

Maritime Arbitration in Africa: Reflecting on the Current Status and Future Development

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**Maritime Arbitration in Africa: Reflecting on the Current Status and Future
Development**

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Abstract

The paper critically reflects on the status and future development of maritime arbitration in Africa. It examines the progress made towards embracing maritime arbitration in Africa. The paper further appraises the current practice of maritime arbitration in Africa and highlights its prospects and pitfalls. Further, the paper proposes reforms towards strengthening the future development of maritime arbitration in Africa.

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1.0 Introduction

The maritime industry is responsible for the transportation of goods, products, and people by sea¹. This includes everything from container ships, and oil tankers, to cruise ships and passenger ferries to smaller vessels like fishing boats². The maritime industry is a complex industrial sector encompassing various players involved in transport, logistics, regulatory, engineering, finance and insurance activities which are vertically and horizontally intertwined³. In addition to transportation, the maritime industry also encompasses activities like shipbuilding, repair and maintenance, port operations, and marine engineering⁴. It is a crucial part of the global economy and without it, international trade would come to a standstill⁵. Shipping has for many centuries been the major form of transportation, as well as an essential communication link connecting coastal cities, countries and continents⁶. Since the dawn of humanity, the sea has been a source of sustenance, providing food and avenues of trade⁷. The earliest civilizations used the sea as an avenue to search for wealth in the form of spices, minerals, and other natural resources⁸. The search for natural resources and wealth resulted in the establishment of the maritime industry that would continue in some form or another until its present form⁹.

It has been observed that next to rail transportation, water transportation is economically and environmentally the most efficient way to travel or transport merchandise; and,

¹ Chiltern., 'Why is the Maritime Industry so Important.' Available at <https://www.chilternmaritime.com/why-is-the-maritime-industry-so-important/> (Accessed on 05/09/2023)

² Ibid

³ Ghaderi. H., 'Wider Implications of Autonomous Vessels for the Maritime Industry: Mapping the Unprecedented Challenges.' *Advances in Transport Policy and Planning*, Volume 5, 2020, pp 263-289

⁴ Chiltern., 'Why is the Maritime Industry so Important.' Op Cit

⁵ Ibid

⁶ Maritime Sector., Available at <https://www.windrosenetwork.com/Maritime-Sector> (Accessed on 05/09/2023)

⁷ Lord. B., 'Dispute Resolution on the High Seas: Aspects of Maritime Arbitration.' Available at <https://core.ac.uk/download/pdf/234109331.pdf> (Accessed on 05/09/2023)

⁸ Ibid

⁹ Ibid

currently, around 90% of world trade is carried by the international shipping industry¹⁰. The Organisation for Economic Co-operation and Development (OECD) estimates that 90% of globally traded goods are carried by sea¹¹. Due to its importance, the efficient running of the maritime industry is crucial to the safe running of global trade¹².

One of the most pertinent concerns in the maritime industry is the management of disputes. The long history of the maritime industry is dotted with both success and disputes¹³. It has been observed that globalization, climate change, the imperative to move toward net zero, and shifting economic landscapes are all factors in the increase of maritime disputes¹⁴. The twin priorities of energy independence and energy security, set against the background of the climate crisis, are driving the formation of new supply chains and construction projects with a direct impact on maritime disputes¹⁵. Efficient management of maritime disputes is vital for the success of the maritime industry.

In the maritime industry, arbitration has served as a common tool for the settlement of disputes for several decades¹⁶. It has been argued that maritime arbitration remains a popular way to manage maritime disputes due to the often lower costs involved and the ability to mold the process to the needs of the parties involved¹⁷. As a result, arbitration is widely used among international shipping operators to solve almost every kind of dispute and, consequently, arbitral clauses are included in many maritime contract forms¹⁸. This has been attributed to its remarkable advantages over litigation including

¹⁰ Maritime Sector., Op Cit

¹¹ Organization for Economic Co-operation and Development., 'Ocean Economy and Innovation.' Available at <https://www.oecd.org/ocean/topics/ocean-economy/> (Accessed on 05/09/2023)

¹² Chartered Institute of Arbitrators., 'Hot Topics for International Maritime Arbitration in 2023.' Available at <https://www.ciarp.org/news/hot-topics-for-international-maritime-arbitration-in-2023/#:~:text=Maritime%20arbitration%20is%20particularly%20suited,option%20compared%20to%20court%20proceedings> (Accessed on 05/09/2023)

¹³ Lord. B., 'Dispute Resolution on the High Seas: Aspects of Maritime Arbitration.' Op Cit

¹⁴ Chartered Institute of Arbitrators., 'Hot Topics for International Maritime Arbitration in 2023.' Op Cit

¹⁵ Ibid

¹⁶ Lord. B., 'Dispute Resolution on the High Seas: Aspects of Maritime Arbitration.' Op Cit

¹⁷ Ibid

¹⁸ Gregori. M., 'Maritime Arbitration Among Past, Present and Future.' Available at https://www.researchgate.net/publication/324953844_Maritime_Arbitration_Among_Past_Present_and_Future (Accessed on 05/09/2023)

flexibility, specialization, confidentiality and, more generally, possibility for the parties to determine every aspect of the procedure according to their specific needs¹⁹. Arbitration is therefore the number one choice for the management of maritime disputes around the world and over the past few years, there has been an increase in international maritime arbitrations as a result of a protracted period of unforeseen challenges throughout the sector²⁰. These include the COVID-19 pandemic, international geopolitics, and the economic crisis²¹. Maritime arbitration is generally classified under international commercial arbitration but it differs from the general model for a number of reasons, which make it somehow 'special' from the sources of law, to the kind of arbitrated disputes, to the characteristics of the maritime arbitral proceedings²².

The paper critically reflects on the status and future development of maritime arbitration in Africa. It examines the progress made towards embracing maritime arbitration in Africa. The paper further appraises the current practice of maritime arbitration in Africa and highlights its prospects and pitfalls. Further, the paper proposes reforms towards strengthening the future development of maritime arbitration in Africa.

¹⁹ Ibid

²⁰ Chartered Institute of Arbitrators., 'Hot Topics for International Maritime Arbitration in 2023.' Op Cit

²¹ Ibid

²² Gregori. M., 'Maritime Arbitration Among Past, Present and Future.' Op Cit

2.0 Maritime Arbitration in Africa: Promises and Pitfalls

Africa continent boasts of an abundance of natural resources, in particular aquatic and marine resources, with a potential that has not yet been fully tapped in the context of economic growth and Sustainable Development including transportation and trade²³. The continent is surrounded by two of the largest three oceans in the world being the Atlantic Ocean and the Indian Ocean while the African Great Lakes constitute the largest proportion of surface freshwater in the world (27%), with Lake Victoria being the third largest fresh water lake in the world by area, and Lake Tanganyika being the second largest in volume and depth in the world²⁴. The maritime industry plays a crucial role in economic development in Africa. It has been observed that African countries are highly dependent on exports of raw materials and imports of food, manufactured goods and fuel with more than 90 percent of Africa's total trade (including imports and exports) pass through seaports²⁵.

In addition, initiatives have been undertaken at the regional level towards strengthening the maritime industry in Africa. The *Africa's Integrated Maritime Strategy*²⁶ aims to strengthen Africa's maritime capability and capacity. In addition, the *African Maritime Transport Charter*²⁷ seeks to strengthen the African maritime industry through measures such as implementing harmonized maritime transport policies capable of promoting sustained growth and development of African merchant fleets and to foster closer cooperation among the States Parties of the same region and between the regions and facilitating and encouraging regular consultations for determining African common

²³ Africa Union., 'Maritime Transport: Increasing African Ports Capacity and Efficiency for Economic Growth.' Available at https://au.int/sites/default/files/documents/32186-doc-maritime_transport_increasing_african_ports_capacity_and_efficiency_for_economic_growth-e.pdf (Accessed on 05/09/2023)

²⁴ Ibid

²⁵ Ibid

²⁶ Africa Union., 'Africa's Integrated Maritime Strategy (2050 AIM Strategy).' Available at https://au.int/sites/default/files/newsevents/workingdocuments/33832-wd-african_union_3-1.pdf (Accessed on 06/09/2023)

²⁷ African Union., 'Revised African Maritime Transport Charter.' Available at <https://www.peaceau.org/uploads/revised-african-maritime-transport-charter-en.pdf> (Accessed on 06/09/2023)

positions on issues of international maritime policy. Such initiatives are expected to strengthen the maritime industry in Africa with the continent having the potential to become a maritime hub for global trade²⁸. The growth of the maritime industry in Africa provides an opportunity for the use of arbitration to manage disputes arising in the sector²⁹. It has been asserted that maritime arbitration in Africa has the potential to become an effective tool in resolving cross border shipping disputes in sub-Saharan Africa³⁰.

The African Maritime Transport Charter envisages the use of arbitration to manage maritime disputes in Africa³¹. It provides that states parties shall undertake to settle their disputes regarding the interpretation or the application of the provisions of the Charter by negotiations or any other peaceful means agreed upon by them, which may include enquiry, mediation, conciliation, arbitration, and judicial settlement³². The Charter is therefore vital in fostering maritime arbitration in Africa.

It has further been asserted that the African Continental Free Trade Area Agreement presents an opportunity for growth of arbitration in Africa including maritime arbitration³³. The Agreement seeks, amongst other things, to create the world's largest free trade area covering the entire African continent³⁴. The Agreement further includes dispute settlement mechanisms for any disputes that arise between member States and

²⁸ Toesland, F., 'Africa can Become a Maritime Hub for Global Trade.' Available at <https://www.un.org/africarenewal/magazine/september-2021/africa-can-become-maritime-hub-global-trade> (Accessed on 06/09/2023)

²⁹ Pike, A., 'Maritime Arbitration to Resolve Cross-Border Shipping Disputes in Sub-Saharan Africa.' Available at <https://bowmanslaw.com/insights/shipping-aviation-and-logistics/maritime-arbitration-resolve-cross-border-shipping-disputes-sub-saharan-africa/> (Accessed on 06/09/2023)

³⁰ Ibid

³¹ African Union., 'Revised African Maritime Transport Charter.' Op Cit

³² Ibid

³³ Hartwell, M., 'Arbitration in Africa: A Review of Recent Regional Initiatives.' Available at <https://www.nortonrosefulbright.com/en-pg/knowledge/publications/558921ae/arbitration-in-africa> (Accessed on 06/09/2023)

³⁴ African Union., 'Agreement Establishing the African Continental Free Trade Area.' Available at https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf (Accessed on 06/09/2023)

envisages the use of arbitration in management of disputes³⁵. It stipulates that parties to a dispute may resort to arbitration subject to their mutual agreement and shall agree on the procedures to be used in the arbitration proceedings³⁶. The African Continental Free Trade Area Agreement can therefore promote the use of arbitration to manage disputes arising in the maritime sector pursuant to its provisions.

In addition, Africa has been identified as a thriving market for arbitration which provides an opportunity for the adoption and growth of maritime arbitration in the continent³⁷. It has been observed that there is increasing confidence by African practitioners in selecting African laws to govern commercial contracts and African seats for Africa-related arbitrations³⁸. In addition, the Pan-African agenda is fostering efforts towards establishing a standing African International Commercial Court to deal with disputes expected to arise in connection with the nascent Africa Continental Free Trade Area Agreement³⁹. There has also been an increase in regional and international arbitration centres in Africa providing a platform for management of disputes in Africa through arbitration⁴⁰. To this end, it has been observed that the importance of international commercial arbitration as the most viable approach to international disputes including maritime disputes is being recognized and basic structures and institutions for arbitration are being established across the continent⁴¹. There are also effort towards promoting maritime arbitration in Africa through the establishment of maritime law arbitration centres by some arbitral institutions⁴². These efforts are essential in fostering maritime

³⁵ Ibid, Protocol on Rules and Procedures on the Settlement of Disputes.

³⁶ Ibid, Article 27

³⁷ Ripley-Evans. J, & De Sousa. M., '2022 SOAS Arbitration in Africa Survey Reveals a Thriving Market for Arbitration on the Continent.' Available at <https://hsfnotes.com/africa/2022/11/25/2022-soas-arbitration-in-africa-survey-reveals-a-thriving-market-for-arbitration-on-the-continent/#:~:text=The%20Arbitration%20Foundation%20of%20South,centres%20in%20the%202020%20survey> (Accessed on 06/09/2023)

³⁸ Ibid

³⁹ Ibid

⁴⁰ Hartwell. M., 'Arbitration in Africa: A Review of Recent Regional Initiatives.' Op Cit

⁴¹ Muigua. K., 'Promoting International Commercial Arbitration in Africa.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/PROMOTING-INTERNATIONAL-COMMERCIAL-ARBITRATION-IN-AFRICA-EAIA-Conference-Presentation.pdf> (Accessed on 06/09/2023)

⁴² Hartwell. M., 'Arbitration in Africa: A Review of Recent Regional Initiatives.' Op Cit

arbitration in Africa by attracting domestic maritime disputes and international maritime disputes that occur in Africa's massive commodity export and transport sectors⁴³.

From the foregoing, it is evident that there is huge potential for maritime arbitration in Africa. However, it has been observed that in maritime arbitration, English law remains by far the most popular choice of law with London being the most popular choice of seat for arbitrations with the laws and arbitration seats of Singapore and New York also being preferred over Africa⁴⁴. The suitability of London as a seat for maritime arbitration has been attributed to factors such as the availability of experienced specialist counsel, and experts, availability of experienced specialist arbitrators (particularly in the maritime field), the experience of the English Commercial Court in exercising its supervisory jurisdiction and in ordering "interim measures" such as injunctions and document or property preservation orders, relative cost and speed and the wealth of English commercial and maritime case law⁴⁵. Associations such as the London Maritime Arbitrators Association have enhanced the appropriateness of London as a seat for maritime arbitration by advancing and encouraging the professional knowledge of London maritime arbitrators and, by recommendation and advice, assisting the expeditious procedure and disposal of maritime disputes⁴⁶.

Other centres such as Dubai have also enhanced their efforts to foster maritime arbitration through the consolidation of arbitration centres in order to reinforce Dubai's status as an international arbitration hub for Africa and the Middle East and at attracting foreign investments⁴⁷. In support of this move, it has been argued that maritime

⁴³ Ibid

⁴⁴ Pike. A., 'Maritime Arbitration to Resolve Cross-Border Shipping Disputes in Sub-Saharan Africa.' Op Cit

⁴⁵ Marine Strategy., 'Ian Gaunt Explains the Benefits of London Arbitration.' Available at <https://maritime-executive.com/features/ian-gaunt-explains-the-benefits-of-london-arbitration> (Accessed on 06/09/2023)

⁴⁶ The London Maritime Arbitrators Association., Available at <https://lmaa.london/about-lmaa/> (Accessed on 06/09/2023)

⁴⁷ Vergani. E, & Melchionda. L., 'A New Landscape for Commercial and Maritime Arbitration in Dubai.' Available at <https://www.globallegalpost.com/news/a-new-landscape-for-commercial-and-maritime-arbitration-in-dubai-429998383> (Accessed on 06/09/2023)

arbitration centres can provide top quality services only when they have a consolidated practice and everyday experience, which are a great added value in the shipping industry⁴⁸. India is also enhancing its capacity for maritime arbitration through measures such as the setting up of an arbitration and conciliation center with an emphasis on shipping disputes that is aimed at providing time-bound and cost-effective management of disputes by concentrating on all aspects of shipping under one framework⁴⁹. The centre is aimed at fostering maritime arbitration by focusing on leading ship owners, ship brokers, ship charterers, ship recyclers, regulatory bodies and maritime consultants⁵⁰.

Africa can follow the foregoing examples in order to build its capacity as a hub for maritime arbitration. It has been asserted that the continent has a vibrant maritime sector that has not yet been fully tapped in the context of economic growth and Sustainable Development including transportation, trade and dispute management⁵¹. There has always been concern about African cities not being chosen as international arbitration venues and African arbitrators not having commensurate international appointments⁵². There is need for an effective strategy and development of an attractive arbitration environment in Africa in the field of maritime arbitration⁵³.

⁴⁸ Ibid

⁴⁹ Khurana. G., 'India -The Future Destination of Maritime Arbitration.' Available at <https://irglobal.com/article/india-the-future-destination-of-maritime-arbitration/> (Accessed on 06/09/2023)

⁵⁰ Ibid

⁵¹ Africa Union., 'Maritime Transport: Increasing African Ports Capacity and Efficiency for Economic Growth.' Op Cit

⁵² Oleghe. F., 'Africanisation of International Dispute Resolution: A Myth, a Fact, or a Movement.' Available at <https://afaa.ngo/page-18097/13023496> (Accessed on 06/09/2023)

⁵³ Ibid

3.0 Way Forward

It has been observed that in order to promote maritime arbitration, there is need for an arbitration-friendly legal system⁵⁴. Therefore, unless disputants see a marked difference between arbitration and litigation within a legal system, that country will hardly be a venue of choice⁵⁵. It is thus evident that encouraging parties to arbitrate their shipping disputes in Africa may require changes to the legislative framework of those countries seeking to host more international arbitrations⁵⁶. It is therefore important for African countries to enact arbitration friendly laws and policies including those on maritime arbitration in order to foster the appropriateness of African countries as venues and seats of maritime arbitration⁵⁷.

Further, the suitability of maritime arbitration in Africa may be further bolstered by the establishment of maritime arbitration centres and institutions in the continent with their own set of bespoke maritime arbitration rules⁵⁸. Maritime arbitration has developed in other parts of the world due to the establishment of specialized centres and institutions which have their own governing rules and qualified personnel⁵⁹. African countries can follow this example and establish maritime arbitration institutions and centres with the requisite institutional and technical capacity and personnel in order to promote maritime arbitration. It has been asserted that there is something special about maritime law that sets it apart in terms of legal principles and activity and as such maritime arbitration calls for its own seats⁶⁰. It is therefore imperative to establish centres and institutions for maritime arbitration in Africa having the requisite capacity to handle maritime arbitrations. It has been observed that arbitral institutions are playing an important role

⁵⁴ Ibid

⁵⁵ Ibid

⁵⁶ Pike. A., 'Maritime Arbitration to Resolve Cross-Border Shipping Disputes in Sub-Saharan Africa.' Op Cit

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ Gregori. M., 'Maritime Arbitration Among Past, Present and Future.' Op Cit

⁶⁰ Vergani. E, & Melchionda. L., 'A New Landscape for Commercial and Maritime Arbitration in Dubai.' Op Cit

in developing regional centres, which will be key to meeting the growing need for dispute resolution services on the continent⁶¹.

It is also imperative for arbitrators, litigators, policy makers, judicial officers and everyone involved in the maritime industry to enhance their capacity and expertise in maritime arbitration in order to enhance its quality⁶². The scale, diverse range and complexity of maritime arbitrations coupled with an increase in arbitral systems means that it is essential to have the right knowledge and skills to navigate the field⁶³. It has been argued that having arbitrators qualified and experienced in the intricacies of the matters of law, fact and technology commonly involved in shipping arbitration is far more important (and much safer) than having general practitioners in the field of arbitration⁶⁴. To this extent, reaching a quick and sound decision might well avoid disrupting big projects, such as offshore and renewable energy plants, which inevitably overlap with the shipping industry⁶⁵. It is therefore vital for arbitrators and other stakeholders in the maritime industry in Africa to enhance their capacity and expertise in maritime arbitration through education, training and capacity building⁶⁶. These measures will cement the place of Africa as a hub for maritime arbitration.

⁶¹ Ripley-Evans, J., & De Sousa, M., '2022 SOAS Arbitration in Africa Survey Reveals a Thriving Market for Arbitration on the Continent.' Op Cit

⁶² Chartered Institute of Arbitrators., 'Hot Topics for International Maritime Arbitration in 2023.' Op Cit

⁶³ Ibid

⁶⁴ Vergani, E., & Melchionda, L., 'A New Landscape for Commercial and Maritime Arbitration in Dubai.' Op Cit

⁶⁵ Ibid

⁶⁶ Muigua, K., 'Promoting International Commercial Arbitration in Africa.' Op Cit

4.0 Conclusion

Maritime arbitration has emerged as the preferred mechanism for managing disputes in the maritime industry⁶⁷. Maritime arbitration offers certain advantages in managing disputes in the maritime industry including flexibility, specialization, confidentiality and, more generally, possibility for the parties to determine every aspect of the procedure according to their specific needs⁶⁸. It has been observed that the maritime industry in Africa is growing, a situation which provides an opportunity for the use of arbitration to manage disputes arising in the sector⁶⁹. Maritime arbitration in Africa has the potential to become an effective tool in resolving cross border shipping disputes in sub-Saharan Africa⁷⁰. However, the potential of maritime arbitration in the Continent is yet to be realized with English law remaining by far the most popular choice of law with London being the most popular choice of seat for arbitrations with the laws and arbitration seats of Singapore and New York also being preferred over Africa.⁷¹ There is need to enhance the appropriateness of Africa as an ideal environment for maritime arbitration through formulation of arbitration friendly laws and policies on maritime arbitration, establishment of maritime arbitration centres and institutions and enhancing the capacity and expertise of African arbitrators and practitioners in maritime arbitration⁷². The future of maritime arbitration in Africa looks promising and there is need to embrace it.

⁶⁷ Lord. B., 'Dispute Resolution on the High Seas: Aspects of Maritime Arbitration.' Op Cit

⁶⁸ Ibid

⁶⁹ Pike. A., 'Maritime Arbitration to Resolve Cross-Border Shipping Disputes in Sub-Saharan Africa.' Op Cit

⁷⁰ Ibid

⁷¹ Gregori. M., 'Maritime Arbitration Among Past, Present and Future.' Op Cit

⁷² Ibid

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