



The Asia-Pacific Arbitration Review 2021

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The Asia-Pacific Arbitration Review 2021

A Global Arbitration Review Special Report

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Account manager Bevan Woodhouse

Production editor Kieran Redgewell

Chief subeditor Jonathan Allen

Subeditor Sarah Meaney

Head of production Adam Myers

Editorial coordinator Hannah Higgins

Publisher David Samuels

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Subscription details

To subscribe please contact:

Global Arbitration Review

Meridian House, 34-35 Farringdon Street

London, EC4A 4HL

United Kingdom

Tel: +44 20 3780 4134

Fax: +44 20 7229 6910

subscriptions@globalarbitrationreview.com

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Welcome to *The Asia-Pacific Arbitration Review 2021*, a *Global Arbitration Review* special report. *Global Arbitration Review* is the online home for international arbitration specialists, telling them all they need to know about everything that matters.

Throughout the year, GAR delivers pitch-perfect daily news, surveys and features, organises the liveliest events (under our GAR Live banner) and provides our readers with innovative tools and know-how products.

In addition, assisted by external contributors, we curate a range of comprehensive regional reviews – online and in print – that go deeper into developments in each region than the exigencies of journalism allow. *The Asia-Pacific Arbitration Review*, which you are reading, is part of that series. It contains insight and thought leadership inspired by recent events, from 37 pre-eminent regional practitioners.

Across 17 chapters and 112 pages, it offers an invaluable retrospective. All contributors are vetted for their standing and knowledge before being invited to take part.

Together, our contributors capture and interpret the most substantial recent international arbitration events of the year just gone, with footnotes and relevant statistics. Other articles provide valuable background so that you can get up to speed quickly on the essentials of a particular country as a seat.

This edition covers Australia, China, Hong Kong, India, Japan, Korea, Malaysia, Singapore and Vietnam. It also has overviews of construction and infrastructure disputes in the region (and how to avoid them), investment treaty arbitration (particularly its relevance to the Belt and Road Initiative), the impact of covid-19 on the art of damages calculation, and third-party funding.

Among the nuggets it contains:

- the common mistakes that contractors make when allocating risk in contracts and how to avoid them;
- a groundbreaking year for international arbitrations in Korea;
- the vogue among Asian states for including appeal mechanisms in their ISDS;
- how China's government has managed to open up the mainland market to institutions such as the ICC, without having to amend the national arbitration law;
- the end of natural-justice based challenges to awards in Singapore; and
- a handy table showing the position of third-party funding in eight Asian states.

And much, much more.

We hope you enjoy the volume. If you have any suggestions for future editions, or want to take part in this annual project, my colleagues and I would love to hear from you. Please write to insight@globalarbitrationreview.com.

David Samuels

Publisher

May 2020

Serving the Maritime Ecosystem

Punit Oza

Singapore Chamber of Maritime Arbitration

In summary

This chapter aims to highlight how the Singapore Chamber of Maritime Arbitration (SCMA) is contributing to the maritime and trading ecosystem in Singapore and beyond.

Discussion points

- Arbitration's role in the 'give and take' of Asian business.
- Key elements of the SCMA's rules and operating institutions.
- The SCMA's two special procedures: for marine fuel disputes and ship collisions.

Arbitration and its value to the ecosystem

Arbitration is the leading dispute resolution mechanism, especially in cases of commercial and international arbitration. It is a private mechanism for dispute resolution, selected and controlled by the parties as an alternative to court and is a final and binding determination of parties' rights and obligations.

In most cases, even the prospect of commencing arbitration may help find a quicker commercial solution for the parties. It often happens that the dispute has lingered on between parties and then one of the parties simply stops responding. The notice of arbitration is served by one of the parties to bring the other silent party back to the table. Once the notice is received by the other party, they usually return and hammer out a solution and the notice is withdrawn. This is a regular practice among businesses – especially in Asia where a 'give and take' culture is common – and eventually facilitates a settlement among the parties whether they go through arbitration or not.

The importance of a vibrant arbitration ecosystem is widely acknowledged as vital for doing business. This was highlighted as recently as June 2019 by Indian Supreme Court Judge V Ramasubramanian.¹ Singapore has 'worked symbiotically, and tirelessly, over the years to achieve the common goal of making us a major arbitration capital of the world'.² Some of these factors include 'a forward-thinking legislature, a robust judiciary, an expanding corps of skilled arbitration lawyers, and a top-notch infrastructure'.³ Singapore provides an ideal ecosystem for conducting international arbitration and the international arbitration mechanism in Singapore supports commerce in Singapore and beyond. The SCMA is honoured to be part of that arbitration ecosystem, as well as an integral part of Maritime Singapore.

It is well established that arbitration is a unique and successful avenue for dispute resolution; however, to really contribute and add value, the arbitration venue must:

- have a commercial focus;
- be independent and neutral; and
- provide cost-effectiveness for the parties.

The remainder of this review will present evidence that the SCMA ticks all three boxes.

Commercial focus

In the context of maritime arbitration, parties often choose arbitration so that their disputes will be adjudicated by commercially minded experts with a shipping or other relevant background, in a confidential setting, and where the eventual award can be easily enforced under the New York Convention. In most cases, the parties also want the decision to be final in order to move on from the dispute.

The SCMA is fortunate to have a diverse board chaired by Justice Chao Hick Tin, a senior judge of the Supreme Court of Singapore. The majority of the directors include eminent lawyers and arbitrators. A soon-to-be established users council representing shipowners, operators, cargo owners, brokers, protection and indemnity clubs and underwriters will add a further layer of expertise on which the SCMA can draw for comment and feedback. As the SCMA executive director, I bring a considerable amount of commercial experience with me, having worked for more than 25 years with both shipping companies and trading houses, meaning that I have the privilege of understanding the whole commodity and shipping supply chain from end to end.

The SCMA model of arbitration primarily provides an ad hoc framework for the resolution of shipping and trade disputes. As provided by the SCMA Rules, the start of arbitration is linked to the notice of arbitration by one of the parties as, while the rest of the process – including choosing and nominating the arbitrators – is left to the parties. It is only when either or both parties request the SCMA's assistance that the chairman can appoint an arbitrator as per the SCMA Rules.

While the choice of arbitrators is left entirely to the parties, the SCMA boasts a stellar line up of arbitrators, empanelled using an extremely robust and sustainable vetting process, that the parties can choose from. Mirroring the global character of Maritime Singapore, the SCMA's panel of 114 arbitrators are drawn from 15 jurisdictions ranging from Northern Europe to Australia. This is important, as a cultural understanding of commercial disputes is critical to ensuring the right conduct and adjudication of a dispute.

As a leading maritime centre, Singapore provides the required support and infrastructure systems necessary to ensure the smooth functioning of the arbitration process. With significant representation of both trading and shipping companies, the required expertise in the form of expert witnesses is also plentiful. The SCMA hopes to create a formal expert witness panel to add further value to its users and members.

One of the key aspects that the parties are looking for is the finality of the arbitration decision so that they can move on. Except in rare cases (eg, breach of natural justice, fraud or corruption), an SCMA award is binding. However, the Singapore Ministry of Law is currently reviewing feedback received following public consultation in relation to various proposed amendments to the International Arbitration Act (Cap 143A), which includes the introduction of a right of appeal on a point of law. The jury is still out.

The SCMA is extremely commercially focused and is fortunate to be a part of the leading commercial maritime capital of the world, enjoying the natural advantages of its position.

Independent and neutral

According to Sonal Sharma, ‘The most quintessential element of international arbitration is an impartial, independent and neutral tribunal.’⁴ The SCMA delivers this to the full, boasting a truly multinational and multicultural panel of independent and professional arbitrators to choose from. The SCMA also allows parties complete flexibility to appoint arbitrators from outside the SCMA panel. If the dispute requires three arbitrators, the parties may feel comfortable nominating arbitrators who are familiar to each of them and their cultural backgrounds, while the third arbitrator may be the neutral choice. Parties are spoilt for choice in such a situation, given the variety and depth of the SCMA panel.

When it comes to corruption, it is not only the lack of corruption that matters but also the perception of non-corruption. The SCMA gains deservedly in these aspects from Singapore’s stellar reputation and its maritime ecosystem. In the 2020 Corruption Perception Index, Transparency International ranked the least corrupt countries – with Singapore in fourth place out of 180 countries.⁵ This key advantage makes the SCMA an appropriate and relevant framework for arbitration for parties who are looking for an independent and neutral venue.

Further, the SCMA Rules provide complete flexibility for the parties pursuant to any law of their choice. If the parties can nominate qualified arbitrators, or decide to choose from the SCMA Panel, they are able to resolve disputes in accordance with the law chosen to power their contracts. English law is often chosen, but there is no reason why Chinese, Singaporean or Indonesian law cannot be applied in the resolution of disputes conducted by the SCMA.

A cost-effective option

In an industry that is cyclical in nature, cost considerations take predominance in all disputes. The SCMA is a truly cost-effective solution for parties. The SCMA is based on a flexible unadministered or ad hoc arbitration model, providing parties with control of the arbitration process and the freedom to reach an agreement with the arbitrator on their fees. At the same time, the parties have some of the features of institutional arbitration, such as access to a qualified panel of arbitrators and a secretariat to assist the parties if needed. The key benefit of the SCMA is the low level of fees for the parties, as there is no frontloading of high fees as is the case with institutional arbitrations.

In an institutional model of arbitration, there are stricter deadlines set by the body administering the arbitration and penalties for the parties who miss them. Given the multinational dimension of shipping, as well as the multiple languages and time zones involved, such deadlines are impractical for shipping and trade disputes. The asset in dispute (usually the ship) is typically at great distance from where the arbitration is taking place and there are

considerable complications involved to source data and people to argue or counter-argue the case. The SCMA proves extremely cost-effective as the parties mutually take the decision regarding such issues. Flexibility of the model helps keep the costs at reasonable levels.

Consider a demurrage dispute between an Indian shipowner and an Indonesian coal shipper. Given the nationality and domicile of the parties, it is likely that both the required data and people – including the expert witnesses well versed in the ways of shipments from Indonesia – could be more easily sourced, procured and flown into Singapore rather than from other centres further away. Singapore’s legal firms are also able to provide suitable personnel to handle such disputes in a more efficient manner. Both parties save on costs due to this arrangement and the SCMA holds a cost advantage as a result, albeit only in relevant cases.

With the largest dispute resolution complex in the world, Maxwell Chambers and Suites in Singapore boasts state-of-the-art facilities enabling remote hearings and video evidence of witnesses and parties. Most SCMA hearings are held in Maxwell Chambers, although parties can choose other venues by mutual consent. The use of modern technology not only reduces cost but also ensures a business-as-usual approach when severe restrictions are in place, such as the covid-19 pandemic.

Certain cases often require special expertise or procedures, which ensure a speedy and cost-effective solution. Like most arbitration centres, the SCMA has a small-claims procedure⁶ for cases where the dispute amount is less than US\$150,000. This is a much faster and simpler procedure and is, therefore, cheaper for the parties.

The SCMA has two specialised procedures. The SCMA Bunker Claims Procedure⁷ (SBC Terms) deals specifically with cases involving disputes regarding marine fuels, given Singapore’s pre-eminent world position as a bunker supplier. The fact that these terms have been formulated jointly with the Maritime and Port Authority of Singapore (a port regulator) and the Singapore Shipping Association (an industry body) amplify their relevance for the ecosystem.

The SCMA also has a separate procedure for dealing with ship collisions. The SCMA Expedited Arbitral Determination of Collision Claims (SEADOCC)⁸ aims to provide a fair, timely and cost-effective means of determining liability for a collision in circumstances where it has not been possible or appropriate to reach such an apportionment of liability using other means of dispute resolution.⁶ With substantial expertise in this field within the Singapore legal fraternity, SEADOCC is a unique offering to the global maritime ecosystem in a complex area of maritime law.

When using the SCMA’s specialist procedures, parties are assured of complete focus and cost-effectiveness of the process in order to arrive at a final and binding solution in the most efficient manner.

The road ahead for SCMA

The SCMA offers a commercially focused, independent and neutral, as well as a cost-effective dispute resolution mechanism for the maritime ecosystem. The road ahead for the SCMA will be built on the solid foundation provided by these factors.

The support and participation of the global maritime and trading community in Singapore is exemplary and the SCMA is very much a part of the ecosystem. In relevant cases, the SCMA will be happily embraced by the maritime and trading community. The secretariat’s role will be to ensure greater awareness and exposure for the SCMA and its value.

While focusing on the maritime and trading community, the SCMA will work on initiatives to enhance the value of the SCMA for its users and members.

Finally, no organisation can sustain itself without the support of the wider economic community. A vibrant arbitration forum is vital for the progress of the ecosystem. This was the key purpose of setting up the SCMA and its role may well evolve beyond that in future. The road ahead will involve multiple collaborations with industry representative bodies, lawyers, protection and indemnity clubs and institutes of higher learning – all of which are essential to building a sustainable and thriving SCMA that will feed into the maritime and trading ecosystem of Singapore and beyond.



Punit Oza
Singapore Chamber of Maritime
Arbitration

Punit Oza is the executive director and registrar of the Singapore Chamber of Maritime Arbitration (SCMA). Mr Oza has more than 26 years of experience in leading shipping and trading companies – such as Precious Shipping in Bangkok, Noble Chartering in Hong Kong and Torvald Klaveness in Singapore. Mr Oza holds an LLB from the University of London and an MSc in shipping trade and finance from CASS Business School in London. He is also a member of the Trade and Connectivity Subcommittee of Singapore Government's Future Economy Council and chairs the Singapore branch of Institute of Chartered Shipbrokers.

Notes

- 1 See www.outlookindia.com/newscroll/arbitration-ecosystem-vital-for-easeofdoingbusiness/1664206
- 2 Justice Steven Chong – SCMA Distinguished Speaker Series 2014.
- 3 Justice Steven Chong – SCMA Distinguished Speaker Series 2014.
- 4 <http://arbitrationblog.kluwerarbitration.com/2014/04/08/neutrality-v-nationality/>.
- 5 See https://en.wikipedia.org/wiki/Corruption_in_Singapore.
- 6 See www.scma.org.sg/rules#smcpcf.
- 7 See www.scma.org.sg/rules#bunker.
- 8 See www.scma.org.sg/rules#seadocc.



28 Maxwell Road #03-09
Maxwell Chambers Suites
Singapore 069120
Tel: +65 6324 0552
Fax: +65 6324 1565

Punit Oza
mail@scma.org.sg

www.scma.org.sg

The Singapore Chamber of Maritime Arbitration (SCMA) is a specialist arbitration institution for the resolution of maritime and international trade disputes. It is guided by its principal aim of providing a comprehensive set of non-administered arbitration rules with optional features. SCMA offers the maritime and international trade communities a neutral, cost-effective and flexible framework to resolve their disputes fairly and expeditiously.

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