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A Fusion of Principles and Rules:

Expedited Arbitral Determination of Collision Claims and its Potential Application in Cases involving Ships Crossing the Singapore Straits

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A. Introduction

1. Singapore's role as a seat of maritime arbitration is gaining acceptance within the shipping industry. Since November 2012 a Singapore Arbitration Clause is incorporated into the existing Baltic and International Maritime Council ("BIMCO") Dispute Resolution Clause that appears in new and revised BIMCO contracts. The Singapore Chamber of Maritime Arbitration's ("SCMA") rules are now referred to in BIMCO forms. However, apart from disputes arising from BIMCO forms, SCMA's also has a set of rules in place that are tailored for collision claims that arise from tortious acts. That is the SCMA Expedited Arbitral Determination of Collision Claims ("SEADOCC"), which presents a unique fusion of dispute resolution principles.

2. This paper briefly explores the SEADOCC Rules and in particular discusses the overlap between principles of arbitration and expert determination that are injected within the applicable procedure.

3. The uniqueness of the SEADOCC Rules are also discussed by reference to very common admiralty claims in Singapore; that of ships colliding while crossing the Singapore Straits Traffic Separation Scheme[1] ("TSS").

4. Finally, this paper sets out the current law pertaining to vessels that are required to satisfy the fusion of crossing rules and TSS rules of the International Collision Regulations 1972, as amended. Quotes from relevant judgments pertaining to the applicable legal principles and *orbiter dicta* are also discussed bearing in mind the combination of a crossing situation within a TSS which requires special attention; lest parties are then faced with whether to apply the SEADOCC Rules in any disputes arising from such collisions.

B. SEADOCC

5. Historically, the question of whether a reference was to an arbitrator or an expert determiner had kept the courts occupied.[2] Today, however, where the decision-maker is not acting in a judicial manner, the process is not likely to be held to be arbitration.[3] The SEADOCC procedures require submission of a draft liability award with reasons,[4] which then

[1] "Traffic Separation Scheme" means *"a routeing measure aimed at the separation of opposing streams of traffic by appropriate means and by establishments of traffic lanes"*: per Sheen J. in The *"Achilleus"*, [1985] 2 Lloyd's Rep. 338 at 342.
[2] Kendall on Expert Determination, Sweet & Maxwell 5th Ed., (2015) at 16.2-1.
[3] Kendall on Expert Determination, Sweet & Maxwell 5th Ed., (2015) at 16.7-1 paragraph (c).
[4] SEADOCC Terms clause 23.

allow parties the opportunity of further submissions.[5] Thereafter, finalisation of a decision on liability is made.[6] Given the parties ability to intervene following receipt of the draft award, such a process does not satisfy the requirement of acting in a judicial manner. However, when looking at the SEADOCC procedure as a whole there may be an alternative view that will be discussed at the conclusion of this paper.

6. One question that will be apparent in this paper is whether, for the purposes of issuing a liability award under SEADOCC, we have a decision-maker who is to be an expert that is called an arbitrator, or an arbitrator who is thrust into an expert determination process. Accordingly, this paper uses the terms 'arbitrator', 'expert', 'expert determiner', 'decision-maker' and 'tribunal' within the context of the relevant principles herein discussed.

7. For reference, a copy of the SEADOCC rules is appended herewith; see Appendix 3. Whilst commonly referred to as the SEADOCC rules, it will be noted that the document describes its contents as *"the SEADOCC Terms"*.[7] The use of the word "terms" reflects the ability to vary the SEADOCC Terms by agreement between the parties.[8] The ability to vary is not available when applying rules of an arbitral institution, which are normally binding upon the parties once incorporated into a contract or agreed.

8. The SEADOCC Terms refer to its prescribed process of dispute resolution as SEADOCC Arbitration[9] and its stated aims are primarily to provide parties, that agree to its use, a binding decision on the apportionment of liability[10]. That is for cases involving two or more ships that have experienced a collision or multiple collisions; as the case may be. As collisions involving ships fall under the ambit of tortious acts[11] occurring on the high seas or on any navigable waters, the only avenue towards application of SEADOCC rules would be the express agreement by the respective ship owners', insurers' and perhaps even cargo interests after the collision event. Thus, unlike contracts that have, for example, BIMCO or International Chamber of Commerce ("ICC") arbitration clauses, selected or included in contracts well before any dispute is contemplated or envisaged, parties entering into a SEADOCC dispute resolution process are expected to be waryof what exactly they are opting into.

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[5] SEADOCC Terms clause 26.
[6] SEADOCC Terms clause 28.
[7] SEADOCC Terms clause 2.
[8] SEADOCC Terms clause 8.
[9] SEADOCC Terms clause 4.
[10] *Ibid*.
[11] "Tortious acts" refer to acts that are in breach of laws concerning the interests that a person has in his or her bodily security or the protection of an entity's tangible property, financial resources or reputation. These rights are actionable only if they are infringed upon unlawfully. In collisions involving ships the tort of negligence is predominantly in issue.

9. In regard to appointment of a decision-maker, the SEADOCC Terms expressly provide for a sole 'arbitrator' to be appointed jointly by the written agreement of the parties.[12] In addition, the Terms state that any SEADOCC arbitration will have its seat in Singapore, and in that regard expressly refers to the application of mandatory provisions of Singapore's International Arbitration Act (Chapter 143A) ("**IAA**").[13] The IAA incorporates the UNCITRAL Model Law for International Commercial Arbitration ("Model Law"). Thus, the requirement to agree to a sole arbitrator in writing appears to preclude any Singapore appointing authority from making an appointment under Articles 6[14] and 11 (4)[15] of the Model Law and Section 8 (2)[16] of the IAA. That is in the event the parties experience an impasse as to the appointment of their sole arbitrator/decision-maker after agreeing to the use of SEADOCC Terms. This is because the Article 11(4) of the Model Law provides as follows:

   "…any party may request the court or other authority specified in Article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment." [Emphasis added]

10. Thus, conceivably under SEADOCC any appointment of a sole 'arbitrator' that is not reached by the written agreement of the parties, which is the stipulated means for securing any appointment, may be open to subsequent challenge in regard to that arbitrator's jurisdiction. In a decided case,[17] it was held that the appointment of an expert can only be set aside if the appointment is not made in accordance with the terms of the contract; by analogy this applies to any decision-maker whether labelled as an arbitrator or expert. Thus, for SEADOCC to work, cooperation between the parties is crucial in this respect. This is because any appointment of a sole arbitrator by an appointing authority

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[12] SEADOCC Terms clause 5.
[13] SEADOCC Terms clause 10.
[14] Article 6. *Court or other authority for certain functions of arbitration assistance and supervision*
The functions referred to in Articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by ..... [Each State enacting this Model Law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]
[15] Article 11. *Appointment of arbitrators*
…
(4) Where, under an appointment procedure agreed upon by the parties,
(a) a party fails to act as required under such procedure; or
…
any party may request the court or other authority specified in Article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.
[16] International Arbitration Act (Cap. 143A)
Section 8. Authorities specified for purposes of Article 6 of Model Law
…
8. (2) The Chairman of the Singapore International Arbitration Centre shall be taken to have been specified as the authority competent to perform the functions under Article 11(3) and (4) of the Model Law.
[17] *Poh Cheng Chew v K P Poh & Partners Pte Ltd* [2014] 2 SLR 573

may not satisfy the expressed requirement of having reached a written agreement in that respect. In fact, given that the High Court of Singapore is, by virtue of Section 8 (1)[18] of the IAA, excluded from appointment functions, the parties are left to jointly agree to the appointment of a sole decision-maker or perhaps relinquish the SEADOCC process and revert to the courts for adjudication of their dispute. This highlights the highly voluntary nature of the SEADOCC procedure of dispute resolution.

11. Given the above process of appointment, there will be no Notice of Arbitration setting the SEADOCC dispute resolution process in motion. Instead, disputing parties will only be able to proceed as proposed by SEADOCC once the joint appointment of a decision-maker is agreed in writing. This can occur only after the parties have achieved an agreement as to the adoption of the SEADOCC Terms or a variant thereof.

12. As stated above, the SEADOCC Terms offer a dispute resolution process that leads primarily to the publication of an award addressing the issue of apportionment of liability with reasons.[19] Secondly, if the parties so require, an award on quantum as well.[20] The issuance of awards addressing both liability and quantum would naturally lead to full settlement of the case. The Terms thus refer to the former as a Liability Award[21] and the latter as a Settlement Award[22]. Singapore law and the exclusive jurisdiction of the Singapore Courts govern any disputes arising from the SEADOCC Terms.[23]

13. Practically, however, given that the SEADOCC Terms may be varied, they provide an outline for what is essentially a fusion of dispute resolution procedures (details of which are provided in the following section), whereby parties may alter the terms and conditions to suit their requirements.[24] This is achievable as SEADOCC essentially forms the basis of a dispute resolution agreement entered into post collision. Accordingly, when adopting the SEADOCC Terms 'as is' the procedure expressly departs from those that may be applicable in courts of any jurisdiction.[25] For example, no allocation is made in the SEADOCC procedure for time to permit discovery requests, interrogatory applications and hearings. This should be expected, however, as it is essentially an expedited form of dispute resolution.

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[18] International Arbitration Act (Cap. 143A) Section 8. (Authorities specified for purposes of Article 6 of Model Law)
8. (1) 8.—(1) The High Court in Singapore shall be taken to have been specified in Article 6 of the Model Law as courts competent to perform the functions referred to in that Article except for Article 11(3) and (4) of the Model Law.
[19] SEADOCC Terms clause 4.
[20] SEADOCC Terms clause 6.
[21] SEADOCC Terms clauses 4, 32, 35.
[22] SEADOCC Terms clauses 6, 32, 35.
[23] SEADOCC Terms clause 36.
[24] See paragraph 5 above and note 8.
[25] SEADOCC Terms clause 8.

14. As to why this is so, when SCMA in collaboration with Hill Dickinson's Singapore office launched SEADOCC in November 2013, the introductory presentation referred to the background leading up to the unveiling of SEADOCC as *inter alia* being *"support for the idea of a "small claim" collision service and discussions to define what that might mean"*. Hill Dickinson's in an online article has also stated[26] that SEADOCC *"will not be appropriate for all collisions, where the questions of liability are complex and/or the quantum is significant, or where there are multiple interested parties, it offers a relatively straightforward and cost effective process designed to complement and enhance the existing maritime legal services available to the shipping community in Singapore and possibly beyond"*. The draughtsman of SEADOCC had also suggested[27] that application of the SEADOCC procedure may be appropriate for cases where the negotiations on the apportionment of liability in a shipping collision have reached an impasse or the quantum involved is relatively low.

15. Thus, in a case where parties agree to use SEADOCC, the procedures as drafted envisage that after the parties have jointly appointed an 'arbitrator', that person then issues an engagement letter setting out *terms and conditions* including the arbitrator's applicable hourly rates.[28] The procedure, however, requires the engagement letter before the initial meeting. Thus, details concerning the case are however not discussed until an initial meeting is held. In the writer's view, the 'arbitrator' will not be in a position to fully understand the circumstances of the dispute at the outset of receiving an appointment under the SEADOCC procedure; hence, any terms and conditions provided at that stage may by necessity be somewhat general. The terms and conditions should thus preferably include the requirement of having terms of reference executed with the parties and that any submissions shall only follow immediately thereafter.

16. Moreover, as elements involving expert determination are involved in the SEADOCC procedure, 'arbitrators' should not let their guard down in this connection and must ensure issues as to the intended scope of their duties are dealt with thoroughly. This is to ensure satisfaction of the principle that any expert determination must be conducted within the terms of the parties' agreement;[29] hence it cannot be overstated that this should be given utmost attention. Otherwise, an 'arbitrator' proceeding on the assumption that the normal duties or powers of a tribunal apply would be detrimental to the effectiveness of the intended process. This may be crucial in the event any dispute arises on whether SEADOCC is in fact an arbitration process or simply a form of expert determination. As

[26] http://www.hilldickinson.com/publications/marine,_trade_and_energy/2014/february/hill_dickinson_singapore_spear.aspx
[27] *Ibid.*
[28] SEADOCC Terms clause 14.
[29] *Veba Oil Supply & Trading GmbH v Petrotrade* [2002] 1 All E.R. 703.

explained in the following section an expert determiner's decision is appealable on certain grounds. In fact, where principles of arbitration and expert determination overlap, an arbitrator/expert determiner must bear in mind the relevant principles applying to both dispute resolution processes and endeavour to satisfy them in order to prevent challenges available in one form of dispute resolution but not the other.

17. Practically, however, drafting of any terms of reference may be viably completed following the first case management conference; reffered to as a initial meeting. This is because the SEADOCC Terms also envisage that the first case management conference will be used to establish the nature of the dispute; the broad issues involved; the level of documentation; and the service required by the parties. Needless to say, given these stipulated procedures, to ensure effectiveness on the part of the tribunal or decision-maker, drafting of the terms of reference should only occur after such elementary aspects of the dispute are ascertained and fully understood.

18. In this regard, any terms of reference will need to be executed within a period of time following the initial meeting and the parties' submissions should preferably commence upon finalisation and execution of the said terms of reference. This is not, however, expressly provided for in SEADOCC procedure but from a tribunal's perspective would undoubtedly aid in ensuring the scope of the decision-makers duties are clear; both to understand parties' intentions and in turn to manage any issues as tribunal or expert-determiner or both.

19. The first case management meeting is held to allow an initial assessment[30] of the matter to be conducted in order to then receive the arbitrator's non-binding estimate of the tribunal's expected fees[31]. From an arbitrator's perspective, however, this estimate should not be used as the basis for any figure to be indicated in any letter of security for fees that the arbitrator is entitled to under SEADOCC. That is, any letter from the relevant insurers at the outset of any proceedings.[32] This is because, from experience, parties may seek to amend pleadings upon receiving the opposing interest's submissions and this may lead to an extension of the procedural timetable; especially if parties both agree that there are aspects that both sides wish to address. In such cases, the arbitrator's non-binding estimate would then become superfluous; with its only affect being a disadvantage to the decision-maker who uses it for the purposes of any security for fees obtained at the outset as provided for under SEADOCC.

20. In fact, SEADOCC Terms expressly provide for the request of security for an arbitrator's fees. The Terms suggest this may be obtained in the form of a letter of comfort or security from the respective Protection &

[30] SEADOCC Terms clause 12.
[31] SEADOCC Terms clause 13.
[32] See paragraph 20 below.

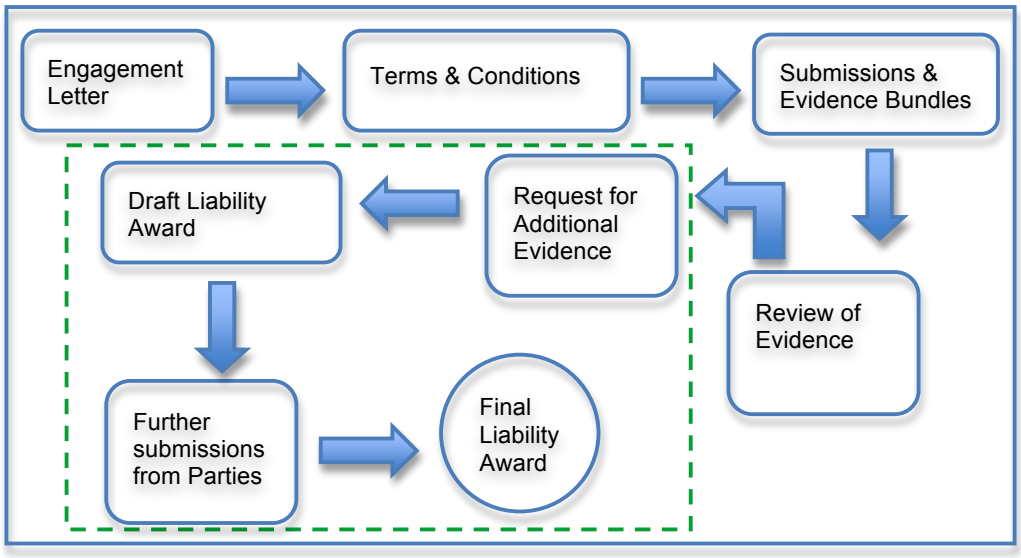
Indemnity ("P&I") insurers or such body as the arbitrator considers being satisfactory.[33] For example, the extent of any P&I Club's risk and involvement following a collision would hinge upon whether hull and machinery ("H&M") insurers, who traditionally held ¾th collision liability under a Running Down Clause ("RDC") in a H&M policy, have allowed the relevant P&I Club underwriting the remaining ¼th of liability to take the lead for claims following a collision. Alternatively, H&M insurers may cover 4/4th of liability under the RDC clause, in which case P&I Clubs may not be involved following a collision matter. Thus where only the H&M insurer's liability is at risk under the relevant contract of indemnity, arbitrators may obtain security for fees from sources other than P&I Clubs. On the issue of costs of the arbitrator, SEADOCC stipulates that this will be shared equally between the parties irrespective of the outcome as to liability and/or full settlement.[34] In any event, there is nothing to prevent the decision-maker from only delivering the liability or settlement award upon receipt of full payment for fees and costs.

21. Nonetheless, once the parties manoeuvre past the initial hurdles of agreeing to the utilisation of SEADOCC Terms and have agreed to the appointment of a sole 'arbitrator', the dispute resolution procedure begins as outlined in clauses 18 through to 29 of the Terms. In summary this entails attention to the available evidence and processes within the time limits stated below:-

    a. Summary of the background facts and evidence bundle (within 14 days of the arbitrators appointment).[35]
    b. Parties' prompt and simultaneous exchange of bundles. [36]
    c. Review of evidence by arbitrator (14 days).[37]
    d. Additional evidence (14 days).[38]
    e. Draft written award by arbitrator (six weeks).[39]
    f. Further written submissions (21 days).[40]
    g. Final liability award by arbitrator (four weeks).[41]
    h. Expected time scale of five months. [42]
    i. Thereafter to address inter-ships claims (quantum) if parties require the arbitrator's service.[43]

22. The diagram below shows the process as envisaged under SEADOCC rules up to the issuance of a Liability Award.

[33] SEADOCC Terms clause 15.
[34] SEADOCC Terms clause 34.
[35] SEADOCC Terms clause 18.
[36] SEADOCC Terms clause 19.
[37] SEADOCC Terms clause 20.
[38] SEADOCC Terms clause 21.
[39] SEADOCC Terms clause 25.
[40] SEADOCC Terms clause 26.
[41] SEADOCC Terms clause 27.
[42] SEADOCC Terms clause 28.
[43] SEADOCC Terms clauses 30 to 32.



23. The timelines involved in the event the arbitrator is required to issue a Settlement Award under SEADOCC are not, however, specified within the Terms. Thus, the trite principle that an arbitrator is the master of procedure where the parties do not agree to a process will remain relevant during the resolution of the quantum of claims; where the parties elect that service. This is because the arbitrator may in the period up to issuance of a Settlement Award proceed in the usual manner of making such directions and orders pertaining to the evidence required in connection with the claims in dispute.[44]

24. The Terms provide that the Liability Award and any Settlement Award shall each have the force of an Arbitration Award made under the IAA.[45] Thus, it seems that any award issued must be compliant with the requirements of the New York Convention[46] for the purposes of enforcement. It is thus an implied term of SEADOCC that any decisions produced must take the form of an arbitration award; notwithstanding that the procedure to produce a Liability Award mirrors an expert-determination process.

25. Even so, as can be seen under items e) and f) of paragraph 21 above, the SEADOCC procedure departs from a purely adjudicatory style of dispute resolution by allowing parties the option to present further submissions after receiving a draft award. It should be noted that there are no provisions for awarding costs in the event the parties require only a Liability Award to be issued.

[44] SEADOCC Terms clause 31.
[45] SEADOCC Terms clause 32.
[46] United Nations Convention on The Recognition and Enforcement of Foreign Arbitral Awards, Concluded at New York on 10th June 1958.

26. The only provision as to costs and fees expressly stipulates the arbitrator's entitlement to charge rates set out in the Engagement Letter for work carried out.[47] In addition, that the arbitrator's costs are to be shared equally by the parties.[48] This is akin to an expert determiner's powers, where he/she has no power to award costs between the parties unless expressly provided for by the relevant terms of the dispute resolution contract. This is in contrast to the powers of an arbitrator, which include the power to award any remedy or relief that could have been ordered by the High Court.[49] SEADOCC clearly stipulates otherwise when deciding in advance the issue relating to costs of the 'arbitration'. This is another reason why the terms of reference need to be carefully considered and the scope of the 'tribunals' duties and powers are made clear so that a decision-maker who is labelled as an 'arbitrator' under the SEADOCC Terms remains on the same page with the parties concerned.

27. The writer's view is that a sole 'arbitrator' appointed under SEADOCC Terms, who then attempts to execute his/her duties on the assumption that the usual powers of a tribunal are available to him would be at peril of being open to challenge. This is because the principles of expert determination diverge from that of arbitration; as outlined in the following section. Accordingly, a decision-maker appointed under SEADOCC must remain mindful of the relevant aspects in order to manage the process effectively.

[47] SEADOCC Terms clause 33.
[48] SEADOCC Terms clause 34.
[49] International Arbitration Act (Cap. 143A) section 12 (5) (powers of the tribunal).

C. A Process Fused with Elements of Arbitration and Expert Determination

28. This section seeks to discuss how the SEADOCC procedure may be considered to be a fusion of arbitral and expert determination processes. In addition, where the principles of arbitration and expert determination do overlap or require separate treatment, it sets out the salient principles applying to both dispute resolution processes and endeavours to highlight salient issues when using the SEADOCC procedure.

29. First, however, one key difference to note between commencing arbitration and an expert determination process is the fact that the latter does not stop the limitation period running or address issues of contractual time bars.[50] This is because by virtue of section 12A of the IAA limitation periods apply to arbitral proceedings as they would apply to legal proceedings. An expert determination *per se* does not however fall within the ambit of the IAA; hence there may be no protection against any approaching time limits unless parties agree in writing to a time extension. There is also no comparable statute that extends the ability to protect against a time limit when submitting a claim to expert determination. Thus it would be prudent for any party agreeing to the use of SEADOCC to obtain a written agreement for extension of time if the two-year[51] limitation period relating to collisions at sea is approaching. Alternatively, a writ may be issued in the usual manner to protect against a limitation period.

30. Accordingly, parties agreeing to the SEADOCC procedure should remain mindful of any time limits and may wish to take steps to attain suitably worded agreements to extend time in which to bring a suit; whether or not the SEADOCC procedure has commenced. This is because courts have held that simply referring to an expert as an arbitrator does not lend that status to the expert. In *Taylor v Yielding*,[52] the court reiterated as follows:

> *"The cases are quite clear that you cannot make a valuer an arbitrator by calling him so or vice versa."*

[50] English cases have persuasive value in Singapore law and before the Singapore courts. Similar to section 13 of the UK Arbitration Act 1996, which provides that the Limitation Acts apply to arbitral proceedings as they apply to legal proceedings.
The Singapore International Arbitration Act (Cap. 143A) provides in section *8A.—(1) The Limitation Act (Cap. 163) and the Foreign Limitation Periods Act 2012 shall apply to arbitral proceedings as they apply to proceedings before any court and any reference in both Acts to the commencement of proceedings shall be construed as a reference to the commencement of arbitral proceedings.*
[51] Maritime Conventions Act 1911 (Rev. 2004), section 8 (1) (limitation of actions)
[52] [1912] 56 S.J. 253.

As stated above, if there is no requirement for the decision-maker to act in a judicial manner, the process is not likely to be held to be arbitration. In the writer's view, clauses 18 to 29 of SEADOCC provide a non-judicial process of decision-making. However, clauses 30 to 32 appear to allow the decision-maker to take on the role of 'master of procedure', i.e. the role expected of an arbitrator; see paragraph 23 above. This is where the **fusion** lies within SEADOCC in regard to principles of expert determination and arbitration. That is to say, the process up to issuance of the Liability Award resembles a typical expert-determination process while process relating to the subsequent Settlement Award is consistent with a documents only arbitration.

31. A critical diverging aspect between an arbitration and an expert determination is that a decision under the latter process may be appealed on the following grounds:

- Material departure form instructions/ Not acting within jurisdiction/ authority/ terms of appointment;[53]
- Fraud, collusion, corruption, partiality, bad faith, bias and the like;[54]
- Manifest of patent error.[55]

However, in the majority of cases the courts have not interfered with the decisions made in expert determination.[56] Nonetheless, the ability to appeal an expert determination cannot be discounted, as would be the case of arbitration conducted under the ambit of the IAA.

32. Thus the position in relation to an expert determination differs from arbitration because appeals are not allowed under the IAA. Instead only setting aside of the award may be attempted in accordance with the grounds set out in Article 34(2) of the Model Law and section 24 of the IAA, which provides that the court may set aside an award on the specific grounds provided. As a matter of interest, however, this contrasts with the position under the Arbitration Act ("AA") of Singapore (Chapter 10), which normally applies to domestic arbitration involving Singapore entities. The AA allows, subject to certain conditions, an

[53] *Veba Oil Supply & Trading GmbH v Petrotrade Inc.* [2002] 1 All E.R. 703. The test of materiality – "*any departure from instructions must generally be regarded as material unless it can be characterised as trivial or de minimis in the sense of it being obvious that it could make no possible difference to either party*": *Poh Cheng Chew c K P Poh & Partners Pte Ltd* [2014] 2 SLR 573.

[54] *Campbell v Edwards* [1976] 1 WLR 403; per Lord Denning, "*Fraud or collusion unravels everything".*

[55] *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2009] 2 SLR (R) 385, where the court sent the decision back to the expert for rectification.

[56] *Evergreat Construction v Presscrete Engineering Pte Ltd* [2006] 1 SLR (R) 634; *Geowin v MCST No 1256* [2007] 1 SLR 1004; *Halifax Life Ltd v The Equitable Life Assurance Society* [2007] EWHC 503; *George Worrall v Ivor Topp* [2007] EWHC 1809; *Homespace Ltd v SITA South East Ltd* [2008] EWHC Civ 1; *Persimmon Homes Ltd v Woodford Land Ltd* [2011] EWHC 984 (Ch); *Straits Exploration (Australia) Pty Ltd v Murchison United NI* [2005] WASCA 241; *The Heart Research Institute v Psiron Ltd* [2002] NSWSC 646.

appeal to the court on a question of law arising out of an arbitral award made in the proceedings.[57]

33. In regard to partiality, however, while an expert is expected to act impartially, the standard is unlike that of an arbitrator, as the test for an expert is actual partiality rather than appearance of partiality.[58]

34. Further, in regard to an error in connection with a point of law in an expert's decision, the issue was inconclusively discussed in *Barclay Bank v Nylon Capital LLP*[59], where Lord Neuberger MR held that an error of law did not preclude a challenge to the determination,[60] and that if a point of law did arise during the course of determination the parties are well advised to consider referring it to the court for a preliminary ruling.[61] Alternatively, an expert may wish to provide two decisions based on the parties respective contended versions on interpretation of the point of law disputed; so as to have a valid decision in the event of a successful challenge in court.[62] This alternative is, however, only available to expert determiners and is not an option for an arbitrator, who is required to make a clear reasoned decision on issues that are in dispute in his/her reference.

35. Generally in arbitration, upon closure of the process as outlined in a procedural timetable or order, it is left to the tribunal to produce a reasoned award that is enforceable under the New York Convention[63]. A typical arbitral process is shown in the diagram below.

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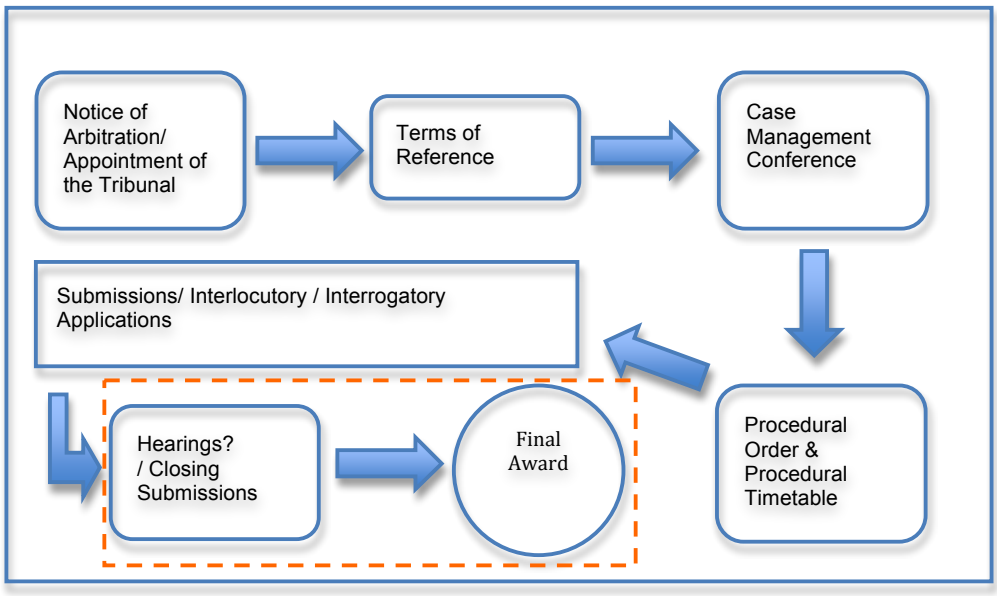
[57] Arbitration Act (Cap. 10), section 49 (appeal against award).
[58] *Bernhard Schulte GmbH v Nile Holdings Ltd* [2004] EWHC 977, per Mr Justice Cook, *"… as a matter of law, they are of no assistance in the absence of actual bias, fraud, collusion, or material departure from instructions". Macro & Others v Thompson & Others (No 3)* [1977] 2 BCLC 36.
[59] [2011] EWHC Civ 826.
[60] Disagreeing with the opposite view expressed in *Nikko Hotels v MEPC Plc* [1991] I Lloyd's Rep. 370.
[61] See *Wilky Property Holdings Plc v London & Surrey Investments Ltd* (No. 2) [2011] EWHC 2888.
[62] Per Lord Neuberger MR in *Barclay Bank Ltd v Nylon Capital LLP* [2011] EWHC Civ 826 at 72: "…if the expert needs to determine a point of law which divides the parties, he may think it right not only to decide the point and say how he has decided it, but to indicate what the valuation would have been if he had decided the point the other way."
[63] Supra note 46.



36. In expert determination, however, there is no prescribed model and the procedure hinges upon the relevant dispute resolution clause or, in the context of this discussion, the SEADOCC Terms and any subsequent directions by the expert determiner/arbitrator.[64] However, as stated above, SEADOCC procedure adopts the expert determination practice of requiring the submission of a draft decision to the parties, i.e. the draft liability award.

37. While it is an established practice under institutional rules of arbitration for tribunals to submit a draft award for scrutiny by the institution, it is certainly not submitted to the parties in dispute. As enforceability is a key element in the use of arbitration as a means of dispute resolution, arbitral institutions, e.g. the ICC or the Singapore International Arbitration Centre ("SIAC") Rules, require that draft awards be submitted to the Secretariat and Registrar respectively for scrutiny. Such scrutiny is seen as a service to the parties in ensuring the substance and enforceability of the award without interfering in the tribunal's decisions on the issues in dispute.

38. As for the required form of a decision under expert determination and an award under arbitration, there is no overlap and the two dispute resolution processes diverge in that an arbitration award must include reasons unless the parties agree otherwise. In expert determination, the position is reversed. An expert's decision does not need to contain accompanying reasons unless the contract between the parties and the expert stipulates it; and the court will not order the expert to give reasons or elaborate further if the contract carries no such requirement.[65] Thus,

[64] Kendall on Expert Determination, Sweet & Maxwell 5th Ed., (2015) at 16.8-1.
[65] Re a Company (No 00330 of 1991) Ex P. Holden [1991] BCLC 597 at 603; Dixons Group Plc v Murray-Oboynski (1997) 86 B.L.R. 19 at 20 and 28; Morgan Sindall Plc v Sawston Farms [1999] E.G.L.R. 93, CA followed in *Doughty Hanson & Co Ltd v Roe* [2007] EWHC 2212 (Ch); Barclay Bank Plc v Nylon Capital LLP [2011] EWHC Civ 826.

SEADOCC expressly calls for a reasoned decision called a Liability Award.

39. The SEADOCC Terms requirement for a draft 'award' or decision to be submitted to the parties before finalising of that decision,[66] is a familiar procedure within the context expert determination processes and allows for any factual or typographical errors to be corrected. However, such a process is known to weaken the effectiveness of the expert determination by giving the parties an opportunity, which they would not otherwise have, to challenge the decision.[67] Thus, it is important to ensure that the draft is circulated only after the parties have completed submission, as is intended by SEADOCC procedures, i.e. following receipt of any additional evidence.

40. By virtue of clause 26 of the SEADOCC Terms, however, the parties are then allowed to *"…provide…any further submissions that they may have…"* but expressly limits submissions to four pages of A4 sized paper. While this provides some physical limits on the number of pages that each party is entitled to submit, any party may still attempt to provide a further round of substantive submissions, albeit in a condensed form. Given that the SEADOCC Terms do not provide the decision-maker with the power to amend the procedure challenges to any decision should be expected. This in turn might, for example, see a party whose challenge is not accepted or ignored to claim that the expert was being partial in discounting further submissions provided, *i.e.* in an attempt to appeal the decision. In this regard, where terms of reference agreed provide powers to do so, a direction by the 'arbitrator' requiring parties further submission to focus on non-contentious factual or typographical errors may help prevent challenges to the decision contained in a draft liability award.

41. The diagrams in Appendix 1 and 2 show graphical depictions of the procedural differences between a typical institutional arbitral process and the adopted SEADOCC (expert determination cum arbitral) process, *i.e.* after closing submissions or, in the context of SEADOCC, after receipt of any additional evidence.

42. The fusion of expert determination and arbitration principles in SEDOCC procedure, in light of certain divergences between these principles, clearly require special attention. For instance the ability to appeal a decision, the standards of partiality, the addressing of contentious points of law, the extent of inherent powers to issue directions and orders, the effect of challenges should all, while keeping in mind the *dictum* in *Taylor v Yielding*, cause a decision-maker acting under these procedures to ensure that aspects that could allow an appeal under expert

[66] See paragraphs 21 e. and 25 above.
[67] Kendall on Expert Determination, Sweet & Maxwell 5th Ed., (2015) at 12.8-6. *Lanes Group Plc v Galliford Try Infrastructure Limited* [2011] EWHC 1679 (TCC); *Doughty Hanson & Co Ltd v Roe* [2007] EWHC 2212 (Ch).

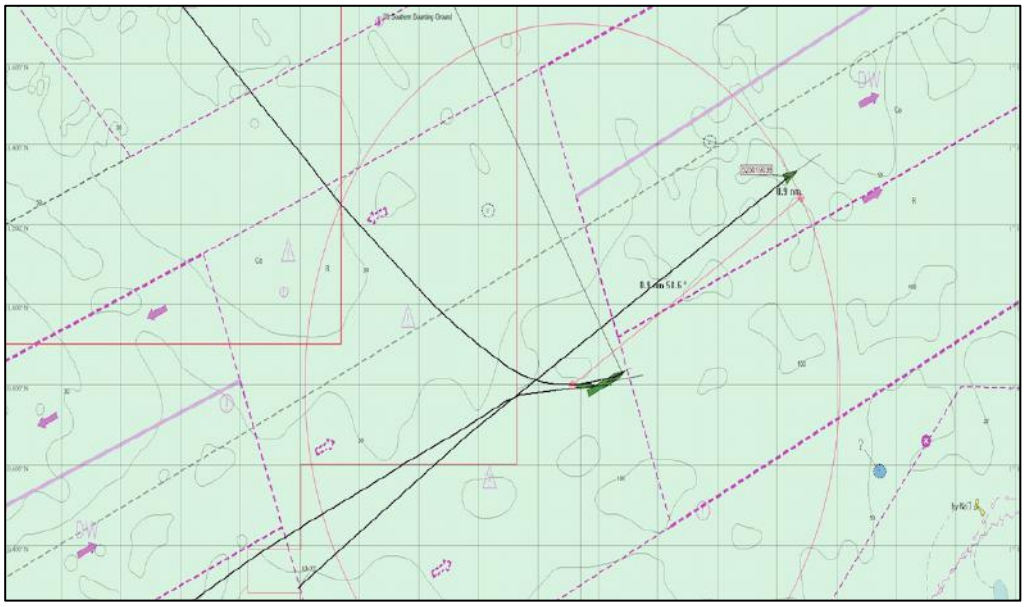
determination principles are addressed from the outset. Essentially any decision-maker appointed under SEADOCC must for the inherent effectiveness of his/her office guard against any aspects that may allow an appeal under expert determination principles; and for the integrity of a process that holds itself out to be an arbitration.

43. Thus, at the outset of any appointment under SEADOCC, there is a need to address aspects where the underlying principles in the procedure diverge between the respective dispute resolution processes. Management of issues summarised in the preceding paragraph could achieve this during the drafting of the terms of reference by seeking clarity from the parties concerned as to the form of dispute resolution process intended, whether arbitration or expert determination. For example, the process as to how any contentious points of law are addressed and the power to issue directions and orders as an arbitrator may prove to be crucial in the event of challenges against the tribunal's decision, either in further submissions as allowed for under SEADOCC or in court. In particular, where the procedure up to the issuance of a liability award is in fact found to be an expert determination and not arbitration.

44. The writer's views on how the diverging principles under arbitration and expert determination principles may be resolved from a practical perspective are discussed in the conclusion of this paper.

D. Example of an Admiralty Case for SEADOCC Application

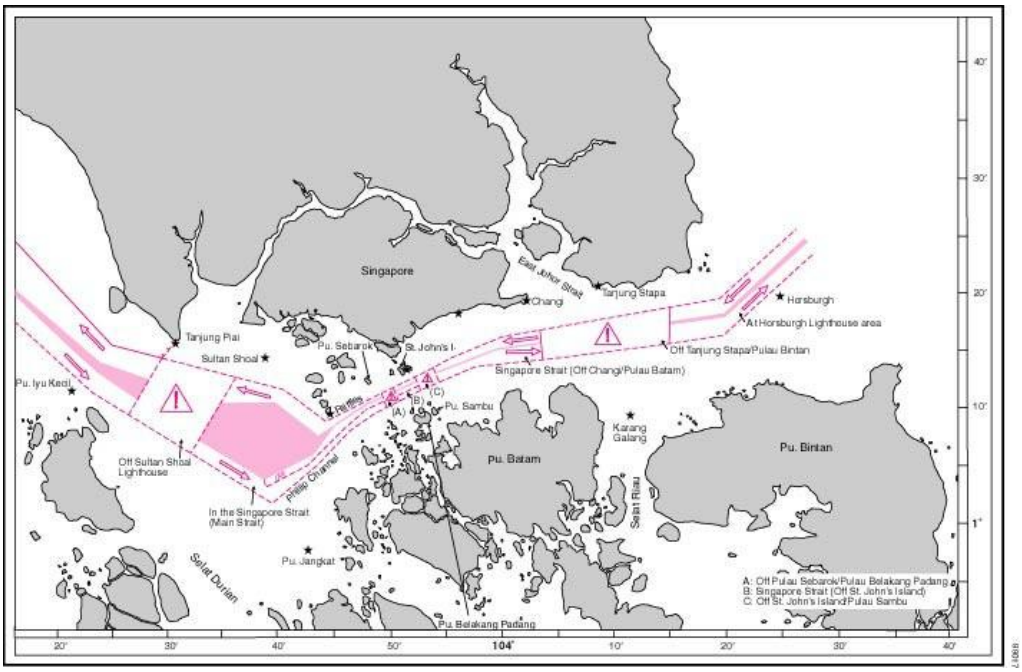
45. The following photo shows the tracks of a vessel that attempted to cross the Singapore Straits Traffic Separation Scheme ("TSS") and another that was proceeding east bound along the TSS. The vessel that crossed the TSS had done so after disembarking the Singapore pilot only to then collide with an east bound vessel proceeding along the appropriate traffic lane.



46. In this case, a container ship disembarked the Singapore pilot at the Pilot Southern Boarding Ground before increasing speed in an attempt to cross the west bound traffic lane of the Singapore Straits TSS. The container ship intended to join the east bound lane to proceed to Hong Kong. However, despite good visibility an oil tanker proceeding in the east bound lane was not carefully assessed by those on board the containership when increasing speed to cross the TSS; bearing in mind that crossing at a predetermined speed is completely possible if manoeuvres are executed with care. The container ship's acceleration coupled with her bridge team's lack of situational awareness and a delayed alteration of course resulted in that vessel carrying too much headway. A collision then resulted with the east bound oil tanker. The container ship also failed to cross the precautionary area at right angles to the direction of traffic flow.

47. The arrows in the photos below indicate the direction of traffic flow in the east and west bound lanes of the Singapore Straits. In addition, the square area watermarked with a number of warning symbol labels in the preceding photo is the precautionary area within which this collision occurred. Similarly, warning symbols in the photo below show the

precautionary areas located in the Singapore Straits, which are almost square or rectangular in shape.



48. The damage to both ships in this case did not result in any hull penetration or breach in the ships' structures. This was a result of a glancing blow between the respective ships' hulls. The potential damages were thus not as serious as might have been possible had a perpendicular angle of blow occurred. This resulted in a relatively "small claim", which is the category of disputes that the drafters of SEADOCC had aimed to deal with.

49. The convergence of traffic into the relatively narrow Singapore Straits is aided by the presence of its TSS. The Singapore Straits TSS has over the years helped ensure that traffic flow is kept as orderly as is practicable. Areas where ships are frequently required to cross the traffic lanes have also had precautionary areas adopted to enhance levels of safety of pilot boarding grounds where vessels frequently cross the traffic lanes.

50. The International Regulations for Preventing Collisions at Sea 1972 ("Colregs"), as amended, stipulate *inter alia* the Rules relating to ships that are at risk of a collision while proceeding on crossing courses on any navigable waters. The following are some of the salient Rules and are not intended to be exhaustive:

> ***RULE 1***
> *Application*
> …

(b) Nothing in these Rules shall interfere with the operation of special rules made by an appropriate authority…

…

RULE 2
Responsibility
(a) Nothing in these Rules shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to comply with these Rules or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

(b) In construing and complying with these Rules due regard shall be had to all dangers of navigation and collision and to any special circumstances, including the limitations of the vessels involved, which may make a departure from these Rules necessary to avoid immediate danger.

RULE 8
Action to Avoid Collision
(a) Any action to avoid collision shall be taken in accordance with the Rules of this Part and shall, if the circumstances of the case admit, be positive, made in ample time and with due regard to the observance of good seamanship.

(b) Any alteration of course and/or speed to avoid collision shall, if the circumstances of the case admit, be large enough to be readily apparent to another vessel observing visually or by radar; a succession of small alterations of course and/or speed should be avoided.
(c) If there is sufficient sea room, alteration of course alone may be the most effective action to avoid a close-quarters situation provided that it is made in good time, is substantial and does not result in another close-quarters situation.

(d) Action taken to avoid collision with another vessel shall be such as to result in passing at a safe distance. The effectiveness of the action shall be carefully checked until the other vessel is finally past and clear.
(e) If necessary to avoid collision or allow more time to assess the situation, a vessel shall slacken her speed or take all way off by stopping or reversing her means of propulsion.

(f)
(i) A vessel which, by any of these Rules, is required not to impede the passage or safe passage of another vessel shall, when required by the circumstances of the case, take early action to allow sufficient sea room for the safe passage of the other vessel.
(ii) A vessel required not to impede the passage or safe passage of another vessel is not relieved of this obligation if approaching the other vessel so as to involve risk of collision and shall, when taking action,

have full regard to the action which may be required by the Rules of this Part.
(iii) A vessel the passage of which is not to be impeded remains fully obliged to comply with the Rules of this Part when the two vessels are approaching one another so as to involve risk of collision.

RULE 10
Traffic Separation Schemes

(a) This Rule applies to traffic separation schemes adopted by the Organization and does not relieve any vessel of her obligation under any other Rule.

(b) A vessel using a traffic separation scheme shall —
(i) proceed in the appropriate traffic lane in the general direction of traffic flow for that lane;
(ii) so far as practicable keep clear of a traffic separation line or separation zone;
(iii) normally join or leave a traffic lane at the termination of the lane, but when joining or leaving from either side shall do so at as small an angle to the general direction of traffic flow as practicable.

(c) A vessel shall so far as practicable avoid crossing traffic lanes, but if obliged to do so shall cross on a heading as nearly as practicable at right angles to the general direction of traffic flow.
…

RULE 15
Crossing Situation
When two power-driven vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way and shall, if the circumstances of the case admit, avoid crossing ahead of the other vessel.

RULE 16
Action by Give-way Vessel
Every vessel which is directed to keep out of the way of another vessel shall, so far as possible, take early and substantial action to keep well clear.

RULE 17
Action by Stand-on Vessel

(a)
(i) Where one of two vessels is to keep out of the way the other shall keep her course and speed.
(ii) The latter vessel may however take action to avoid collision by her manoeuvre alone, as soon as it becomes apparent to her that the

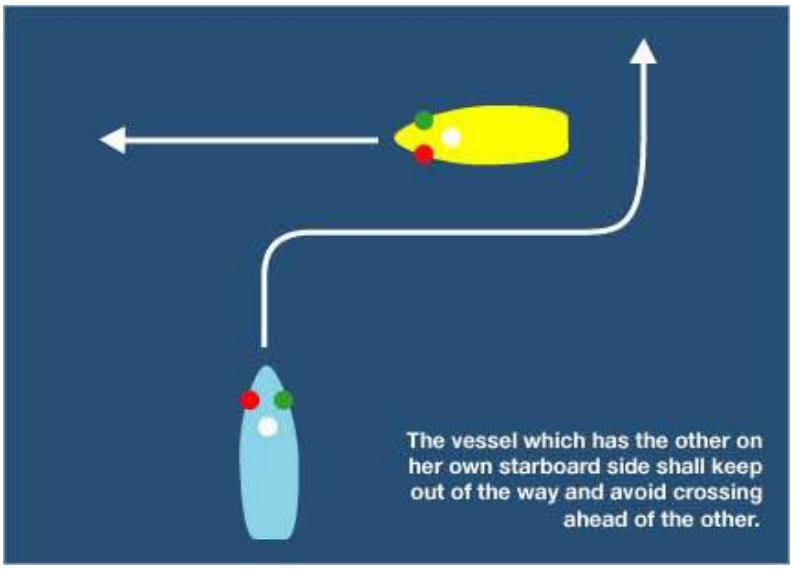
vessel required to keep out of the way is not taking appropriate action in compliance with these Rules.

(b) When, from any cause, the vessel required to keep her course and speed finds herself so close that collision cannot be avoided by the action of the give-way vessel alone, she shall take such action as will best aid to avoid collision.

(c) A power-driven vessel which takes action in a crossing situation in accordance with sub-paragraph (a) (ii) to avoid collision with another power-driven vessel shall, if the circumstances of the case admit, not alter course to port for a vessel on her own port side.
(d) This Rule does not relieve the give-way vessel of her obligation to keep out of the way.

51. Rule 10 addresses the manner in which vessels are to be navigated in and around a TSS. Within the context of this discussion Rule 10 (c) is of particular importance; as it requires ships to cross at right angle to the direction of traffic flow; yet certain bye-law or special rules may not treat the requirement as being applicable in a precautionary area[68].

52. Rules 15, 16 and 17 of the Colregs address rights and responsibilities between vessels in a typical crossing situation. This entails the vessel that has the other on its starboard (right) side must keep out of the way and avoid crossing ahead.



53. As background to crossing situations in a TSS, there exist local notices that stipulate special rules relating to how vessels are to cross a TSS and a precautionary area. The position relating to Singapore is found in

[68] "Precautionary area" means an area where ships must navigate with particular caution. See http://www.imo.org/OurWork/Safety/Navigation/Pages/ShipsRouteing.aspx

The Maritime and Port Authority ("MPA") of Singapore's Port Marine Circular No. 4 of 2013,[69] which provides that:

> *"3. Vessels crossing the TSS and precautionary areas in the Singapore Strait to proceed to or from ports or anchorages should comply with the following procedures:*
>
> *(a) A vessel in the Singapore Strait which intends to cross the eastbound or westbound traffic lanes in the TSS or precautionary areas respectively should comply with the following:*
>
> *(i) report to the [Vessel Traffic Information System] (VTIS) to indicate its intention in advance, allowing VTIS to alert ships in the vicinity of the crossing vessel;*
>
> *(ii) display the signals consisting of three all-round green lights in a vertical line in ample time prior to crossing in order for other vessels to note the intention to cross the TSS or precautionary areas;*
>
> *(iii) when traffic conditions are favourable make a large alteration of course, if necessary, so as, to be readily apparent to other vessels in the vicinity observing visually or by radar and cross the traffic lane on a heading as nearly as practicable at right angles to the general direction of traffic flow; and*
>
> *(iv) report to VTIS and switch off the night signals when it has safely left/crossed or joined the appropriate traffic lane."*
> [Emphasis added]

Per Mr Justice Wilmer in The *"Empire Brent"*,[70] where such local rules do not conflict with the general rules, *i.e.* the Colregs, the latter are supplementary to the local rules.

54. This Port Marine Circular provides important guidance in regard to how vessels are expected to manoeuvre when crossing the traffic lanes off Singapore; whether doing so in the TSS or the precautionary area. This is because the position in other jurisdictions may not be the same as a result of the geographical characteristics surrounding the TSS. For example, in the Thames Estuary TSS, where the precautionary area is over ten nautical miles wide and of an irregular shape there is no practical means for vessels to establish a perpendicular crossing where traffic will be found heading in various directions where a number of

[69] This circular primarily introduces local requirements of lights to be displayed during the hours of darkness by vessels crossing the TSS and precautionary areas. However, the radio reporting requirements and manner in which vessels cross naturally, and by ordinary conduct of vessels, applies both day and night.
[70] (1948) 81 Ll.L. Rep. 306 at 312.

adjacent traffic lanes resume. In fact the UK's Maritime & Coast Guard Agency's Marine Guidance Note ("MGN") 364 states, at 2.13, that "*precautionary areas are not part of a TSS, and Rule 10 is not generally applicable, however, ships should navigate with particular caution within such areas*".

55. Nonetheless, MGN 364 also recognises the importance of special local rules:

"Mariners are also reminded that except where there are special local rules to the contrary, the other Steering and Sailing Rules… apply within a scheme…".

Accordingly, the MPA's Port Marine Circular No. 4 of 2013 would by virtue of Rule 1 (b) of the Colregs result in any special rules taking precedence in connection with the manner of crossing in a TSS or precautionary area in the Singapore Straits. In addition, while it might be argued that Rule 10 does not apply to a precautionary area because the Colregs makes no reference to such areas, the exceptions contained in MGN 364 as quoted above would negate any such argument as it recognises the precedence of local requirements, e.g. the MPA's circulars. Thus, with this background concerning the importance of local rules, any assumption that a TSS or precautionary area may be navigated through on the basis of the guidance set by authorities of an unrelated jurisdiction, despite the general application of the Colregs, would be a misguided view when considering such cases.

56. Thus, the requirements pertaining to how any crossing in the Singapore Straits is to be executed is very clear. The local requirements on crossing the Singapore Straits is to do so perpendicular to the direction of traffic flow, as stipulated by the MPA's circular. This simply echoes Rule 10 (c) of the Colregs, and applies regardless of whether a ship is crossing the TSS or a precautionary area.

57. Rules of good seamanship are of course of utmost importance as well when considering the issue of navigation in congested waters such as the Singapore Straits. In the "*Century Dawn"*,[71] Mr Justice Clarke (as he was then) had said, *"[i]n my judgment, particularly in light of the advice of the assessors…the obligation in 10 (c) applies to vessels crossing any traffic lane whether the purpose of crossing it is to cross the next lane or to join it. Of course the obligation to cross at a right angle is qualified by the expression "as nearly as practicable". Moreover no attempt should be made to cross either lane in a traffic separation scheme unless it is safe to do so."* [Emphasis added]

58. The principles of good seamanship referred to in the "*Century Dawn"* (to cross when it is safe to do so) are essential when considering a matter involving ships crossing the Singapore Straits. This is because, a vessel

[71] [1994] 1 Lloyd's Rep 138 at 151.

leaving port would normally be unable to maintain a constant speed as a result of having to slow down to disembark a pilot before increasing speed again. As a result the principle of good seamanship stated in the preceding paragraph will be crucially important before any attempt to cross the TSS is executed; lest speed is blindly increased, which is how the collision referred to in paragraph 45 had occurred.

59. Moreover, in respect to Rules 15, 16 and 17, blind compliance or attempts to enforce a right that exists for a stand-on vessel, by say careless acceleration after slowing down to disembark a pilot will be deemed to be a negligent act. First, because crossing in such a manner would be breach of the dictum in the *"Century Dawn",* which is also a case involving a collision between ships on crossing courses in the Singapore Straits TSS. Secondly, because literal observance of the Rules cannot be set up as a defence where the collision might have been avoided by ordinary care.[72] In The *"Benares"*,[73] Lord Justice Bowen remarked that *"otherwise a captain at sea may be trained in the impression that he is better off with his passengers and crew at the bottom of the sea and the rule obeyed, than in taking the one chance of safety remaining to him".* In the writer's view, it is ordinary care to ensure any acceleration of speed, after disembarking a pilot, while attempting to cross a TSS or precautionary area in the Singapore Straits, is done following an assessment of the resulting effects of the intended manoeuvres. Otherwise it would be deemed to be poor seamanship. In fact, from a nautical perspective ordinary care connects us to the principle of "ordinary practice of seamen" found in Rule 2 (a) or otherwise known as "good seamanship".

60. By virtue of the Rules in the Colregs the responsibilities between crossing vessels are defined while designating obligations between both ship's as a give-way vessel and stand-on vessel respectively. However, while this grants the stand-on vessel with a right of way, it does not allow those on board a stand-on vessel to act in such a way as to create a risk of collision when none existed. For example, where a ship's crew acts recklessly and negligently by abruptly increasing speed while being situationally unaware as to whether their actions would embarrass a vessel already in close proximity that would otherwise not have the obligations of a give-way vessel. That is, bearing in mind that an obligation to give-way commences only after a risk of collision or close quarters situation exists. Thus in The *"Spyros"*[74] *per* Lord Merriman, *"…In my opinion, in those circumstances the Spyros is not entitled to invoke the crossing rule when she herself creates the situation in which it would theoretically apply, by her own negligent action…"*. On the facts, Spyros was held 2/3^{rds} to blame; despite being the stand-on vessel.

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[72] *The Benares (1883) 9 P.D. 16 (CA), (1883) 5 Asp.M.C. 171; followed in The Sapphire and The Girdleness, Ad. Ct. February 27, 1884.*
[73] *Ibid*.
[74] [1953] 1 Lloyd's Rep 501 at page 509 col. 2.

61. Similarly, in The *"Tojo Maru"*[75], *per* Lord Justice Willmer, *"…It seems to me that no vessel is entitled, in face of another vessel seen to be approaching, to put herself deliberately on a crossing course in the position of a stand on vessel, so as to force that other vessel to keep out of her way. I should certainly regard it as wrong to adopt any such manoeuvre at a late moment when the vessels are within a short range of each other…"*. On the facts, both vessels were held equally to blame.

62. Then in The "*Savina"*[76], the House of Lords upheld Mr Justice Brandon's apportionment of 60/40 with the stand-on ship being more heavily to blame because there was evidence at trial which supported a finding that the stand-on ship intended to force her way across the head of the "*Savina"* in such a way as to compel drastic avoiding action by the latter.

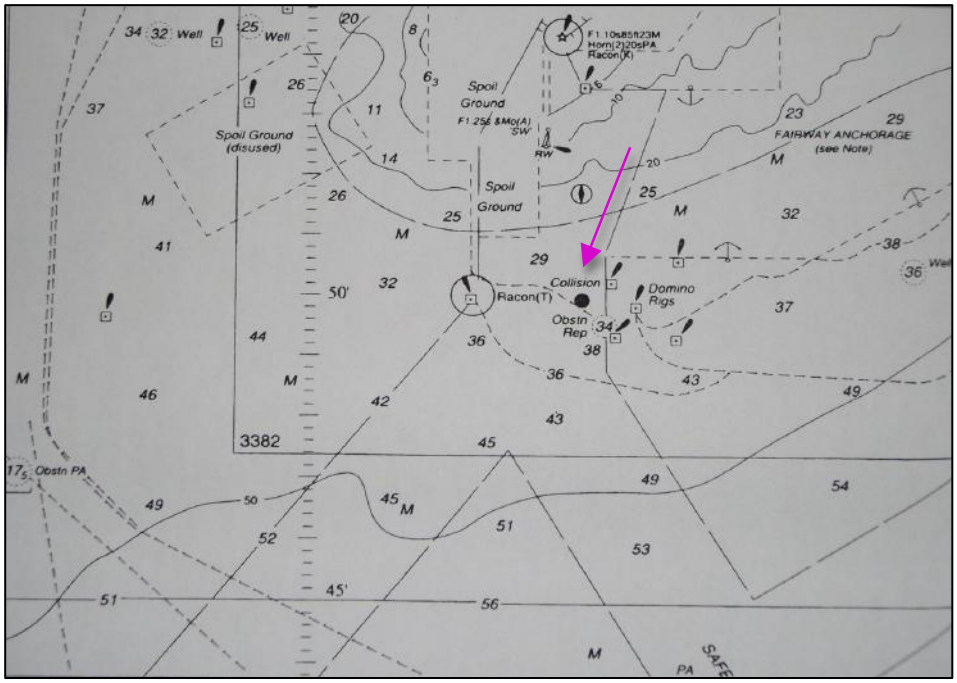
63. However, in The *"Century Dawn"*[77], the Court of Appeal held that the crossing rule applied notwithstanding which vessel was at fault in giving rise to a crossing situation and that "*Century Dawn*" was entitled to the status of a stand-on vessel despite that vessel's own fault in crossing a TSS at the wrong angle in breach of Rule 10(c)[78]. The Court of Appeal's decision in *"Tojo Maru"* was distinguished on its facts as a case in which the stand-on vessel sought to force the other vessel out of the way. Thus, essentially where there is clear evidence showing a stand-on vessel had deliberately attempted to cross ahead of a give-way vessel so as to force her out of the way when both vessels were a short distance apart, there would be a higher probability of the stand-on vessel being held more to blame.

64. However this division of obligations between crossing vessel's under the Colregs, while relevant to vessels crossing a TSS certainly requires a **fusion** with the applicable special rules or port marine circulars together with application of the required principles of good seamanship. It is essentially not simply direct application of Colregs but also of the local requirements which must be considered together with the relevant *dictum*. In addition, given the courts' decisions referred to above, any ship's Master who attempts increasing speed to cross a TSS utilising a splash of Nelsonian blindness will not find any form of victory following a collision under such circumstances.

65. In regard to increase of speed, in the *"Enif"*[79] that vessel was at all material times increasing her speed in a situation where *"Alexia"* had *"Enif"* on her own starboard side. *"Enif"* put her engines ahead following the departure of the pilot. Her speed at this time was 5.5 knots, and she was making about 13 knots when her engines were put to stop very shortly before the collision. The Admiralty Court held that *"Alexia"* was

[75] [1968] 1 Lloyd's Rep 365 at page 377.
[76] [1976] 2 Lloyd's Rep 123 at page 126 col. 1 and page 132 col. 2.
[77] [1996] 1 Lloyd's Rep 125.
[78] *Ibid* at page 132 col. 2.
[79] [1999] 1 Lloyd's Rep 643

the give-way vessel under the crossing rule and that apportionment of liability was to find *"Alexia"* 70% to blame and *"Enif"* 30% to blame. This case, however did not involve any TSS when the Greek-flagged ship *"Alexia"* collided with the Singapore-flagged ship *"Enif"* approximately six miles south of Southwest Pass, Louisiana, near the entrance of the Mississippi River into the Gulf of Mexico. The diagram below shows the location of the *"Enif"'s* collision:



66. The preceding salient cases are in regard to the apportionment of liability involving crossing vessels where the stand-on vessel was reckless and failed in its obligations under the Colregs and principles of good seamanship. However, apart from the *"Century Dawn"* case referred to above, these cases did not occur in the Singapore Straits TSS. Nevertheless the cases are useful references as to the likely range of apportionment subject always to the distinguishing factors that may exist.

67. The critical obligation of a stand-on vessel is the requirement to keep her "course and speed", under Rule 17 a (i) of the Colregs, per Lord Alverstone CJ in The *"Roanoke"*[80] means the *"course and speed in following the nautical manoeuvre in which to the knowledge of the other vessel is at the time engaged"*. There are no known cases accepting that a vessel crossing a TSS is expected to increase her speed

68. As a matter of interest, however, where the stand-on vessel had not embarrassed the give-way vessel and the circumstances as to good

[80] [1908] P. 231 at 239.

seamanship required when crossing a TSS are not in issue, then the following are some relevant English law cases on crossing courses.

- The *"Angelic Spirit"* and *"Y Mariner"*[81]; where the give-way vessel was held 70% to blame.
- The *"Lok Vivek"* and *"Common Venture"*[82]; where the give-way vessel was held 75% to blame.
- The *"Mineral Dampier"* and *"Hanjin Madras"*[83], a case where an agreement over the VHF leading to a crossing situation; the give-way vessel was found to be 80% to blame.
- The *"Sitaram"* and *"Spirit"*[84]; the give-way vessel was held 75% to blame.
- The *"Topaz"* and *"Irapua"*[85]; the give-way vessel, *"Irapua"*, was 80% to blame.
- The "Samco Europe" and *"MSC Prestige"*, where there were VHF radio communications between the ships that resulted in the vessels departing from the requirements of the Colregs; the give-way vessel was 60% to blame.

69. The range of liability in the above cases is primarily between 70:30 and 80:20 against the give-way vessels. However, there are decisions that have apportioned liability outside this range in order to address the relevant facts of the case; e.g the *"Samco Europe"*.

70. However, the *orbiter dicta* and cases discussed above are not intend to address the scenario described in the beginning of this section but are merely indicative of the potential issues that may need to be addressed when considering a collision case involving a crossing situation in the Singapore Straits.

71. Accordingly, where SEADOCC is applied in order to resolve the potential apportionment of liability in such admiralty cases a number of factors will need to be weighed by the appointed decision-maker when drafting any Liability Award. For each case the apportionment will need to be resolved based on the facts. True apportionment of liability for a collision can never be made unless both "blameworthiness" and "causative potency" of both vessels are given equal consideration in the investigation.[86] Per Mr Justice Teare in The "Sea Express":[87]

[81] [1984] 2 Lloyd's Rep. 595.
[82] [1995] 2 Lloyd's Rep. 230.
[83] [2001] 2 Lloyd's Rep. 419.
[84] [2001] 2 Lloyd's Rep. 107.
[85] [2003] EHWC 838.
[86] Maritime Law (5th Ed. 1998, LLP) 290.

"Apportionment is not a matter of adding up the faults on each side. Apportionment is a qualitative not a quantitative exercise."

72. Accordingly, a qualitative approach will be necessary in any exercise under the SEADOCC procedure aiming to produce a Liability Award. Where facts from the time line of events are scrutinised in order to obtain a detailed analysis of the elements that had the greatest causative potency while weighing the culpability of those in charge of the respective vessels involved.

E. Conclusions

SEADOCC Utilisation

73. Whether the preceding example of a collision involving a crossing situation in the Singapore Straits TSS (see paragraphs 45 and 46) is the kind that may be referred to SEADOCC 'arbitration' may well be simply a matter that is dependant upon any impasse that the parties have had during any without prejudice negotiations. SEADOCC procedure, however, given its aims to deal with "small claims" may be relevant for parties who are self-insured or those who have little or no claims support being provided by their insurers. As logically, considering that SEADOCC is intended to be used in connection with cases of low value and uncomplicated liability issues, it is unlikely that such matters would provide sufficient stimulus for parties to incur further costs to engage a third party to act as a decision-maker in a dispute resolution mechanism. Moreover, SEADOCC requires the parties' express agreement and cooperation in order to move forward on both the terms to be agreed and the appointment of an 'arbitrator'. Accordingly, it may be the rare instance where parties are able to cooperate in dealing with the technicalities involved in agreeing to SEADOCC Terms yet are unable to find middle-ground towards reaching a settlement on the apportionment of liability involving a relatively small claim. However, where one or both parties have little or no experience in dealing with collision claims and need assistance in reaching an agreement as to the apportionment of liability and inter-ships claims then SEADOCC may remain relevant.

See also the Maritime Conventions Act 1911 (Rev. 2004), section 1 (Rule as to division of loss)
(1) Where, by the fault of two or more ships, damage or loss is caused to one or more of those ships, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each ship was in fault, except that if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally.
(2) Nothing in this section shall operate so as to render any ship liable for any loss or damage to which her fault has not contributed.

[87] [2010] EWHC 3180 (Admlty) at 84.

Fusion of Principles

74. As mentioned at paragraph 30, by virtue of clauses 18 to 29 of SEADOCC a non-judicial process of decision-making is envisaged in connection with the issuance of a Liability Award. Furthermore, clauses 30 to 32 appear to allow the decision-maker to take on the role of arbitrator and 'master of procedure'. Thus an alternative is to view the procedure as a hybrid dispute resolution process that involves two limbs. First, in order to obtain a Liability Award, a procedure that is undoubtedly extracted from the practices of expert determination where the decision can be reviewed, commented on and potentially challenged by the parties themselves before the finalisation. Secondly, in regard to the Settlement Award, a process that gravitates back toward the possibility of an 'arbitrator' calling for evidence before assessing and issuing a decision on quantum. However, adoption of SEADOCC means the parties can cease further proceedings after obtaining a Liability Award, in which case the decision up to that stage may be viewed as an expert determination only. Where the Settlement Award is also issued then the entire process may be akin to a "Med-arb" proceeding where mediation is attempted first followed by arbitration.

75. However, where there was no election in the parties written agreement with the 'arbitrator' to obtain a Settlement Award under SEADOCC and one of the parties does not thereafter accept the decision on liability, then issues might arise on whether the Liability Award can be enforced as an arbitration award under the New York Convention. Thus the discussion at paragraph 24 pertaining to the structure of any decision issued should be in the form of an arbitration award would be relevant in this regard.

76. However, there could be arguments that SEADOCC was in fact an expert determination process. Further, that only mandatory provisions of the IAA applied (see paragraph 9) to the procedure instead of all IAA provisions. Thus the decision of the expert determiner is not in fact an arbitration award regardless of the labels the SEADOCC Terms had attached to the decision-maker. Further by analogy from the principle in *Taylor v Yielding,* where the expert who is not acting in a judicial manner to arrive at a decision cannot be called an "arbitrator", then one cannot refer to such a process or its decision as an "arbitration" or "arbitration award" respectively. This is because, the procedure was not conducted in a judicial manner (see paragraphs 5 and 30). Accordingly, arguably the decision does not then constitute a document that that can be enforced under the New York Convention. This may not be a relevant argument if both parties are Commonwealth based entities as the majority of expert determinations are held to be binding, save for the exceptions stated above (see paragraph 31).

Managing Potentially Conflicting Principles

77. In order to resolve such issues, the following are some steps that the 'arbitrator' under SEADOCC may wish to attempt in addressing the issues given the diverging principles that apply to the relevant procedure:

    a. The 'arbitrator''s terms of reference agreed with the parties are drafted once a clear set of information concerning the background to their case is available. This will ensure the possibility of departing from instructions is prevented.

    b. Ensure that the terms of reference state the broad issues in dispute between the parties and any instructions pertaining to what is expected in connection with the resolution of those issues. As the SEADOCC Terms can be varied the parties are free to amend the procedure by agreement.

    c. Establish whether all the powers of an arbitrator under the IAA are available to the decision-maker under SEADOCC; have the position expressly stated in the terms of reference.

    d. Discuss what aspects of the IAA the parties believe are not mandatory and how they foresee that working with their intended procedure.

    e. Ensure the terms of reference express clearly the powers that the 'arbitrator' has vested, e.g. whether the power to decide on his/her own jurisdiction is available, which an expert determiner in unable to do unless expressly provided for in his contract.

    f. Ensure that the terms of reference address how any issues as to any points of law that are in contention are addressed.

    g. Endeavour to ensure a higher standard of partiality, vis-à-vis the aspect concerning actual or appearance of partiality, is observed in dealings with the parties, see paragraph 33 above;

    h. Establish, at the outset, the extent of further submissions the parties intend to provide under the SEADOCC procedure; whether factual and typographical or substantive, in order to manage this based on the powers confirmed under the preceding heads c. and d. above.

    i. Any challenges in the form of further submissions from the parties should not be ignored, as may be possible in an expert determination where the decision-maker need not dispense reasons unless expressly required to do so. Instead, any further submission should be included into the draft 'award' under the

respective parties' contentions on the relevant issues in dispute and the decision should be drafted with reasons for the decision and why a particular version of events is accepted in connection with a particular issue.

Admiralty Principle and Fusion of Rules

78. Finally, on the admiralty cases pertaining to crossing courses, Mr Justice Clarke's judgment in the *"Century Dawn"* that *"no attempt should be made to cross either lane in a traffic separation scheme unless it is safe to do so"*, simply reflects the correct approach in terms of good seamanship practice that is required. On the facts of the *"Century Dawn"*, however, there was no brazen attempt to utilise engine power and related acceleration when crossing the Singapore Straits TSS, which would undoubtedly weigh more heavily against vessels that negligently attempt to do so.

79. The importance of any local rules and requirements as referred to in paragraph 64 are overriding features to be considered in a SEADOCC dispute resolution process, which seeks to establish the appropriate apportionment of liability for a collision matter before deciding any disputed inter-ship claims. The overriding nature of local rules is given force by regulations enacted to give effect to the Colregs, and in particular Rule 1 (b) thereof, which recognises the precedence of *"…the operation of special rules made by an appropriate authority…"*. In addition, the *dictum* of Mr Justice Willmer in The "Empire Brent" (see paragraph 53) confirms how a fusion of local rules and the Colregs will entail the former being given priority where there is no conflict. In fact there is no conflict in the context of this discussion since the Port Marine Circular referred to above merely echoes Rule 10 (c) (see paragraph 56).

80. In light of the above discussion, SEADOCC is a procedure that requires special attention given the fusion of principles within its procedure. Where expert determination and arbitration blend into what is intended to be a simplified form of dispute resolution. Simplification, however, introduces limits, for example compromising the ability to obtain discovery, etc (see paragraph 13). For the 'arbitrator' sitting as a decision maker, however, the management of the functions required of his/her office will by necessity require sharp focus on the various legal issues that may result in unintended consequences arising from both the diverging and overlapping principles discussed in this paper. Sharp focus is thus crucial, lest the following words of the writer and satirist, Jonathan Swift,[88] ring true:

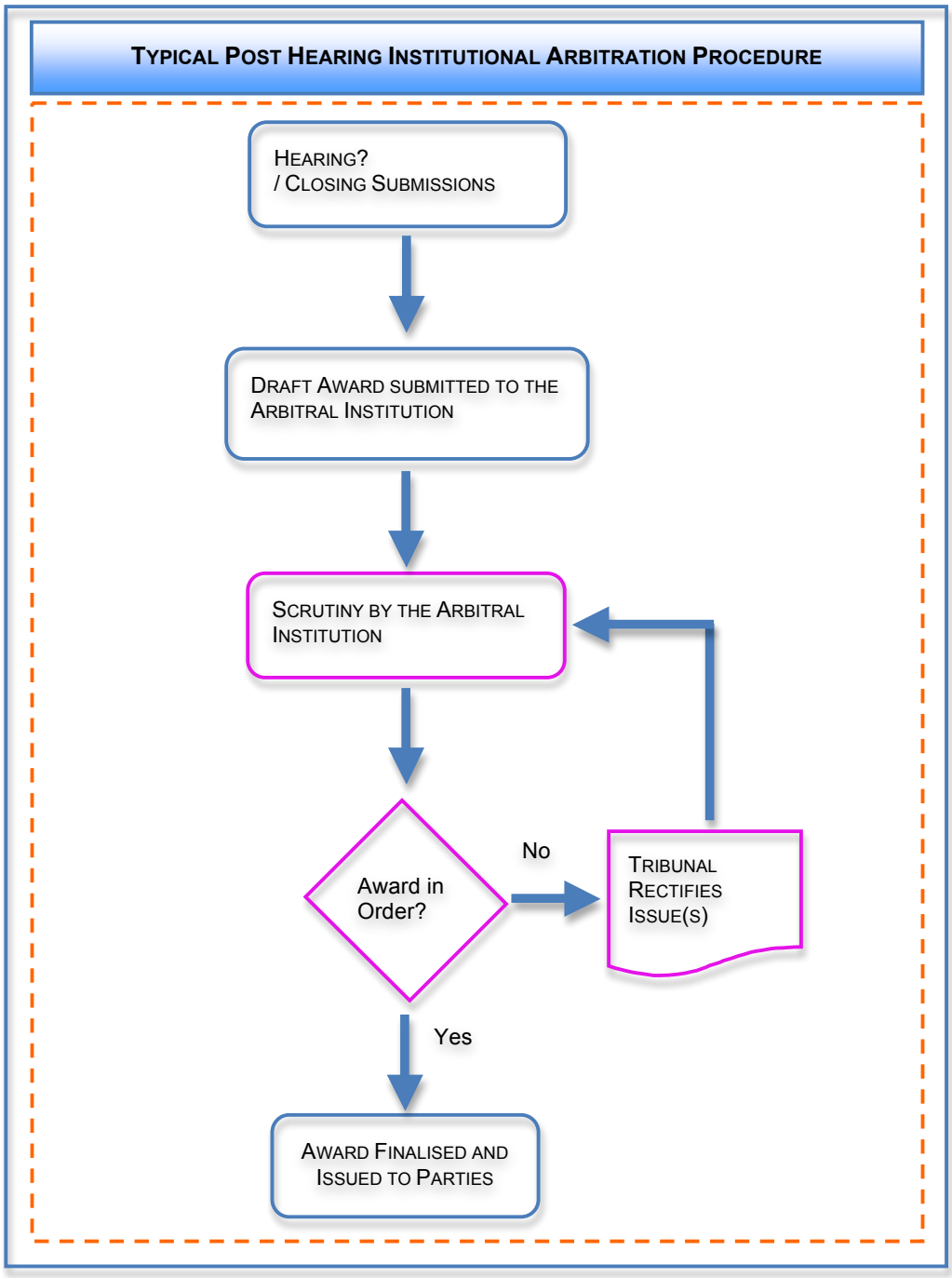
"Laws are like cobwebs, which may catch small flies, but let wasps and hornets break through"

[88] 1667 – 1745

Appendix 1

A Fusion of Principles and Rules:

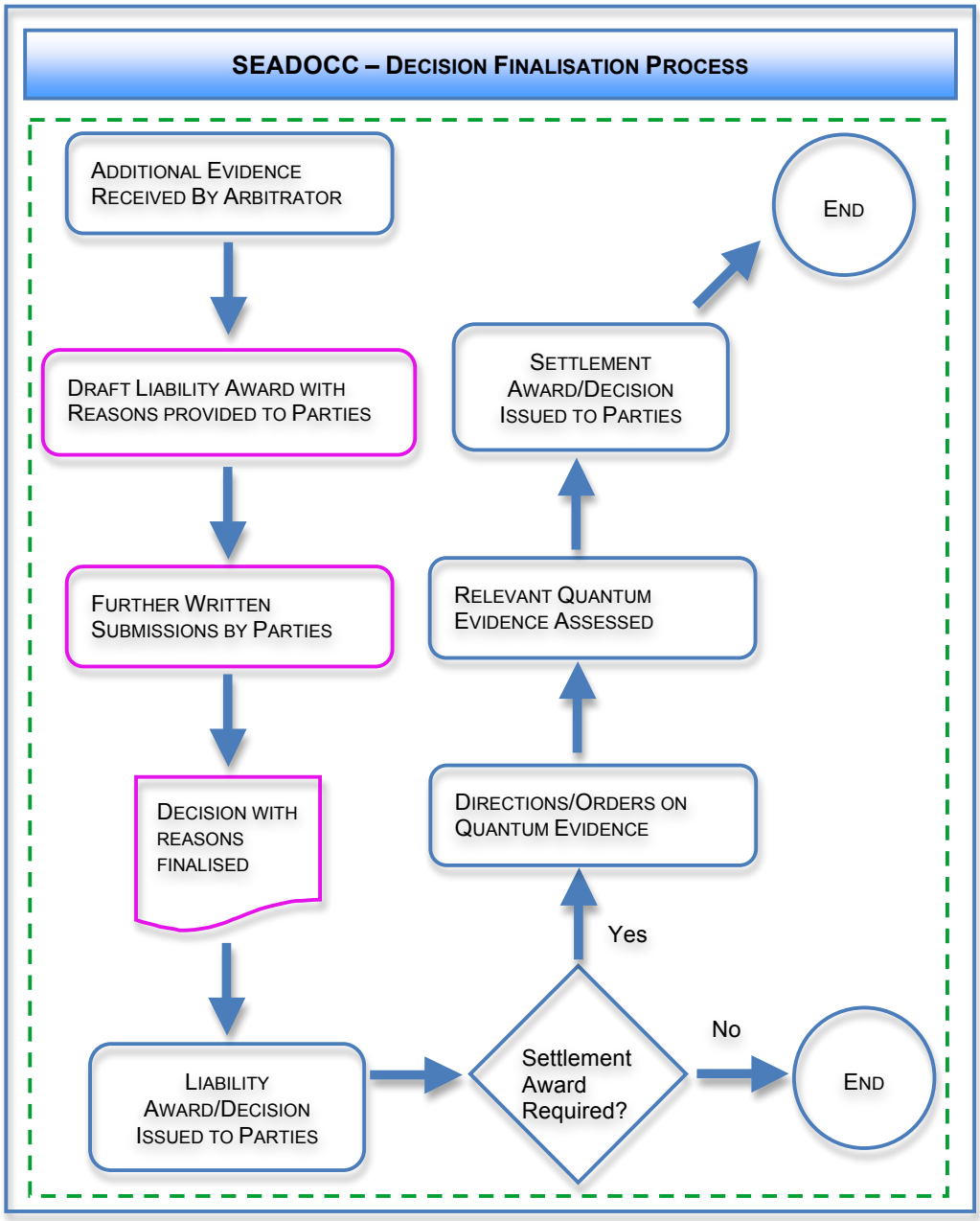
Expedited Arbitral Determination of Collision Claims and its Potential Application in Cases involving Ships Crossing the Singapore Straits


TYPICAL POST HEARING INSTITUTIONAL ARBITRATION PROCEDURE
HEARING?
/ CLOSING SUBMISSIONS
DRAFT AWARD SUBMITTED TO THE ARBITRAL INSTITUTION
SCRUTINY BY THE ARBITRAL INSTITUTION
Award in Order?
No
TRIBUNAL RECTIFIES ISSUE(S)
Yes
AWARD FINALISED AND ISSUED TO PARTIES

Appendix 2

A Fusion of Principles and Rules:

Expedited Arbitral Determination of Collision Claims and its Potential Application in Cases involving Ships Crossing the Singapore Straits



Appendix 3

A Fusion of Principles and Rules:

Expedited Arbitral Determination of Collision Claims and its Potential Application in Cases involving Ships Crossing the Singapore Straits

SCMA Expedited Arbitral Determination Of Collision Claims

(SEADOCC)

In Collaboration with Hill Dickinson LLP

SCMA Expedited Arbitral Determination of Collision Claims ("SEADOCC")

The SEADOCC Terms

The Terms

1. These Terms relate to the maritime arbitration procedure referred to herein, which will be governed exclusively by the Singapore Chamber of Maritime Arbitration ("the SCMA").

2. This procedure will be known as the SCMA Expedited Arbitral Determination of Collision Claims ("SEADOCC") and these Terms may be referred to as "the SEADOCC Terms".

Objective

3. SEADOCC aims to provide a fair, timely and cost-effective means of determining liability for a collision in circumstances where it has not been possible or appropriate to reach such an apportionment of liability using other means of dispute resolution.

4. The purpose of arbitration under these Terms ("the SEADOCC Arbitration") is to provide a binding decision on liability ("the Liability Award") for a collision between two or more ships ("the Collision") by a single appointed arbitrator ("the Arbitrator").

5. The Arbitrator will be appointed jointly by each Party to the dispute arising out of the collision (together "the Parties"). It is a condition precedent of the Parties taking part in SEADOCC that they agree in writing to the identity and appointment of the Arbitrator and commencement of a SEADOCC Arbitration.

6. By agreement between the Parties, the Arbitrator may also be called upon to review the quantum of the inter-ship claims and, pursuant to an agreement on the apportionment of liability between the Parties or a Liability Award under these Terms, provide a final and binding award on the payment to be made on the balance of claims from one Party to the other ("the Settlement Award").

7. The Parties will be free to appoint any person as an Arbitrator. It is envisaged that this would be someone with legal or practical experience in dealing with claims arising from collisions between vessels, drawn from the maritime community in Singapore. The SCMA will maintain a list of Arbitrators ("the SEADOCC Panel") who have taken part in SEADOCC Arbitration and produced at least one Liability Award as defined herein.

8. The Parties hereby agree that the determination of the apportionment of liability and, where agreed between the Parties, the assessment of inter-ship claims arising out of the Collision will be conducted under the SEADOCC Terms, rather than in accordance with the procedure of the Courts of any jurisdiction. The SEADOCC Terms may however be varied by agreement between the Parties.

9. The juridical seat of the SEADOCC Arbitration shall be in Singapore.

10. The SEADOCC Terms shall govern the SEADOCC Arbitration save that if any of these Terms is in conflict with a mandatory provision of the International Arbitration Act (Cap 143A) and any statutory re-enactment thereof in Singapore ("the Act"), from which the Parties cannot derogate, such provisions shall prevail.

11. The SCMA will not be liable for any claims or disputes arising out of the appointment of any Arbitrator, whether chosen from the SEADOCC Panel or not. The Parties will make any such appointments at their own risk.

Initial Assessment

12. As soon as possible following the appointment of the Arbitrator, he or she will hold an initial meeting or telephone conference with the Parties to establish the nature of their dispute, the broad issues involved, the likely level of documentation and the service they require.

13. Based on this, the Arbitrator will provide an estimate of his or her likely costs for providing the Liability Award and/or Settlement Award. This will be indicative only and will not be binding on the Arbitrator.

Engagement Letter and Options

14. On appointment, the Arbitrator will provide the Parties with an engagement letter (the "Engagement Letter") clearly setting out his or her hourly rates and terms and conditions which shall be no greater than his or her usual hourly rates.

15. The Arbitrator may also seek a letter of comfort or security from the Parties' respective P&I insurers or such other body as the Arbitrator shall consider satisfactory, confirming that these insurers shall in the first instance be jointly and severally liable for settling the Arbitrator's Costs as defined herein.

Early settlement

16. If the Parties settle their dispute at any stage following the appointment of the Arbitrator ("an Early Settlement"), they will inform him or her as soon as reasonably possible.

17. The Arbitrator will be entitled to the costs and expenses of any work conducted prior to and up to the date of an Early Settlement in accordance with the Engagement Letter.

Submissions

18. The Parties shall each within 14 days of the Arbitrator's appointment provide him or her with the following documents and information (collectively "the Evidence"):

    a. A summary of the background facts of the case set out on no more than six pages of A4 paper.

b. A maximum of one lever arch file of key documents ("The Arbitration Bundle"), which may be provided in electronic form, such as:

   i. Navigation charts;

   ii. Deck and engine logbook extracts;

   iii. Deck and engine bell books;

   iv. Engine data logger records;

   v. Course recorder extracts

   vi. Weather forecasts and reports, if relevant

   vii. STCW Crew certificates for those officers and ratings involved in the incident;

   viii. Any photographs or notes made by the witnesses;

   ix. Other ship's documents or records which may be relevant to the case;

   x. Any key advices provided to the Parties by their legal advisors;

   xi. Any criminal or civil reports by national maritime administrations;

   xii. Any surveyors' reports;

   xiii. Any available AIS data.

c. Copies of any ECDIS or VDR/SVDR data, including playback software, from the respective Ships.

19. The Parties will promptly after provision of the Evidence to the Arbitrator make appropriate arrangements for the simultaneous exchange of their Arbitration Bundles.

20. The Arbitrator will review the Evidence and determine whether there is any additional information or documentary evidence ("Additional Evidence") which might assist him or her in making the Liability Award. It is envisaged that this initial review would be conducted within 14 days of the Parties providing to the Arbitrator their Arbitration Bundles. The Arbitrator will then provide a written list of any such Additional Evidence to the Parties.

21. The Parties shall within 14 days of the Arbitrator's written request provide such Additional Evidence as he or she may request. Neither Party shall be obliged to provide such Additional Evidence to the Arbitrator, but the Arbitrator may draw whatever inference he or she considers appropriate in the circumstances from any failure to do so.

22. Where Additional Evidence is provided to the Arbitrator, the Parties will at the same time serve on each other an identical copy of their respective Additional Evidence. The Parties will make appropriate arrangements for the simultaneous exchange of such Additional Evidence.

23. The Arbitrator will then prepare a draft written Liability Award with reasons ("the Draft Award") on the apportionment of liability for the Collision, which he will provide to the Parties for their consideration.

24. The Parties agree that once such a Draft Award has been published they will be bound to obtain a final written Liability Award from the Arbitrator, subject to the Parties achieving an Early Settlement and regardless of whether they provide further written submissions in response to the Draft Award as set out below.

25. The Draft Award will normally be available to the Parties within six weeks after the Parties have provided such Additional Evidence as the Arbitrator may require.

26. The Parties shall within 21 days of receiving the Draft Award provide to the Arbitrator any further written submissions they may have, on not more than four pages of A4 paper, in response to the Draft Award.

27. Where the Parties provide further written submissions to the Arbitrator, the Parties will promptly make appropriate arrangements for the simultaneous exchange of such further written submissions.

28. The Arbitrator will then prepare his or her Liability Award with reasons on the apportionment of liability for the collision. The Liability Award will normally be available to the Parties within four weeks after the Parties have provided their further written submissions in response to the Draft Award.

29. It is envisaged that the timescale from the appointment of the Arbitrator to the publication of the Liability Award will be no longer than five months, and hopefully shorter than this, subject to any exceptional circumstances.

Inter-ship Claims and Settlement

30. By agreement between the Parties, the Arbitrator may also provide a Settlement Award on the payment to be made on the balance of inter-ship claims arising out of the Collision from one Party to the other.

31. The Arbitrator shall make such directions and orders as he or she considers necessary to obtain evidence on claims ("the Quantum Evidence") including invoices, vouchers and payment receipts. Having reviewed the Quantum Evidence, the Arbitrator will then provide a Settlement Award.

32. The Liability Award and any Settlement Award will be final and binding on the Parties. The Liability Award and any Settlement Award shall each have the force of an Arbitration Award made under the Act.

Costs and Fees

33. The Arbitrator will be entitled to charge the rates set out in the Engagement Letter for work carried out in preparing a Liability Award or Settlement Award as described in these Terms.

34. The costs of the Arbitrator ("the Arbitrator's Costs") will be shared equally between the Parties regardless of the outcome of the SEADOCC Arbitration. The Parties shall be jointly and severally liable for payment of all the Arbitrator's Costs. Payment will be made promptly within 30 days of receiving his or her invoice. Thereafter the Arbitrator shall be entitled to charge interest at 5% per annum on any unpaid Arbitrator's Costs.

File Closure

35. Three months after the publication of the Liability Award and/or Settlement Award (as appropriate) the Arbitrator shall notify the Parties of his or her intention to dispose of the Evidence and any other documents and to close the file. He or she will act accordingly unless otherwise requested by either Party within 21 days of such notice being given.

Law and Jurisdiction

36. Any dispute arising under these Terms shall be subject to Singapore Law and the exclusive Jurisdiction of the Singapore Courts.

Dated this [ ] day of [ ] 20[ ].