



# SHIPPING INSIGHT: WHO RULES THE WAVES?

## Welcome to the first of our HFW Shipping Insight reports, a series of four publications focussing on a range of issues critical to the shipping industry in 2017.

In the past year, we have all learned to expect the unexpected, with anti-globalisation and populism at centre stage and social media and technology playing a lead role. Uncertainty has followed the systemic shocks of the UK's vote to leave the European Union and Donald Trump's first eight months as President of the US. While the global economic challenges have naturally impacted shipping, many commentators are now identifying signs of financial recovery, with freight rates nudging up. As the industry takes stock, we look at whether London will continue to lead in maritime banking, broking, insurance and law and cover the rise of new maritime legal hubs.



### **CRAIG NEAME**

Global Head of Shipping, Offshore and Logistics





## London after Brexit

The UK's historic vote for Brexit has left many in the shipping industry questioning whether London can continue to remain the world's leading maritime hub for shipping-related services. Businesses want to retain passporting rights and are also concerned about regulatory uncertainty after the UK exits. Lloyd's insurance market has confirmed they will set up in Brussels and AIG is opening a new base in Luxembourg, while other insurance groups have also indicated they are likely to open EU offices. At the same time, questions have been raised about whether England will remain the jurisdiction of choice for the resolution of shipping disputes and whether English law clauses will still be chosen for charterparties, ship building contracts, ship sale contracts and bills of lading. Concerns have been expressed about enforceability of English judgments and arbitration awards. In addition to these Brexit-related concerns, in recent years, English arbitration and Alternative Dispute Resolution (ADR) procedures have seen calls to modernise if they are to remain fit for purpose in the modern world.

Historically, London has been the leading centre for the resolution of shipping disputes and the London maritime hub was last valued at more

than £22 billion. The shipping industry currently accounts for more than 500,000 jobs within the UK, including ship brokers, lawyers and those working in classification, finance, insurance and maritime education.

It seems likely that the landscape of maritime London will shift somewhat as many banks and insurers relocate at least part of their operations in the wake of the Brexit vote. Hamburg, Paris and other up and coming EU shipping centres are wooing Brexit-affected London businesses. But HFW's view is that, while the UK economy remains robust and the gravitational pull of the London maritime cluster continues, financial institutions and insurers will continue to see the value in being located in London. London remains a key financial centre with a track record of stable regulation and we think wholesale departures are unlikely to happen in the short or even medium term.

London arbitration awards will continue to be enforceable under the New York Convention 1958 in the same way as before, as Britain and the EU member states will continue to be signatories. London awards will therefore continue to be internationally enforceable after Brexit. Parties to London shipping arbitration proceedings may actually be in a stronger position post-Brexit.

This is because they are likely to have the option to use anti-suit injunctions to prevent parties to arbitration agreements taking their case to courts in EU countries. As arbitration dominates shipping dispute resolution, we therefore expect English law and dispute resolution to continue to be chosen for the majority of shipping contracts in the coming years.

The UK government confirmed in its Brexit White Paper that it is working towards reciprocal enforcement of court judgments after the UK exits the EU. It is hoped that the practical effect of Brexit on cross-border enforcement of English court judgments in the EU will be limited.

London continues to be the main centre for wet and dry shipping mediation and ADR. The new Early Intervention (EI) scheme brings ADR into play at the very start of a dispute, aiming to settle disputes where both parties want to reach a commercial settlement without the initial costs of the arbitration or court process. The confidential guided negotiation is facilitated by a neutral third party with industry expertise. We are seeing an increasing appetite for such forms of ADR and early indications are that most EI negotiations are successful, resolving disputes quickly and cost-effectively. This appetite for fast track London ADR seems set to continue.

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### **Is English law moving with the times?**

Aside from Brexit concerns, there have been recent high-profile complaints that English shipping law has not been moving with the times and that there has been insufficient published new law. Arbitration decisions are confidential and, because it can be difficult to appeal, shipping arbitrations usually do not produce public court judgments. In our view, the shipping industry understands and is happy with the current compromise position. Arbitration enables the industry to handle disputes confidentially and practically and a flurry of recent high profile shipping court cases do in fact show the system working well. English shipping law continues to evolve with recent court cases going to the heart of key issues in modern shipping law.

### **New legal milestones**



Breaking tonnage limits



The correct safe port test



The basis of package limitation



When dishonesty allows marine insurers to refuse to pay out



When owners can claim damages for non-payment of hire



How damages are calculated after early redelivery



2016

HFW was the most active firm in the Commercial Court in 2016, according to The Lawyer Court Rankings 2016.

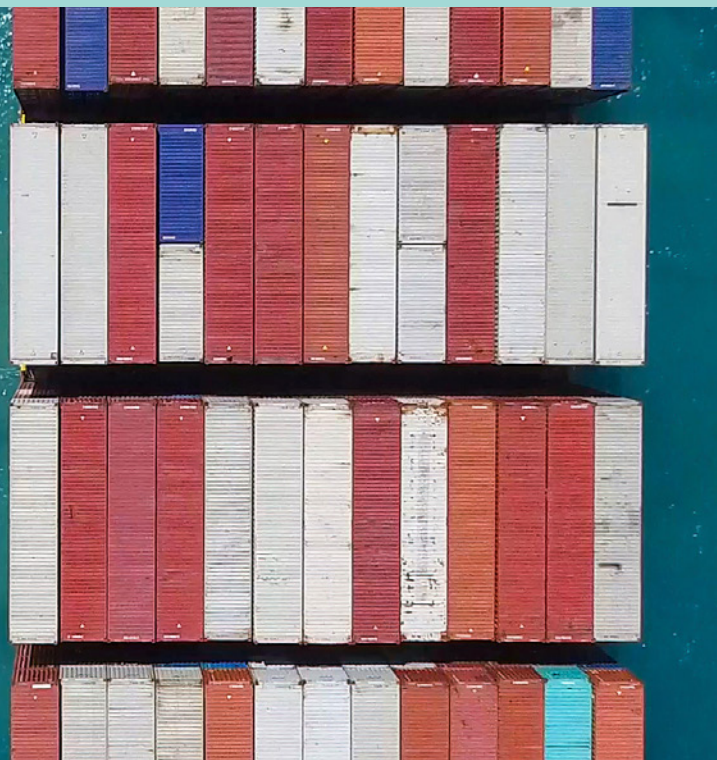
48

The firm spent 48 days in the Commercial Court last year.

12

HFW worked on 12 Commercial Court trials.

# CASE STUDIES



## Tonnage limits broken in an exceptional case: **ATLANTIK CONFIDENCE**<sup>1</sup>

In late 2016 tonnage limits were broken for the first time under English law in a unique case concerning the bulk carrier, *ATLANTIK CONFIDENCE*.

The *ATLANTIK CONFIDENCE* suffered an engine room fire and ultimately sank. The owners applied to the English Admiralty Court to create a limitation fund. Cargo insurers contested this on the basis that the only explanation for the sinking was a deliberate scuttling by the crew on the direction of the owners. HFW successfully argued for insurers that:

- The innocent explanation put forward by the owners required a series of improbable circumstances
- The only credible explanation was therefore that the loss was deliberate

HFW's view is that this ground-breaking case turned on its own unique facts. The case demonstrates the court's willingness to break limits in the correct factual scenario. It does not lower the threshold for breaking limits and innocent owners have nothing to fear.

## How to be safe: **THE OCEAN VICTORY**<sup>2</sup>

The Supreme Court decided this high profile safe port case in May 2017. The vessel had become a total loss as a result of "long waves" affecting the vessel when she was attempting to leave the Japanese port of Kashima. Charterers successfully argued that the port was safe as:

- The simultaneous gale force winds and long waves amounted to an abnormal occurrence
- Abnormal meant rare and unexpected
- This combination of weather was entirely unprecedented in the recorded history of the port

In our view the Supreme Court judgment was a useful clarification of the safe port test, returning us to the traditionally understood position.

## Lightening the load for cargo claim calculation: **THE MAERSK TANGIER**<sup>3</sup>

This case in April 2017 dealt with Hague-Visby Rules package limitation for containerised cargoes and clarified the rules on what will be considered a unit.

Large unpackaged tuna pieces carried in three reefer containers were damaged. The court decided that:

- The correct test for a 'unit' is if individual items are packaged together for transit
- If they have been packaged together then individual items are part of a single package but are not units
- If they have not been packaged together, each physical item is a 'unit'

Given the actual packaging used in the containers, each individual piece of tuna was therefore one unit. Package/unit limit applied to every individual package. We believe the industry will welcome this guidance which should make it easier to calculate cargo claims, but as the case has now been appealed to the Court of Appeal, the last word on this is some months away.

1. *Kairos Shipping Ltd v ENKA & Co LLC (The Atlantik Confidence)* [2016] EWHC 2412 (Admlty); [2016] 2 Lloyd's Rep. 525

2. *Gard Marine & Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)* [2017] UKSC 35; [2017] 1 W.L.R. 1793; Times, May 22, 2017

3. *Maersk Tangier (Kyokuyo Co Ltd v A.P. Moller/Maersk A/S trading as Maersk Line)* [2017] EWHC 654 (Comm) [2017] UKSC 35; [2017] 1 W.L.R. 1793; Times, May 22, 2017



# HFW is a finalist for the Lloyd's List i-Law Maritime Law Award 2017 after an exceptional year working for clients on high profile shipping cases, including the standout limitation case **ATLANTIK CONFIDENCE**.

## The fraudulent claim defined: **THE DC MERWESTONE**<sup>4</sup>

In the second half of 2016 the Supreme Court upheld a €3.2 million claim by the owner of a damaged vessel who lied in support of an otherwise valid claim. The court decided that the 'collateral' lie told was actually irrelevant.

An insurer did not have to pay where a policyholder:

- Had fabricated its entire claim completely
- Exaggerated the loss resulting from a covered event

However, the court decided that as the claim itself in this case was legitimate the insurer had to pay out and the lie did not mean the insurer could refuse payment. HFW acted for the successful owners and we see this case as a useful decision clarifying the test for a fraudulent claim.

## Can't pay or won't pay? The Spar Shipping case<sup>5</sup>

In late 2016, the Court of Appeal ruled on the question of whether payment of hire is a condition. On this point the court found in favour of the charterers, who were represented by HFW.

The court decided that:

- Punctual payment of hire is not a condition, but an innominate term
- Charterers renounced the charters by their repeated failure to pay hire on time, entitling owners to claim damages

Owners do not therefore have an automatic claim for damages where charterers are in breach of the hire payment clause. To make a claim, owners must be able to prove renunciation by demonstrating that they have been deprived of the whole benefit of a charterparty.

This decision has broadly brought us back to the position before the *ASTRA*<sup>6</sup> case was decided and has provided welcome certainty on the status of hire payments.

## Benefitting from early redelivery: the **NEW FLAMENCO** story<sup>7</sup>

The Supreme Court decided in June how damages should be calculated when owners hit with early redelivery then do better than would otherwise have been expected.

After early redelivery in 2007 in breach of charterparty, owners then sold the vessel. They claimed for net loss of profit for hire from actual redelivery until the agreed redelivery date in 2009. Charterers argued that:

- The vessel had been sold in 2007 for significantly more than the 2009 market value
- Owners had therefore benefitted from the early redelivery by over US\$15 million
- Owners should recover nothing because the sale profit was more than the loss of profit claim

The Supreme Court concluded owners could still claim their full net loss of profit as the sale had not been caused by the early redelivery itself. This will be welcome news to owners.

4. *Versloot Dredging BV and another (Appellants) v HDI Gerling Industrie Versicherung AG and others (Respondents)* [2016] UKSC 45

5. *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd* [2016] EWCA Civ 982; [2017] Bus. L.R. 663; [2016] 2 Lloyd's Rep. 447

6. *Kuwait Rocks Co v AMN Bulkcarriers Inc (The MV "Astra")* [2013] EWHC 865 (Comm) 2 Lloyd's Rep. 69

7. *Globalia Business Travel S.A.U. (formerly TravelPlan S.A.U.) of Spain v Fulton Shipping Inc of Panama (The New Flamenco)* [2017] UKSC 43

## Out to overtake London?

Aside from London, the maritime world is also looking to important existing and newer maritime clusters which have developed in the last decade. A number of other cities across the world including Singapore, Hamburg and Piraeus, as well as Oslo and Hong Kong are established as leading shipping commercial centres. Other centres both inside and outside the EU are seeking to pick up London maritime business, with Greece on a drive to attract UK-based owners and marine insurance brokers for an enhanced post-Brexit maritime cluster in Piraeus.

With 15-20% of the global fleet owned or managed through Greece or by Greek interests, Piraeus is already one of the most important European shipping hubs outside London. It continues to maintain a complete cluster of highly experienced shipping professionals and service providers, including the major P&I Clubs, insurers, surveyors and its vast pool of shipping operations/technical personnel which support, advise and supply shipping markets worldwide. While Greek shipping lawyers will continue to use London arbitration and ADR, Brexit may enhance the maritime services sector in Piraeus at the expense of London.

Houston is anticipating a long-term Brexit boost, with the recent start of bilateral US/UK trade talks. In August this year the UK's Secretary of State for International Trade visited Houston and other key US centres to kick off negotiations. The world's leading offshore cluster is in Houston, a significant maritime services centre with a specialisation in the offshore sector. Houston has a highly diverse maritime market and expansion of the Panama Canal has transformed the US Gulf Coast. 2016 was the port of Houston's second busiest ever year. A substantial increase in LPG, propane and butane exports mean that Houston continues to grow, with ongoing construction of docks, tanks and pipelines. The port of Houston is expected to recover well from the damage inflicted last month by Hurricane Harvey. Houston is becoming more of a centre for arbitration in the

U.S. Gulf of Mexico. More and more energy, offshore and blue water charters and contracts are calling for arbitration in Houston under the Houston Maritime Arbitrators Association (HMAA) Rules.

Australia's prime minister indicated in July that Australia will agree a free trade deal with the UK as soon as possible following Brexit. The maritime sector is worth around \$1.7 billion to the Australian economy and it is expected trade will be boosted by Brexit with increased access to the UK market particularly in respect of agricultural products. Domestic maritime arbitrations are largely dealt with by the Australian Maritime and Transport Arbitration Commission (AMTAC) (established by the Australian Centre for International Commercial Arbitration (ACICA)) and while most international maritime arbitrations are dealt with outside Australia there has been some increase in international parties arbitrating there, attracted by Australia's proximity to Asia, modern and arbitration-friendly legal system and neutrality.

Maritime centres in Asia, particularly Hong Kong, Singapore and increasingly also Shanghai, are growing their market share of the broader maritime services sector. Shanghai is fast becoming a major rival to traditional maritime hubs in banking, marine insurance and shipbroking and the PRC has announced it will work to make Shanghai a global shipping centre by 2020. In the wake of the downturn in Western banking markets, Chinese banks and leasing houses have become the most important source of global shipping lending. The PRC is now the third-largest ship-owning nation, with Shanghai the world's busiest port. China P&I is also growing internationally. We expect that over the next ten years Shanghai and its free trade zone will become a major global centre for insurance, legal and associated services for global shipping. In China there are three main arbitration institutions which are commonly used to resolve large international commercial disputes. These are the China International Economic and Trade Arbitration

Commission (CIETAC), China Maritime Arbitration Commission (CMAC) and the Beijing International Arbitration Centre (BIAC) and use of these is expected to grow.

Across HFW's international maritime team we are working in up-and-coming marine disputes centres including Singapore, Hong Kong, Dubai and Paris which are already positioning themselves to take on London by aiming to deliver decisions on shipping cases more quickly and cheaply.

In Asia, Singapore, Hong Kong and Shanghai compete for a slice of the shipping arbitration pie. These centres are finding particular success with Asia-based corporates who want to do business closer to home and in a more favourable time zone.

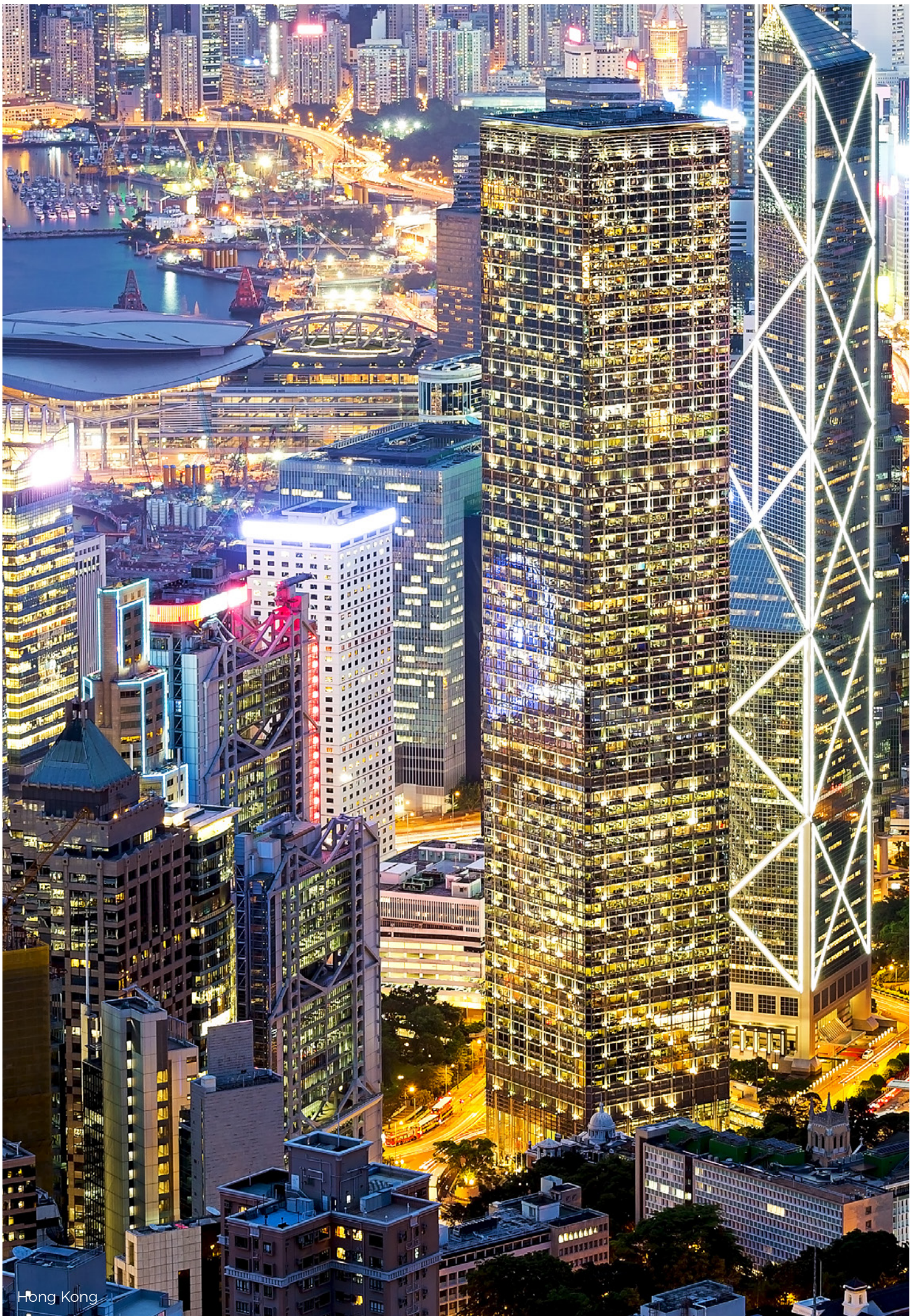
## Singapore

Of these challenger jurisdictions in Asia, Singapore has been quickest out of the blocks and fiscal incentives there have encouraged the establishment of a significant regional maritime hub. Singapore benefits from the sheer volume of passing shipping trade and its strong container, offshore, bunker and oil trading sectors. Maritime services businesses are well established in Singapore, with around 130 major shipping groups supported by a major cluster of P&I clubs, as well as a thriving marine insurance market.

Singapore wants to be seen as a maritime dispute resolution centre, and is rapidly moving towards its goal of being the primary alternative to London as the shipping jurisdiction of choice. Its new international maritime court, the Singapore Chamber of Maritime Arbitration, and the Singapore International Arbitration Centre (SIAC) are supported by a strong network of experts and other litigation resources. The international and maritime arbitration communities have welcomed these efforts, with LMAA arbitrators sitting on Singapore arbitration panels. In May this year, Singapore legalised third party funding for arbitration, which will further enhance Singapore's appeal.









Dubai

## Hong Kong

Hong Kong is looking to catch up with Singapore as a centre for shipping business and has been increasingly promoting itself as an alternative to Singapore. Hong Kong benefits from its position as a gateway to mainland China as well as its continuing status as a shipping hub and presence in the second-hand vessel market. For Asian businesses, arbitration in Hong Kong offers the opportunity to deal with disputes in the local region using the established and well-respected arbitration system there.

Hong Kong's strengths include its open and corruption-free business environment, which is supported by modern, reliable infrastructure and an experienced network of skilled professionals including arbitrators, mediators and experts. Arbitration awards made in Hong Kong are enforceable in over 150 jurisdictions under the New York Convention and also in mainland China through a separate arrangement.

Many mainland Chinese shipping companies choose Hong Kong arbitration because Hong Kong is an administrative region of China, while non-Chinese industry parties often view Hong Kong as a safe arbitration seat with a strong pro-arbitration reputation and an independent judicial system.

The Hong Kong International Arbitration Centre (HKIAC) promotes and administers arbitrations and other dispute resolution activities, including mediation and adjudication, and through its light touch approach generally succeeds in keeping costs low and arbitrations concluded promptly. HKIAC has dealt with a significant number of shipping arbitrations over the last few years and in 2016 over 20% of all HKIAC's arbitrations involved maritime disputes. Hong Kong is also boosting its attractiveness by legislative change on 14 June 2017 ensuring third party funding of both mediation and arbitration is allowable in Hong Kong. The bill is likely to enter into force within 2017 and this can only help Hong Kong to capitalise on the opportunities generated by China's epic infrastructure project, One Belt One Road.

## Dubai

In the Middle East, Dubai is following Singapore and Hong Kong in Asia by building itself into a regional and global maritime hub. Dubai has created its first Maritime Advisory Council, which includes HFW partner Yaman Al Hawamdeh, so that Dubai regulators can engage with maritime businesses. The Emirates Maritime Arbitration Centre (EMAC) was launched in 2016 and aims to serve as the first specialised marine arbitration centre in the Middle East. EMAC has

chosen the Dubai International Financial Centre (DIFC) as its default seat of arbitration, which should allow smooth enforcement of EMAC's awards within onshore Dubai and potentially within the region.

In addition, the Dubai courts remain ahead of other courts within the Middle East region on the maritime front. The Dubai Court of Cassation has recently upheld a judgment ordering the recognition and enforcement of a London arbitration award under the New York Convention. This case was successfully brought by HFW's Dubai team and was particularly significant as it was the first case to order the recognition and enforcement of a foreign arbitral award made on the basis of an unsigned charterparty. With supportive courts and its new maritime institutions, Dubai is well on the way to securing its place as a leading world maritime hub.

## Paris

In Europe, Paris is looking to pick up London business after Brexit and has a long-standing reputation as an alternative maritime arbitration forum with its flexible and business-orientated approach to commercial disputes. Recent changes there have strengthened the attractiveness of Paris as a maritime centre, including substantive changes to French contract law last year and procedural



reform of French arbitration law in 2011. French arbitration law is user-friendly and allows for the smooth recognition and enforcement of foreign arbitral awards. The cost of arbitration in Paris is also well below the European average.

Shipping disputes are heard in the International Chamber of Commerce (ICC) and also in the smaller Paris International Arbitration Chamber and Paris Maritime Arbitration Chamber. Paris also offers many experienced international arbitrators, including LMAA members, with an appreciation of different legal systems and an in-depth understanding of technical maritime issues.

Paris' reputation as a leading maritime cluster and a key arbitration centre in the EU means that it is ideally placed to benefit from changes in the shipping market post-Brexit. Ad hoc arbitrations, where the parties resolve their dispute without the involvement of an arbitral institution, are also used in maritime disputes and are often heard in Paris by the experienced pool of arbitrators there.

## The future

The global maritime industry can only benefit from the increased competition between maritime centres and the drive for greater efficiency and cost-effectiveness

in resolving maritime disputes. London remains in favour, with a strong position born of a decades-long reputation for sophisticated maritime law, experienced maritime arbitrators, reliable courts and dedicated and respected commercial and admiralty judges. It will take time for the global shipping industry to have the same trust in newer centres without the same track record. Despite strong challenges from the new dynamic maritime hubs, we anticipate that London will continue to be the leading centre for shipping dispute resolution in the short to medium term, whatever the arrangements are following Brexit. For London to retain its lead longer-term, sector concerns about the expense and duration of litigation will need to be addressed. The new EI ADR scheme may be part of the solution and we expect adoption of this and other similar schemes to increase significantly over the next few years. Finally, marine hubs need to keep up with the latest technologies and cannot afford to be left behind if they are to stay in the maritime race. In our next report in this series, we will look at innovation in the shipping industry against a backdrop of big data, the growth of digital trade and the recent NotPetya and Wannacry cyber attacks.

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**Recent shipping awards**



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