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Commentary on the 3rd Edition of the Rules of SCMA

1. Overview

The SCMA last changed its Rules in May 2009. The most significant change then was from an institution administrating the arbitration process to a maritime industry driven entity providing a framework for maritime arbitration which gives party autonomy. It is therefore more akin to the traditional approach to maritime arbitration as exemplified by the London Maritime Arbitrators Association than the approach taken by the International Chamber of Commerce for commercial arbitration. SCMA arbitration is commenced by the claimant notifying the respondent. No management fees are paid to the SCMA.

The Rules have been revised again in 2015 and the 3rd Edition was published in October 2015. The more important changes are highlighted below.

Under the Rules the assumption is that the tribunal is of three arbitrators, but the parties can agree on a sole arbitrator or some other arrangement. Although there is a panel of arbitrators listed by SCMA, the parties can appoint any person that they chose to be an arbitrator. In the event that the parties cannot agree on a sole arbitrator or two arbitrators cannot agree on the appointment of the third arbitrator, on application of a party the appointment is made by the Chairman of the SCMA. There is no scale of arbitrators fees, but there is a requirement that arbitrators shall disclose their hourly rate, the number of hours worked and the purpose of that work. The law of the dispute can be any law that the parties have agreed. The physical place of the arbitration is Singapore, unless the parties agree another place. The juridical seat of the arbitration is Singapore, unless the parties agree another seat. If the juridical seat is Singapore, the arbitration is subject to the International Arbitration Act of Singapore, irrespective of the nationality of the parties.

The SCMA provides a set of Rules and a set of model clauses which do not form, part of the Rules. Schedules to these Rules can also be issued and apply as from the date that they are issued, not retroactively. Notes of Guidance can also be issued and are non-binding. There is a small claims procedure for claims not exceeding USD150,000 as set out in the last part of the SCMA Rules. Under this procedure, there is a sole arbitrator and a cap on arbitrator’s fees and recoverable legal costs. The current Rules incorporate SEADOCC, a set of rules specifically designed for resolving collision cases by specific agreement to arbitration after the claims have arisen. There is further procedure, separate from the SCMA Rules, for claims falling under

2. Singapore's SS600:2008 Code of Practice for Bunkering.
Model Clauses

There are now 4 model clauses. The first is the SCMA BIMCO Arbitration Clause 2013 which follows the BIMCO standard clause which now has options for arbitration in London, New York and Singapore. The second is the SCMA Arbitration Clause as was published previously. The third is the SCMA Bunker Arbitration Clause applying the Singapore Bunker Claims Procedure. The fourth is the new SCMA Arb-Med-Arb Clause allowing a mediated settlement to be made into an enforceable arbitration award.

3. Commencement of Arbitration – Rules 4 & 5

Arbitration is commenced by the claimant serving a written notice of arbitration on the respondent. This notice should include

(a) a request that the dispute be referred to arbitration,
(b) the identity of the parties to the dispute;
(c) reference to the arbitration provision in the contract;
(d) reference to the contract relating to the dispute;
(e) proposal on number of arbitrators; and
(f) the name(s) of the claimant's proposed arbitrators. It will be noted that arbitration is commenced without an arbitrator actually being appointed.

Within 14 days of receipt of the notice of arbitration the respondent shall serve on the claimant a comment in response to any of the proposals contained in the notice of arbitration and the name(s) of the respondent's proposed arbitrator(s).

It will be noted that there is no need to inform the SCMA when the arbitration is commenced. However, the tribunal is required to inform the SCMA of its appointment, see paragraph 3 below.

4. The Tribunal – Rules 6,7,14,15,16,18 & 46

Unless otherwise agreed the tribunal is of three arbitrators. Each party is to appoint one arbitrator and the two arbitrators are to appoint a third. The parties can agree a sole arbitrator or any other number of arbitrators and also the procedure for appointment. If an arbitrator to be appointed cannot be agreed upon after 30 days, one of the parties can apply to the Chairman of SCMA to appoint an arbitrator. If there are more than two parties in the arbitration, the parties shall agree a procedure for appointing the tribunal with 21 days of the service of the notice of arbitration and if the parties are unable to do so, the tribunal is

appointed by the Chairman of SCMA. The appointment fee of an arbitrator is SGD 500 payable to the arbitrator; if the Chairman of SCMA is required to appoint an arbitrator there is an appointment service fee of S$750 per party is payable to SCMA before release of the letter. If a full response is not received at time of release of the appointment letter, the party applying for the appointment shall make the full payment of S$1,500 for release and seek recovery of S$750 through their claims from the other party.

Within seven days of its appointment, the tribunal shall inform the SCMA of its appointment along with a brief nature of the dispute, without disclosing the parties' names. The purpose of this is so the SCMA can keep statistics on arbitrations conducted under its Rules. Also the SCMA is available to be contacted by a party or an arbitrator to assist informally to resolve any inappropriate delays in the process of the arbitration or the publication of the Award. The information to be supplied to the SCMA is published on its website, but at time of writing consists of the following: date of commencement of arbitration, names of the arbitrators, nationality of the parties, the type of dispute and, if known, the approximate amount in dispute.

The Tribunal conducting an arbitration shall be and remain at all times independent and impartial. A prospective arbitrator is required to advise any party seeking to appoint him of any circumstances likely to give rise to justifiable doubts as to impartiality or independence and if nominated or appointed to disclose such circumstances to all parties.

The appointment of an arbitrator can be challenged if there are justifiable doubts as to impartiality or independence or he does not possess the qualifications required by agreement of the parties. The challenge must be made within 14 days from the appointment of the arbitrator or within 14 days after the circumstances on which the challenge is based become known to the party challenging. If a party does not agree to the challenge or the arbitrator does not withdraw, the party making the challenge can refer the matter to the Chairman of the SCMA for his decision.

A court of competent jurisdiction may, on the application of a party, remove an arbitrator who
(i) is physically or mentally incapable of conducting the proceedings or where there are justifiable doubts as to his ability to do so, or
(ii) has refused or failed to use all reasonable dispatch in conducting the arbitration or making an Award.

The SCMA maintains a panel of arbitrators, details of which are on the SCMA website. It is not required that the parties use a person on the panel and they may chose anyone they wish. The criteria for membership of the SCMA panel is given on the SCMA website and is that the applicant: (i) has been engaged for at least ten years in a responsible position or positions in

one or more areas of the maritime industry, either commercial, technical or legal, (ii) has knowledge of law relating to maritime, arbitration practice and procedure, and (iii) demonstrates an ability to draft reasoned awards in maritime. There are provisions to enable waiver of the criteria in appropriate cases. Applicants are approved by an election sub-committee.

The SCMA Rules provide that the members of the Tribunal shall not be liable for any act or omission in connection with the arbitration. This has been amended to remove the proviso "unless the act of omission is shown to have been in bad faith" to follow the provisions in the SIAC Rules.

5. **Tribunal's fees – Rules 12, 13 & 29**

The parties have joint and several liability for fees, although the initial payment is made by the appointing party. An arbitrator may require payment of his fees and expenses at appropriate intervals, but not less than every three months. Rule 12 has been amended to give the Tribunal greater discretion as to how to invoice the parties consistent with their joint and several liability. If the fees and expenses remain unpaid for more than 28 days after payment is requested, an arbitrator may resign after giving 14 days' notice of this to all parties and payment remains unpaid. The Tribunal is entitled to call for security for estimated fees and expenses and rule 13 has been amended to give the tribunal a wider discretion to do justice between the parties. The form and amount of security is now at the Tribunal's discretion. There is a standard booking fee of SGD 1,125 per day per arbitrator for an oral hearing under Rule 29. If the hearing goes ahead this amount is offset against the Tribunal's fee.

6. **Law of Dispute, Juridical Seat of Arbitration, Place of Arbitration – Rules 2, 21 & 22**

The Tribunal shall apply the law agreed by the parties as being applicable to the substance of the dispute. Failing such agreement, the Tribunal shall apply the law determined by the conflict of laws which the Tribunal considers applicable.

The juridical seat of the arbitration is Singapore, unless the parties agree otherwise. The Tribunal only has the power to determine the juridical seat if the parties have failed to decide it. If the juridical seat is Singapore, and the SCMA Rules apply, the International Arbitration Act of Singapore (Cap 143 A) applies irrespective of the nationality of the parties. This Act applies the UNICTRAL Model Law on Arbitration 1985, with certain modifications. A commentary on the Act can be found on the SCMA website. One point to note is that unlike England's Arbitration Act 1996, there is no appeal on an error of law. If the parties do wish to have an appeal on error of law, it is open to them to agree to the juridical seat being England or some

other jurisdiction which gives effect to their wishes or to agree that the arbitration shall be

subject to the Arbitration Act of Singapore (Cap 10). This Act normally applies when both parties are Singaporean, but parties can agree that it shall apply when the parties are international; the Act permits an appeal on error of law. A commentary on this Act can also be found on the SCMA website.

The physical place of the arbitration is Singapore unless the parties agree another place. The Tribunal does not have the power to determine the physical place of the arbitration – it is for the parties to decide. Maxwell Chambers in Singapore has an excellent dispute resolution facility. The building has 22 hearing rooms, video conferencing facilities and extensive translation services. The website of Maxwell Chamber is www.maxwell-chambers.com. As to language, the SCMA Rules call for the arbitration to be in English, unless the parties otherwise agree.

7. Case Procedure – Rules 8,9,25,30 & 31

Under the new Rules, the SCMA as an organisation does not get involved in the case procedure and it is left the parties and the Tribunal. Unless otherwise agreed, case statements must be served at 30 day intervals, commencing with a Statement of the Claimant's Case within 30 days after the appointment of the Tribunal. The case statements are required to contain the fullest particulars of the party's claim or defence and to attach all supporting documents relevant to the issues between the parties to try and avoid any unnecessary process. If there is a failure to serve the Statement of the Claimant's Case or the Respondent's Defence, the Tribunal can terminate the proceedings in the event of the former and make an Award in the event of the latter. Within 14 days of the time fixed for the Statement of the Claimant's Reply, a Questionnaire must be served by each party detailing various matters regarding procedure, presenting evidence, length of hearing and costs.

Unless the parties have agreed documents only, the Tribunal shall hold a hearing for the presentation of evidence by witnesses. However, the testimony of witnesses can be submitted in written form and the Tribunal may place such weight on the written testimony as it thinks fit, in particular if the witness does not attend the hearing to give oral evidence. Rule 22.3 has been amended to give the Tribunal discretion whether hearings shall take place in Singapore or elsewhere in an appropriate case.

No party can adduce expert evidence without the leave of the Tribunal. Unless otherwise agreed by the parties, the Tribunal may appoint one or more experts to report to the Tribunal on specific issues and the Tribunal may require any party to give the expert relevant

information or to produce or provide access to, relevant documents, goods or property for inspection by the expert.

8. Jurisdiction and Powers of the Tribunal – Rules 20 & 33

The Tribunal has jurisdiction to rule on its own jurisdiction. Under Singapore's International Arbitration Act, an aggrieved party can appeal to the Singapore High Court within 30 days. The Tribunal may make an Award notwithstanding the failure of a party to comply with the Rules or the Tribunal's orders. The Tribunal has wide powers to permit parties to amend claims and time limits, to order parties to produce documents or make property available for inspection and samples to be taken.

If the parties agree, the Tribunal has power to join other parties to the arbitration. Where two or more arbitrations raise common issues of fact or law, the respective Tribunals can direct the arbitrations to be heard concurrently and give directions appropriate in the interests of fairness, economy and speed, including admission of evidence give in one arbitration be admitted in the other. This can be particularly important where there are claims up or down a chain of charters or commodity contracts.

9. The Award – Rule 32, 36, 37, 38, 39 & 41

The Tribunal now has a wide discretion when to close the proceedings under Rule 32. Unless the parties otherwise agree, the Tribunal shall make an Award in writing within 3 months from the date that proceedings are closed and shall state reasons for the Award. Interim Awards and separate Awards on different issues can be made. The Award shall be signed by all members of the Tribunal or a majority of the Tribunal. If an arbitrator does not sign the Award, the signatures of the majority shall be sufficient, provided that the reason for the omitted signature is stated. Members of the Tribunal need not meet together to sign the Award. There are provisions enabling a party to request, within 30 days after receipt of the main Award, an additional Award as to claims presented but omitted from the main Award. Also within the same time period, unless another time period has been agreed between the parties, a party may request a correction of any clerical or computation errors.

As soon as practicable after an Award has been made, the parties shall be notified along with the amount of the fees and expenses of the Tribunal. The Award shall specify the extent to which a party shall bear these fees and expenses. The Award can also include the extent to which costs of one party shall be paid by the other party. The Award can fix the amount of these costs or direct that the costs be taxed if not agreed. The Tribunal may make an Award in any currency it considers just and award simple or compound interest. Rule 37 now allows a Tribunal to award interest after the date of the award reflecting changes in Singapore law and

the International Arbitration Act. The tribunal shall specify the costs of the arbitration and which party or parties shall bear them. A new provision has been included expressly at Rule 41.4 allowing the Tribunal to take into account any unreasonable refusal by a party to

participate in a mediation when deciding which party shall bear the costs of the arbitration and the legal or other costs of the parties and their amount.

The parties and the Tribunal shall at all times treat all matters relating to the arbitration and the Award as confidential. The Tribunal shall send a copy of the Award to the SCMA within 14 days from the date of collection of the Award by one of the parties, with the identity of the parties removed. The SCMA can now publish the Award, provided no party objects within 60 days of publication of the Award. This is an amendment to put the onus on a party to object to encourage the publication of awards. The publication will be redacted to preserve anonymity as regards the identity of the parties, of their legal or other representatives and of the members of the Tribunal. The SCMA sees the publication of summaries of awards as important for the development of arbitration in Singapore and for the enhanced knowledge of the law and of arbitration practice.

10. SEADOCC

Rule 47 now provides that the parties may agree to the terms of SEADOCC for the determination of a dispute arising out of a collision. The SEADOCC terms are set out in Schedule B. These terms provide for a sole arbitrator whose charge rate shall be set out in an Engagement Letter. The parties are to bear the Tribunal's fees equally but are jointly and severally liable for the Tribunal's fees.

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