forum and who to support on the method chosen (the arbitrator to decide the dispute or the mediator to help the parties find a solution for their dispute).

They are also both means developed by the *lex mercatoria*, as means for solving disputes faster and without State's interference. As their use has spread out, the State has enacted legislation to support their use by the parties, controlling possible attempt of not using the methods in a lawful form and with goodwill. Legislation is enacted to create the necessary framework for regulating arbitration and mediation as legal forms of solving disputes in case something does not happen as planned by the parties or in case one of the parties attempts to use the judiciary to avoid its previous contracts.

Mediation and arbitration are also complementary forms of solving conflicts. A prevalent use form of recurring to mediation nowadays is through multi-tiered clauses. They allow the parties to negotiate the possibilities to litigate or arbitrate in advance in case a mediation fails, for instance.

Some parties may include plain mediation clauses in their contracts. There is also the possibility of including more complex clauses, feasibly leading through escalation or tired dispute resolution clauses. More alternatives mean the parties will have plans of what to do in case mediation fails. Sometimes, having a well-designed multi-tiered clause will lead to legal security.

Usually, mediation is the first alternative to arbitration or other methods, being possible for the parties, before moving to mediation, to: negotiate in good faith, try to resolve their conflict through friendly discussions, send the person who holds the power to negotiate to participate actively to solve the matter amicably; or refer the dispute for an expert determination[77].

There are also proceedings which are multi-tiered or also named med-arb proceedings. These are proceedings where an arbitrator may switch roles between arbitrator

[77] AMBROSE; MAXWELL; COLLETT, op. cit.

and mediator[78]. These procedures are controversial. Some scholars find them very interesting, and others criticize them since they cannot "satisfy the core values of mediator neutrality, party self-determination, and confidentially[79]", all of which are essential for an efficient mediation.

With med/arb proceedings, the parties can switch between both methods (as previously agreed by them), creating legal certainty as to which methods will be used in case a mediation fails, for example. Or, depending on the legal system, when there is a need to stop the statute of limitation and mediation is not legally foreseen to do such, arbitration may be started for such purposes, and mediation will be attempted as a "first" step of that arbitral process, guaranteeing the parties will have their rights assured.

[78] AMBROSE; MAXWELL; COLLETT, op. cit.

[79] PAPPAS, op. cit., page 160.

CHAPTER 3

MARITIME MEDIATION

3.1 Taxonomy on Maritime Mediation

A taxonomy on maritime disputes has been created in the context of the MediMARE Project, by Torgeir Haavik, Kristine Storkersen and Stian Antonsen[80].The taxonomy was developed to classify maritime disputes to frame them before mediation. The understanding is that not all disputes may be suitable for mediation, and parties always need to understand the main points of conflict to be able even to start a mediation process. Thus, the taxonomy lists the dispute's actors, categories and indications of dispute severity (regarding complexity, impact, urgency, and effects).

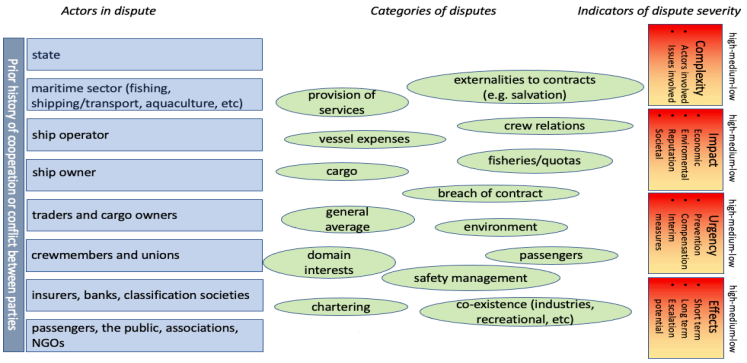

Figure 1. A taxonomy of disputes. Created by HAAVIK, Torgeir; STORKERSEN, Kristine and ANTONSEN, Stian. **A Taxonomy of maritime disputes as a foundation for mediation**, page 5.

[80] HAAVIK, Torgeir; STORKERSEN, Kristine and ANTONSEN, Stian. **A Taxonomy of maritime disputes as a foundation for mediation.** Available at https://medimare.eu/wp-content/uploads/2022/07/Taxonomyreport-web.pdf. Access on June 11th, 2023.

The classification of actors from the taxonomy that may be a part of the maritime disputes lists States, the Maritime Sector (including fishing companies, shipping, and transport companies, aquaculture companies, among others), ship operators, ship owners, traders and cargo owners, crewmembers and unions, insurers, banks classification societies, passengers, the pubic, associations and non-governmental associations. So, all the actors mentioned above may, while involved in maritime affairs, also be interested in maritime disputes. The list of actors presented in the taxonomy is not exhaustive, and other actors may be included in some situations such as, for example, the Port.

The **categories of disputes** identified by the MediMARE Project and included in the taxonomy are:

- Breach of contract
- Cargo
- Chartering
- Co-existence (industries, recreational, among others).
- Crew Relations
- Domain interests
- Environment
- Externalities to contracts (for example salvation situations)
- Fisheries/quotas
- General average
- Passengers
- Provision of services
- Safety management
- Vessel expenses

In the **breach of contract** category, one can find all situations in which a contract of maritime nature could be breached. These situations might include the discussion of what would be the possible causes for a ship´s failure, with possible concurrence of causes like defective workmanship and proven lack of maintenance or liability of the shipyard as an initial breach of the contract. One can also include a possible breach of contract when there is a discrepancy in the products dispatched– in case of an absolute difference between the description or the sample sent by seller and the product delivered.

Cargo disputes are classified as the ones in which there is a conflict or emerging problem related to cargo. There could be, as an example, damage caused to cargo in a container, and the parties might need to determine where and in which stage the damage happened and who is responsible for such damage. Specially in the case of combined transport (multimodal) when there is a need to define where the damage occurred, and which parties are involved in being able to start mediation. Only with the information of who is involved, it is possible to invite the parties to a mediation procedure.

Chartering is the process of leasing/hiring part or whole of a ship. It might be a more balanced contract than other transportation contracts in which contracting parties have a power imbalance. It could be a very long-lasting contract, and thus this makes it very complex. There are different charter parties' contracts (like the above explained): the demise charter, voyage charter and time charter. Demise charter (or bareboat charter-

ing) is hiring a vessel without a crew or anything else. So, the charterer is responsible for hiring the crew, and paying all the expenses of the ship, including maintenance, fuel and port expenses. In the voyage charter, the chartering is per trip, either for the whole vessel or part of it. There is also the time charter, in which the hiring of the vessel is for a specific period of time, and the operational control of the vessel remains with the ship owner. Disputes related to the charter party may be regarding the unseaworthiness of the ship if it is presented without full and complete conditions to operate, which could be a documentation situation, as well as if the vessel is presented with a leakage, with a broken engine or machinery or with a non-working steering gear. All these conflicts would need mediation to be solved. Also, contractual claims are related to violation or inadequate charter party contracts. When a contract is signed, the vessel is presumed to be available for the whole period. In case there is a need for it to be off hire during an emergency repair, the freight to be paid could be readjusted to reflect the correct time it is available for the charterer.

Co-existence claims are the ones that concern the existence of more than one activity in the sea, sharing space and/or dividing the use of time among the parties. If parties will use the same area, and their activities are incompatible or could cause safety concerns, these matters could cause conflicts. Examples could be gathering activities and practices of wind sports and shellfish in the same location[81].

Crew Relations conflicts are the ones that could emerge from labor relationship among crewmembers and all the employees who are appointed to work on ships, cruises, and platforms, among others. When there are several persons working together, conflicts might arise, which is natural. When one understands the nature of a crew relationship, which is to be in a closed circulation environment for weeks and eventually for months, it is even easier to understand and conceptualize the possible emergence of conflicts. Can you imagine a vessel that makes long journeys in the ocean, or even continental platforms where workers must stay onboard for long periods without going home or having a possibility to “take a break”? Since these workers are in a long-term relationship, it is preferable for it to be restored to preserve the long-term labor relationship. For its characteristics, mediation is the preferrable means of solving these types of conflict.

Domain interests are the ones to include conflicts caused by the delimitation of maritime spaces and boundaries. The example given by Torgeir Haavik, Kristine Storkersen and Stian Antonsen[82] is a conflict between the manager and the fishermen due to disagreements on the regulation of a Marine Protected Area.

Environmental conflicts are those that are related to environmental matters. This type of classification of disputes is the one whose concern for and studies are more rapidly growing. Environmental conflicts include any kind of environmental situation, e.g.

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81 Ibid.

82 Ibid.

when there is a leak in a bunker, a leak of oil in the ocean (as what happened in the Prestige disaster, as an enormous oil spill[83]), or matters recently under discussion: disputes regarding the permission of older ships to be regularly used due to illegal substance in their composition, such as asbestos.

Externalities to contracts are conflicts related to situations outside a contract's boundaries. Salvation would be a significant example of an externality to a contract. There is a ship in distress, with engine problems, sinking or has already sunk, for instance, and another ship has an obligation to save the ship before continuing any of its planned activities.

Conflicts regarding fisheries and **quotas** include fisheries and possible controversies relating to fishing quotas, thus being defined and ascribed to certain natural or legal persons. Problems might emerge from the internal division of quotas within the fisherman of a specific State.

General average conflicts are those related to the "sharing of the financial consequences of an unexpected casualty between the commercial parties which have a financial interest in seeing the "adventure" completed. The expenses which fall within this definition are borne by those parties in proportion to the value of their respective interests at the time when and place where the adventure ends"[84]. Conflicts usually refer to the concept of general average and knowing if a particular expense is included in the general average idea.

Passengers' conflicts are the ones connected to the transport of persons. Persons are transported in more than one type of vessel. Cruise ships are the most common and known ones, and they are vessels with contracts of a mixed nature: contracts of transportation and recreational purposes (in a cruise, there are services such as in hotels, restaurants, shopping stores, entertainment activities, among others). So, the potential for situations that can cause conflicts is vast. Passengers may get food poisoning, hurt themselves in an entertaining activity, or even when boarding a ship due to the lack of proper conditions. During the COVID 19 Pandemic, the world witnessed multiple conflicts between passengers and cruise companies, related to the cancelling of cruise ships and rescheduling.

Provision of services conflicts are the ones that may be caused by the rendering of services and multiple situations deriving from it. Poor rendering of services or the non-solving of problems hired to be solved may cause disagreements.

The classification of **safety management** includes the rendering of management services concerning the safety of the crew, the passengers, the ship, the cargo, and all that is involved in the operation of a ship.

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[83] MARTINEZ, Marta Rodriguez; LLACH, Laura. **Spain´s biggest environmental disaster: The Prestige oil spill 20 years later**. Euronews, 30/11/2022. Available at https://www.euronews.com/2022/11/14/spains-biggest-environmental-disaster-the-prestige-20-years-after. Access on June 5th, 2023.

[84] TSIMPLIS, Michael. The Liabilities of the Vessel. In BAATZ, Yvonne (coord.). **Maritime Law**. 5. ed. Oxon: Informa Law, 2021, page 269.

Vessel expenses include all the expenditures needed and listed for a well-functioning ship.

This taxonomy and list of categories of disputes was created to facilitate the understanding of what kind of conflict the matter at stake relates to. It is merely explanatory and classificatory, covering a wide range of maritime disputes, being relevant to identify the main interests in a maritime conflict, and supporting the parties on the definition of the best form of solving them.

The taxonomy also includes **indicators of dispute severity**, which are classified according to their complexity, impact, urgency and effects. The **complexity** ranges from low to high and will depend on the actors and issues involved in the disputes. The **impact** also varies from low to high, depending on their economic, environmental, reputational or societal classification. As to the **urgency**, the range is the same, from low to high, and the classification includes the possibility of prevention, just compensation, or whether interim measures might be taken. And last of all, regarding the **effects**, it is still ranged from low, medium or high, and their classification depends on whether the potential is short-term, long term or escalation.

These indicators were elaborated to contribute to the identification of situations where mediation is most fitted to be used. The categories and actors are very broadly classified, and one situation may be framed in more than one category. The list is non-exhaustive, and the Project participants' intention when created the taxonomy was for it to be a starting point for the classification of maritime mediations.

For example, if there is a problem related to the quotas, and that situation is due to the elevated numbers of pollution, the situation's complexity will increase.

It is adequate to use mediation in all levels of complexity, impact, urgency and effects of the categories of disputes. Nonetheless, the more these indicators increase, the same happens with the appropriateness to use mediation, since: as more complex the situation is, the more creative and flexible the mediation will have to reveal itself to accommodate the particularities of each case; as more impactful the matter is, the more transformative dimensions of mediation are valuable to the resolution of the disputes; as more urgent the situation is, the more mediation needs to be solved in an expeditious manner and with a wide variety of solutions that could lead to a settlement that prevents or diminishes the aggravation of damage; and as more enduring the effects of the situation are, the more mediation can be a means of managing and reestablishing relationships, avoiding escalation of the conflict and as a means of promoting pacification of the situation at stake.

It is, therefore, to all parties' benefit to be able to use mediation to solve disputes in the maritime area, and the taxonomy has reinstated those arguments.

3.2 Taxonomy illustrated

The author of this book has used the taxonomy to create a list of disputes and classify them accordingly to the criteria of the taxonomy explained above. This outcome was called the extended taxonomy and is listed below. There is a classification as to the topics involved in the disputes, a brief characterization, the actors involved, and the level of complexity, impact, urgency and effects that, as already shown, may be relevant

to set out criteria for resorting to mediation and to conduct the mediation itself. Indeed, mediators and parties, with the taxonomy's support, may better understand which actors should necessarily be involved in mediation (as parties or experts, for instance), how long should the mediation run, and which model or type of mediation is more adjusted to the dispute.

Topics involved in the dispute	Characterization (short description)	Actors involved	Complexity	Impact	Urgency	Effects	Note or reference
General average	Case: Dispute due to compensation for cargo thrown overboard to save a ship from grounding	Ship owner(s), ship operator, cargo owners	Medium	Medium	Low	Medium	HAAVIK, Torgeir; STORKERSEN, Kristine and ANTONSEN, Stian. **A Taxonomy of maritime disputes as a foundation for mediation.** Available at https://medimare.eu/wp-content/uploads/2022/07/Taxonomyreport-web.pdf. Access on June 11th, 2023.
Provision of services	Case: The fire extinguishment system retrofitted on a ship does not function appropriately	Ship owner(s), ship operator, system manufacturer	Low	Low	High	Medium	HAAVIK, Torgeir; STORKERSEN, Kristine and ANTONSEN, Stian. **A Taxonomy of maritime disputes as a foundation for mediation.** Available at https://medimare.eu/wp-content/uploads/2022/07/Taxonomyreport-web.pdf. Access on June 11th, 2023.
Fisheries quotas	Case: Fishing quotas were changed, and part of the maritime sector is unsatisfied	State, Maritime sector (not always with converging views), associations	High	Medium	Medium	High	HAAVIK, Torgeir; STORKERSEN, Kristine and ANTONSEN, Stian. **A Taxonomy of maritime disputes as a foundation for mediation.** Available at https://medimare.eu/wp-content/uploads/2022/07/Taxonomyreport-web.pdf. Access on June 11th, 2023.
Co-existence	Case: A company developed a wave energy technology located in a fishing domain (claim for compensation)	Maritime Sector (not always with converging views); eventually, the State	High	Medium	Low	Medium	HAAVIK, Torgeir; STORKERSEN, Kristine and ANTONSEN, Stian. **A Taxonomy of maritime disputes as a foundation for mediation.** Available at https://medimare.eu/wp-content/uploads/2022/07/Taxonomyreport-web.pdf. Access on June 11th, 2023.

Topics involved in the dispute	Characterization (short description)	Actors involved	Complexity	Impact	Urgency	Effects	Note or reference
Environmental disasters at sea	Case: An oil ship (cargo) has an accident at sea and leaks oil affecting the coasts of three countries	States, Maritime sector, Cargo owners, NGOs, General Public	High	High	High	High	Reference: HAAVIK, Torgeir. STORKERSEN, Kristine and ANTONSEN, Stian. **A Taxonomy of maritime disputes as a foundation for mediation.** Available at https://medimare.eu/wp-content/uploads/2022/07/Taxonomyreport-web.pdf. Access on June 11th, 2023. Check the International Convention on Civil Liability for Oil Pollution Damage, adopted in Brussels on 29 November 1969, as amended by the Protocol signed in London on 27 November 1992 - and the International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunkers Convention) was adopted in London on 23 March 2001.
Environment	Case: Dispute regarding the permission of older ships to be in regular use due to illegal substances, such as asbestos	State; Ship operator; Ship owner; traders and cargo owners; Maritime Sector; NGOs, General Public	High	High	High	High	Reference: https://oglobo.globo.com/brasil/noticia/2022/08/apos-descumprimento-de-ordem-judicial-retorno-de-porta-avioes-brasileiro-que-se-guia-para-desmanche-e-solicitado-a-embaixadas-estrangeiras.ghtml
Environmental disasters at sea/ domain interests	Case: Discussion on the tort responsibility on the damage caused by hydrocarbons or chemical products derived from ships located in different areas of the ocean: competence of the Coastal State, Territorial Sea, Contiguous Zone, Exclusive Economic Zone	State, Ship Owner, Cargo Owners, NGOs, General Public, Insurance (eventually)	High	High	Medium	High	Reference: PINHEIRO, Luís de Lima. Estudos de Direito Marítimo. Lisboa: AAFDL Editora, 2021, page 237
Safety Passenger/ Force Majeure and Acts of God	Case: Due to Covid (or other illness), a cruise ship was stranded in one port and could not let its passengers out or set sail for another port	State, Ship owner, Passengers, Insurance (eventually); crewmembers and unions	Medium	Medium	High	Medium	HAAVIK, Torgeir; STORKERSEN, Kristine and ANTONSEN, Stian. **A Taxonomy of maritime disputes as a foundation for mediation.** Available at https://medimare.eu/wp-content/uploads/2022/07/Taxonomyreport-web.pdf. Access on June 11th, 2023.

Topics involved in the dispute	Characterization (short description)	Actors involved	Complexity	Impact	Urgency	Effects	Note or reference
Safety Passenger; co-existence (industries, recreational, etc.); Force Majeure and Acts of God	Case: Claims for personal injuries or death suffered during a cruise (contract of a mixed nature: contract of carriage of passengers by sea, holiday and relaxation, food and beverages, package travel.)	State, Passengers, ship operator, insurance (if applicable)	High	Medium	Medium	Medium	Reference: BOKAREVA, Olena. Claims for personal injuries by cruise ship passengers under international and EU regimes. In NAWROT, Justyna AND PEPŁOWSKA-DABROWSKA, Zuzanna. Codification of Maritime Law: Challenges, possibilities and experience. New York: Routledge, 2020. Minor accidents, such as a slip and fall; food poisoning (gastroenteritis), accidents during embarkation and disembarkation; accidents in the swimming pool, falling overboard, falling from the stairs, medical maltreatment; up to higher risk accidents, such as a collision (due to rough weather or human mistakes) with passengers drowning, injuring, and dying. Or event SHIPPING INCIDENTS, defined by the Convention as " shipwreck, capsizing, collision or stranding of the ship, explosion or fire in the ship, defect in the ship. See also Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 226 onward
Domain interests	Case: Conflict between manager and users (fisherman) due to disagreements on the regulation of Marine Protected Area	State Manager of the Protected areas (Public Administration) and Maritime sector (Artisanal Fishermen) Ship owners (small-scale owners)	High	Low	Medium	High	HAAVIK, Torgeir; STORKERSEN, Kristine and ANTONSEN, Stian. **A Taxonomy of maritime disputes as a foundation for mediation.** Available at https://medimare.eu/wp-content/uploads/2022/07/Taxonomyreport-web.pdf. Access on June 11th, 2023.
Co-existence (ii)	Case: Shellfish gatherer's activities and practice of wind sports in the same area (incompatibility of uses, safety issues)	Shellfish gatherers Wind sports users and promoters	Medium	Medium	Medium	High	HAAVIK, Torgeir; STORKERSEN, Kristine and ANTONSEN, Stian. **A Taxonomy of maritime disputes as a foundation for mediation.** Available at https://medimare.eu/wp-content/uploads/2022/07/Taxonomyreport-web.pdf. Access on June 11th, 2023.
Provision of services/ breach of contract	Case: Ship presents malfunctions or has broken machinery/ pieces due to defects in production. The shipyard is liable for the defect.	Ship operators; ship owners; insurers; banks, and Classification societies	High	Medium	Medium	Medium	Reference: https://www.maritimemediationcenter.com/

Topics involved in the dispute	Characterization (short description)	Actors involved	Complexity	Impact	Urgency	Effects	Note or reference
Provision of services / breach of contract	Case: Disputes over fuel quantity or quality provided for the fuel provider company.	Ship owner; ship operator; maritime sector	Medium	Medium	Medium	Medium	Reference: https://www.maritimemediationcenter.com/
Crew relations/ safety	Case: Crew and officers' accidents onboard of the ship/ occupational hazards.	State; Ship operator; Ship owner; crewmembers, and unions	High	High	High	Medium	Reference: https://www.maritimemediationcenter.com/
Crew relations/ Government	Case: Crew conflicts with hierarchical superiors, either in legal terms or due to illegal conduct from superiors (harassment).	State; Ship operator; Ship owner; crewmembers, and unions	High	High	High	Medium	
Crew Relations/ Government	Case: Non-Compliance of workers with disciplinary regimes.	State; Ship operator; Ship owner; crewmembers and unions	Medium	Medium	Medium	Low	
Crew Relations/ Government	Case: Crew treatment during a pandemic (COVID-19, monkeypox or other) in need of a classification of essential workers to have freedom of circulation privileges, and priority for vaccination, for example.	State; Ship operator; Ship owner; traders and cargo owners; crewmembers and unions; NGOs	High	High	High	High	Reference: IMO News Summer 2021. Available at https://issuu.com/imo-news/docs/imo_news_summer_2021_/s/12561442
Externalities to Contracts	Case: Judicial discussions on the applicable law due to the different international conventions in place in different States. Example: Brussels Convention 1924, 1968 and 1979 Protocols, Hamburg Convention 1978. Different applicability depending on what legislation is in place in the State judging the case and applying the convention it has ratified.	Ship operator/ Ship owner; traders and cargo owners; insurers, banks, classification societies	Medium	Medium	Low	Medium	Reference: PINHEIRO, Luís de Lima. Estudos de Direito Marítimo. Lisboa: AAFDL Editora, 2021, pages 183 e 184. In a different perspective: Case applicable law when paramount clause determines the applicability of Brussels convention of 1968, to a signatory and a non-signatory country, as well as a choice of law clause to the non-signatory country legislation. What should the applicable law be? (page 198, PINHEIRO, 2021).

Topics involved in the dispute	Characterization (short description)	Actors involved	Complexity	Impact	Urgency	Effects	Note or reference
Government/ Domain interests/ Crew relations	Case: Applicable law to crew labor relations	Ship operator; ship owners; traders and cargo owners; crew-members	Medium	Medium	Low	Medium	Reference: PINHEIRO, Luís de Lima. Estudos de Direito Marítimo. Lisboa: AAFDL Editora, 2021, page 229.
Domain interests	Case: applicable law to crimes and misdemeanors that happen inside the ship wherever it may be located in the ocean.	State, Crewmembers, passengers, Ship owner, Ship operator, Traders and Cargo Owners (possibly)	Medium	Medium	Low	Medium	Reference: PINHEIRO, Luís de Lima. Estudos de Direito Marítimo. Lisboa: AAFDL Editora, 2021, page 235. Competence of the law of the flag, law of registry or a general connection criterion, connected by the presumption of connection with the law of the flag?
Breach of contract	Case: Ship collision and discussion on the liabilities and indemnification payment. Collision may be caused by negligence in the navigation of the ship (where crew is overworked and the lack of rest causes inappropriate watch system), or in the management of the ship (compliance with statutory provisions and ensuring appropriate crewing for the ship with adequately trained seafarers).	Ship operator/ Ship owner; traders and cargo owners; insurers, banks, classification societies, passengers (possibly), crew-members and union.	High	High	Medium	Medium	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. pages 248 onward.
Breach of contract	Case: Ineffectiveness of the Paramount Clause when it would lead to the application of a pattern of responsibility of the carrier below the limit established by the Brussels Convention modified by the 1968 Protocol.	Ship operator/ Ship owner; traders and cargo owners	Medium	Medium	Low	Low	Reference: Referência: PINHEIRO, Luís de Lima. Estudos de Direito Marítimo. Lisboa: AAFDL Editora, 2021, page 248.
Chartering/ Breach of Contract	Case: charterer terminating the contract if the ship is not presented at the port of loading at the date specified in their contract.	Ship operator/ Ship owner; traders and cargo owners	High	High	High	High	Reference: PINHEIRO, Luís de Lima. Estudos de Direito Marítimo. Lisboa: AAFDL Editora, 2021, page 274 Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 149 as to REASONABLE DISPATCH for charterparties

Topics involved in the dispute	Characterization (short description)	Actors involved	Complexity	Impact	Urgency	Effects	Note or reference
Provision of services	Case: lack of safety at the port agreed by the Parties where the load/ unloading should be made. Definition of who should be responsible if it is not possible for the ship operator to fulfill contract at the specific port due to lack of safety.	Ship operator, Ship owner, Traders and cargo owners, insurers, port authorities	High	High	Medium	Medium	Reference: PINHEIRO, Luís de Lima. Estudos de Direito Marítimo. Lisboa: AAFDL Editora, 2021, page 277 Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 152 SAFE PORTS
Provision of Services	Case: Traffic jam at the port, delaying the ship (either at the beginning or end of the contract of affreightment). Payment of late fees, including demurrage.	Ship operator, traders and cargo owners, maritime sector, port authorities	High	High	High	Medium	Reference: PINHEIRO, Luís de Lima. Estudos de Direito Marítimo. Lisboa: AAFDL Editora, 2021, page 279 Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 190 (voyage charterparty demurrage)
Provision of services/ breach of contract	Case: An event occurs that makes the ship stay longer than predicted at the port for unforeseeable circumstances (a pandemic or other public interest situation, for example). Definition of who ought to pay for the costs.	Ship operator, traders and cargo owners, maritime sector, port authorities	Medium	Medium	Medium	Medium	Reference: PINHEIRO, Luís de Lima. Estudos de Direito Marítimo. Lisboa: AAFDL Editora, 2021, page 281 and 283 (right of compensation per delay at the port)
Breach of contract/ Vessel expenses	Case: misrepresentation of the owner of the ship as to what her actual condition/state is. Possible termination of the contract and indemnification of the injured party.	Ship operator; ship owner	High	High	Medium	Medium	Reference: PINHEIRO, Luís de Lima. Estudos de Direito Marítimo. Lisboa: AAFDL Editora, 2021, page 293
Chartering/ Breach of Contract	Case: the possibility terminating the contract if the ship is not ready at the time the contract of affreightment was supposed to start.	Ship operator; ship owner; traders and cargo owners (might involve crewmembers)	High	High	High	High	Reference: PINHEIRO, Luís de Lima. Estudos de Direito Marítimo. Lisboa: AAFDL Editora, 2021, page 294

Topics involved in the dispute	Characterization (short description)	Actors involved	Complexity	Impact	Urgency	Effects	Note or reference
External-ities to Contracts / Force Majeure/ Chartering	Case: Delay in the start of the boarding of the merchandise for reasons not attributable to the ship owner/ship operator. Negotiation among the parties. If it was due to a delay caused by ship owner or ship operator, possible contract termination.	Ship operator; ship owners; traders and cargo owners; insurers.	Medium	Medium	Medium	Medium	Reference: PINHEIRO, Luís de Lima. Estudos de Direito Marítimo. Lisboa: AAFDL Editora, 2021, page 295
External-ities do contract/ breach of contract/ chartering	Case: Deviation - Ship changing its route due to justifiable causes: saving lives, supporting another ship in danger or without justifiable reason and leading to a delay in the contract deadlines. (Unjustified deviation is a fundamental breach of contract, and the charterer has the right to elect to terminate the agreement).	Ship operator; cargo owners; insurers.	Medium	Medium	Low	Medium	Reference: PINHEIRO, Luís de Lima. Estudos de Direito Marítimo. Lisboa: AAFDL Editora, 2021, page 295 Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. pages 150 - DEVIATION IN CHARTERPARTY
Chartering	Case: Claims due to contractual infringements or inadequacy on Charter-Party contracts. Contractual agreements must lay all conditions for when, for example, the vessel is " off-hire" (during emergency repairs); adjustments to the hire charge in the event of the vessel being laid up	Ship operator/ Ship owner; traders and cargo owners; insurers, banks, classification societies	Medium	Medium	Low	Medium	Reference: ROGERS, Anthony, CHUAH, Jason, and DOCKRAY, Martin. Cases and Materials on the Carriage of Goods by Sea. Fifth Edition. London and New York: Routledge, 2020. page 10.
Cargo	Case: damage caused to the cargo that was in a container. Problem as to define legal liability for loss or damage to goods between all transport members in a Combined Transport or Through Transport Operation	Ship operator/ traders and cargo owners, insurers	High	High	High	High	Reference: ROGERS, Anthony, CHUAH, Jason, and DOCKRAY, Martin. Cases and Materials on the Carriage of Goods by Sea. Fifth Edition. London and New York: Routledge, 2020. page 13

Topics involved in the dispute	Characterization (short description)	Actors involved	Complexity	Impact	Urgency	Effects	Note or reference
Chartering	Case: discussion on the validity of an arbitration clause included in a charter party or in a BL.	Ship operator/ Ship owner; traders and cargo owners	Medium	Medium	Medium	Medium	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 5
Breach of Contract	Case: discussion on the validity of the arbitration clause when there is not a written document to prove the business practice of concluding the contract by exchanging emails: charterparties for example.	Ship operator/ Ship owner; traders and cargo owners	Medium	Medium	Medium	Medium	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 6
Breach of Contract	Case: discussion and distinction whether a contract is void (e.g., for illegality or *ultra vires*) or voidable (misrepresentation or non-disclosure).	Ship operator/ Ship owner; traders and cargo owners; insurers, banks, classification societies	High	High	High	High	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 35
Cargo/ Breach of Contract	Case: definition of jurisdiction based on where damage has occurred (difficulty in defining where it has happened).	Ship operator; traders and cargo owners; insurers	High	High	Medium	Medium	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 39
Cargo/ Breach of Contract	Case: conflicts due to *forum shopping*, especially because of different legislation applicable, liability and tonnage limits on the different legislation and international conventions.	Ship operator; traders and cargo owners; insurers	High	High	Medium	Medium	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. pages 51 and 52
Breach of Contract	Case: definition of the choice of law when a contract is silent; implied choice of law; two or more connecting contracts.	Ship operator; traders and cargo owners; insurers	Medium	High	Medium	High	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. pages 62 and 63

Topics involved in the dispute	Characterization (short description)	Actors involved	Complexity	Impact	Urgency	Effects	Note or reference
External-ities to contracts/ Breach of Contract	Case: discussion on the nature of a ship-building contract. " Shipyard terminated the contract and sued buyer for the payment of the first two installments of the purchase price due at the time of the rescission. Buy-er claimed that no property in the ship had ever passed to them under the rescinded contract and therefore the total failure of consideration made the instalments not due." (BAATZ, 2021, p. 83)	Shipyard; ship owner	High	High	High	High	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 83 Definition whether a shipbuilding contract is a contract of sale or a construc-tion contract (in which case the design and construction are also part of the consider-ation, not just the delivery of the good). Qualification as a hybrid contract? In this case, choice of law is also essential since different legislations qualify contracts differently.
Breach of Contract	Case: ship's fail-ure. Concurrence of causes for the failure: defective workmanship and proven lack of maintenance vs the shipyard's liability as an initial breach of contract.	Ship Owner, in-surer, ship opera-tor, crewmembers and unions	High	High	Medium	High	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 86 Case: Ackerman v. Protim Yard found to be ex-cused from liability if its initial breach of contract was less significant than the lack of maintenance in causing the event.
External-ities to contracts	Case: problems related to the reg-istration of a ship. Either the chain or registration might not be complete, or bona fide purchaser relies upon the evidence of title of seller provided by the Register.	State; Ship Own-er (and Bona Fide Purchaser)	Medium	Medium	Medium	Medium	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 101
Cargo/ Breach of Contract	Case: incorrect use of Incoterms (ICC) in the contract, leading to mis-taken obligations/ responsibilities of the Parties. One example is who bears the risk of loss of or damage to the goods while in transit.	Ship owner; ship operator; traders and cargo own-ers; crewmem-bers and unions; insurers, banks, classification societies	High	High	Medium	High	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. pages 109 to 114

Topics involved in the dispute	Characterization (short description)	Actors involved	Complexity	Impact	Urgency	Effects	Note or reference
Breach of Contract	Case: Breach of contract caused by a discrepancy in the products: either not as described, not in a satisfactory quality, or not as the sample sent by the seller.	Traders and Cargo Owners; Product Sellers; Insurers, banks, classification societies	High	High	Medium	High	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 116
Breach of Contract/ Payment terms	Case: Payment made by letter of credit may be rejected if the credit was agreed to be confirmed or if it requires the tender of documents different from the ones listed in the sale contract. Seller may refuse payment LC and withhold shipment of the goods.	Ship Operator, Traders and Cargo Owners (Seller and Purchasers), Insurers, Banks, Classification Societies	High	High	Medium	Medium	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 121 (“ the buyer is not entitled to amend the seller’s documentary duties via the letter of credit after the contract of sale has been concluded”. UCP 600)
Breach of Contract/ Payment terms	Case: Acceptance of a non-conforming credit – either express or through conduct - has been held to amount to a new agreement capable of modifying the contract of sale.	Traders and Cargo Owners; Product Sellers; Insurers, banks, classification societies	High	High	Medium	Medium	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 121 (“ the buyer is not entitled to amend the seller’s documentary duties via the letter of credit after the contract of sale has been concluded”. UCP 600)
Cargo/ Breach of Contract	Case: Discussion on the rejection of the goods in either FOB/CIF terms - physical versus documentary delivery of the goods.	Traders and Cargo Owners; Product Sellers; Insurers, banks, classification societies	High	High	High	High	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 124
Chartering/ Breach of contracts	Case: In chartering, breach of agency contract between broker and principal (lack of reasonable skill and care /claim in contract or in the tortious duty of care).	Broker, ship operator, ship owner, traders and cargo owners	High	High	Medium	Medium	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. Page 130
Chartering/ Breach of contracts	Case: In chartering, the liability of broker when misrepresenting rather than acting on behalf of the principal	Broker, ship operator, ship owner, traders and cargo owners	High	High	Medium	Medium	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 131

Topics involved in the dispute	Characterization (short description)	Actors involved	Complexity	Impact	Urgency	Effects	Note or reference
Chartering/ Breach of contracts	Case: Even with Broker not being a party to the chartering contract, could s/he enforce commission clauses between principals and shipowners and use the same ADR method used in the main contract?	Broker, ship operator, ship owner, traders and cargo owners	Medium	High	Medium	Medium	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 131. Allowed in England through the case Nisshin Shipping Co Ltd v Cleaves & Co. Ltd.
Chartering	Case: In a charter party contract ship is presented as unseaworthy (either ship leaking, machinery or engines and steering gear not working)	Ship operator, ship owner, traders and cargo owners	High	High	High	High	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 137
Chartering	Case: Owner makes misrepresentation during negotiation for charter party. Charterer may avoid the contract and sue for damages for misrepresentation.	Ship operator, ship owner, traders and cargo owners	High	High	Medium	High	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 141
Chartering	Case: Frustration of a charter party contract.	Ship operator, ship owner, traders and cargo owners	High	High	Medium	High	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 157. According to National Carriers Ltd. V. Panalpina (Northera) Ltd: " Frustration of a contract takes place when there supervenes an event (without fault of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding rights and/ or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances: in such case, the law declares both parties to be discharged from further performance" In maritime context frustration may occur if the ship is DESTROYED, REQUISITIONED, SEIZED or TRAPPED due to OUTBREAK OF WAR" .

Topics involved in the dispute	Characterization (short description)	Actors involved	Complexity	Impact	Urgency	Effects	Note or reference
Chartering	Case: Early redelivery - Earlier termination of a charter party time contract. Damages due to owner. Alternatively Late redelivery	Ship operator; ship owner; traders and cargo owners; insurers, banks, classification societies	Medium	Medium	Medium	Medium	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 161 onward
Chartering	Case: Off hire situations during which hire payment will cease, such as if the ship is captured, seized, detained or arrested legally (authorities) or illegally (pirates).	State, Ship operator, Ship owner, Traders and cargo owners, crewmembers and unions, insurers, banks, classification societies	High	High	High	High	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 177
Cargo	Case: Shipper makes a contract of carriage with carrier for the carriage of goods sold to Buyer. Buyer pays the price against the tender of the Bill of Lading by Shipper to Buyer. If goods are damaged in transit, the doctrine of privity of contract can cause problems (according to English law) for the Buyer to sue Carrier since Buyer is not a part of the contract of carriage (which was made only between the Shipper and carrier. Shipper did not suffer any loss, and therefore has no reason to sue, although having a title).	Ship operator, Ship owner, Traders and cargo owners, insurers, bank and classification societies	High	Medium	Medium	Medium	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 201
Cargo	Case: Seller suffers loss through the carrier's breach of the contract of carriage of goods which the carrier contracts with Buyer of goods.	Ship operator, Ship owner, Traders and cargo owners, Crewmembers and unions	Medium	Medium	Medium	Medium	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 206

Topics involved in the dispute	Characterization (short description)	Actors involved	Complexity	Impact	Urgency	Effects	Note or reference
External-ities to contracts	Case: definition of a salvor's remu-neration under the Salvage Conven-tion (based on the criteria under Article 13). Under Article 14 - special remu-neration is due to salvages involving environment dam-ages.	Ship operator, ship owner, Insurers, banks and classification societies, Sal-vage ship	Medium	Medium	Low	Low	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 258 Salvage reward is payable by the owners of the property salved, to the proportion of the value of the property saved - judges and arbitrators have significant discretion in awarding salvage (page 259) - could mediation define it by? Salvage reward's right is supported by a mari-time lien of the highest priority and a possessory lien on the salvaged property.
General Average	Case: " Injections of compressed air into the cargo tanks of a grounded tanker, as part of a salvage operation to refloat her, may cause increased cargo leakage through the damaged bottom"	Ship operator, ship owner, traders and cargo owners (eventual-ly), crewmembers (eventually), insurers, banks, classification societies	Medium	Medium	Low	Low	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 270.
General Average	Case: " Hull and cargo damage, typically water damage, caused by firefighting op-erations, discharge and reloading of the cargo at a port of refuge, and ex-penses incurred at that port. Expenses incurred, either by the ship or cargo owners, to forward the cargo to its destination onboard another ship, where the damage to the original carrying ship renders the continuation of her voyage physically or financially im-practicable, will not be treated as GA, in the absence of an express agree-ment between the parties".	Ship operator, ship owner, traders and cargo owners (eventual-ly), crewmembers (eventually), insurers, banks, classification societies	Medium	Medium	Low	Medium	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 270.

Topics involved in the dispute	Characterization (short description)	Actors involved	Complexity	Impact	Urgency	Effects	Note or reference
General Average	Case: Piracy charging ransom to release ship, cargo and crew. Ransom payments that are reasonably made are admissible as GA expenditure.	State, Ship operator, Ship owner, Insurers, Banks and Classification societies	Medium	Medium	Low	Low	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 270.
Domain interests/ environment	Case: The owner of a wrecked ship takes no action to remove it. Can the Coastal State take the necessary measures if it is outside the territorial waters?	State, Ship owner, NGO and the public	Medium	High	High	Medium	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 291
Domain interests	Case: Ship bunkering other ships transfer its remaining supplies to another ship operated by the same enterprise while both were in the archipelagic waters (therefore with innocent passage) without receiving prior authorization to do so.	State, Ship owner/ ship operator	Medium	Low	Low	Medium	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 346. Also, Duzgit Integrity Arbitration. https://pca-cpa.org/en/cases/53/
Crew Relations/ Artificial Intelligence	Case: Discussion related to unmanned/autonomous ships. Would the ship remain seaworthy if there are not qualified seafarers (in the Maritime Labour Convention to concept to personnel not " on board" of the vessel)?	State, Ship owner/ship operator, crewmembers and unions	Medium	Medium	Low	Low	Reference: KARLIS, Thanasis. Maritime law issues related to the operation of unmanned autonomous cargo ships. World Maritime University Journal of Maritime Affairs (2018) 17:119-128. Access on September 2nd. 2022. Available at https://doi.org/10.1007/s13437-018-0135-6 also in Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 331, check also if they would be compliant with the International Convention on Standards of Training, Certification and Watchkeeping 2010 (BAATZ, 2021, page 386).

Topics involved in the dispute	Characterization (short description)	Actors involved	Complexity	Impact	Urgency	Effects	Note or reference
Domain Interests	Case: conflicts regarding bunkering of fishing vessels under coastal State fisheries' jurisdiction. States are allowed to prohibit bunkering of such vessels and even confiscate ships that engage in it unlawfully - to the extent necessary to ensure compliance with coastal State regulations (Article 73, 1 of UNCLOS)	State, maritime sector, ship owner/ship operator;	Medium	Low	Low	Low	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 347. Case Virginia G (ITLOS, 2014).
Domain Interests	Case: The ship understood not to have to comply with the laws of the port it was in because it was holding a flag from a different State - understanding that the exclusivity of the Flag State is absolute. Prevention of the foreign ship from returning to high seas since it was leaving port without the prescribed safety equipment.	State, maritime sector (eventually), ship owner, ship operator	Medium	Medium	Low	Low	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 349. Such as in Sellers v. Maritime Safety Inspector (New Zealand Court of Appeal 1999, 2 NZLR 44).
Domain interests/ environment	Case: Greenpeace protesters invade a Russian oil ship. Russia laid piracy charges against them, and later downgraded the charges to hooliganism.	State, ship owner/ship operator, NGO/the public (eventually)	Medium	Low	Low	Low	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 354. Arctic Sunrise arbitration.
Domain interests/ environment	Case: Foreign Ship detained and prosecuted by Coastal State (in one of its ports) for violating pollution laws in its territorial sea or EEZ.	State, ship owner/ship operator	Medium	Medium	Medium	Medium	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 370. article 220 of UNCLOS.
Externalities to contracts/ breach of contract	Case: A bulk carrier suffered a total loss after a severe fire on board. Insurers denied liability based on misrepresentations, non-disclosure, and breach of the express ISM warranty.	Ship owner, ship operator, traders and cargo owners, insurers, banks, classification societies	Medium	Medium	Medium	Medium	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 380. Sea Glory Co v All Sagr National Insurance Co (The Nancy).

Topics involved in the dispute	Characterization (short description)	Actors involved	Complexity	Impact	Urgency	Effects	Note or reference
Environment	Case: The ship sank, and the certification organization, the owners, and the master of the ship were sued for liability due to the pollution caused at the coastal State.	State, ship owner, ship operator, crewmembers and unions, insurers, banks, classification societies	High	High	High	High	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 399. Erika case. https://www.gard.no/web/updates/content/53582/french-court-holds-multiple-defendants-liable-for-erika-spill
Environment	Case: Pollution affected the food chain of an area, making fish (salmon) dangerous to human health/ unproper to eat, in the reasoning of the spilling of oil from a ship. Thus, the salmon farming industry of such region sued shipowners, their insurers and the IOPC Fund for economic loss arising from the grounding of the ship.	Shipowner; insurers; IOPC Fund; maritime sector, the public	High	High	High	High	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 414. Case Landcatch Ltd. V. International Oil Pollution Compensation Fund.
Externalities to contracts/ Breach of Contract	Case: Broker breaches his duty of care to the assured - policy contracted had coverage for a shorter period than the guaranteed required.	Insurance Broker, insurers, shipowner;	Medium	Medium	Medium	Medium	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 472. Tudor Jones v. Crowley Colosso Ltd. See also Sharp v. Sphere Drake Insurance (The Moonacre - crew using the ship as houseboat) and Involnert Management Inc v. Aprilgrange Ltd (The Galatea).

Topics involved in the dispute	Characterization (short description)	Actors involved	Complexity	Impact	Urgency	Effects	Note or reference
External-ities to contracts/ crew relations	Case: Insurance war-ranty and conditions in the discussion. In the case Pratt v. Aigaion Insurance Co. SA, a vessel was insured, and the crew left the vessel after fishing to have dinner in a pub. The ship caught on fire and became a total loss. " The contract provided " Warrant-ed Owner and/or Owner's experienced skipper on board and in charge at all times and one experienced crew member". the court interpreted the warranty *contra proferentem* as it was found to be ambiguous. The Court also held that stipulating for " an experienced skipper" must have meant that the warranty was to be complied with when the vessel sailed, not when she was moored after fishing".	Ship operator/ ship owner; crew-members and unions; insurers, banks, classifica-tion societies	High	Medium	Medium	Medium	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 489. Case Pratt v. Ai-gaion Insurance Co. SA.

Topics involved in the dispute	Characterization (short description)	Actors involved	Complexity	Impact	Urgency	Effects	Note or reference
External-ities to Contracts	Case: Contractual discussions on the insurance contract. " In Thames v. & Mersey Marine Insurance Co V. Hamilson, Fraser & Co (The Inchmaree), a mechanical pump was damaged by the condensed salt from seawater. The House of the Lords held that this was not a peril " of" the seas because it could just as easily could have happened on land: it was not sufficient to make it a peril of the seas that it happened while pre-paring for a voyage or while the ship was at sea or even that it involved seawater. The common form of policy was imme-diately amended to say that such faults were indeed covered and the Inchmaree clause was born. Crew negligence was also covered by this new clause"	Ship owner/ ship operator; crewmembers; insurers	Medium	Low	Low	Low	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 504. Thames v. & Mersey Marine Insurance Co V. Hamilson, Fraser & Co (The Inchmaree).
Breach of contract	Case: " trader purchased a cargo of cooper ingots and sold it to buyer in China on the same day. When the containers were opened in Hong Kong, they were found to contain only slag of nominal value. It transpired that all documen-tation pertaining to the cargo - bills of lading, packing lists and quality certif-icates - had been fraudulent. The trader was unable to recover from the cargo insurers as there could be no loss of a cargo that never existed".	Traders and Cargo Owners; Product Sellers; Insurers	High	High	Medium	Medium	Reference: BAATZ, Yvonne. Maritime Law. Fifth Edition. New York: Routledge, 2021. page 512. Case Engelhart CTO (US) v. Lloyd's Syndicate 1221 for the 2014 Year of Account.

3.3 Mediation types

There are several mediation models: the Facilitative Model, the Evaluative Model, the Principles Model, the Transformative Model and the Narrative Circular Model.

In **evaluative mediation**, the mediator is allowed to express their view of what is a fair and just resolution of their dispute, on what are the strengths and weaknesses of their cases, and, as if the mediator behaved like a judge or a jury, they may make formal and informal recommendations to the parties regarding a possible outcome of a conflict resolution (e.g. arbitration or litigation). Evaluative mediation is based on a more active role of the mediator, who is usually an expert and will make available to the parties their expertise, technical knowledge and experience[85].

In **facilitative mediation**, there is no evaluation, and such behavior is not allowed. However, there is freedom for the mediator to express his/her view of the dispute, if the parties so request[86].

> 'In facilitative mediation a neutral third party, a mediator, assists the parties to settle their disputes. It is a voluntary process of managed negotiation where the parties negotiate their own deal, but it has a timetable, a structure and dynamics which 'simple' negotiation lacks. Mediators issue no judgment or awards. They control the process, not the result'[87].

In facilitative mediation, the mediator supports the parties for them to be able to reach the mutually agreed solution, usually through questions. Facilitative mediation is the primary type of mediation used by the parties who choose mediation as their ADR.

Transformative mediation differs from the previous types since understands it intends for the parties in the process to be empowered truly and have direct control over the process. The previous models do not have this emphasis on this characteristic[88]. It is a model that focuses on self-determined conflict resolution among the parties, and for them to learn how to solve their own conflicts, acquiring new skills that will be used in future resolution of conflicts.

The **principle model** (also known as the Harvard Model) is usually used in commercial mediations and is to produce a wise and effective agreement, to improve (or not to worsen) the parties' relationship. It searches for the development of the Best Alterna-

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[85] CEBOLA, Cátia Marques**. La Mediación: um nuevo instrumento de la administración de la justicia para la solución de conflictos**. Tesis Doctoral. Facultad de Derecho, Universidad de Salamanca, 2011. Available at https://iconline.ipleiria.pt/bitstream/10400.8/761/1/DDAFP_Marques_Cebola_C_LaMediacion.pdf. Access on November 28th, 2022.

[86] CLIFT, 2010.

[87] CLIFT, 2010, page 509.

[88] PAPPAS, op. cit. pages 157-204.

tive to a negotiated agreement. The model was developed by Roger Fisher and William Ury, with additions by Bruce Patton is called the model of principles since it is based on four main principles: first, the separation of people from their problems; second, the importance of valuing parties' interests and needs, and not their positions; third, the importance of inventing several options for the parties to reach an agreement with mutual gain; and fourth, the need to insist on the use objective criteria[89].

The **narrative circular model** has as a basis the parties telling their version of the conflict to support the parties in reaching a common comprehension of the conflict. The parties will tell their stories and change their meanings, reformulating, deconstructing, and reconstructing them. There will be a collective construction of a narrative recognized by all parties[90].

Catia Marques Cebola and Susana Sardinha Monteiro have given their specific views on these mediation models and their application in maritime mediation. For them, the facilitative model is often applied to maritime mediations since it "focuses on solving complex problems and simultaneously requires the integration of a diversity of knowledge, data, and technical and scientific facts"[91]. The evaluative mediation may be used in the maritime area with the utmost caution since the role of the evaluative mediator allows for the proposition and elaboration of suggestions for solutions. Regarding transformative mediation, it will be used in maritime mediation when parties with weak claiming capacity are to be encouraged to participate in the decision-making process. Therefore, there will be a change in the form parties relate in terms of working towards promotion of reconciliation. It could also be used for highly litigious and complex cases when parties claim mutual damages. The principles model is used in the maritime area, in a lesser formal form than in the United States of America. Maritime mediation will use the circular narrative model "when it is necessary to establish effective communication between parties, with a view to mutual understanding of the different perspectives that the parties bring to the process, in order to create a common story (to all parties) as in a puzzle". Therefore, all models have a different purpose and may be used in maritime mediation. It is essential for the parties and the mediator to understand the models available and to analyze what should be used in their precise situation due to their characteristics and specificities.

3.4 Maritime mediation procedure

The mediation procedure is very flexible and may present different features depending on the characteristics of the conflict. It may involve only two parties and a mediator or more participants. It may be concluded in one day if the parties have organized

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89 FISHER, Roger, URY, William, PATTON, Bruce. **Getting to Yes: Negotiating Agreement Without Giving In**. Second Edition. United States of America: Penguin Books.

90 CEBOLA, 2011.

91 CEBOLA, Cátia Marques and MONTEIRO, Susana Sardinha. **Maritime Mediation Models** in MediMARE Intensive Training. June 21st, 2023.

themselves and are fully committed to achieving an agreement, or it may take longer. Undoubtedly, mediation is a much simpler procedure than litigation or arbitration.

Rhys Clift[92] suggests the parties prepare themselves for the mediation by writing a brief mediation summary. With this summary, the parties may, with prose language and in an informal, simple, and straightforward way, explain what the case is about, and what they intend to demand. This will support the mediator to help the parties understand each other and the case itself. There should not be an overwhelming number of documents, so only a few central, and most important documents should be included in this summary. This cannot be anything like what parties would find or produce for a litigation or arbitration.

Important to mention that everything presented by the parties: the case summary and the documents are confidential, and parties should refrain from "legalizing" or "judicializing" the mediation procedure, using much the most complex judicial language or attempting to produce difficult evidence to prove their case. The character of the mediation shall continue to be informal, and the more documents produced, the more parties will escalate the formality of the procedure.

Usually, mediation is done in three phases: exploration, negotiation and a concluding phase (settlement). This is what scholars and mediators describe, but since mediation is an informal process and there is no pre-defined procedure, parties are free to decide what they intend on following. Parties are stimulated to use informal language to keep the procedure simple and least "judicialized". Also, the parties must bring to the negotiating table the person who has the decision-making authority since that person is the one to accept (or not) any proposed settlement. If the person with the decision-making power is not present, the efficiency and speed of the mediation procedure may be lost, since the negotiation parties will have to stop and consult that person.

During the mediation procedure, the mediator will commonly conduct private caucusing sections. These are sections conducted privately among the parties and the mediator, which move back and forth between the private and common sections. These have different purposes depending on the stage they happen. They may be early to "make the disputants feel fully heard, obtain direct access to the principals, facilitate venting, gather sensitive information, identify interests and probe for obstacles and build trust"; the middle stage encourages the exchange of information; ask about their interests, probe the parties' priorities, control the flow of negative information, reframe the disputants' views, moderate the bargaining process, change the disputant's assessments of the merits, develop potential options and encourage optimism" and, at a later stage "keep pushing and exploring, place the responsibility on the disputants, advise them, offer an evaluation, suggest specific settlement terms, adjourn and try again, and refer the parties to another process" [93]. Some of these objectives depend on the type of

[92] CLIFT, 2010.

[93] GOLAN and FOLBERG, op. cit., pages 153 to 160.

mediation referred to above since, for example, the mediator will not offer an evaluation in a facilitative mediation.

Online mediation has increased during the COVID-19 pandemic[94], and with its growing use, there is a better understanding of the positive side of conducting of online procedures. The involved costs are significantly smaller. Also, since it is essential to "bring to the table" the persons with decision power, and, depending on the corporations' location it might be very difficult to combine agendas, online mediation represents a bright side for this scenario. As to the downside of it, the mediator and the other parties will have more difficulty reading the nonverbal gestures of the parties[95], since usually on the cameras, parties have a limited vision of what they can see, sometimes a minimal angle. Sometimes the screen where they are watching the online procedure is too small. Specific instructions from the mediator should be respected on this behalf, regarding lighting, positioning of the cameras, etc., so that the process is not negatively impacted.

3.5 Enforcement of settlement agreements

When talking about mediation settlement agreements, it is essential to mention enforcement. Especially in the maritime area, due to its transnational nature, the enforcement matter rises with greatly. Mediation may lead to different formats of agreements. Some of them are written, and some do not have to be, and therefore, it is essential to discuss what is required in case enforcement is needed.

If, through mediation, the dynamic of the conflict is reconfigured and it is overcome in a manner that the parties accept its new format, parties will usually get to fulfil what they have accomplished through their mediation terms. In such situations, it is generally not necessary to talk about enforcement. Although, it is essential to understand what to do if that is not the situation among the parties. What if the parties reach a settlement agreement, and one of the parties decides not to respect it?

Then the other party will have to seek other measures to get payment or fulfil an obligation established in the agreement. One crucial question to be answered is whether enforcement mechanisms are established in the settlement agreement and in the legislation applicable in the State of execution. For such, one should understand what options are available and established by law, which is not uniform throughout legal systems.

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[94] CLIFT, Noel Rhys. **The Impact of COVID-19, Facilitative Mediation, Early Intervention, and the new Visual Online Dispute Resolution - Part 2.** November 2021. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3954261 Access on June 23rd, 2023.

[95] SCMA. **E-dispute resolution, World War C and the ongoing resolution of maritime disputes**. Available at E-dispute resolution and World War C_.pdf (scma.org.sg). Access on June 16th, 2023. In the same sense: SCMA. Dispute resolution and mediation during the COVID-19 disruption. Available at Dispute resolution and mediation during the COVID.pdf (scma.org.sg). Access on June 16th, 2023.

The first option is the one that follows the minimum approach[96]. For those, mediation agreements are like any other agreements which must be taken to court for an executive title to be issued, and, in such a manner, enforcement will be possible.

The second approach, a medium approach is the one according to which written mediation settlement agreements are enforceable if transformed in other legal instruments. There are three options for such "transformation". The mediation settlement may be turned into a notarial deed with the support and intervention of a notary public. With such procedure, the settlement agreement will be turned into a public instrument. Second, there is the possibility of judicial ratification of the court settlement. And third, the transformation of the settlement into an arbitral award in case of a med-arb procedure. In all three situations, the agreement may be enforceable even in cases – widespread in the maritime field – where the country of execution differs from the issuing authority.

The third approach is the maximal one. It is a more recent legal solution, and it understands that the mediation agreement is immediately and automatically enforceable, assuming the procedural guarantees given by the mediator's presence.

Direct enforceability is recognized in some national legislations, for instance, by article 9 of the Portuguese Law no. 29/2013) and also internationally by the Singapore Convention on Mediation, which reinforces the guarantees for compliance connected to mediation by the recognition of direct enforceability of international mediation settlements in the territory of any of the signing parties of the Convention. The enforcement of international mediation agreements recognized by the Singapore Convention on Mediation is to fill gaps in cross-border enforcement[97], as it expressly excludes settlement agreements which have been approved by a court or have been concluded in the course of court proceedings, are enforceable as a judgment in the State of that court and have been recorded and are enforceable as an arbitral award[98].

Under the Singapore Conventions, agreements must be in writing, signed by the parties, and they must show evidence it is the result of a mediation process[99].

By encouraging the enforceability of mediation in the maritime area, the tendency is to make the process more reliable. A party may, through the Singapore Convention, trust that the international settlement agreement signed in a faster process and with its more customized agreement will be enforceable in case it is needed.

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[96] LOPES, Dulce and PATRÃO, Afonso. **A executoriedade dos acordos de mediação em matéria civil e comercial**. *Revista Vox*, (13), 2022, 10–26. Available at https://www.fadileste.edu.br/revistavox/index.php/revistavox/article/view/22 Access on August 11th, 2023.

[97] ALEXANDER, Nadja Marie and CHONG, Shoyu. **An Introduction to the Singapore Convention on Mediation – Perspectives from Singapore**. March 2019 Nederlands-Vlaams tijdschrift voor mediation en conflict management 22(4):37-56. DOI http://dx.doi.org/10.5553/TMD/138638782018022004005

[98] Article 1, number 3 of the Singapore Convention.

[99] Article 4, number 1 of the Singapore Convention.

CHAPTER 4

MARITIME MEDIATION ASSOCIATIONS

We have, in Chapter 1, differentiated the types of maritime disputes. For private contracts, mainly in the shipping area, there is a predominance of appropriate means of solving conflicts. Mediation is a tendency - it has been each time more used. There are several private international organizations which provide support for international contracting parties. They usually use these organizations as a forum for solving disputes, as well as referring to their rules and model clauses, which may be inserted into their contract. When they refer to such rules and clauses, they are incorporated into their contract, and the parties become legally binding for them. It is more reliable for the parties to foresee how to solve possible conflicts if and when they emerge. It gives them predictability and legal certainty.

Using the model clauses created by associations with notorious knowledge and practice in the field is important since they were developed by experienced professionals and experts and improved with time.

We will analyze international commercial associations (which are not just used in the maritime and shipping area but also for other areas) and other specialized associations in maritime law.

The United Nations Commission on International Trade Law (UNCITRAL) is the main body of the United Nations, specialized in international trade law. Among the several areas the organization regulates are: creating rules, model laws, notes to explain themes with detail, and even supporting the United Nations in creating the texts of international treaties. Therefore, it is a complete organization, which provides general guidelines (soft law instruments) as well as hard law instruments. In this sense, UNCITRAL has been acting as a significant supporter of countries that do not have adequate mediation legislation. UNCITRAL published the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation in 2018. This Model law is provided to support countries in modernizing their legislation. They can adopt the

model law as a parameter to ensure greater predictability and assurance in its use[100]. It contains the concept, procedure, conduction of mediation, communication between the mediator and the parties, the binding and enforcing nature of the settlement agreements, and confidentiality. An essential reference to the growing use of mediation is that the model law dated 2002 referred to conciliation, and the one published in 2018 changed the terminology and adopted the term mediation. This change was probably a consequence of the Singapore Convention, which uses the same vocabulary.

The **International Chamber of Commerce (ICC)** is an international non-governmental organization that aims to promote and develop business and international trade. It creates soft law rules that may be used by the Parties in their international contracts in order to harmonize the regulations to which the parties will be bound. Among the subjects they develop materials on is mediation. Also, IIC has the **ICC International Centre for ADR**, which is a center that provides services for mediation procedures as well as administered mediation.

The **Society of Maritime Arbitration (SMA)** is an American professional non-profit organization, based in New York. Its mission is to "establish commercially effective legal procedures for Alternative Dispute Resolution". SMA has rules of mediation (SMA Rules) and a mediation clause. It does not organize or administer mediations. Its members may organize and administer mediation since it has a broad range of members specialized in maritime arbitration and mediation who have received training to be arbitrators and mediators. It even provides for a Code of Ethics for Mediators to support the parties' organization of the mediation procedure. It also provides for arbitration and Salvage Rules.

The **Baltic and International Maritime Council (BIMCO)** is an organization formed by ship owners, charterers, ship operators, brokers, agents, P&I clubs and other entities operating in the shipping sector. It has 110 years of functioning and provides support to its members. It provides model contracts and clauses which may be used during contract drafting and negotiation.

The **London Maritime Arbitrators Association (LMAA)** is an association of practicing arbitrators, which aims to support the growth of professional knowledge of London maritime arbitrators, and to support fast dispute solving. Mediation is one of the services they render, which includes other alternative dispute resolution means, as well: adjudication and dispute resolution boards and early neutral evaluation.

An international mediation and dispute resolution center, focused on maritime and shipping conflicts is the **Maritime Mediation Center**. This center presents a list of mediators specialized in the maritime area to whom one can refer cases to be mediated.

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[100] UNCITRAL. **UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation***, 2018*. Available at https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation. Access on May 28th, 2023.

The **Maritime Arbitration Association of the United States (MAA)** is described as a non-profit national organization in the maritime community for alternative dispute resolution. It is responsible for providing information on dispute resolution, supporting professional education and training and administering alternative dispute resolution means, namely mediation, arbitration and other out-of-court settlement methods.

The **Hong Kong International Arbitration Centre (HKIAC)** is a non-profit organization located in Hong Kong. Established in 1985, it is one of the world's leading dispute resolution organizations, specializing in arbitration, mediation and adjudication.

This is just an explanatory list of existing international associations. It does not intend, by any means, to be exhaustive. It intends to show some of the critical organizations that act on maritime matters, specifically in shipping in maritime mediation.

CHAPTER 5

RULES OF PROCEDURE

Due to the international nature of the maritime area, and some of its characteristics, mediation is the best means of solving disputes. Their actors are also international, and the regulations in the international maritime area are sparce and diverse (ranging from local, state, regional and international rules). This international nature of maritime disputes may lead to several conflicts, including conflicts of law and conflicts of jurisdiction. This is one of the reasons we have been stating mediation to be one of the preferred and best means of solving maritime conflicts. Parties may, in a maritime mediation, use the principle of private autonomy, choosing the exact way in which they want their conflict solved: where, according to which rules, and by whom.

In this context, mediation rules have a great importance in the maritime international arena. They will fill the blanks left by the legislation gaps, which are usually insufficient to cover all the areas. There are some international treaties, but their adhesion is small. Therefore, mediation rules fill the gaps, although they are not mandatory. Parties will need to choose voluntarily to adopt such rules contractually (before or after the conflict arises) for them to be used in case of an emerging conflict.

In mediation, there is not an established procedure to be followed, like there is in litigation, or even like there might be in arbitration (established by State legislation). Thus, mediation rules will only set general parameters for how to commence mediation and how the parties may follow such procedure. They will also establish how parties may appoint the mediator (or mediators in case they will appoint more than one mediator), what is the confidentiality level of the procedure and how the parties will communicate during the mediation (among themselves and with the mediator). Also, they will define if the parties may (or may not) present evidence, how they will do it, and the appropriate moment for evidence to be presented. There will also be a determination regarding the settlement agreement and the termination of the mediation. And finally, they will define how parties will share mediation costs and, in case they do not reach an agreement, how they will move to another procedure, such as arbitration.

Each of the mediation rules mentioned below (which is only an exemplificative list) has its own terms, but the ones we have mentioned are general terms. These Rules of Mediations (and clauses) are published by several organizations and may be incorporated into the text of a contract (by reference) or adapted as the parties may desire.

Important international commercial and maritime law associations, such as BIMCO, LMAA, SMA (these last three specialized in the maritime field), the ICC and UNCITRAL all provide for rules of mediation which the Parties can use. The advantage of using the Rules and clauses written by experts in the field is that they have been developed by field experts and updated throughout the years to adjust to the needs of the involved parties.

UNCITRAL published the UNCITRAL Mediation Rules in 2021[101]. The rules were previously named UNCITRAL Conciliation Rules and dated 1980, and, with the increasing use of mediation, the name on the rules has changed. There are also Notes on Mediation[102] accompanying the rules, which provide a broad explanation regarding mediation to parties and clarify any possible doubts regarding the mediation procedure, including a chart with an overview of the mediation steps.

UNCITRAL Mediation Rules (2021) are available on their website. Also, one can find their explanatory guide on mediation, which is very detailed.

The ICC published in 2014 its Mediation Rules, substituting the 2001 Amicable Dispute Resolution Rules[103], to reflect the current practices, recognizing the growing importance of mediation as a mechanism for solving conflicts. Their previous rules were the 2001 Amicable Dispute Resolution Rules (ADR Rules). ICC Mediation Rules may be found in several languages, which facilitates international contracts depending on where the parties are located. Mediation under the ICC is administered by the ICC International Centre for ADR (a separate administrative body within the ICC). It is a species of administered mediation (in comparison with administered arbitrations). ICC has four alternative model mediation clauses[104], which provide: an option to use the ICC Mediation Rules; an obligation to consider the ICC Mediation Rules; an Obligation to Refer to Dispute to the ICC Mediation Rules while permitting parallel arbitration proceedings if required; and at last, an Obligation to refer the dispute to the ICC Mediation Rules, followed by arbitration if required[105]. Therefore, ICC provides multi-tiered clauses to make them available for the

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101 UNITED NATIONS. **UNCITRAL Mediation Rules (2021***).* Vienna: United Nations, 2022. Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/22-01369_mediation_rules_ebook_1.pdf Access on July 11th, 2023.

102 UNITED NATIONS. **UNCITRAL Notes on Mediation (2021).** Vienna: United Nations, 2021. Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mediation_notes.pdf Access on July 11th, 2023.

103 ICC. **Mediation Rules.** Available at https://iccwbo.org/dispute-resolution-services/mediation/mediation-rules/. Access on July 11th, 2023.

104 ICC. **Mediation Rules**. Available at https://iccwbo.org/dispute-resolution-services/mediation/mediation-rules/ . Access on July 11th, 2023.

105 ICC. **Mediation Clauses.** Available at https://iccwbo.org/dispute-resolution-services/mediation/mediation-clauses/. Access on July 11th, 2023.

parties if want to use them. The diversity of the languages in which the clauses and rules of ICC are provided constitute an enormous advantage since it is a worldly know association (although English is still the most used language in maritime agreements).

The **Society of Maritime Arbitrators Rules for Mediation** published the latest version of its rule in 2016[106]. SMA identified the increasing use of mediation in the past years and updated their rules to better answer to the maritime community's needs. Their previous version of the rules was dated 1999. In SMA Rules, there is a Model Mediation Clause which can be incorporated by the parties in their contracts, foreseeing the possibility of using amicable settlement of disputes in case a conflict emerges.

BIMCO does not have mediation rules which the parties could examine. Their most updated alternative dispute resolution clause is dated 2021 and named Mediation/Alternative Dispute Resolution Clause[107]. BIMCO's clause is attractive since it is developed by a team representing active maritime members, such as shipowners, charterers, brokers, arbitrators, P&I clubs and legal experts.

LMAA published the **LMAA Mediation Terms** is dated 2002[108]. LMAA Mediation Terms stipulate general rules for the mediation procedures, including how to commence and end a procedure, how to appoint a mediator, how the parties are supposed to exchange information, what are the duties and powers of the mediator, the procedure's confidentiality and costs. LMAA has also published mediation terms made in co-operation with the Baltic Exchange, in 2009[109]. The LMAA / Baltic Exchange Mediation Terms 2009. These terms provide rules on how to form a mediation procedure and are very similar to LMAA Mediation Terms (2002). The downside is that LMAA does not provide a mediation clause to be included in the contracts. It references there is no need for a specific mediation clause contained in the contract when referring a dispute to mediation under LMAA/Baltic Exchange Mediation Terms.

The Maritime Arbitration Association of the United States also provides for Mediation Rules. MAA administers the mediation process and provides services for a specialized dispute resolution form of solving the conflict.

Also, the Hong Kong International Arbitration Centre (HKIAC) Mediation Rules are effective from 1st August 1999. They are published by HKIAC in consultation with the Hong Kong Mediation Council (HKMC) and are similar to the mediation rules of the government of Hong Kong.

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106 SOCIETY OF MARITIME ARBITRATORS. **SMA Rules for Mediation 2016.** Available at https://smany.org/mediation-rules.html. Access on July 11th, 2023.

107 BIMCO. **Mediation/Alternative Dispute Resolution Clause 2021.** Available at https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/mediation-clause-2021. Access on July 11th, 2023.

108 LONDON MARITIME ARBITRATORS' ASSOCIATION. **LMAA Mediation Terms 2002.** Available at https://lmaa.london/terms-mediation-terms/. Access on July 11th, 2023.

109 LONDON MARITIME ARBITRATORS' ASSOCIATION. **LMAA/Baltic Exchange Mediation Terms 2009.** Available at https://lmaa.london/lmaa-baltic-exchange-mediation-terms-2009/. Access on July 11th, 2023.

CHAPTER 6

MARITIME MEDIATION CLAUSES

As the parties understand the importance of foreseeing in the contract what is their chosen method for solving disputes, to avoid conflicts as to how the emerging conflict will be solved, they also avoid unnecessary litigation. In case the parties want to remediate possible conflicts in faster and least expensive forms, they will want to foresee the use of mediation contractually. For some States, such as London, this is as close as a guarantee may be regarding the possible use of mediation.

This may lead to a possible creation of an obligation to attempt to mediate. So, if the parties want to use model mediation clauses provided by the associations we have mentioned above they may choose the clause and incorporate it into their commercial contract or even sign a separate agreement solely to agree to mediate in case of a future conflict or in case of an installed conflict.

If the parties have made a choice and predicted contractually what will be the defined route, the path is clear and previously defined, and it raises the level of predictability of the obligations of the parties. Parties may also choose multi-tiered clauses that foresee the possibility of escalating into other types of proceedings, such as arbitration (multi-tiered or multi-step clauses) or may use simple mediation clauses.

The **UNCITRAL Model Mediation clauses** can be found in the annex of their Model Mediation Rules. There are two model clauses available, one which may be used for when the parties only want to mediate, and the multi-tiered clause, used for when the parties stipulate that, if mediation fails, they will automatically proceed to use arbitration as a means of solving their disputes.

"**Mediation only**

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination, or invalidity thereof, shall be submitted to mediation in accordance with the UNCITRAL Mediation Rules.

Note: The parties should consider adding:

(a) The year of adoption of the version of the Rules;

(b) The parties agree that there will be one mediator, appointed by agreement of the parties [within 30 days of the mediation agreement], and if the parties cannot agree, the mediator shall be selected by [relevant selecting authority];

(c) The language of the mediation shall be …;

(d) The location of mediation shall be … ." [110].

"**Multi-tiered clause**

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination, or invalidity thereof, shall be submitted to mediation in accordance with the UNCITRAL Mediation Rules. Note: Parties should consider adding: (a) The selecting authority shall be (name of institution or person); (b) The language of the mediation shall be …; (c) The location of mediation shall be… . If the dispute, or any part thereof, is not settled within [(60) days] of the request to mediate under these Rules, the parties agree to resolve any remaining matters by arbitration in accordance with the UNCITRAL Arbitration Rules. 10 Note: Parties should consider adding: (a) The appointing authority shall be (name of institution or person); (b) The number of arbitrators shall be (one or three); (c) The place of arbitration shall be (town and country); (d) The language of the arbitration shall be… "[111].

The ICC Model Clauses provide four alternatives to the parties which may be chosen and used by the parties in their contract. The clauses are scaled as they increasingly increase their commitment level to the mediation procedure. Clause A will be used when the parties may seek to settle according to ICC Mediation Rules. That is only an option; there is no obligation to commence mediation. In clause B, the parties commit to start mediation procedures according to ICC Mediation Rules. Clause C states the parties will start mediation but may also concomitantly start an arbitration procedure. And finally, clause D states the parties will start mediation and may subsequently start an arbitration procedure.

[110] UNCITRAL. **Mediation Rules (2021).** Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/22-01369_mediation_rules_ebook_1.pdf. Access on July 11th, 2023. Page 17

[111] Ibid., Page 09

Clause A: Option to Use the ICC Mediation Rules: The parties may at any time, without prejudice to any other proceedings, seek to settle any dispute arising out of or in connection with the present contract in accordance with the ICC Mediation Rules.
Clause B: Obligation to Consider the ICC Mediation Rules: In the event of any dispute arising out of or in connection with the present contract, the parties agree in the first instance to discuss and consider referring the dispute to the ICC Mediation Rules.
Clause C: Obligation to Refer Dispute to the ICC Mediation Rules While Permitting Parallel Arbitration Proceedings if Required: (x) In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. The commencement of proceedings under the ICC Mediation Rules shall not prevent any party from commencing arbitration in accordance with sub-clause y below." (y) All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.
Clause D: Obligation to Refer Dispute to the ICC Mediation Rules, Followed by Arbitration if Required: In the event of any dispute arising out of or in connection with the present contract, the parties shall first refer the dispute to proceedings under the ICC Mediation Rules. If the dispute has not been settled pursuant to the said Rules within [45] days following the filing of a Request for Mediation or within such other period as the parties may agree in writing, such dispute shall thereafter be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration[112].

The Society for Maritime Law (SMA) has published the **2016 Model Rules**, which has the following model mediation clause:

[112] ICC. **Mediation Clauses.** Op.cit.

Model Mediation clause

If a dispute arises under this contract, the parties may agree to seek an amicable settlement of that dispute by mediation under the Mediation Rules of the Society of Maritime Arbitrators, Inc. (SMA) of New York then in force. If there is then a mediation but it does not result in a settlement, or if the parties do not agree to mediate, the dispute shall be referred to arbitration before three commercial arbitrators under the Arbitration Rules of the Society of Maritime Arbitrators, Inc. (SMA), one to be appointed by each of the parties and the third by the two so chosen and their decision or that of any two of them shall be final and binding. Alternatively, the parties may refer the dispute to one commercial arbitrator under the SMA Rules for Shortened Arbitration Procedure ("SMA Shortened Rules") whose decision shall be final and binding. In either case, judgment upon such arbitration award may be entered in the U.S. Federal District Court for the Southern District of New York[113].

BIMCO has updated its alternative dispute resolution clause into **a Mediation/Alternative Dispute Resolution Clause** dated 2021. This clause is recommended to be used in conjunction with their arbitration clause (or a jurisdiction clause, in case the parties decide to use State Courts instead of arbitration if the mediation procedure does not result in an agreement). The BIMCO Clause may be used for alternative dispute resolutions in general, not just mediation. They intended to provide a broader clause that the parties could refer to. At the end of the clause, there is a safeguard remembering the parties that mediation might not stop the statute of limitations, so it reminds parties to take the necessary measures if that is the case.

[113] SOCIETY OF MARITIME ARBITRATORS. **Mediation Rules (2016).** Available at https://smany.org/mediation-rules/. Access on July 11th, 2023.

CONCLUDING REMARKS

The development of maritime mediation is a necessary step towards bringing more efficiency and inclusion in solving maritime conflicts.

Throughout this book, we have listed several important characteristics that highlight the notorious benefits of the use of maritime mediation, and also pointed out areas of attention regarding the use of mediation in the maritime field.

As a final exercise, we want to conclude by detailing some ways in which the development of mediation can be fostered in the maritime area[114].

The first one would be through public policy. If a country develops a public policy to stimulate parties to mediate and advertise their benefits, this legislative path might well be followed. It does not necessarily mean to institute mandatory mediation, but to regulate mediation – for instance, the enforcement of mediation agreements and its traits – to make it attractive to all involved, including the one's that still believe it the less: lawyers. Indeed:

> "All systems of administering justice should also be embedded with the knowledge that mediation exists and is a tool for achieving justice. Therefore, legislation should recognise the use of mediation for private and public entities within disputes that are open to mediation, as most do already with arbitration; but also judges (in on-court mediations) and lawyers (in on-court and off-court mediations) should promote this dispute resolution mechanism as one of the tools for solving a conflict.[115]"

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[114] This subject was addressed by the author in the MediMARE Final Symposium, held in Coimbra on July 1st. 2023. DONATO, Roberta Mourão. **Round table: the need for maritime mediation in MediMARE Final Symposium**. July 1st, 2023.

[115] LOPES, Dulce and DONATO, Roberta. **Module 04- Specificities of Maritime Mediation** in MediMARE Online Course. University of Coimbra Distance Learning Unit, 2023.

The second one is through education. This would be the basis for changing the mindset of maritime operators and legal operators in the maritime industry. If law schools and the maritime academia educate students to have as their first alternative a mediation procedure or another peaceful dispute-solving mechanism instead of thinking first about litigation, the legal systems would be more effective and efficient, and all the benefits of mediation would emerge in practice.

The third goes further and involves specific maritime mediation training. The formation of accredited mediators in the maritime area may bring the necessary reliance and expert knowledge to allow parties to attempt to mediate. Those who attempt and solve their problems more efficiently, less costly, and more beneficially will continue using the system and spreading the word on its benefits.

The fourth one would be through arbitration. Although this consideration might raise some eyebrows, arbitration can play a crucial role in supporting mediation, as some international and domestic arbitration centers also publicize rules for mediation and mediation clauses and administer mediation procedures. There is a “common” logic behind holding both mediation and arbitration since the procedures are, to some extent, complementary. If parties are unsuccessful in mediating, they will eventually arbitrate, as med-arb or multi-tiered clauses demonstrate to a great extent. Also, the same experts in maritime law that compose the list of mediators may be on the list of arbitrators, reinforcing competence in the field. Nevertheless, their action is quite distinct in both dispute-resolution mechanisms.

As a whole, we understand maritime mediation is a better means of solving disputes due to all its financial benefits and its ability to restore relationships. In the maritime area, the speed of solving conflicts is important due to the economic impacts of waiting. Maintaining commercial relationships in an area where actors are limited is also crucial. Due to its characteristics, mediation is a preferred method for dispute resolution in the maritime field.

ANNEX 1 · WIKIMEDIMARE

MEDIATION AND MARITIME GLOSSARY[116]

Acts of God – "An overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado. The definition has been statutorily broadened to include all natural phenomena that are exceptional, inevitable, and irresistible, the effects of which could not be prevented or avoided by the exercise of due care or foresight"[117].

***Ad hoc* arbitration** – Ad hoc Arbitrations are arbitrations that happen in a freer format. The Parties will choose the arbitrator, the arbitration rules and procedure, the venue and the location where the arbitration will occur.

Adequate Dispute Resolutions – a term that is used to refer to the extrajudicial means of resolution of conflicts, given the fact that they are not judicial[118]. They are, indeed, a more adequate means of solving disputes instead of constantly referring conflict to litigation.

Administered arbitration – an arbitration procedure made in an institution with pre-defined procedural rules, a list of arbitrators to indicate for the parties to choose (if they so desire), and the infrastructure for the arbitration procedures. The infrastructure includes the physical location (offices and rooms for the procedure to happen and to accommodate the parties) and administrative services to support the parties during all the procedure and for their communication on the progress of the arbitration.

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[116] This glossary has been elaborated by the author and previously published in the MediMARE Newsletters, available at the MediMARE website, as well as in the MediMARE Online Course.

[117] GARNER, Bryan (editor). **Black´s Law Dictionary**. 9th edition. St. Paul: West, 2009, page. 39.

[118] LOPES and PATRÃO, 2016, op. cit.

Several are the examples of the institutions that make administered arbitration, and we can mention the ICC International Centre for ADR[119] and the London Maritime Arbitrators Association[120].

Administered mediation – A mediation procedure that happen in one of the institutions that provide specific rules, a list of mediators and all the infrastructure necessary for the development and progress of the mediation, including physical structure and administrative services. One example of such institutions is the International Chamber of Commerce, which administers mediations through the ICC International Centre for ADR[121].

Administration fees – Administration fees are the fees paid to a chamber or association responsible for administering the arbitration or mediation. It will be responsible for providing the physical space, supporting the parties' communications and making the parties and the arbitrators or mediators aware of all the procedural developments.

Alternative Dispute Resolutions – Alternative dispute resolution is the term most commonly used by the American doctrine to refer to non-judicial means of solving disputes[122]. The term is criticized as it highlights litigation as the "normal" procedure and the other forms of solving conflicts as alternative. Thus, new terms to address this group of non-judicial forms of litigating conflicts emerged, such as Appropriate Dispute Resolutions and Adequate Dispute Resolutions (both also ADR).

Appropriate Dispute Resolutions – a more adequate term to refer to Alternate dispute resolutions, in the sense that they are more appropriate means of solving disputes, rather than to solve disputes having advantages and disadvantages, and the parties may choose among the different means available according to what is more appropriate to them[123]. (ref. Alternative Dispute Resolutions).

Arb/Med Proceeding – The Arb/med proceeding is one in which the neutral third party first conducts an arbitration procedure and then asks the parties if they want to mediate. That without disclosing the content of the arbitration award. If the parties choose to mediate and the mediation is successful, the content of the arbitration award is not disclosed by the parties[124].

Arbitration – "A method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.

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[119] ICC. **ICC International Centre for ADR.** Available at https://iccwbo.org/dispute-resolution-services/mediation/icc-international-centre-for-adr/. Access on November 28th, 2022.

[120] LONDON MARITIME ARBITRATOR'S ASSOCIATION. **Notes on London Arbitration and Frequently Asked Questions.** Available at https://lmaa.london/notes-on-london-arbitration/. Access on November 28th, 2022.

[121] ICC. **ICC International Centre for ADR.** Op. cit.

[122] LOPES and PATRÃO, 2016, op. cit.

[123] CEBOLA, 2011.

[124] CEBOLA, 2011.

Also termed (redundantly) binding arbitration[125]". Arbitration may be used to decide on patrimonial conflicts, for capable parties who can consent on the arbitration agreement. Arbitration is a confidential procedure, and it may be an *ad hoc* administration (ref.) or an administered arbitration (ref.).

Arbitrator – "A Neutral person who resolves disputes between parties, especially by means of formal arbitration"[126]. The arbitrator is a person appointed by the parties in an arbitration conflict to decide their demand in an arbitration tribunal. A conflict decided with litigation will usually be decided by one, three or five arbitrators. In case the parties decide to move with an administered arbitration, there are arbitration chambers which may refer to the parties a list of arbitrators specialized in a specific subject. The parties may choose an arbitrator who is not a jurist in some situations that refer to technical non-legal matters, which is an added value, since the decision will then be decided with more specialized knowledge.

BATNA – Best Alternative to a Negotiated Agreement is a concept introduced by Roger Fisher, William Ury and Bruce Patton in the book Getting to Yes: Negotiating Agreement Without Giving In[127]. The process of finding your BATNA requires three distinctive operations. The first is inventing. The negotiator has to create a list of possible actions to be taken if no agreement is reached. The second is to check your list on step number one, improve the best of them and turn the "most promising into real alternatives"[128]. And third is to select, among the alternatives you created, the best one. That is the Best Alternative to a Negotiated Agreement, which should be used as a parameter against every offer you receive during a negotiation.

Bill of Lading – "Originally called a "bill of loading", a bill of lading is not necessarily the complete contract of carriage of goods but is usually the best evidence of the contract. It is, as well, a receipt signed 278 by the master or on his behalf indicating in what apparent order and condition the goods have been received on board. Finally, it is also a document of title and thus a document of transfer, but not a negotiable instrument. It is usually a standard form contract, prepared and issued by the carrier or his agent"[129].

Breach of Contract – Breach of contract are disputes related to the non-observance or infringement of one (or more) of the contractual obligations by either of the parties in a contract.

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125 GARNER, op. cit., page. 119.

126 GARNER, op. cit., page. 120.

127 FISHER, URY and PATTON, op. cit.

128 Ibid., page 104.

129 TETLEY, William. Glossary of Maritime Law Abbreviations, Definitions, Terms and Odds ´n Ends in European Transport Law. **Journal of Law and Economics**. Vol. XXII n.3, 1997, page 278.

Broker – Broker is "a person who acts for or represents another in the buying and selling of shares in companies or protection against risk, or who arranges for the lending of money"[130].

Bulk carrier – Bulk carrier is the carrier that transports bulk cargo, which is the one that is not packaged in any way, such as grains, cement, steel and iron ore.

Bunker disputes – Bunker disputes are disputes related to the fueling of vessels. Sometimes associated with the quality and quantity of the fuel or any occurrence during the fueling procedure.

Cabotage – Cabotage is the maritime transportation between domestic ports of a country. This concept may also include continental transportation and within ports of autonomous regions of the same country (such as in Portugal, with the islands of Madeira and Azores)[131].

Caucus sections – Caucus sections are private sections conducted by the mediator with the parties of a mediation procedure to

Certification societies – "Certification societies are independent private bodies engaged in the study, development and surveillance of the technical side of ship structural safety, and as such, they have achieved a pivotal role within the shipping world. Generally speaking, the work of classification societies is based on service contracts with shipowners and shipbuilders alike"[132].

Charter Party Disputes – Charter party disputes are all disputes which connect to charter party contracts and relationships, which might be related to freight, hire, demurrage or any other matter that may occur during the charter party contract.

Charterers – Charterers are the persons who rent a ship or a vessel in a charter party contract.

Choice of forum – In an international agreement the parties may choose where they want their dispute to be litigated on. In case of such a decision, they may include in their international contract (ref.) a choice of forum, which will bind the parties to litigate in the venue decided on such clause.

Choice of law – in an international agreement, it is very common for the parties to decide what law will apply to their contract, since usually they come from different States. In case of such a choice, the parties will include in their international contract

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[130] CAMBRIDGE DICTIONARY. **Broker (noun).** Available at https://dictionary.cambridge.org/dictionary/english/broker. Access on February 10th, 2023.

[131] This definition of cabotage, including continental cabotage and insular cabotage may be found at Decreto-Lei nº 7/2006, de 4 de Janeiro. Available at https://www.imt-ip.pt/sites/IMTT/Portugues/TransporteMaritimo/Cabotagem-Nacional/Paginas/Cabotagem-Nacional.aspx. Access on February 10th, 2023.

[132] LORENZON, Filippo. **Safety and Compliance.** In BAATZ, Yvonne. *Maritime Law.* Fifth Edition. New York: Routledge, 2021, page 399.

(ref.) a choice law referring to all the conflicts which might arise among the parties to be decided according to the legislation of the country they decide on. The choice of law might be chosen also in international contracts where parties refer dispute resolution to arbitration.

CIF Terms – CIF is one of the most used Incoterms (ref.), which stands for Cost, Insurance and Freight. In the Incoterm CIF the exporter is responsible for paying all the costs, insurance and freight until the merchandise arrives at the port of destination. The exporter is responsible for delivering the products cleared for export at the port of shipment and paying all the costs until the destination port.

Coastal State – Coastal State is a state that borders territorial seas and which, according to the United Nations Convention on the Law of the Sea, has sovereignty extending "beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea"[133].

Collision is "an accident that happens when two vehicles hit each other with force"[134].

Compulsory mediation – In some legal systems, it is mandatory for the parties to attempt to mediate their disputes. In such cases, parties will attend before a mediator, but the principle of party autonomy and voluntary is preserved: they can decide to stop the mediation procedure at any point.

Confidentiality – Mediation procedures are, generally, confidential, which means none of the information disclosed between the parties and the mediator, and from the parties to the mediator may be made public. The parties, at the beginning of a mediation procedure, sign non-disclosure agreements (NDA Agreements).

Container – container is a metal recipient used to transport of cargo through air, maritime, railroads or roads[135]. The most common sizes are 20 and 40 feet. Dry containers are the most common ones. Other types are: Flat rack container, open top container, open side storage container, refrigerated ISO containers, ISO Tanks, Half height containers and special purpose containers.

Contiguous Zone – the Contiguous Zone is described by the United Nations Convention on the Law of the Sea as zone contiguous to its territorial sea, and it may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured[136].

Cruise – contract of a mixed nature, including both the contract of carriage of passengers by sea, holiday and relaxation, food and beverages, and package travel.

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133 UNITED NATIONS. United Nations Convention on the Law of the Sea. Article 2.

134 CAMBRIDGE DICTIONARY. **Collision.** Available at https://dictionary.cambridge.org/dictionary/english/collision. Access on February 17th, 2023.

135 PORTO DE LISBOA. Glossário. **Contentor.** Available at https://www.portodelisboa.pt/glossario. Access on April 20th, 2023.

136 UNITED NATIONS. United Nations Convention on the Law of the Sea. Article 33.

Demurrage – Demurrage is the extended stay or the fee charged by the extended stay of a container or vessel in a port. There is a contract in which a period is stipulated in which the stay is contracted, and whatever exceeds that stays must pay a fee called demurrage. It is also "the detention of a ship by the freighter beyond the time allowed for loading, unloading, or sailing" or "a charge for detaining a ship, freight car, or truck"[137].

Deviation – Ship changing its route due to justifiable causes: saving lives, supporting another ship in danger or without justifiable cause and leading to a delay in the contract deadlines.

Early Neutral Evaluation (ref. ADR) – Early neutral evaluation is an extrajudicial means of solving disputes in which a judge, an arbitrator or an independent third party hears the parties for one day and then verifies the written evidence presented by them. Then, he or she gives a non-binding evaluation of the possible outcome of the dispute. For confidentiality and neutrality purposes, the person who provided the non-binding view cannot participate in any proceeding with the same parties[138].

Enforcement – "The act or process of compelling compliance with a law, mandate, command, decree or agreement"[139].

Equity – "The body of principles constituting what is fair and right: natural law[140]". Not all legal systems allow State judges to decide based on equity. ADR decisions may be taken based on equity.

Escalonated Clauses – Escalonated mediation clauses or tiered dispute resolution clauses are used in case the parties want to escalate possible conflict resolution types. There are different types of escalonated clauses, and a perfect example are the ICC clauses.

Evaluative mediation – Evaluative mediation is the mediation procedure in which the mediator is allowed to express his views of what is a fair and just resolution of the dispute, as well as on what are the strengths and weaknesses of the case[141].

Exclusive Economic Zone – "The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part (Part V of UNCLOS), under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions" of UNCLOS"[142]. It is in the Exclusive Economic Zone that the Coastal State has " (a) sov-

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137 MERRIAM-WEBSTER. **Demurrage.** Available at https://www.merriam-webster.com/dictionary/demurrage?utm_campaign=sd&utm_medium=serp&utm_source=jsonld. Access on February 20th, 2023.

138 CLIFT, 2006.

139 GARNER, op. cit., 608.

140 GARNER, op. cit., page. 618.

141 CLIFT, 2010.

142 UNCLOS, **Article 55 Specific legal regime of the exclusive economic zone**. Available at https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Access on February 20th, 2023.

ereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to: (i) the establishment and use of artificial islands, installations and structures; (ii) marine scientific research; (iii) the protection and preservation of the marine environment; (c) other rights and duties provided for in this Convention"[143].

Executive Tribunal (ref. ADR) – is an extrajudicial means of solving conflicts which involves a senior manager who attends the procedure with the case handlers before a mediator. The case handlers present the case and leave the procedure, and in such a moment the mediator and the senior managers discusses how the case can be solved[144].

Extrajudicial Dispute Resolutions – Extrajudicial dispute resolutions are the means of solving disputes without referring them to litigation. Among extrajudicial dispute resolutions are negotiation, conciliation and arbitration.

Facilitative Mediation – Facilitative mediation is the type of mediation where "a neutral third party, a mediator, assists the parties to settle their disputes. It is a voluntary process of managed negotiation where the parties negotiate their own deal, but it has a timetable, a structure and dynamics, which 'simple' negotiation lacks. Mediation issues no judgment or awards. They control the process, not the result"[145].

Fishing Quotas – Fishing Quotas are "Total allowable catches (TACs), or fishing opportunities, are catch limits (expressed in tonnes or numbers) that are set for most commercial fish stock"[146].

FOB Terms – FOB Terms are one of the Incoterms, a publication of the ICC, periodically published (the latest is dated 2020) to reflect market practices and needs. The Term means Free on Board (FOB), which means the obligation of the exporter ends when the goods are delivered on board of the ship.

Force Majeure – "An event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (e.g., floods and hurricanes) and acts or people (e.g., riots, strikes, and wars)"[147].

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143 UNCLOS, **Article 56 Rights, jurisdiction and duties of the coastal State in the exclusive economic zone**. Available at https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Access on February 20th, 2023.

144 CLIFT, 2006.

145 CLIFT, 2010, page 509.

146 EUROPEAN COMMISSION. **Fishing Quotas**. Available at https://oceans-and-fisheries.ec.europa.eu/fisheries/rules/fishing-quotas_en. Access on February 20th, 2023.

147 GARNER, op. cit., page. 718.

Forum Shopping – "The practice of choosing the most favorable jurisdiction or court in which a claim might be heard. A plaintiff might engage in forum shopping, for example, by filing suit in a jurisdiction with a reputation for high jury awards or by filing several similar suits and keeping the one with the preferred judge"[148].

General Average – is the "sharing of the financial consequences of an unexpected casualty between the commercial parties which have a financial interest in seeing the "adventure" completed. The expenses which fall within this definition are borne by those parties in proportion to the value of their respective interests at the time when and place where the adventure ends"[149].

Goods Carried by Sea – "Any goods conveyed by merchant ships. This includes all packaging and equipment such as containers, swap bodies, pallets or road goods vehicles. Mail is included; goods carried on or in wagons, lorries, trailers, semi-trailers or barges are also included. Conversely, the following items are excluded: road passenger vehicles with drivers, returning empty commercial vehicles and trailers, bunkers and stores of vessels, fish carried in fishing vessels and fish-processing ships, goods carried internally between different basins or docks of the same port"[150].

Groundings – (In Maritime law) "The term 'unintentional grounding' in shipping describes the accidental impact of the ship on seabed or waterway side. However, grounding can also be intentional in order to land crew or cargo (beaching) or to conduct maintenance or repairs (careening). Intentional grounding demands very careful maneuvering and high navigational skills, as any misunderstanding or wrong decision may lead to unfavorable situations. Nevertheless, it is the unintentional grounding that we must pay more attention and operators should ensure that crew members are aware of the emergency actions that should be followed in such cases"[151].

Incoterms – Incoterms are a publication of the ICC, periodically published (the latest is dated 2020) which sets different obligations and responsibilities for exporters (sellers) and importers (buyers). They are terms of trade for the sale of goods, divided into four groups, and goes from the slightest obligation to the exporter, which is the EXW (Ex works) when the Sellers's obligation is to deliver goods to the importer at its factory (being also responsible for providing documentation for the export procedures), to the most obligation to the seller DDP (Delivery Duty Paid) in which the

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148 GARNER, op. cit., page. 726.

149 TSIMPLIS, op. cit., page 269.

150 EUROPEAN UNION / UNITED NATIONS / ITF / OECD, **Glossary for transport statistics**, 5th edition, 2019. Available at https://ec.europa.eu/eurostat/documents/3859598/10013293/KS-GQ-19-004-EN-N.pdf/b89e58d3-72ca-49e0-a353-b4ea0dc8988f?t=1568383761000. Access on February 21st, 2023.

151 SAFETY4US. **Emergency Procedures: Actions to be taken in case of ship grounding.** Available at https://safety4sea.com/cm-emergency-procedures-actions-to-be-taken-in-case-of-ship-grounding/. Access on February 21st. 2023.

only responsibility of the buyer is to unload goods at the destination – even duty, taxes and customs clearance are paid by the seller.

International Contracts – International contracts are agreements between private or public parties that can be made orally or in writing. They are, though, usually made in writing due to the complexity of issues surrounding international enforcement of obligations, for example: foreign parties, obligations to be fulfilled in different States, agreement on the choice of law and choice of venue. International contracts are used for the international sales of goods and the international rendering of services.

International Treaties – International treaties are formal agreements between the subjects of International Public Law, e.g., States, International Organizations and the Holly See. These agreements have to be made in writing and may be made between two or several international subjects.

IOPC Fund – IOPC Stands for International Fund for compensation for Oil Pollution Damage. "The IOPC Funds are two intergovernmental organisations (the 1992 Fund and the Supplementary Fund) which provide compensation for oil pollution damage resulting from spills of persistent oil from tankers"[152].

Lex maritima or ***lex marityma*** is "The body of customs, usage, and local rules governing seagoing commerce that developed in the maritime countries of medieval Europe"[153].

Lex mercatoria or **law merchant** is "a system of customary law that developed in Europe during the Middle Ages and regulated the dealings of mariners and merchants in all the commercial countries of the world until the 17th century. Many of the law merchant's principles came to be incorporated into the common law, which in turn formed the basis of the Uniform Commercial Code"[154].

Litigation – Litigation is "the process of carrying on a lawsuit"[155]. Litigation occurs in State courts and are judged by Judges with jurisdictional authority attributed by the State. Judicial Decisions are enforceable in State Courts, as well.

Maritime disputes – Maritime disputes are the disputes that relate toe maritime activity. It might derive from maritime activities, related parties, and/or maritime law.

Maritime law – "The body of law governing marine commerce and navigation, the carriage at sea of persons and property, and marine affairs in general; the rules governing contract, tort, and workers'- compensation claims or relating to commerce on or over water"[156].

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152 IOPC Funds. Available at https://iopcfunds.org/. Access on February 21st, 2023.

153 GARNER, op. cit., page. 995.

154 Ibid., page. 956.

155 Ibid., page. 1017.

156 Ibid., page. 1055.

Med-Arb Proceedings – The Med-arb proceeding is one in which there is first the possibility of mediation, and, if unsuccessful, parties will start the arbitration[157].

Mediation – "Mediation is a process of assisted negotiation in which a neutral person helps people reach an agreement. The process varies depending on the style of the mediator and the wishes of the participants"[158]. It is not a negotiation since it necessarily involves a neutral third party. It is a consensual and confidential process led by the mediator, but the whole decision-making process is controlled by the parties.

Mediation clauses – Mediation clauses are used by the Parties in a contract to refer to mediation as the dispute resolution form they are adopting in case of an emerging dispute. There are several mediation clauses from different associations, and we mainly refer here to the International Chamber of Commerce (the ICC Model Clauses, which are multi-tiered clauses with increasing levels of commitment to the mediation procedure) and the UNCITRAL Model Mediation Clauses (one Mediation only and another Multi-tiered clause). Regarding specific Maritime Mediation Associations: the Society for Maritime Law (SMA) published in the SMA 2016 Model Rules, including a model mediation clause, and BIMCO also published in a Mediation/Alternative Dispute Resolution Clause 2021. All these rules have been developed by experts in their respective fields and updated as market practices and needs so required. SMA also provides a more complete SMA Model Agreement to Mediate,

Mediation Costs – Mediation costs usually involve the payment of the mediation fee, charges for a meeting room, expenses and meals. Usually, the fees are shared equally by the parties but may divide in a different proportion, according to their agreement.

Mediation Rules – mediation rules intend to explain to the parties what is the procedure to be followed during a mediation procedure, and, as mediation in the maritime usually happens with multistate parties, it also fills in legislative blanks or makes it clear to the parties what is the rule they will follow. Parties need, therefore, to decide what will be the rules applicable to their dispute. Several international associations have mediation rules. The UNCITRAL published the 2021 UNCITRAL Mediation Rules, and the International Chamber of Commerce published its Mediation Rules in 2014. As to specific maritime associations, the Society of Maritime Arbitrators Rules for Mediation is dated 2016. The London Maritime Arbitrators Association published its LMAA Mediation Terms in 2022, and in 2009 LMAA and the Baltic Exchange published the LMAA/Baltic Exchange Mediation Terms 2009. The Maritime Mediation Center also has mediation rules on its website.

Mediator – A mediator is an impartial third person called upon to support the parties in resolving their conflict. The mediator does not have any power in the decision of the conflict except to guide and support the parties into reaching an agreement. There are

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157 CEBOLA, 2011.

158 GOLANN and FOLBERG, op. cit.

several codes of conducts which will provide rules for the mediator´s acts. One of them is the Code of Ethics for SMA Mediators, for when mediations happen within SMA.

Mini-Trial (ref. ADR) – Mini-Trial is a form of alternative dispute resolution that consists of two phases. In the first phase, the parties defend their arguments for that specific case before an impartial person and the individuals with deciding powers from both sides. The intention is to defend to the other parties that their request has grounds, and they should reach an agreement[159]. In the second phase, the committee with the individual with deciding powers will intend on deciding. If they do not reach an agreement, they will make a statement on the solution a judge would give. The intention of the statement is to show a judge would decide and to encourage the parties to reach an agreement.

Multi-door courthouse – The multi-door courthouse was a system proposed in 1976 at the Pound Conference by Frank Sander. He suggested there should be a system to integrate in the same physical space several methods of conflict resolution, with different "doors" for each of the conflicts. When a conflict is brought to this building, the first door to which it should be directed is the mediation door. If it is not solved, then it should be directed to other forms of conflict resolution, such as litigation or arbitration if the parties so decide[160].

Neutral Fact Finder (ref. ADR) – Neutral fact finder is a procedure in which a neutral third party investigates the facts of that case, reporting them to the parties. There is no discussion of legal issues – neither liability nor quantum- and there are no assessments on the merits of the case made during the procedure. As the name refers, it is a procedure to investigate facts[161].

Non-Disclosure Agreements – Non-Disclosure Agreements (NDA) are confidentiality agreements for the parties not to disclose any information. In mediation procedures it is very common for the parties to sign NDA agreements to guarantee that no information revealed during negotiations will be released to people outside the mediation.

Peril of the Sea – "An action of the elements at sea of such force as to overcome the strength of a well-founded ship and the normal precautions of good marine practice. A peril of the sea may relieve a carrier from liability for the resulting losses. Also termed danger of navigation; danger of river; marine peril; marine risk; (in regard to the Great Lakes) perils of the lakes; danger of the sea"[162].

Port – "An area of land and water made up of such infrastructure and equipment so as to permit, principally, the reception of waterborne vessels, their loading and unloading, the storage of goods, the receipt and delivery of those goods and the embarkation

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159 CEBOLA, 2011, page 70.

160 CEBOLA, 2011, page 28.

161 CLIFT, 2006.

162 GARNER, op. cit., page 1253.

and disembarkation of passengers, crew and other persons and any other infrastructure necessary for transport operators within the port area"[163].

Salvage – Salvage is the act of assisting a ship at risk. The assistance is for saving lives, and property and to prevent pollution. There is a public policy developed to encourage assistance of endangered vessels, entitling the salvor to a salvage reward; to pay the reward at the time of rendering assistance, without a salvage contract; and the right of payment of the reward is protected by a maritime claim with a high priority: i.e. a maritime lien, which may be enforceable by a right to arrest the salved property[164].

Seafarers – A seafarer is "someone who is employed to serve aboard any type of marine vessel"[165].

Seaworthy vessel – "A vessel that can withstand the ordinary stress of the wind, waves, and other weather that seagoing vessels might ordinarily be expected to encounter. In some legal contexts, the question whether a vessel is seaworthy includes the question whether it is fit to carry an intended cargo properly. Under federal maritime law, a vessel's owner has the duty to provide a crew with a seaworthy vessel"[166].

Settlement Conferences (ref. ADR) – Settlement Conferences are conciliation attempts with a judge which happen before litigation starts[167]. Since the judge will get to know the facts of the case in different circumstances other than the presented in litigation and taking the confidentiality of mediation/conciliation procedures into account, he cannot be the same as the judge in that dispute.

Ship – Ship is "a large boat for travelling on water, specially across the sea"[168].

Shipping law – Shipping law or Law of Shipping is "the part of maritime law relating to the building, equipping, registering, owning, inspecting transporting, and employing of shops, along with the laws applicable to shipmasters, agents, crews, and cargoes; the maritime law relating to ships"[169].

Shipyard – Shipyard is where ships are built or repaired.

Singapore Convention on Mediation – The United Nations Convention on International Settlement of Disputes Resulting from Mediation, named the Singapore Convention on Mediation, was adopted by the United Nations Assembly in 2018. It has a general

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163 EUROPEAN UNION / UNITED NATIONS / ITF / OECD, op. cit.

164 TSIMPLIS, op. cit., page 254.

165 THE MISSION TO SEAFARERS. **What is a Seafarer?** Available at https://www.missiontoseafarers.org/about/seafarer-meaning. Access on February 21st, 2023.

166 GARNER, op. cit., page. 1699.

167 CEBOLA, 2011, Pag. 74.

168 CAMBRIDGE DICTIONARY. **Ship.** Available at https://dictionary.cambridge.org/dictionary/english/ship. Access on February 21st, 2023.

169 GARNER, op. cit., page. 966.

basis for mediation procedures, so it supports States that still do not have any legislation or mediation culture implemented on doing so, and, in that sense, the convention itself states that it aims at establishing a "harmonized legal framework for the fair and efficient settlement of disputes arising in international commercial relations" together with the use of the Model Law and Conciliation Rules of UNCITRAL.

Summary Jury Trial (ref. ADR) – Summary Jury Trial is a procedure similar to the Mini-Trial, in which there is a simulation of a judgment through the emission of a summary opinion from a judge, who will issue a non-binding opinion regarding the case. After that, the parties will attempt to reach an agreement knowing what a possible outcome in court would be[170].

Territorial Sea – Territorial Sea is the territorial bound where the coastal State may extend its sovereignty to, and it extends beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters to an adjacent belt of sea[171].

Towing – To tow is "to pull a car, boat, etc. along, fastened behind another vehicle or boat"[172].

Transformative mediation – Transformative mediation is the model by which mediation is understood as having the transformative potential of changing the mental attitude of the parties, generating empowerment and recognition of their capability of solving their daily issues. This model was created by Bush and Folger in 1994[173].

Unseaworthy claims – Unseaworthy claims are claims that relate to the seaworthiness of a vessel. So, if there was a contract for the purchase of a vessel and it was delivered in unseaworthy conditions, there would be an unseaworthy claim.

Vessel – Vessel is "a ship or a large boat"[174].

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170 CEBOLA, 2011, Pag. 72

171 UNCLOS, Article 2. Available at https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Access on February 20th, 2023.

172 CAMBRIDGE DICTIONARY. **Towing.** Available at https://dictionary.cambridge.org/dictionary/english/tow?q=towing. Access on February 21st, 2023.

173 CEBOLA, 2011, Pag. 263.

174 CAMBRIDGE DICTIONARY. **Vessel**. Available at https://dictionary.cambridge.org/dictionary/english/vessel. Access on February 21st, 2023.

ANNEX 2

WIKIMEDIMARE USEFUL LINKS

1. International Conventions

- United Nations Convention on Contracts for the International Sale of Goods (CISG)
- International Convention for the Safety of Life at Sea: 1914 (**SOLAS)** and amended in 1929, 1948, 1960. Current version in force 1974 as amended. Entry into force 25 May 1980. (Safety of ships and marine pollution)
- Athens Convention relating to Carriage of Passengers and their Luggage by Sea, 1974, as amended by Protocol 2002. (Establishes minimum standards for the carrier's obligations and liabilities).
- **The HAGUE CONVENTION**: The *International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Brussels 1924). Disciplines transport contracts (bill of ladings and similar documents).*
- **HAGUE-VISBY**: The *International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, as amended by the Protocol signed at Brussels on 23 February 1968 and by the Protocol signed at Brussels on 21 December 1979*. (Excludes *charter parties*)
- **HAMBURG RULES**: *UN Convention on the Carriage of Goods by Sea* 1978 (alters the Brussels Convention 1924 (the Hague Convention) since its ratification obliges the denounce of that convention). It applies to all types of transport (excludes *charter parties*).
- **ROTTERDAM RULES**: Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea

- United Nations Conference on International Multimodal Transport 1980
- UNCLOS United Nations Convention on the Law of the Sea
- International Convention on Arrest of Ships, 1999
- EUROPE**: Regulation Rome I** (Reg. (CE) nº 593/2008): determination of applicable law to the contracts of sales of ships (article 3rd) and to contracts of work on board of ships (article 8th).
- EUROPE**: Regulation Rome II** (Reg. (CE) nº 864/2007)- extracontractual responsibility for facts that happen on board of ships or involving ships.
- EUROPE: Regulation UE n. 1215/2012 (of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; Regulation n 44/2—2 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters or 2007 Lugano Convention.
- 2005 Hague Convention on Choice of Court Agreements-
- International Convention for the unification of certain rules of law respecting assistance and salvage at sea. Brussels, 23 September 1910
- International Convention on certain rules concerning civil jurisdiction in matters of collision 1952.
- International Convention on Civil Liability for Oil Pollution Damage (CLC)1969 altered by the Protocol of 1992 (CLC 1992).
- SEAFARERS: 1987 International Convention on Standards of Training, Certification and Watchkeeping of Seafarers. Check also the 1994 International Safety Management Code.
- COLLISION: 1952 Collision (Civil Jurisdiction) Convention.
- SALVATION: 1989 International Salvation Convention/ Limitation of Liability for Maritime Claims Convention (1976 Protocol dated 1996)
- SEAFARERS: Maritime Labour Convention 2006 (in the EU Directive 2009/13 directed transposing of its content into national legislations).
- WRECKS: 2007 Nairobi Convention (Wrecks within EEZ of a Contracting State or an equivalent zone of up to 200 miles from the coast)
- LIMITATION OF LIABILITY: the International Convention relating to the Limitation of Liability of Owners of the Sea-Going Ships (Brussels 1957 or 1957 Limitation Convention) and the Convention on Limitation of Liability of the Maritime Claims (London 1976 or 1976 LLMC)
- NATIONALITY/ REGISTRATION OF SHIPS: 1986 United Nations Convention on Conditions for the Registration of Ships.
- 1988 Convention for the Suppression of the Unlawful Acts against the Safety of Maritime Navigation (IMO)
- POLLUTION: Intervention Convention 1969 (International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969) IMO; Convention on Biological Diversity; the Basel Convention on Hazardous

Wastes 1992; the United Nations Framework Convention on Climate Change 1992; the Kyoto Protocol and currently the 2015 Paris Agreement.

- POLLUTION: International Convention for the Prevention of Pollution from Ships 1973 as modified by the Protocol of 1978 (MARPOL 73/78).
- POLLUTION: 1969 Civil Liability Convention + 1976 Protocol + 1992 Protocol = 1992 Civil Liability Convention: 1992 International Fund for Compensation for Oil Pollution Damage (FUND)
- POLLUTION: 2001 Bunker Oil Pollution Convention
- 2010 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (2010 HNS Protocol).
- POLLUTION FROM RADIOACTIVE SUBSTANCES: 1960 Paris Convention; 1963 Brussels Convention; 1997 Protocol to amend the Vienna Convention on Civil Liability for Nuclear Damage and the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention; International Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material (NUCLEAR) 1971 (liability of the carriers of nuclear materials).
- LIABILITY FROM CARRIAGE OF HAZARDOUS WASTES: 1989 Basel Convention on the Control of the Transboundary Movements of Hazardous Wastes and their Disposal (also from scrapping ships, which is considered to be hazardous waste).

2. International Organizations and Courts

- International Chamber of Shipping
- International Court of Justice
- International Maritime Employers' Committee (IMEC)
- International Maritime Organization (IMO)
- International Shipping Federation (ISF)
- International Tribunal for the Law of the Sea (Hamburg)
- Organization for Economic Co-operation and Development (OECD)
- United Nations
- United Nations Division of Ocean Affairs and the Law of the Sea (DOALOS)
- World Customs Organization
- World Trade Organization

3. Mediation Societies, Mediation Rules and Clauses

- American Arbitration Association (AAA)
- BIMCO
- BIMCO Mediation/Alternative dispute resolution clause 2021
- Câmara de Arbitragem e Mediação: Câmara de Comércio Brasil: Canadá (CAM-CCBC)
- Câmara de Mediação e Arbitragem Empresarial (CAMARB)
- CAMARB Mediation Clause
- CAMARB Mediation Rules 2018
- CBAM: Centro Brasileiro de Arbitragem Marítima (CBAM)
- CBAM: Regulamento da Câmara de Arbitragem e Conciliação do Centro Brasileiro de Arbitragem Marítima conciliação no curso do procedimento arbitral artigo 19 artigo 26 conciliação
- Chambre Maritime Arbitrage de Paris (CMAP)
- Conciliation at JSE (Japan Shipping Exchange)
- GMAA: Germany Maritime Arbitration Association (GMAA)
- GMAA Mediation Clauses
- GMAA Rules
- HKIAC Hong Kong International Arbitration Centre (HKIAC)
- HKIAC Mediation Rules
- HKMAG Hong Kong Maritime Arbitration Group (HKMAG)
- HKMAG Terms 2021
- ICC: International Chamber of Commerce
- ICC Alternative model mediation clauses (4 types – include all of them)
- ICC International Centre for ADR
- ICC Mediation Rules
- India Institute of Arbitration and Mediation (HAM Arbitration & Mediation Clause
- India Institute of Arbitration and Mediation (HAM)
- India Institute of Arbitration and Mediation (HAM) Mediation Rules
- International Centre for Dispute Resolution: International Dispute Resolution Procedures
- International Centre for dispute Resolution Mediation Clauses (several, including Med-Arb)
- LMAA: London Maritime Arbitrators Association
- LMAA Mediation Terms 2002
- LMAA Mediation Terms 2021

- Maritime arbitration association of the United States
- Maritime Arbitration Association of the United States Mediation Rules
- Maritime Mediation Centre
- Mediation Rules (Regulamento de Mediação 2016 of CMA-CCBC)
- Mediation Rules of Chambre Maritime Arbitrage de Paris
- OCC: The Arbitration and Dispute Resolution Institute (ADRI) of the Oslo Chamber of Commerce
- Oslo Chamber of Commerce
- Oslo Chamber of Commerce Mediation Clause
- Qatar International Center for Conciliation and Arbitration
- Qatar International Center for conciliation and Arbitration Rules of Conciliation and Arbitration
- SCMA: Singapore Chamber of Maritime Arbitrations (SCMA)
- Singapore Chamber of Maritime Arbitration SCMA
- Singapore Chamber of Maritime Arbitration SCMA BIMCO Arb-Med-Arb Clause SCMA Rules
- Singapore Chamber of Maritime Arbitration SCMA Rules 4th edition (includes mediation clause, med-arb)
- Singapore International Arbitration Center (SIAC Arb-Med-Arb Model Clause)
- Singapore International Arbitration Center (SIAC)
- Singapore Mediation Centre
- SMA: Society of Maritime Arbitrators
- SMA Rules for Mediation 2016
- Tokyo Maritime Arbitration Commission (TOMAC)
- UNCITRAL: United Nations Conference on International Trade Law (UNCITRAL)
- UNCITRAL Model Law on International Commercial Mediation and International Settlement agreements resulting from mediation 2018 (UNCITRAL Model Law)
- UNCITRAL Notes on Mediation
- UNCITRAL Rules on mediation 2021

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