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Summary of Young-OGEMID Symposium No. 18 on "Maritime Arbitration and Mediation" (29 April to 6 May 2024)

by Z. Ejehi

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By: Zahra Ejehi

Executive Summary

Young-OGEMID’s eighteen Virtual Symposium (“Symposium”) revolved around Maritime Arbitration and Mediation which is a specialized area of practice covering disputes over issues such as contracts, cargo, charter parties, insurance, salvage, and collisions. The Symposium gathered four experts in this area to elaborate on topics including "Theory, Law and Practice of Maritime Arbitration", the Permanent Court of Arbitration "Sea Search Armada v. Colombia" case, recent developments in "Maritime Mediation", and more.

The Symposium, which was moderated by Professor S.I. Strong, included the following panelists:

1. **Dr. Eva Litina**[1], Hellenic Consumers' Ombudsman, University of the Aegean;
2. **Dr. Poomintr Sooksripaisarnkit**,[2] Australian Maritime College, University of Tasmania;
3. **Dr. Kleopatra Koutouzi**,[3] Legal Counsel, AIMS Shipping Corporation;
4. **Professor Martin J. Davies**[4], Admiralty Law Institute Professor of Maritime Law, Tulane University.

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[1] **Dr. Eva Litina** is a Legal Expert at the Hellenic Consumers’ Ombudsman and an attorney-at-law admitted to the Athens and New York bars. She has also taught commercial law at the University of the Aegean in Greece. Her main research interests include international arbitration and mediation, maritime and commercial law, comparative law, and diversity and inclusion. Eva is a London Maritime Arbitrators Association (LMAA) Supporting Member, a Member of the Chartered Institute of Arbitrators, Vice Chair of the Community Building, Networking & Scholarship Committee of Racial Equality for Arbitration Lawyers (REAL), and a former YO rapporteur and senior rapporteur. She is the author of “Theory, Law and Practice of Maritime Arbitration”: https://lrus.wolterskluwer.com/store/product/theory-law-and-practice-of-maritime-arbitration/

[2] **Dr. Poomintr Sooksripaisarnkit** is a Lecturer in Maritime Law at the Australian Maritime College, University of Tasmania. He is a Fellow of the Chartered Institute of Arbitrators, a Supporting Member of the London Maritime Arbitrators Association and a member of the Panel of Arbitrators of the Thailand Arbitration Center. He is also on the eBRAM Panel of Arbitrators and APEC Neutrals of the eBRAM International Online Dispute Resolution Centre. He is a member of the Maritime Law Association of Australia and New Zealand and the Australian Insurance Law Association. His research interests lie in commercial conflict of laws (private international law), insurance law (marine and non-marine), private aspects of maritime law, carriage of goods by sea, international sale of goods carried by sea, and aspects of international arbitration (relevant to conflict of laws).

[3] **Dr. Kleopatra Koutouzi** is a graduate of the Athens Law School, with postgraduate studies in Maritime, Corporate and Business Law at the Erasmus School of Law, Rotterdam. In 2022, she received her PhD from the Athens Law School for her research on mass claims in maritime law and alternative methods of dispute resolution (Nomiki Vivliothiki, 2023). She is an Athens lawyer, an Accredited Mediator of the Hellenic Ministry of Justice and a member of various international arbitration associations. She has worked for a number of years in law firms in Greece and abroad in the field of (international) commercial and investment arbitration. For the last several years, she has been working as an in-house legal counsel in a shipping company and as an external collaborator to the International Labour Organization (ILO), providing opinions on the implementation and compliance of Member States with the Maritime Labour Convention (MLC, 2006). Her book can be found via: https://www.eurobooks.net/p/200805/mass-claims-maritime-alternative-methods.html

[4] **Prof. Martin Davies** is Admiralty Law Institute Professor of Maritime Law at Tulane University Law School in New Orleans and Director of the Tulane Maritime Law Center. He is an Overseas Fellow of the Australian Academy of Law and a Titulary Member of the Comité Maritime International (CMI). Before joining Tulane, Prof. Davies was Harrison Moore Professor of Law at The University of Melbourne in Australia and before that,

1. Theory, Law and Practice of Maritime Arbitration

Dr. Eva Litina started her talk about the "**Theory, Law and Practice of Maritime Arbitration**" with a brief introduction to the shipping industry's strong preference for arbitration and the most prominent maritime arbitration centers.

Dr. Litina added that arbitration has been traditionally preferred as a means of dispute settlement in the shipping industry and is incorporated in various standard form contracts governing maritime activities such as shipbuilding, carriage of goods by sea, maritime insurance, and salvage.

Dr. Litina then referred to the procedural advantages of the choice to arbitrate as follows:

- the global enforceability of arbitral awards (under the New York Convention);
- the neutrality of the forum;
- the ability to choose specialized arbitrators; and
- the efficiency, cost, and confidentiality of the proceedings.

She added that *ad hoc* arbitration is the preferred type of arbitration in the maritime industry due to its level of confidentiality, efficiency, and flexibility and is conducted **without** the supervision of an institution or appointing authority. She then mentioned that: The shipping sector being one of the most ardent supporters of ad hoc arbitration, prominent maritime arbitration centers, such as the **London Maritime Arbitrators Association (LMAA)**, **New York Society of Maritime Arbitrators (SMA)**, the **Singapore Chamber of Maritime Arbitration (SCMA)**, and the **Hong Kong Maritime Arbitration Group (HKMAG)** are keen to stress that they are not administering bodies."

Dr. Litina then turned to the reason behind the complexity of the study of maritime arbitration, i.e. lack of publicly available data and awards due to the ad hoc nature and confidentiality of maritime arbitration. She added that there are no available global statistics on the number of maritime arbitrations. The only available information is derived from the number of arbitrators' appointments and the annual record of awards issued based on the rules of each arbitration institution. She mentioned that: "*According to these estimates, London handles eighty percent of the world's maritime arbitration work (3268 appointments in 2023). New York is presumed to be the second-largest maritime arbitration provider, while Singapore and Hong Kong have entered the competition for maritime arbitration business*."

She concluded her first post with another reference to her book and described it as being "*effectively built around exploring the standard form contracts used in practice as reliable evidence of maritime arbitration preferences*". She added that her book "*evaluates the industry's well-established pursuit of self-regulation and focuses on the most prominent maritime arbitral seats—London, New York, and Singapore—while also touching on other relevant jurisdictions, such as Hong Kong, Greece, Japan, and Korea*." According to her, a historical, comparative and policy analysis of maritime arbitration along with an extensive

he taught at Monash University, The University of Western Australia, and Nottingham University. He has also been a visiting professor at universities in China, Italy, Azerbaijan, and Singapore. He is presently a Senior Consultant with the firm of Clyde & Co.

comparative analysis of the legal regime and case law in each jurisdiction is provided in this book.

Q & A Session:

Prof. S.I. Strong thanked **Dr. Litina** for the excellent introduction and posed three questions. Firstly, she asked whether maritime arbitration applies national law or a specific type of international law. She then referred to the Convention on the Carriage of Goods by Sea Act (COGSA) as a quite important law in this regard, while recognizing a slight conflict between different countries' approach to existence of a body of international law known as maritime law. As an example, she mentioned the Australian view to maritime law as a municipal law and the American courts' view recognizing a type of customary public law in this regard.

The second question by **Prof. Strong** was whether from a procedural view, maritime arbitration is different from international commercial arbitration and if there are similarities, whether the two procedures have diverged or converged in recent years.

The third and last question was about the different types of evidence used under maritime proceedings, especially in the legal field of salvage (i.e. the recovery of damaged or sunken ships)[5] and whether AI and the use of deepfakes may affect this type of evidence.

Dr. Litina thanked **Prof. Strong** for the questions and answered the first question raised by Prof. Strong with reference to the international nature of shipping which leads to constant interaction of international and national laws. She mentioned that in maritime arbitration, both maritime substantive and arbitration law apply and the sources of law in this field include international and regional conventions, local laws, trade usage, and standard form contracts. Maritime arbitration is covered by the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration and there are certain international maritime conventions such as Hamburg Rules and Rotterdam Rules which contain specific provisions on arbitration (unlike the older Hague Rules and Hague-Visby Rules). Finally, she mentioned that considering the lack of a uniform regime in this field, mandatory rules are derived from public international law treaty instruments and national laws.

Dr. Litina then referred to lex maritima as the general maritime law including past and present maritime customs, codes, conventions and practice which can be applied in the jurisdictions that have not excluded such application. She added that the internationally accepted rules based on usage and general principles which can be found in the common meanings of international documents and standard forms are considered as the modern lex maritima. Finally, she mentioned the international working group established by the Comité Maritime International to generate an instrument on the lex maritima for practical use under the title of "Restatement of the Lex Maritima".

To answer **Prof. Strong**'s second question, **Dr. Litina** mentioned that maritime and commercial arbitration share common procedural aspects. She added that because the arbitration market is relatively closed, institutions are responsive to client preferences and new initiatives based on the users' needs and the developments in the arbitration field. For example, there is a demand for an increased level of transparency to deal with information asymmetries and other factors contributing to increased costs and delays in both commercial and maritime

[5] To read more on various types of salvage see: https://en.wikipedia.org/wiki/Marine_salvage

arbitration. She also referred to a distinctive feature of maritime arbitration, i.e. the multi-disciplinary nature of maritime arbitration which requires maritime arbitrators to be specialists on maritime matters and not only on arbitration law.

Dr. Litina addressed the third question raised by Prof. Strong regarding types of evidence by highlighting that the evidence taking will mostly depend on the applicable law, arbitration rules and the parties' agreement. As an example, the LMAA Terms (s. 15) provide that it will be for the tribunal to decide all procedural and evidential matters. Typically, LMAA cases proceed on documents alone. Regarding salvage, she referred to the Lloyd's Open Form of Salvage Agreement (LOF) as the preferred contract of the professional salvage industry under English law which provides a framework for determining the amount of salvors' remuneration "*for their services in saving property at sea and minimizing or preventing damage to the environment*". As to the effect of AI on evidence, she added that "*maritime arbitrators who are experts in the field are perhaps well-equipped to recognize deepfakes!*"

Prof. Strong thanked **Dr. Litina** for the detailed answers and asked for her guidance on the requirements or tips for entering maritime arbitration as advocates or arbitrators for law students and junior practitioners. She specifically asked whether obtaining an LLM from a school in one of major countries for maritime law can be among the requirements and asked other panelists to comment on this issue as well.

Dr. Litina responded by describing maritime law as a "*truly international and fascinating subject*" which is highly recommend to young practitioners as a field of study and career development. She also enumerated having an LLM, professional experience and relevant professional qualifications as essential requirements to enter the field.

She added that engaging in one or more areas of the shipping industry (i.e. commercial, technical or legal) and possessing specialized professional qualifications such as Fellowship of the Chartered Institute of Arbitrators would be typically required for a maritime arbitrator. An LLM in maritime arbitration from London and New York as dominant centers of this field with the highest number of maritime arbitration experts and businesses would definitely bring important advantages. She also mentioned that: "*In the US, apart from Tulane Law School, which is known internationally for its maritime law program, NYU also offers an excellent Admiralty course. England, Netherlands (e.g. Erasmus University) and Singapore offer LLM programs specialized in maritime law, while the World Maritime University also offers International Maritime Law programs*."

Dr. Poomintr Sooksripaisarnkit, one of the panelists, provided some observations regarding the previous discussions:

"[1] There has been no success in any attempt to harmonise maritime law. Within the realm of international carriage of goods by sea, some countries are State Parties to the Hague Rules which dated back to the year 1924. Some are State Parties to the Protocol to the Hague-Rules (known as the Hague-Visby Rules). Some are State Parties to the Hamburg Rules (which those countries are not as influential in the global economy scale). Some countries such as Thailand (where I am originally from) prefer enacting their own carriage of goods by sea statute. The Rotterdam Rules have not yet come into force and one would doubt it will ever come into force at all. Hence, conflict of law issues in maritime cases are not uncommon. Your mentioning of the lex maritima is indeed interesting. While most parties to maritime contracts are business parties with access to lawyers and hence their contracts will mostly contain the choice of law and dispute resolution clauses, this may not be the case. In the absence of the choice of law clause, it is interesting how arbitrators will handle given that Article 28(2) of the UNCITRAL Model Law on International Commercial Arbitration allows the tribunal to “apply the law determined by the conflict of laws rules which it considers applicable”. A similar language can be found in section 46(3) of the Arbitration Act 1996 (even though I recently heard we will likely to see the Arbitration Act 2024 really soon!). It will be interesting if maritime arbitrators locate the lex maritima to decide the case. However, whether a body of law known as the lex maritima really exists is questionable. In *The Owners of the Motor Vessel Tojo Maru v N.V Bureau Wijsmuller* [1972] A.C. 242 (The “Tojo Maru”), which is a salvage case, Lord Diplock observed at page 290-291:

‘What has been suggested … is that the “proper law” of the contract is not the internal municipal law of England but the “maritime law of the world” … there is no “maritime law of the world” as distinct from the internal municipal laws of its constituent sovereign states, that is capable of giving rise to rights and liabilities enforceable in English courts. Because of the nature of its subject-matter and its historic derivation from sources common to many maritime nations, the internal municipal laws of different states relating to what happens on the seas may show greater similarity to one another than is to be found in laws relating to what happens upon land. But the fact that the consequences of applying to the same facts the internal municipal laws of different sovereign states would be to give rise to similar legal rights and liabilities should not mislead us into supposing that those rights or liabilities are derived from a “maritime law of the world” and not from the internal municipal law of a particular sovereign state’.

[2] You mentioned maritime arbitrators are perhaps well-equipped to recognise deepfakes! Recently, I am aware there have been some discussions about the possibility that AI itself may one day act as an arbitrator. That will be interesting if AI as an arbitrator can detect deepfakes created by AI.”

He then turned to Prof. Strong’s questions and commented that:

“[3] … I would say it is sufficient to have background practice in the field. Certain issues, for example disputes over the calculation of laytime and demurrage in charter parties, do not need experts on the law of charter parties to decide. Rather, such disputes need those with knowledge in chartering practice. However, the knowledge of maritime law is certainly an advantage. Yes, LLM in maritime law is mainly offered in one of those powerhouse countries, especially in England, since English law has been almost a lingua franca in maritime law. The influence of English law in the field is largely due to historical reason. Today, England is more of a place for maritime legal services. When I worked in Hong Kong, I met some practitioners who did observe that the trend should change because nowadays shipowners and ship-owning countries are clustered around the Asian region, not the United Kingdom. Hence, in their view, there is no practical reason why, for example, they should be subject to English law or why they should arbitrate in London.”

Mr. Earvin Delgado thanked Dr. Litina and by referring to her statement about London and New York as dominant maritime arbitration centers, asked that:

“Are there any specific factors or historical reasons that have contributed to their prominence in the field? Also, with the growing influence of Asian regions in the field of international arbitration — with Singapore and Hong Kong entering the maritime arbitration business as you have mentioned — do you think there will be a trend or shift happening when it comes to the dominance of already established maritime arbitration centers? I'm also curious to know if you foresee the emergence of other promising maritime arbitration centers in the future."

In response to Mr. Delgado, Dr. Litina mentioned that:

"History and tradition keep London and New York dominant in maritime arbitration. The standard arbitration clauses of all commonly used charterparties name London or New York as arbitration seat. Tradition hand in hand with extensive industry standardization leads to a concentration of arbitration expertise in a small number of highly qualified professionals at these locations.

From a practical standpoint confirmed with those negotiating standard form charterparties, the arbitration clause is one of the last and quickest points to be considered. For example, during a negotiation to charter a ship, the interest of the owner is to find employment for his vessel, while the interest of the charterer is to find a ship to deliver cargo. They agree to the contract as willing parties without much concern about the exact wording contained in the contract. Given the indifference of the contracting parties toward arbitration clauses, a reluctance to contemplate a possible dispute, and the genuine interest of the shipowners to keep their ships sailing rather than wasting valuable time and effort negotiating an arbitration venue, London or New York are chosen almost automatically.

Another important factor is that the shipping industry opts for English law, even where there is no English party and despite the fact that England is no longer economically dominant in this industry. English law is valued for its certainty and sophistication, its reputation for respecting the bargain reached between the contracting parties and for the large number of historical precedents reflected in case law. Against this background, there is a broad consensus that English law will continue to be the choice in most international maritime contracts.

Some scholars have supported the idea that the center of maritime arbitration will move from the West to the East as a result of the shifting center of the maritime industry. However, it is also notable that competing arbitration venues, such as Singapore and Hong Kong, promote themselves as seats where disputes arising from English law contracts can be resolved.

More recent maritime arbitration initiatives include the Nordic Offshore and Maritime Arbitration Association, the Asia-Pacific Maritime Arbitration Center in Busan and the Gujarat International Maritime Arbitration Center in India, while the potential and prospects of developing maritime arbitration in other important economies, such as Brazil and the UAE should also be further explored."

Dr. Stanislava Nedeva asked **Dr. Litina** the following questions:

"My first question relates to the notion of arbitral impartiality and independence. A lot has been said and written about the duty of arbitrators to remain free from bias and the topic is also very interesting to me. We have also seen some prominent decisions such as the UK Supreme Court decision in *Halliburton v Chubb* which, amongst others, recognised the duty to disclose as a legal duty but that such a duty would be dependent on the customs and practice in the relevant field. In maritime arbitration is the relevant standard of impartiality and independence in the arbitration rules in international maritime arbitration institutions any different than other general commercial arbitration rules? Are arbitrators subject to any more stringent requirements of disclosure (because arguably there is a more limited 'pool' of arbitrators)? Has the Supreme Court decision (or any other recent prominent decisions) been influential in this field?

My second question relates to how you developed your interest specifically in maritime law and maritime arbitration? What attracted you to the field that then prompted you to conduct further research and respectively, be the focus of your monograph?"

In response to Dr. Nedeva, Dr. Litina mentioned that:

"In the context of maritime arbitration, one of the principal reasons to arbitrate is the ability to choose arbitrators specialized in shipping matters. In the context of impartiality, the choice is a favored advantage as much as a consequential challenge: it is more likely than not that specialized arbitrators in the relatively narrow maritime arbitration sector have some type of relationship with each other and with the parties.

Since there is no uniform legal regime governing the independence and impartiality of arbitrators in general or maritime arbitrators specifically, the issue is handled jurisdictionally and determined largely according to national arbitration laws. In *Halliburton v Chubb*, the UK Supreme Court recognized that there are practices in maritime and commodities arbitrations, as the IBA Guidelines also recognize, in which engagement in multiple overlapping arbitrations does not need to be disclosed because it is not generally perceived as calling into question an arbitrator's impartiality or giving rise to unfairness.

My interest in maritime law developed initially by attending maritime law courses and conferences in Greece. My graduate studies at NYU enhanced my understanding and knowledge of international dispute resolution and motivated me to conduct further research in this field. Furthermore, as an attorney at law, admitted to Athens and New York, I have worked as a legal advisor at the Ministry of Finance and the Ministry of Maritime Affairs in Greece. Working in a traditional maritime nation going through a severe economic crisis further enhanced my motivation to pursue a PhD, considering that research on topics that are important for the shipping industry may also contribute to dealing with crisis situations, as the one at hand."

Dr. Kleopatra Koutouzi, one of the panelists, asked:

"a) We know well that the shipping industry favors settlements given the strong commercial relationships between the parties involved. Are there any updated statistics on how many LMAA arbitrations end up in settlements?

b) This question might diverge from the primary scope of your analysis, but I would like your brief comment on the English courts' powers in support of LMAA arbitrations, i.e. the power to grant anti-suit injunctions where proceedings have been initiated outside of London in breach of an arbitration agreement. Are these ASI granted quite often in the UK? And what is generally the approach of national courts in setting aside proceedings given that the ASI is not binding for the foreign court?"

Dr. Litina responded to Dr. Koutouzi as follows:

"a) Maritime arbitration associations do not provide data on the number of settlements. Given that LMAA statistics estimate 1845 case references and 436 awards, it is certain that out of the total number of references, many end up in settlements, or claims are abandoned.

b) Anti-suit injunctions have been quite controversial. On the one hand, parallel proceedings can lead to increased costs, conflicting decisions and complicated enforcement proceedings. Anti-suit injunctions can be used as a remedy to prevent foreign proceedings started in breach of an arbitration agreement. This practice has created a field of conflict between the civil and common law legal systems. Especially with regard to anti-suit injunctions issued by English courts, this has also been an area where the European notion of mutual trust has been tested. Following the United Kingdom's departure from the European Union, anti-suit injunctions are now available in a wider range of cases than previously. Of course, an anti-suit injunction is an extraordinary remedy, so it is not easily granted.

In Greece, the maritime bench of the Court of Piraeus has faced the issue of anti-suit injunctions from English courts. Citing the Greek Constitution and Article 6(1) of the ECHR on the right of fair trial, the Court held that the enforcement of a foreign judgment or arbitral award which directly restricts a party's access to justice in the form of an anti-suit injunction is against public policy."

Dr. Sooksripaisarnkit, another panelist referred to Dr. Litina's statement that "some scholars (and I would add, some practitioners) supported the idea that the center of maritime arbitration will move from the West to the East." He then asked that: "Since the latest news report suggested that the People's Republic of China has overtaken Greece to become the world's largest ship-owning country, do you have any information on the success of the China Maritime Arbitration Commission (CMAC)? I have not heard much about it. Nor have I seen any statistics regarding maritime arbitration cases in the People's Republic of China."

In his response, **Dr. Litina** elaborated that:

"It has been estimated that around 30% of the LMAA's caseload involves at least one Chinese party. Chinese companies usually accept London in arbitration clauses because of indifference or lack bargaining power.

Although logistical factors, such as access to sea and ports, and the presence of shipping companies, insurers and highly qualified professionals in the field of shipping play a role in the selection of seat, shipping nations do not necessarily attract maritime arbitration business. For example, despite its strong tradition as a maritime nation and the presence of shipowners and shipbrokers in Piraeus, Greece does not have a substantial arbitration industry.

As to CMAC, it provides some caseload statistics, as well as data on the types of cases and the nationalities of the parties involved.[6] It appears that in 2020, the CMAC handled more than 100 cases."

[6] <http://www.cmac.org.cn/en/index.php?id=74>

In this regard, **Dr. Koutouzi** mentioned that:

"In relation to statistics, I trust that the number of appointments surpasses significantly that of case references. From my experience, parties often wield the appointment of an arbitrator as leverage to expedite settlements. The shipping industry is known for its aversion to disputes."

Prof. Strong posed another question regarding **Dr. Litina**'s following statement: "the maritime bench of the Court of Piraeus has faced the issue of anti-suit injunctions from English courts. Citing the Greek Constitution and Article 6(1) of the ECHR on the right of fair trial, the Court held that the enforcement of a foreign judgment or arbitral award which directly restricts a party's access to justice in the form of an anti-suit injunction is against public policy."

Prof. Strong commented that: "It would seem to me that enforcement of foreign judgments/awards is not the same as an anti-suit injunction, since recognition and/or enforcement of a judgment/award only arises if the parties have fully adjudicated their dispute elsewhere. As a result, recognition of judgments/awards is often described as a type of preclusion (at least in the common law!). While anti-suit injunctions also contemplate full litigation in another forum, they can be entered before the matter is adjudicated, so are not preclusionary in the same sense". She then continued to ask Dr. Litina to shed more light on this decision and comment "*if the decision is limited to the maritime context or whether it has broader commercial effect*?"

Dr. Litina answered the last question by stating that:

"In the cases at hand (e.g. Court of Appeal of Piraeus 31/2012) the claimant attempted to enforce in Greece anti-suit injunctions issued by an English court in accordance with the Brussels I Regulation. Perhaps my statement was confusing, as I was also referring to recognition and enforcement of arbitral awards under the New York Convention, since anti-suit injunctions may be issued also by arbitrators.

The stance of Greek courts is not limited to the maritime context. As a general principle, a foreign judgment or arbitral award which directly restricts a party's access to justice in the form of an anti-suit injunction, will be considered contrary to Greek public policy. Greek courts have also denied the effects of an anti-suit injunction issued by a US court (in the context of a family law dispute)."

Prof. Strong responded that it now makes sense to her. She added that: "In the US (and I think the UK/Australia), we would (or at least I would) refer to an anti-suit injunction as an order rather than a judgment or award, so it was just a difference of terminology."

2. Maritime Mediation

The next speaker, **Dr. Poomintr Sooksripaisarnkit** started his discussion about "**Maritime Mediation**" by stating that:

"Arbitration has long been a familiar dispute resolution method among international parties in maritime transactions. The popularity of this is seen in standard form contracts, for examples Clause 54 of the New York Produce Exchange (NYPE) 2015 provides that the parties can choose to arbitrate either in New York or in London or in Singapore, Clause 37 of the GENCON form 2022 incorporating the BIMCO Law and Arbitration Clause 2020 provides for arbitration in London, Clause 24 of the ASBATANKVOY form provides that the parties can choose to arbitrate either in New York or in London or in Singapore, Clause I of the Lloyd's Standard Form of Salvage Agreement (LOF 2020) incorporates the Lloyd's Salvage Arbitration Clauses 2020, Clause 35 of both the Ocean Towage Agreement (Lump Sum) (TOWCON 2021) and the Ocean Towage Agreement (Daily Hire) (TOWHIRE 2021) incorporates the BIMCO Law and Arbitration Clause 2020, Clause 15 of the standard Nipponsale 1999 form provides for arbitration in Tokyo, Clause 42 of the Standard Newbuilding Contract (NEWBUILDCON) provides for an arbitration in London, but also provides an option for parties to agree for a mediation.

Among the major arbitration centres, as has been discussed in the previous presentation, London has been leading the way. As a leading international shipping law firm, Holman Fenwick Willan, published the statistics in September 2023, the London Maritime Arbitrators Association (LMAA) in the year 2022 received 1,807 new maritime references with Singapore in the same year received only 96 new arbitration cases.[7] In Hong Kong, the Hong Kong International Arbitration Centre (HKIAC) published its statistics for the year 2023 showing that maritime cases constituted only 16% of its 281 cases.[8] Many factors lead to the established position of London as a venue of choice for maritime legal services. First, with the past dominance of England as a large ship-owning nation in combination with colonialism which expanded international trade, there has been a long line of established English legal precedents in the domain of shipping law decided by the English courts such that English law is almost a *lingua franca* for maritime law. It is in London where most legal practitioners specialising in maritime and shipping cases locate. Secondly, section 69 of the Arbitration Act 1996 allows an appeal to the courts on the question of law. Thirdly, the enforcement of arbitral awards is facilitated by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) which has been ratified or acceded to by 172 countries around the world.[9]

More recently, however, some legal practitioners, such as Lawrence Teh (Senior Partner and Global Co-Head of International Arbitration Group at Dentons Rodyk and a contact person for the Administrator and Regional Office – Asia of the Comité Maritime International (CMI)), maintained that "mediation is beginning to be recognised as a mode of dispute resolution that parties in maritime transactions would like to have as a serious option, in time to come, mediation might be chosen as a primary mode of dispute resolution rather than as an adjunct to the arbitral or litigation process".[10] This is because, as he maintained, the mediation process is now facilitated by the United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore, 2019) (the "Singapore Convention"), which is modelled upon the New York Convention to support the enforcement of settlement agreements. The Singapore Convention has been ratified by 14 countries.[11]

However, these countries, aside from perhaps Singapore, are not influential in terms of the maritime trade or the global economy. Neither are they known to be popular venues for maritime dispute settlements. Lack of participation from powerful countries such as the United States of America, the United Kingdom, and the People's Republic of China has caused some

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[7] <https://www.hfw.com/downloads/005239-HFW-Maritime-Arbitration-Universe-in-Numbers-Sep-23.pdf>

[8] <https://www.hkiac.org/about-us/statistics>

[9] <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2>

[10] <https://dentons.rodyk.com/en/insights/alerts/2019/january/28/starboard-news-mediation-of-maritime-disputes-aided-by-singapore-convention>

[11] <https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status>

doubts whether the overall scheme of the Singapore Convention will be successful. Different from arbitration, there have been no published statistics from popular dispute resolution venues as to how many maritime cases are settled by mediation each year. In my personal discussion with one of the lawyers in an international shipping law firm, she indicated that throughout her 8 years in dealing with shipping cases, she only came across two instances where one or both parties suggesting mediation and, among those two instances, it was in only one of those that the parties did go through mediation. Against this background, in early 2024, the Singapore Chamber of Maritime Arbitration (SCMA) and the Singapore International Mediation Centre (SIMC) has established a joint 'SCMA-SIMC Maritime Mediators Panel'. Exciting development as it seems, it remains unclear whether mediation will only be recognised as simply an adjunct to an arbitration process, as Mr. George Lim SC, Chairman of the Singapore International Mediation Centre (SIMC) said: "*Internationally, there has been a growing trend towards the use of mediation before or during arbitration to have a quick resolution of the dispute. If a settlement is arrived at during the course of arbitration, it may be recorded as a consent arbitral award which is enforceable in over 170 jurisdictions under the New York Convention*".[12] It is doubtful if the creation of this SCMA-SIMC Maritime Mediators Panel will have any significant impact since the Singapore International Mediation Centre has been enlisting mediators by sectors or by areas of expertise of mediators anyway (e.g. Aviation / Transport, Banking / Finance, Business / Company Mergers and Acquisitions, etc.). Above all, international maritime disputes are often complex in both legal issues, the volumes of documents, technical details, and the quantum involved. As such, one would doubt whether mediation, which mostly lasts one or two days, would be an appropriate dispute resolution mechanism to accommodate such complexity. It is likely that mediation will, in my view, continue to be an adjunct to the arbitration process in that parties may agree for only small or narrow issues to be resolved in mediation. Therefore, it is unlikely that mediation will become a dominant form of dispute settlement in maritime matters."

Q & A Session:

Prof. Strong thanked **Dr. Sooksripaisarnkit** for his excellent analysis of mediation in the maritime setting and opened the Q&A part by commenting that:

"I agree that the Singapore Convention may not be fully effective until major international actors like the UK, the US and China have ratified the instrument (all are currently signatories, and I know that various policymaking groups, such as the New York Bar and the Uniform Law Commission are pushing to get implementing legislation drafted so that the convention can be ratified). However, mediation can certainly develop without the framework of the convention, since the convention only arises when a settlement agreement has been violated and requires enforcement."

She continued by referring to Dr. Koutouzi's statement that "parties active in maritime matters are particularly risk-adverse and prefer to settle disputes rather than have them go through full adjudication, in arbitration or elsewhere". She then asked whether Dr. Sooksripaisarnkit agree with this statement, and does he believe that "the parties are sufficiently competent to negotiate those settlement agreements without a mediator?"

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[12] <https://scma.org.sg/.well-known/[PRESS%20RELEASE]%20SCMA-SIMC%20Maritime%20Mediator%20Panel%202024.pdf>

Prof. Strong also asked: "You also indicate that SIAC, in connection with SMCA, has created a specialist maritime mediation panel, although SIMC has been appointing mediators by sector for some time. Even if this initiative does not change the substance of SIMC's practice, do you think this move will nevertheless improve the optics of maritime mediation in Singapore, such that parties will become more aware of the possibility of mediation and have more faith in the system, since it is visibly focusing on maritime experts?

Prof. Strong's final question was: "what qualities do you think a good maritime mediator must have? Eva discussed how maritime arbitrators can come from a variety of different sub-specialities/practice areas, but mediation is of course a different process. Is it better to have a someone with more practical expertise, more legal expertise or simply trans-substantive mediation expertise?"

Dr. Sooksripaisarnkit responded that:

"[1] To answer your question of the qualities a good maritime mediator must have, I think a good maritime mediator must have a general understanding of the maritime businesses to make a good commercial sense. Any legal background is perhaps not necessary. I recalled when I was trained in mediation by the Centre for Effective Dispute Resolution (CEDR), a trainer said having a background in law is like a double-edged sword. On the one hand, you may pick up issues in disputes or disagreements between the parties rather quickly. On the other hand, with your knowledge of law, you would have made up your mind pretty quickly as to which party would win in the dispute or which party would have better rights. In other words, your supposed impartiality will be affected.

[2] I agree that parties who are active in maritime matters are risk-adverse. But I think they can settle disputes without the need to resort to a mediator. Drawing from my limited experience of working in a ship management company for two and a half years over ten years ago, I think they would negotiate and adjust their existing agreements, for example charter parties, to suit what they agreed. They do not even need a settlement agreement *per se*. For ship-owners who have procured the FD & D (Freight, Demurrage & Defence) insurance with a P & I Club, normally they would seek advice from the FD & D claim handler as well of the course of action they should take as the FD & D will cover the reasonable legal expenses.

[3] I do agree that the creation of SCMA-SIMC Maritime Mediators Panel can enhance awareness of the parties of mediation as an alternative dispute settlement option and can promote Singapore as a venue for maritime mediation. However, as I said, much depends on the nature of the dispute too. Despite that, as I said, I think much depends on the nature of the disputes too."

Dr. Koutouzi, one of the panelists, while agreeing with **Dr. Sooksripaisarnkit**'s response to Prof. Strong's 2nd question, added that: "I have recently received a time charterparty (NYPE form) which included the BIMCO Mediation/Alternative Dispute Resolution Clause 2021. However, the parties decided to delete it in the end from the final text."

She then asked: "What would be the added value of mediation in shipping disputes, a) given industry's tendency to resolve issues "unofficially and commercially" without the involvement of counsels, b) its potential costliness and c) the absence of legal precedent."

Dr. Sooksripaisarnkit responded to **Dr. Koutouzi**'s question by mentioning that:

"In terms of the added value of mediation in shipping disputes, I would say perhaps the mediation may be used in a rare case where the quantum is small (such that it will not be worthwhile to engage lawyers to pursue arbitration or litigation) and parties failed in their attempt to unofficially and commercially negotiate between them. But, as you can observe from my earlier analysis, I am not optimistic of the use of mediation to resolve maritime disputes myself."

Ms. Yesenia L. Alfonso thanked **Dr. Sooksripaisarnkit** for sharing his insights on the role of mediation in maritime arbitration and added that: "I find it interesting that although there is clearly a desire to streamline certain processes and arrive at an efficient method to resolve maritime disputes, there are likewise other factors which you mentioned (like the complexity of the legal issues and volume of documents) that make mediation a less appealing option depending on the circumstances. However, in the case of large and complex maritime disputes, could there be a practical benefit to stipulating mandatory mediation prior to resorting to arbitration? My thinking is that this type of provision may aid in helping parties identify where they agree/disagree earlier on, and perhaps aid in management of the dispute overall, but of course it may not help at all depending on the dispute."

In response to Ms. Alfonso's query, Dr. Sooksripaisarnkit said that:

"I do not see why there is a need for parties to be directed or forced to mediate so that they can agree or disagree. Even for a lesser complex case, under the LMAA Small Claims Procedure 2021, as an example, provides for the claimant to deliver to the respondent a letter of claim not exceeding 2,500 words accompanied by relevant supporting documents. Within 28 days of receiving this letter, the respondent is then to submit a letter of defence and counterclaim along with copies of relevant documents. Then, within 21 days, the claimant is to submit a letter of reply and defence to counterclaim. So, the procedure exists there such that to let the parties contemplate the points they agree or disagree upon. So, I do not see that an early involvement in mediation will assist much."

Prof. Strong followed the response to **Ms. Alfonso** and commented that: "I'm wondering whether the difference in perspective is due to the time/cost of the relevant proceedings. I think one of our speakers said that maritime arbitrations are typically on the documents, which would suggest a relatively fast and inexpensive process, as compared to other types of international commercial disputes, which involve hearings and often thousands upon thousands of documents (I'm assuming the maritime documents-only disputes do not involve as many documents as other types of commercial disputes, but correct me if I'm wrong).

Thus, mediation may result in significant time/cost savings in non-maritime disputes (if resolution is reached on some or all of the outstanding issues/claims) but may not be that much of a time/cost-saving device in maritime matters, particularly if the parties are minded/well-qualified to negotiate on their own in maritime matters."

Dr. Litina, one of the speakers, thanked **Dr. Sooksripaisarnkit** for sharing his insight on the role of mediation in maritime dispute resolution and continued that: "Perhaps the overall culture of amicable settlement favors the use of mediation and other ADR schemes in

Asia compared to e.g. US, a nation with a strong litigation culture. I was wondering about your thoughts on how different cultures affect both the promotion of mediation as a dispute resolution method in maritime disputes and the mediation process."

In response to **Dr. Litina**, **Dr. Sooksripaisarnkit** mentioned that: "It is hard for me to answer this question in the absence of statistics of mediation cases in different parts of the world and, among them, how many involved maritime disputes and how many achieved settlements."

3. Mass Claims in Maritime Arbitration

Dr. Kleopatra Koutouzi started her discussion by thanking **Prof. Strong** for the introduction and the opportunity to discuss her Ph.D. research on "Mass Claims in Maritime Law and Alternative Methods of Dispute Resolution"[13] in the Symposium.

She then provided an introductory remark on the topic highlighting: "the substantial rise in both the quantity and variety of large-scale cross-border claims in contemporary times". She added that:

"there exists a prevailing global inclination towards procedural efficiency, specialization and privatization of justice - all of which are effectively facilitated by arbitration."

Dr. Koutouzi noted that arbitration has long been championed by the shipping industry, a tradition documented throughout its history. However, arbitration clauses are no longer included solely to contracts between equals. Increasingly, they are becoming prevalent in passengers' tickets and crewmembers' employment agreements. She further pointed out that the cruise industry serves as a notable example, highlighting a trend that may soon become mainstream.
Consequently, innovative dispute resolution mechanisms directly impact the maritime sector. She further opined that with maritime incidents increasingly manifesting as large-scale disasters, the international maritime community must be prepared to address mass and often divergent claims swiftly and efficiently.

According to her, in the realm of maritime law, the majority of academic literature primarily focuses on two-party contractual claims. Therefore, in her recently published PhD research, she endeavoured to: "tackle the following challenges addressing an issue hotly debated at both national and international level; whether a group of individuals, impacted by a maritime casualty, can collectively assert their rights before an arbitral tribunal. This inquiry is crucial, considering that collective mechanisms often enhance effective judicial protection."

Dr. Koutouzi stated that:

"[t]o address this question, I examined two different categories of claims; a) contract-based claims from ship passengers, and b) tort-based claims stemming from ship pollution incidents. Regarding the first category, I delved into the specific liability framework governing the sea carriage of passengers. This involved scrutinizing the utilization of arbitration in related disputes, particularly in light of consumer protection concerns, and analysing the prevalence of class action waivers commonly found in passage contracts. In relation to the second category,

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[13] The recently published PhD research is available at: <https://www.nb.org/mass-claims-in-maritime-law-and-alternative-methodsof-dispute-resolution.html>

my starting point was the existing regime regulating liability and compensation in case of ship pollution with the objective to assess whether arbitration could serve as a viable alternative to national court jurisdiction for resolving such claims. In this context, the response mechanisms activated in response to the Deepwater Horizon accident offered valuable insights for consideration.

She further explained that a) her research adopts a cross-sectoral approach, exploring the intersection of maritime law with international commercial arbitration, the procedural practice of mass collective claims, and alternative (out-of-court) dispute resolution (ADR); b) it cuts across several legal fields on a comparative basis with four jurisdictions of reference - United States of America, United Kingdom, France and Greece. She further elaborated that the United States serves as a benchmark for this study, given its long-standing recognition for its familiarity with collective action methods, particularly the unique phenomenon of class actions, and its emphasis on alternative dispute resolution, notably arbitration. Consequently, the USA is a primary destination for the resolution of large-scale disputes. Furthermore, recent US case law regarding class action waivers in consumer and employment agreements, along with the resulting debate, as well as a series of court decisions mandating arbitration in seafarers' injury claims, are highly relevant to the current analysis.

By closing, Dr. Koutouzi admitted that "while the primary question was evident from the outset, conducting a thorough research, structuring a comprehensive analysis and presenting solutions proved to be a challenging endeavour for several reasons, including the complexity of the terminology involved. Therefore, this marks just the beginning, with further research on the topic still needed."

Q & A Session:

Prof. Strong opened the session with the following questions:

"First, with respect to the cruise ship claims (which I suspect could include tort claims if the dispute resolution clause were written broadly), did you find US courts (or arbitrators) accepting multijurisdictional disputes? As a related matter, did you find the rising incidence of class waivers (in litigation or arbitration) to be problematic? I half-remember an Australian case that I taught where the existence of a class waiver for matters brought in US court/arbitration allowed Australian courts to accept jurisdiction over a particular matter (there were also claims under the Australian Consumer Law that needed to be heard in Australia). The trick is I can't remember if that was the recent Carnival Cruise case heard by the High Court or whether it was another case (any of my former students at Sydney are welcome to speak up to remind me). However, the principle would be relevant regardless of the setting of the case.

Second, do you think recent efforts by EU Member States to develop their own forms of collective redress will start to pull matters away from the US? I would think corporate defendants in particular would want to avoid US-style discovery and punitive damages. At this point, the collective redress mechanisms have not yet been transferred to the arbitral realm (and I believe it is unlikely that it will occur in the short term). However, do you think any of them in particular are well-suited to mass maritime disputes, either in court or in arbitration?

Third, does the choice of forum/choice of law in mass disputes typically follow the flag of the ship in question in cases where the parties are permitted to choose? If mass maritime claims are heard in arbitration, is it possible for difficulties to arise with respect to the choice of laws rules that will be applied to determine which substantive law applies? For example, in Australia, a tort committed in littoral waters will attract the law of the place of the tort, whereas a tort committed on the high seas will attract the law of the flag of the ship. This is a relatively mechanistic conflict of laws rules. In the United States, the conflict of laws rules are less clear cut and typically depend upon an interest analysis. How would an arbitrator in a mass maritime arbitration determine which conflict of laws rule to apply? Typically, courts apply their own national rules, but arbitration does not yield such a simple approach."

In response to **Prof. Strong**, Dr. Koutouzi thanked her for mentioning Karpik v Carnival Plc [2023] HCA and continued that:

"I was not aware of the judgment which is indeed very relevant to the topic and today's discussion. The issue of class action waivers is particularly problematic. These waivers are considered in theory null and void in the examined jurisdictions although to be honest, I did not manage to find any decisions at the time. Most if not all of the US courts decisions available at the time of my research involved US citizens who wanted, however, to file their suit at a State different from the one stipulated in the mandatory forum clause. The most famous and classic is Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991)."

To respond the second question, **Dr. Koutouzi** commented that:

"I surely believe that all these huge efforts by EU Member States to develop their own forms of collective redress will start to pull matters away from the US but not in the arbitration field because there are significant reactions against collective forms of arbitration for various legal and policy reasons. That being said, it is not difficult to see the conceptual difficulties that may arise when the notions of arbitration and class actions meet each other. As some authors correctly observe, at first sight, arbitration and class actions do not seem compatible with one another. In fact, they seem to mutually exclude one another. This is mainly due to the US class action opt-out system, which contravenes the consensual nature of arbitration. It is difficult to sustain that someone could be bound by an arbitration agreement and be automatically included in the arbitration process, due to the sole fact that such person did not expressly opt out, with all the known difficulties to do so or even to be aware of that possibility in due time. The aversion towards US class actions, correct or not, is clear in all EU (proposed) instruments for collective redress. For instance, the 2013 EU Recommendation mentions:

> *For the Commission, any measures for judicial redress need to be appropriate and effective and bring balanced solutions supporting European growth, while ensuring effective access to justice. Therefore, they must not attract abusive litigation or have effects detrimental to respondents regardless of the results of the proceedings. Examples of such adverse effects can be seen in particular in 'class actions' as known in the United States. The European approach to collective redress must thus give proper thought to preventing these negative effects and devising adequate safeguards against them.*

In Europe, Spain and Ireland have established some sort of collective consumer arbitration. From my limited study of the Spanish model, I understood that it a sort of subjective accumulation of arbitration claims against a same business or professional based on a similar causa petendi or cause of action that is settled through a single proceeding. Although the Spanish Royal Decree on consumer arbitration has several defects, it is a first step that offers the possibility to settle, through arbitration, the disputes of a large number of individuals. It can therefore enlighten the arbitral institutions wishing to incorporate mass dispute resolutions into their regulations.

Also, France has introduced in its legislation the concept of class actions already since 2014. The relevant framework has been enhanced and improved since then although there still is no significant case law in the field. The relevant framework is well suited to address contractual mass claims arising in maritime and it would influence any reforms of the International Chamber of Commerce which is based in Paris and administers occasionally arbitrations related to the broader maritime field."

On the last question, Dr. Koutouzi responded that:

"I decided not to deal with the choice of law in mass arbitrations, since it would expand further the scope of the research. Nevertheless, I will attempt to reply to your question based on my experience and general research. During my research, I found neither judgements nor arbitral awards dealing with mass arbitrations in ship passengers/ship pollution cases in the examined jurisdictions except the USA. So, any answer can be given on a purely theoretical basis. In case of passengers' claims, the choice of forum/choice of law would not follow -at least as contractual choice- the flag of the ship. It would be either the law of the place of domicile of the passenger (EU perspective) or the place of domicile of the shipowning company (US perspective). Particularly for Europe, arbitrators would consider, apart from any contractual provisions, Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) and Regulation (EC) 864/2007) on the law applicable to non-contractual obligations (Rome II)."

Ms. Guofang Xue asked that: "The debate over the validity of the class action waivers included in cruise line passage tickets looks very interesting to me. My question is does that amount to a valid consent? For example, the Federal Court of Australia upheld the class action waiver in Ruby Princess litigation and considered that the class action waiver clause was not unfair within the meaning of s 23 of the Australian Consumer Law. From the comparative law perspective, how do other countries (eg UK, US, EU) approach it? Any policy consideration behind that? In this regard, how do regulatory authorities balance the interests between the cruise industry and passengers nowadays?"

Dr. Sooksripaisarnkit referred to Ms. Guofang's question and added an update about the judgment of the Full Court of the Federal Court of Australia that she mentioned. He said that this judgment "was overturned by the High Court of Australia in the same case – see *Karpik v Carnival Plc* [2023] HCA 39. In short, the High Court of Australia held in a unanimous judgment that the class action waiver clause is void under section 23 of the Australian Consumer Law because it is unfair."

In response to **Ms. Guofang Xue**, **Dr. Koutouzi** elaborated that:

"1) Based on my research, the validity of class action waivers is currently clearly upheld only in the USA. This is why major US interest cruise lines include class action waiver clauses in their standard passenger tickets (Carnival Group, Norwegian Cruise Lines, Princess Cruise Lines, Regent Seven Seas Cruises, Windstar Cruises and Oceania Cruises INC etc).

Nevertheless, this is not without reactions from the weaker party who often argues that he/she did not consent to such a term. The size of the print of terms and conditions in passenger tickets are commonly so small that they are almost unreadable and invisible. Let alone, in the majority of the cases the passenger is typically not aware of the standard terms of the contract before he/she receives the ticket. This is why these contracts can be considered contracts of adhesion.

2) If someone looks carefully at the standard ticket contracts of EU interests cruise lines, he/she can locate significant variations among the various dispute resolution clauses. Some, like the Swiss Uniworld and Paul Gaugin of French Polynesia and French Ponant even though they include mandatory forum selection clauses, they seem to be silent regarding waivers of class actions or class arbitration. However, they remain also silent as to the possibility of such kind of collective redress. Others, like the Swiss AmaWaterways Gmbh include class action waivers clauses and others, like the British Viking Cruises include the option of arbitration as a method of dispute resolution in case of complaint or dispute.

3) The clear legislative and jurisprudential interpretation in favor of class action waivers in the US has led not only US companies, like the ones in the cruise, tobacco and consumer business, but also European ones, to redraft their standard contracts including mandatory arbitration and class action waiver provisions. A recent example is British Airways which applies different rules to UK/EU passengers compared to the US ones. I decided to quote here the relevant clause is quite enlightening and I think it replies to your question on how regulatory authorities balance the interests between the cruise industry and passengers nowadays.

Clause 33.1 of the Terms and Conditions of the known airline, entitled Class Action Waiver for Residents of the United States and Canada reads as follows:

> *33.1 If you are a resident of the USA or Canada, to the extent permissible by local law or regulation, you agree that the resolution of any Dispute shall be conducted on an individual, not a class-wide basis ("Class Action Waiver"), and that no such proceeding may be consolidated with any other legal proceedings involving British Airways or any other person. You further agree that you, and anyone asserting a claim for you, will not be a class representative, class member, or otherwise participate in a class, representative, consolidated or private attorney general proceeding against British Airways.*

Also, Clause 34, entitled Dispute Resolution and Arbitration Agreement for Residents of the United States and Canada, is tailor made to the different legal cultures by providing different methods of dispute resolution per jurisdiction. In the case of US passengers, the clause provides for binding arbitration in accordance with the FAA to be administered by AAA, pursuant to the AAA's Commercial Arbitration Rules and Mediation Procedures and Supplementary Procedures for Consumer-Related Disputes. In the case of Canadian passengers, the clause provides for negotiation, mediation, arbitration and adjudication before the competent courts (as the last resort), without reference to class action waivers.

It is worth noting though that the above provisions do not apply to European and UK residents. Clause 32 entitled Governing Law clearly states that "*all Members who do not reside in the USA or Canada submit to the non-exclusive jurisdiction of the English courts to resolve any disputes that may arise out of them*."

4) British Airways Terms and Conditions serve as a very good example to illustrate, on the one hand the US influence in the drafting of standard consumer contracts and, on the other hand, the great differences in the treatment of arbitration and its collective forms in the various jurisdictions. The main disparity in approaches is found between the United States and the countries of the European continent. A great deal of this disparity has its roots in Constitutional requirements, radically different between US and EU countries, including UK. The main European statute dealing with this issue is the European Convention of Human Rights which currently creates a wall against the enforcement of class action waivers in Europe (article 6(1) of ECHR establishes the right to a fair trial which in turn embodies the right to a court, which must be practical and effective). Also based on the Council Directive 93/13/EEC on unfair terms in consumer contracts, class action waivers are considered null and void."

Prof. Strong followed up the detailed responses given by **Dr. Koutouzi** to herself and to **Ms. Guofang** by adding that:

"I agree that US-style class actions are not an optimal model for largescale arbitration, but will note that we have an excellent example from the investment realm on how large-scale consent can be obtained on an opt-in basis: Abaclat v Argentine Republic. Of course, that matter was significantly aided by the fact that the respondent state's agreement to arbitrate (or offer to arbitrate) was embodied in a treaty rather than in an arbitration agreement, but the case still provides very useful lessons on how a large-scale suit can be construed. Indeed, many of the procedural elements have been discussed at length and/or are publicly available."

Dr. Koutouzi thanked Prof. Strong for her comments and for mentioning Abaclat v Argentine Republic. She added that in "the absence of similar award in the maritime field, Abaclat, provided very useful tools (both in relation to terminology and the concept of the treaty-based consent) for my analysis and suggestions in relation to the resolution through arbitration of international mass tort claims arisen out of ship pollution."

Mark Kantor asked Dr. Koutouzi: "If you will indulge me on my favorite topic of damages, how according to your research do forums address measuring damages in mass tort claims in the aftermath of marine pollution casualties? I am sure claimants and respondents have very different opinions, and many such disputes settle in any event, but for those claims where the forum reaches the question of quantum relief, does your work suggest a common approach, or widely differing approaches, to measuring the sums due for the tort injuries? And what is/are those approaches."

In response to **Mark Kantor**, **Dr. Koutouzi** stated that:

"A key feature of the international compensation regime in case of ship pollution is the principle of strict liability of the shipowner, i.e. that liability for oil pollution damage falls on the shipowner whose vessel has spilled the oil regardless of any element of fault on the vessel's part. This feature provides the benefit of reducing the scope for argument as to who is responsible for paying legitimate claims thereby ensuring prompt and efficient payment of legitimate claims.

The counterpart of this principle is the ability for the shipowner to limit its liability up to a financial limit calculated by reference to the tonnage of the ship, unless 'it is proved that the pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

For oil pollution damage caused within the jurisdiction of Contracting States a three- tier limitation and compensation system has been developed: the CLC Fund, the 1992 Fund and the Supplementary Fund, explained further below.

The framework for the regime was the 1969 International Convention on Civil Liability for Oil Pollution Damage (1969 Civil Liability Convention) and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution (1971 Fund Convention). Over time, it became clear that the amount of compensation available for major incidents needed to be increased and the scope of the regime widened. This resulted in two further instruments, known as the 1992 Civil Liability Convention and the 1992 Fund Convention. Following the Erika and Prestige incidents, a third instrument, the Protocol to the 1992 Fund Convention (Supplementary Fund Protocol), was adopted in 2003, providing additional compensation over and above that available under the 1992 Fund Convention for pollution damage in the States that become Parties to the Protocol.

Therefore, the industry, by the establishment of the International Oil Pollution Compensation Funds (IOPC Funds), achieved a uniform approach in the quantification of damages in resulting from spills of persistent oil from tankers, to which all Contracting States (and their courts) are bound to.

The IOPC Funds are the main and most important mechanisms so far for the resolution of mass claims arisen out of ship-source pollution, both in terms of evaluation of claims and quantification of damages. They are financed by contributions paid by entities that receive certain types of oil by sea transport. These contributions are based on the amount of oil received in the relevant calendar year, and cover expected claims, together with the costs of administering the Funds.

Since their establishment, the 1992 Fund and the preceding 1971 Fund have been involved in 150 incidents of varying sizes all over the world. In the great majority of cases, all claims have been settled out of court.

Nevertheless, the 1992 Fund faces several complications in connection with dealing with mass claims such as (a) the fact that large numbers of individual claims put a very heavy burden on the claims handling process (b) the fact that many claimants cannot prove their losses with a sufficient degree of detail (c) the fact that efforts to help such claimants establish their losses are very time-consuming and therefore lead to undesirable delays in the claims handling process and (d) the fact that efforts to help such claimants establish their losses are very source-intensive and time consuming and therefore lead to a major increase in the costs of the claims handling process."

Mr. Wooseok Shin thanked Dr. Koutouzi for the introduction to her studies and mentioned that he found the second category of issue, dealing with the question of whether arbitration could serve as a viable alternative to national court jurisdiction for resolving claims stemming from ship pollution incidents, very intriguing.

He added that: "As the State would be highly conscious and concerned of such claims stemming from the ship pollution accident that occurred in their territory, I have two questions in relation to enforceability and transparency or confidentiality issues:

1. Are there any mechanisms in place to ensure the effective enforcement of arbitration awards related to ship pollution, considering the intervention of State interest and international nature of such disputes?

2. How does the confidentiality of arbitration affect transparency and public awareness of environmental issues arising from ship pollution incidents? What measures can be implemented to safeguard confidentiality in arbitration proceedings while also addressing the need for transparency and public engagement in environmental matters?

It would be very interesting to see how these kinds of issues are dealt with in different jurisdictions like the four jurisdictions you have compared - United States of America, United Kingdom, France and Greece."

In response to **Mr. Wooseok**, Dr. Koutouzi said:

"1) Currently, all international conventions, dealing with the shipowner's liability for ship accidents causing pollution damage, provide for the resolution of the relevant claims by litigation, and exclude any reference to arbitration. Therefore, all such disputes, if not resolved solely through the IOPC Funds (as replied to Mark some minutes ago), would go to court. So, strictly speaking there are no specific mechanisms in place to ensure the effective enforcement of arbitration awards related particularly to ship pollution.

The research suggests that arbitration would be an efficient alternative to litigation for these kinds of claims, mainly because it would achieve the concentration of all claims in one forum and secondly - now coming to your question - because the enforceability of international arbitral awards is easier compared to litigation, due to the existence of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. Although some issues may arise as to whether class, mass and collective awards fall within the protection of the New York Convention, most commentators considering the matter have answered the question in the affirmative. Furthermore, most observers agree that large-scale awards are entitled to the same presumption of enforceability that the Convention gives to awards arising from bilateral disputes.

2) Much of the criticism against the Claims Facility set up in the aftermath of Deepwater Horizon 2010 environmental disaster focused on the transparency of the process. There is a wide belief that the more information made about a claims process - the scope of its decision-making powers and the limitations imposed upon it, the peace of its progress and the personal efforts of its staff - the greater the claimants' understanding and likely acceptance and outcome. Nevertheless, the demand for increased transparency may be in contradiction with the desire for confidentiality of the arbitral proceedings. It is well known in international commercial arbitration that one of the reasons why transnational corporations prefer international arbitration is because their business secrets and confidential information are better protected than in international litigation. At the same time, with the collapse of the non-arbitrability doctrine the scope of arbitration has greatly expanded and the notions of transparency and confidentiality are currently re-examined.

The research illustrates the fact that there is no uniformity on the confidentiality principle's scope of application amongst countries and international arbitral institutions. More specifically, in (examined) <u>Arbitral Institutions</u>:

- The arbitration rules of the Permanent Court of Arbitration (PCA) do not contain separate provisions for confidentiality.
- The UNCITRAL Arbitration Rules do not mention the subject, although article 34(5) seems to recognize an implicit confidentiality of the award by requiring the consent of both parties so that it may be made public.
- The American Association of Arbitration (AAA) provides thorough determination of rules with regards to confidentiality.
- The International Chamber of Commerce (ICC) rules do not establish a duty of confidentiality for the parties. Article 8 of Appendix I, and article 1 of Appendix II, only impose duties on arbitrators and the staff of the International Court of Arbitration, but not on the parties, although article 22(3) authorizes the Arbitral Tribunal to make orders concerning confidentiality upon the request of any party.
- In contrast, article 30 of the London Court of International Arbitration (LCIA) rules regulates the duty of confidentiality in a well-defined manner.

<u>National Approaches (based on my research):</u>

Starting with English law, the UK Arbitration Act does not mention confidentiality, but English case law provides an extensive analysis of the topic. Under English law, an implicit duty of confidentiality exists with the conclusion of an arbitration agreement. The duty is based on the principle that arbitration is a private, and consequently confidential, dispute resolution process. Public interest has been held as an exception to confidentiality in arbitration by various English courts.

Before the revision of the arbitration law in 2011, French law imposed one of the highest duties of confidentiality among the international arbitration jurisdictions. Further to legislation amendment, there is a presumption of confidentiality only in relation to domestic arbitration.

Under Greek law, there are no specific provisions in relation to confidentiality of the arbitral proceedings. Confidentiality basically rests on the parties' will.

In the United States, neither the Federal Arbitration Act (FAA) nor the Uniform Arbitration Act (UAA) impose any obligation of confidentiality on the parties to an arbitration agreement, the arbitrator, or the arbitration administrator. Nor do they address the privacy of the arbitration process. The only provision of the Revised Uniform Arbitration Act (RUAA) expressly dealing with confidentiality authorizes an arbitrator to issue a protective order as "to the extent a court could if the controversy were the subject of a civil action in this State." Thus, the primary arbitration laws in the United States impose no express obligation of confidentiality on any of the participants in the arbitration process. To the contrary, both the FAA and the UAA require public disclosure of arbitration awards when a party seeks to confirm or enforce an arbitration award in court. Under the FAA, most courts have refused to allow filing of the award under seal, even when the parties have entered into a separate confidentiality agreement covering the arbitration. At a minimum, then, when a party seeks to have a court confirm or enforce an arbitration award, the award on which it relies likely will be made public."

4. The $10 Billion Investment Arbitration of Sea Search Armada v. Colombia

Prof. Martin Davies commenced his analysis of the Sea Search/Colombia arbitration in relation to the wreck of the San José off the coast of Colombia by providing a summary of the case:

- "The Spanish galleon San José sank in 1708. At the time, it was part of a treasure fleet carrying gold, silver, and emeralds to Spain from what is now Colombia. Most of the treasure had been mined in what are now Peru and Bolivia. The fleet was intercepted by a British fleet, and San José was fired on by the British ship Expedition. San José exploded and sank just as it was about to be boarded by the crew of Expedition. (This was bad news for the British as well as the Spanish crew who died, as the intention of Expedition had been to plunder the valuable cargo and bring it back to Britain.)
- Estimates about the value of the cargo that sank with San José vary, but some place the value as high as US$20 billion (yes, billion, not million).
- A salvage company named Glocca Morra was authorized by the Colombian Direccion General Maritima to search for shipwrecks on the Colombian Continental Shelf.
- Glocca Mora located what it believed to be San José in 1981, and it says that it agreed with Colombia that it (GMC) would receive 35% of any property salvaged from the wreck.
- Glocca Morra then assigned its rights to Sea Search Armada (SSA), which is the Claimant in the present arbitration.
- However, there was no signed contract, and Colombia later denied SSA permission to perform full salvage operations. The Congreso de la República de Colombia (the Colombian legislature) then passed a law giving Colombia all rights to treasure recovered from the San José site, with SSA getting only a 5% finder's fee.
- SSAL then sued Colombia in 1989, challenging the constitutionality of the law in the Constitutional Court of Colombia. The Constitutional Court declared the law to be unconstitutional, and soon after, a regional court in Baranquilla held that SSA and Colombia owned the treasures in equal 50% shares.
- The regional court's judgment was ultimately upheld by the Corte Suprema de Justicia de Colombia (the Supreme Court of Colombia) in 2007. Importantly, however, the Corte Suprema held that any items of "cultural heritage" would not constitute "treasure" for purposes of the ruling about the 50-50 split.
- SSA then filed suit in the U.S. District Court for the District of Columbia (Columbia not Colombia!) seeking, among other things, recognition and enforcement of the Colombian judgment under DC's enactment of the Uniform Foreign-Money Judgments Recognition Act (UFMJRA).
- Colombia argued, among other things, that it was immune from suit because of the (federal) Foreign Sovereign Immunities Act (FSIA) 28 U.S.C. § 1330, but the court did not find it necessary to decide that issue, as it held that the Colombian judgment was not enforceable in the United States under the UFMJRA, as it was not a "money judgment" – i.e., an order that Colombia pay SSA a specific sum of money – but merely a declaratory judgment setting out the respective rights of SSA and Colombia to any treasure to be found: see Sea Search Armada v. Republic of Colombia, 821 F. Supp. 23 268 (D.C.D.C. 2011). That decision was affirmed on

appeal by the U.S. Court of Appeals for the District of Columbia Circuit in 2013: Sea Search Armada v. Republic of Colombia, 522 Fed. Appx. 1 (D.C. Cir. 2013).

- Meanwhile, back in Colombia, the Ministry of Culture issued Resolution No. 0085 in 2020, declaring the entirety of the San José site as "cultural heritage" not "treasure." SSA regards this as an appropriation of its 50% interest in the wreck.
- Having won an apparently unenforceable judgment in Colombia and having failed to enforce that judgment in the United States, SSA moved on to its next tactic – the arbitration presently in progress.
- Although the arbitration is taking place at the Permanent Court of Arbitration (PCA) in the Hague, it is in fact, technically, an ad hoc arbitration pursuant to the UNCITRAL Arbitration Rules 2021. As it often does, the PCA is providing "administrative support" for the arbitration, which involves a private party and a country about a maritime dispute. PCA is administering the arbitration with a Tribunal constituted under the UNCITRAL Rules.
- SSA's claim in the arbitration depends on a bilateral treaty between the United States and Colombia, the United-States Colombia Trade Promotion Agreement 2012 (the TPA). Among other things, the TPA makes expropriation of foreign investors' assets without compensation unlawful.
- Colombia has objected to the jurisdiction of the Tribunal under Article 10.20.5 of the TPA on several grounds, including that SSA is not a "protected foreign investor" for purposes of the TPA, as it has never invested in Colombia's territory. (It should be noted that it also questions whether the site identified by Glocca Morra was, indeed, the location of the San José wreck.)
- At the request of the Tribunal, the United States Department of State made a submission in December 2023 about the interpretation of the TPA, without making any comment about how its interpretation applies to the facts of the case.
- As a footnote to this already-long story, readers may know that there is a UNESCO Underwater Cultural Heritage Convention 2001, which has been ratified by 76 countries. Among other things, the Convention provides that "Underwater cultural heritage shall not be commercially exploited" (Art. 2(7)), that "Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or the law of finds" unless it is authorized by the relevant authorities (Art 4). "Underwater cultural heritage" is defined by Art 1(1)(a) as "all traces of human existence and having a cultural, historical or archaeological character" that has been underwater for at least 100 years. This would clearly apply to the wreck of San José but (and it is obviously a big but) Colombia has not ratified the Convention.
- Spain has ratified the UNESCO Convention, and it should be noted that Spain has also asserted rights over the San José shipwreck, on the basis that it is the legal owner of the cargo, which it has never abandoned. (Spain has made similar claims in many other treasure salvage cases about sunken Spanish galleons). Spain is not party to the SSA/Colombia arbitration but has made diplomatic overtures to Colombia. Among other things, nearly 600 Spanish sailors died on the vessel, thereby giving the wreck historic and cultural importance for Spain. There may well be legal interventions by Spain in the future.
- Finally, the Qhara Qhara indigenous community of Bolivia has also asserted rights to the treasure on the basis that it was extracted by Qhara Qhara people from Potosí mines. It is not clear (at least to me) what legal basis there is for that claim, although there is an obvious moral basis."

Q & A Session:

Prof. Strong started the session by asking four questions:

"1) Do maritime experts typically have to be experts in cultural heritage law as well, or do the litigation teams bring in co-counsel who are expert in this area?

2) The previous question is likely affected by the frequency with which these kinds of sunken-ship cases arise. Do you have any idea on how often these historical cases arise as compared to what might be called more standard salvage cases (i.e., sunken ships that are not over the 100-year mark, for example)? Are they more likely to arise now that we have sonar and other types of technology that makes searching for sunken ships easier?

3) Do countries have to show any attempts to salvage a sunken ship to continue to assert an interest? For example, did Spain or Colombia attempt to find or raise the San Jose at any point since its sinking?

4) Do you have a view on the strength of any of the legal claims? In other words, what does your crystal ball tell you about the likely outcome of this dispute."

Dr. Davies responded with a no to Prof. Strong's first question and further explained that:

"the San José case was relatively unusual in that the original salvor, Glocca Morra, attempted to make a deal with the Colombian government from the outset after finding what it thought was San José. A more typical way of proceeding is for a treasure salvor to bring some artifact up from the wreck and to deposit it with the court for the purpose of claiming in rem jurisdiction over it. By a (highly dubious) process of extrapolation, this may persuade the court to give the salvor "salvor in possession" rights in rem over the entire wreck based on its actual in rem jurisdiction over the raised artifacts. That is how Odyssey Marine Exploration originally claimed "salvor in possession" rights over the wreck of the Titanic, even though it was only in possession of some retrieved artifacts."

He continued that in case "such approach is taken, as it often is, the salvor asserts its right in court and then effectively invites others to contest that right – including any sovereign that wants to assert underwater cultural heritage rights. Only once that contest has been entered does the maritime lawyer need some co-counsel or expert help. Many non-UNESCO-Convention countries have domestic underwater cultural heritage legislation that is similar to the Convention in its definition of UCH, so it may be necessary to get expert opinion about cultural and historic significance, and the amount of time the wreck has been submerged. But if the salvor can find artifacts and no country contests them as UCH, then no expert opinion is necessary."

Dr. Davies' response to the second question was that in his view "*there are fewer cases than there used to be, largely because the new technologies have made it that much easier to find most (but not all) of the sunken wrecks that might have had valuable cargo aboard*". He then elaborated that despite having easier ways and new equipment to do the search, because of the lifetime of these developments, there are not too many of these cases anymore. He concluded that: "*[e]ven what you call 'standard salvage' cases are reducing in number, mainly because salvors now increasingly prefer to enter into fixed-price service contracts rather than the traditional 'no cure, no pay' arrangement*".

He then responded to the third question by a 'No' and continued that it depends on the content of the country's national law. In Dr. Davies' opinion, if national underwater cultural heritage law is appropriately drafted, countries can do what Colombia is attempting to do in this case and own a wreck after a commercial salvor finds it. He added that this is "*one of the principal objections that commercial salvors have to the UNESCO Convention, which is that it gives them no incentive whatever to go out and spend considerable money to find whatever valuable wrecks that are still out there. Commercial salvors would (and do) say that the consequence of the UNESCO Convention is that remaining culturally significant wrecks will remain out there undiscovered on the seabed if no-one is given a commercial incentive to find them. As for raising the San José itself, rather than artifacts from it (and all that gold, silver, and emeralds), I am doubtful. The Mary Rose, which was raised almost intact from English waters in 1982, sat on the seabed in cold water; San José sank in warm tropical waters and has been down there for over 300 years. I am no expert in the technology, but I think the expectation is that it will crumble to dust if any attempt is made to raise the hull whole*".

To address the fourth question, Dr. Davies mentioned that he is doubtful about Colombia's objection to jurisdiction based on Article 10.20.5 of the TPA since there is a possibility of rejecting jurisdiction by the arbitrators. He continued that if "the case does proceed to the merits, I think that one of the very important questions of fact will be whether the thing that Glocca Morra found in 1981 was, in fact, San José. Colombia now says that that is not the San José wreck. On the legal merits, I think the weakest point of SSA's claim is that there was never actually a signed written agreement about the division of spoils. The weakest point of Colombia's defense is that the "We have changed our mind, it's all ours now" response does look a lot like appropriation of something that was agreed with Glocca Morra/SSA. Whether that actually offends the terms of the TPA is rather beyond my area of expertise. Finally, my crystal ball does tell me that Colombia would probably not be quite so aggressive about claiming the entire site as "cultural heritage" if the wreck were not, in fact, San José, but I freely confess that that is just speculation on my part. Even the 5% "finder's fee" offered by Colombia's Congreso after the first legislative response would have amounted to \$1 billion if the cargo is, indeed, worth \$20 billion. For Colombia to resile even from the "finder's fee" raises at least one of my eyebrows in doubt about what is down there. The arbitrators will hear that, but it will presumably remain confidential."

Prof. Strong thanked Dr. Davies and referred to the impact of the temperature and salinity of the water in similar cases, such as the Vasa, a Swedish warship sunk in 1628 which was raised intact 333 years later in 1962.[14] She added that in Vasa case, the process was only possible due to the particular nature of the water in the Stockholm archipelago.

Mr. Wooseok Shin raised a follow-up question about the reaction of the non-arbitration parties and asked: "How would the legal interventions by Spain look, considering its ratification of the UNESCO Convention and its assertion of rights over the San José shipwreck despite not being a party to the arbitration? You also mentioned that Spain has raised such claims on different occasions. How did the Spanish claims in many other treasure salvage cases work?"

Dr. Davies considered **Mr. Wooseok**'s question as a crucial yet difficult one, as its answer "*will depend on where exactly the supposed wreck of San José lies – which presently remains a secret*". He then further explained the issues by reference to the following authorities:

[14] For more information, see: https://www.visitstockholm.com/o/the-vasa-museum/

- "Article 7(1) of the UNESCO Underwater Cultural Heritage Convention protects (as you would expect) the exclusive right of coastal states to "regulate and authorize activities directed at underwater cultural heritage in their…territorial sea." Importantly, though, that reservation applies only as recognition of the exclusive sovereignty of "States Parties" – and Colombia is not a State Party to the UNESCO Convention.
- Article 2 of the UN Convention on the Law of the Sea (UNCLOS) recognizes the sovereignty of coastal states over their territorial sea including (Art 2(2)) the seabed and subsoil. This would suggest that if San José is within Colombia's territorial sea (12 nautical miles from the baseline), Spain would have little or no basis as a matter of international law to complain of what Colombia might do in relation to it.
- However, Colombia has signed but not ratified UNCLOS, so the provisions of UNCLOS are relevant to Colombia's sovereign rights only to the extent that they form part of customary international law (which is, as you probably know, the position that the United States takes).
- If San José is outside what international law would recognize as Colombia's territorial sea but is within what would be Colombia's Exclusive Economic Zone (EEZ), things become a little more complicated still. (For what it is worth, I think it much more likely as a matter of fact that San José is somewhere beyond 12 nautical miles. Public statements by the Colombian authorities suggest that it is at a depth of about 600 meters – a depth very unlikely to be found within the territorial sea.)
- If San José is somewhere beyond Colombia's territorial sea but within the EEZ, Colombia's rights as a matter of international law would be much more restricted, even if it were a party to the UNESCO Convention and/or UNCLOS (which it is not). Article 56 of UNCLOS sets out the rights and jurisdiction of a coastal state in relation to its EEZ and they do not obviously include protection of underwater cultural heritage. (Similarly, if San José is within the contiguous zone (24 nautical miles), Colombia's rights under UNCLOS Art 33 would be similarly limited – although for the reasons already stated, I think the wreck is likely to be beyond 24 nm.)
- Although Spain is party to the UNESCO Convention, and although that Convention does give States Parties rights in relation to UCH in the EEZ of other countries (Art 9(1)(b)), those rights only apply to UCH in the EEZ or continental shelf of "another State Party" – so it wouldn't apply to Colombian EEZ or continental shelf.
- In short, the rights of both Colombia and Spain in relation to the wreck are far from clear as a matter of international law if the wreck is somewhere in Colombia's EEZ – which is perhaps why Spain has concentrated on diplomatic efforts so far.
- The arbitration between Colombia and SSA is solely concerned with Colombia's alleged expropriation of SSA's rights by operation of Ministry of Culture Resolution No. 0085 in 2020. That does not affect Spain at all, so there is no basis for Spain to become party to the arbitration.
- If the dispute between Spain and Colombia were to proceed beyond the diplomatic stage, the obvious place for it to go to would be the International Tribunal for the Law of the Sea (ITLOS) – except for the fact that Colombia is not party to UNCLOS. That leaves only, I think, the International Court of Justice (ICJ), which does retain jurisdiction over law of the sea matters in relation to countries not party to UNCLOS. (Colombia has been party to several law of the sea disputes at the ICJ.)

- You ask also about the position that Spain has taken in previous treasure salvage cases. That has generally been a matter between Spain and a commercial salvor. If the owner of salved artifacts cannot be found or has abandoned the property, the salvor may keep the property under the law of finds. If, however, the owner has not abandoned the property, the salvor may claim reward under the law of salvage but may not keep the artifacts. That's why Spain consistently says that it has never abandoned any of the sunken treasure on Spanish galleons."

He concluded his response by mentioning that there can be no definitive answer to the issues raised by Mr. Wooseok due to their complexity and given Colombia's (non-)participation in the relevant Conventions.

Mr. Kantor asked that: "Regarding your observation that the ICJ is a possible path, which of course would require that the US Government take up the claim before the ICJ, has the US State Department shown any interest in intervening in this dispute at any of its stages?"

Dr. Davies responded **Mr. Kantor** by saying that: "So far as I know, the US Government's only intervention in the dispute so far has been to respond to the Tribunal's request for a submission about interpretation of the US-Colombia bilateral TPA. I picture any potential dispute at the ICJ being between Spain and Colombia. The United States has little or no sovereign interest, as there is no historic or cultural significance in the San José wreck for the United States. The only American connection with the dispute is SSA's assertion that it is entitled to a share of whatever is found down there. I can't picture the US Government getting involved just to protect SSA's interests, except on the issue of the TPA with Colombia, where the Department of State has been studiously neutral so far."

Finally, on 8 May, Prof. Strong thanked the four speakers for sharing their time and expertise and announced the symposium on maritime and mediation as closed.

Addendum:

At the end of the symposium, **Mr. Joseph M. Mathews** provided the listserv with breaking news regarding a recent UK case about salvage rights. According to the report sent by him[15], in the case of Argentum Exploration Ltd (Respondent) versus Republic of South Africa (Appellant), the UK Supreme Court ruled that South Africa has sovereign immunity against a salvage repayment claim from a company that recovered around $43 million worth of silver bullion from a cargo ship sunk during World War II.[16]

Prof. Strong thanked him for the update and asked the panelists' opinion on the UK case mentioned while providing a summary of the case as published by the UK Supreme Court.[17]

Dr. Davies commented that: "[a]lthough the result in Argentum turned on the interpretation of s. 10(4)(a) of the U.K.'s State Immunity Act 1978, it is consistent with Article 25 of the Salvage Convention (which the U.K. Supreme Court mentions at [43]), which provides that 'non-commercial cargoes owned by a State' cannot be seized or arrested if they (the cargoes) are entitled to sovereign immunity 'under generally recognized principles of international law.'" He added that the Salvage Convention is applicable in judicial or arbitral cases raised in a State Party's jurisdiction, regardless of the location of the salvage operation, and this was the reason of its application in the Argentum case which was brought in the UK.

Dr. Davies then referred to the San José case in which Colombia is not party to the Salvage Convention, but the United States is. He added that: "*If SSA (or any other salvor) were to do something similar to what Argentum did – i.e., salve some property from the wreck and then bring it to the United States in order to proceed against it in rem – the Salvage Convention would apply because the proceedings would be brought in the United States.*"

Dr. Davies also mentioned that notwithstanding the reference to sovereign immunity "under generally recognized principles of international law" in Article 25 of the Salvage Convention, any claim to sovereign immunity would presumably be considered under the Foreign Sovereign Immunities Act. He further elaborated this by referring to lack of jurisdictional immunity of a foreign state in enforcement of maritime lien in relation to admiralty actions (as in Argentum case) in case the maritime lien "is based upon a commercial activity of the foreign state" (28 U.S.C. § 1605(b)).

According to **Dr. Davies**, while Article 25 would also require examining the commercial nature of a cargo, the above-mentioned phrase is broader than the one considered by the Supreme Court in Argentum. He added that to his opinion, Spain, as owner of the cargo, would be the only State in that case to enjoy immunity. He concluded his comments by stating that: "*Colombia raised sovereign immunity in the U.S. proceedings where SSA tried to enforce the Colombian judgments in its favor, but it could not claim sovereign immunity in relation to the*

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[15] South Africa Immune to Sunken WWII Silver Salvage Claim <https://www.law360.com/internationalarbitration/articles/1834732?nl_pk=7404113b-0e09-41ca-910a-f742762e7b15&utm_source=newsletter&utm_medium=email&utm_campaign=internationalarbitration&utm_content=1834732&read_main=1&nlsidx=0&nlaidx=0>

[16] https://www.supremecourt.uk/cases/uksc-2022-0162.html

[17] https://www.supremecourt.uk/cases/docs/uksc-2022-0162-press-summary.pdf

cargo on San José, I think. All of this is hypothetical, of course, as I doubt very much that any of that will happen."

Prof. Strong thanked **Dr. Davies** for his very useful comments and considered them as indication of a relatively high level of consistency in sovereign immunity law on cross-border maritime issues.