

SHEARMAN & STERLING

# ARBITRATION AS A MEANS OF IMPROVING HUMAN RIGHTS PROTECTIONS AT SEA

YAS BANIFATEMI





**YAS BANIFATEMI**

Partner  
Co-Head of International Arbitration  
Head of Public International Law

**SHEARMAN & STERLING**

# TOPICS TO BE DISCUSSED

INTRODUCTION

I – CHALLENGES IMPEDING PROTECTION OF HUMAN RIGHTS AT SEA

II – HOW ARBITRATION CAN ENHANCE THE RULE OF LAW AT SEA

III – CHALLENGES AN ARBITRATION-BASED SYSTEM COULD FACE AND POSSIBLE SOLUTIONS

## INTRODUCTION

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1. Interplay between international arbitration and human rights

2. Project Framework

3. The White Paper

## ● 1. THE INTERPLAY BETWEEN ARBITRATION AND HUMAN RIGHTS

- The bridge between international arbitration and human rights is not new; the interconnection exists in investment treaty arbitration.
- To the extent human rights have been a subject in investment treaty arbitration, however, it has generally been as a point of focus on the perceived limitations of the investment protection regime, for example in relation to the balancing of such rights as the right to water, to health and more generally to a safe environment.

This criticism may take root in a number of misperceptions about investment treaty arbitration :

- A perceived chilling effect on the exercise of State regulatory power;
- The fact that affected third parties (e.g. indigenous communities) are not parties to the dispute (although they may intervene as *amici curiae*);
- A perceived lack of transparency.

## ● 1. THE INTERPLAY BETWEEN ARBITRATION AND HUMAN RIGHTS

- However, the notion that international arbitration and human rights are intrinsically incompatible is misguided: not only is international arbitration not an impediment to the development of human rights; it is, in fact, a powerful tool that can be used to strengthen and advance the protection of human rights.

In the same way as it was used, decades ago, to promote the rule of law in the protection of aliens and foreign nationals, international arbitration can, today, become the tool for an effective promotion of the rule of law in the protection of human rights. Its accessibility and bespoke nature can be used to enhance access to justice and accountability, by giving a real voice to affected parties.

- Specifically, international arbitration can be used to expand and improve the scope of human rights protection in the maritime environment, which has been compared to a human rights “black hole” (see e.g. Human Rights at Sea and SlaveFreeSeas, “Slavery at Sea”; I. Mann, “Maritime Legal Black Holes”, 29:2 EJIL 247, 2018).

This is the focus of our project with Human Rights at Sea (HRAS).



## ● 2. THE FRAMEWORK

### Seas as a “black hole” in the protection of human rights

- Approximately 90% of world trade is shipped at sea (source: UN, ICS).
- The fishing industry employs over 50 million people globally (source: ILO).
- Seas cover 71% of the Earth’s surface.
- High seas, *i.e.* areas beyond national jurisdiction, count for approximately 64% of the oceans’ surface.
- Within that vast expanse, many types of human rights abuses occur repeatedly and with impunity (sources: ILO, Human Rights Watch, UNCHR, Human Rights at Sea):
  - Highly exploitative working conditions on fishing fleets, shipping vessels, cargo ships etc. (modern slavery, dangerous working conditions, forced labour, denied wages, withheld passports);
  - Physical violence (sometimes enforcing inhumane working conditions), other degrading or inhumane treatment (including torture);
  - Human trafficking;
  - Non-assistance to distressed ships, refusal of entry to refugees and asylum-seekers.

## ● 2. THE FRAMEWORK

The project is built around the shared vision that victims' access to an effective remedy is key to filling the current void

- Human Rights at Sea has been working since April 2014 to support the awareness, implementation and accountability of human rights protections throughout the marine environment.
- HRAS' Founder and CEO David Hammond says he first considered the possibility of using arbitration to further that mission while in his own sort of marine environment – his shower!
- Not too long after, and by coincidence, Alex Marcopoulos took the initiative to contact David Hammond to explore ways our firm could contribute to the charity's mission as arbitration counsel:
  - Alex has a background in shipping and maritime law and has focused some of his work on those areas, in line with our team's expertise and past work in public international law (including law of the sea);
  - Our team prides itself on its tremendous *pro bono* contributions, so this was a logical step for us to take.
- As soon as the relationship between HRAS and Shearman & Sterling began, the project quickly springboarded off of:
  - HRAS's years of dedicated study of the main issues impeding effective human rights protection at sea; and
  - Shearman & Sterling's experience and expertise in international arbitration and public international law.



## ● 2. THE FRAMEWORK

### The Human Rights at Sea team



**DAVID HAMMOND**

Founder & CEO



**ELISABETH MAVROPOULOU**

Trustee

### The Shearman & Sterling team



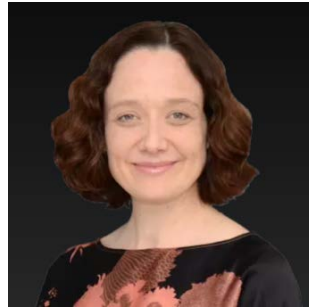
**YAS BANIFATEMI**

Partner



**ALEX MARCOPOULOS**

Counsel



**ELISE EDSON**

Senior Associate



**SANDRINA ANTOHI**

Associate



**MARIIA TSAROVA**

Associate

## ● 3. THE WHITE PAPER

### Goal of the White Paper

- Establish the conceptual framework of an arbitration-based system providing the victims of human rights abuses at sea with access to an effective remedy.
- Initiate the analysis and work on concrete steps to create and implement this system, including by overcoming identified key impediments.

### White Paper contents

- Main obstacles currently preventing victims of human rights at sea from accessing an effective remedy;
- Assessment of how international arbitration can provide a more effective mechanism for redress;
- Specific recommendations on the features that an effective arbitration system for human rights at sea disputes would need.

### Next steps

- Develop the project through broader conversation with stakeholders and the international legal community.
- Begin drafting core documents (*i.e.* draft arbitration agreements, offers of consent, draft arbitral rules).

## INTRODUCTION

## I – CHALLENGES IMPEDING PROTECTION OF HUMAN RIGHTS AT SEA

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1. Obstacles to States policing compliance with human rights at sea

2. Practical barriers to victims' access to adjudicative fora

3. Lack of independent and specialized domestic judges

4. Inadequate enforcement of international judgments

# 1. OBSTACLES TO STATES POLICING COMPLIANCE WITH HUMAN RIGHTS AT SEA

Principal bases for jurisdiction at sea (UN Convention on the Law of the Sea, 1982)

FLAG STATE: State where vessel is registered

- Jurisdiction over vessel itself, irrespective of location. Responsible *inter alia* for seafarer labour conditions.
- “Flags of convenience”: open, easily-accessed and usually more lenient registries (e.g. Panama, Liberia, Marshall Islands)

COASTAL STATE: State with coastal frontage

- Jurisdiction over their territorial sea (12 nautical miles), some jurisdiction over contiguous zone (12 to 24 nautical miles) and some jurisdiction over EEZ (up to 200 nautical miles from baseline)
- However, ships bearing foreign flag enjoy the right of innocent passage, limiting the coastal States’ right to inspect foreign ships and exercise criminal jurisdiction

PORT STATE: State of port where ships dock to load or discharge passengers or cargo

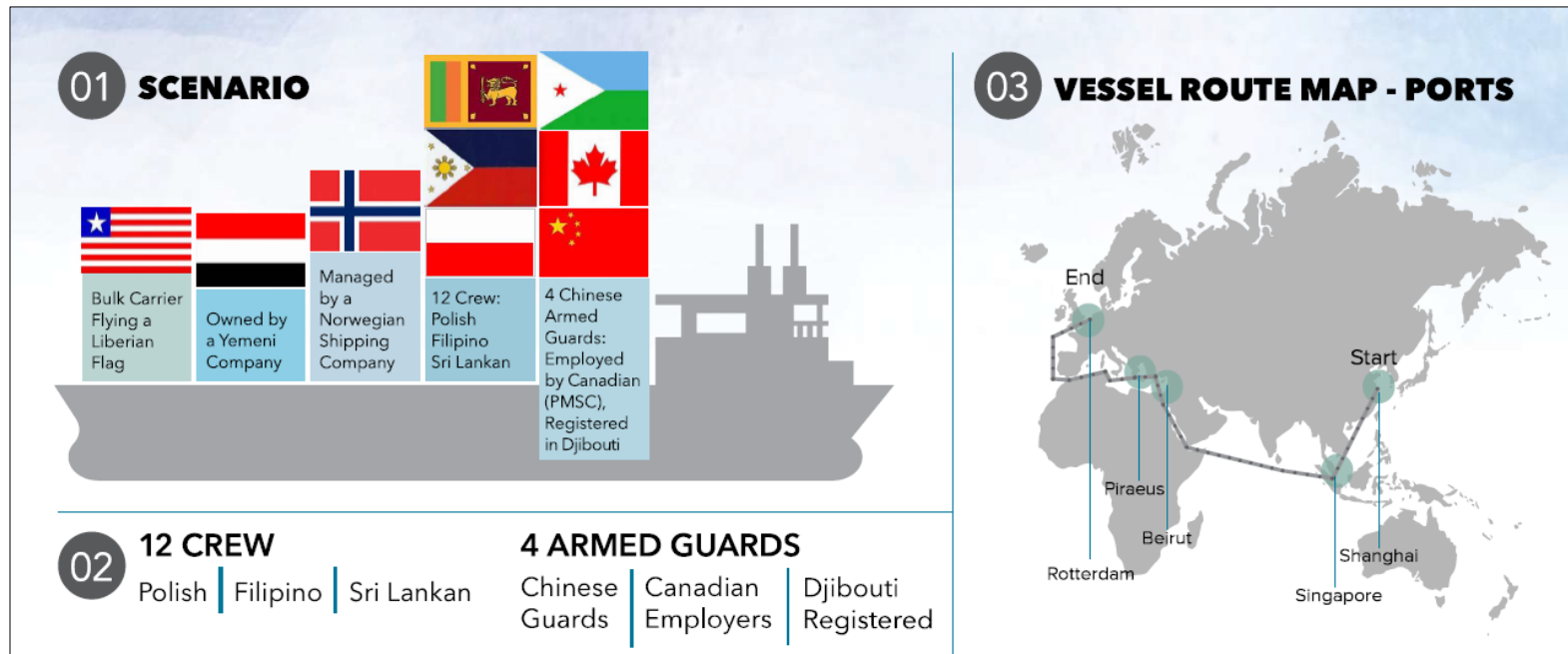
- Jurisdiction to regulate and inspect ships within their ports (incl. customs, national security, sanitation etc.)

ALL STATES

- Universal jurisdiction over piracy

# 1. OBSTACLES TO STATES POLICING COMPLIANCE WITH HUMAN RIGHTS AT SEA

Illustration: Bulk carrier sailing from Shanghai to Rotterdam, 12,000 nautical miles



Source: Human Rights at Sea

- A single ship can implicate many different nationalities (of both real and legal persons)
- Ships are often outside the territory of the States of nationality of persons aboard
- Ships may also travel outside the territory of any State, on the high seas

# 1. OBSTACLES TO STATES POLICING COMPLIANCE WITH HUMAN RIGHTS AT SEA

Illustration: Bulk carrier sailing from Shanghai to Rotterdam, 12,000 nautical miles, 5 ports



Source: Human Rights at Sea

- Great distances render effective policing very difficult
- Flag States constantly maintain jurisdiction over a vessel, but they have very limited monitoring resources (e.g. Marshall Islands: pop. 58,413; third most used flag state in 2019, with 4,715 registered vessels as at April 2020; very limited sea patrol capacity)



## ● 2. PRACTICAL BARRIERS TO THE VICTIMS' ACCESS TO ADJUDICATIVE FORA

### a. Identification of a domestic court with jurisdiction

- Difficult to identify which State has jurisdiction (including *e.g.* identifying the nationality of corporate employer).
- Not all State courts will accept to hear claims for extraterritorial human rights abuses; some common law courts are receptive to *forum non conveniens* arguments by respondents and decline to exercise jurisdiction.
- Not all States legislate extraterritorial behavior of corporate entities. In Canada, the Supreme Court only recently ruled that companies could be sued in Canada for human rights abuses abroad, on the basis that customary international law forms part of Canadian common law (*Araya v. Nevsun Resources Ltd.*, 28.02.2020).

### b. Geographical distance between the victim and domestic courts having jurisdiction

- Example (based on Slide 14): a Polish crewmember wishes to leave the ship in Singapore; armed guards employed by Canadian security subcontractor lock him in a cabin, and let him out when the ship is close to Greece. Canada and Singapore are very distant from both the location where he is left off (Greece) and his home State (Poland).
- Further, when working, a victim is often far from any domestic court whatsoever.

### c. Foreign legal systems

- Victims are often required to navigate the procedural rules of a foreign legal system having jurisdiction over their claims (for ex: conditions for filing and notifying claims, time bars, rules on evidence, etc.).

## ● 2. PRACTICAL BARRIERS TO THE VICTIMS' ACCESS TO ADJUDICATIVE FOR A (CONT'D)

### d. Language barriers

- Example: an abuse occurs in a Rotterdam port; the Dutch courts have jurisdiction, but the Filipino claimant and potential witnesses only speak Tagalog.

### e. Access to specialized international human rights bodies involves many procedural hurdles

- Common requirement of exhaustion of local remedies (or compelling proof that this would have been futile).
- Victims are often unaware these avenues even exist.

### f. Lack of funds

- Onerous costs of the claim itself (legal representation, court fees, travel fees, translation fees etc.).
- In the case of human rights at sea, competent legal advice is also required in the pre-claim analysis, to determine which is the responsible entity or State and which courts have jurisdiction.

### ● 3. LACK OF SPECIALIZED AND INDEPENDENT DOMESTIC JUDGES

#### a. Specialized knowledge of human rights law is rare at the domestic level

- Human rights cases raise sensitive issues (e.g. extreme trauma, other evidential sensitivities, disclosure of identity) and require specialized knowledge and a tailored approach.
- In many domestic jurisdictions, cases involving allegations of human rights abuse will be heard by generalist judges.

#### b. Domestic judges are not always independent and may operate under the wrong incentives

- There may exist an incentive to favor the Respondent State: judicial appointments and promotions are political in certain jurisdictions, or at least managed by the sitting Government.
- There may exist an incentive to favor the party with deeper pockets (most often not the victim), notably when judicial corruption is prevalent in the jurisdictions where human rights abuses occur.

## ● 4. SPECIALIZED INTERNATIONAL BODIES OFTEN LACK THE POWER TO COMPEL EXECUTION

Meanwhile, international bodies specialized in human rights have relatively weak (or no) enforcement mechanism

E.g. A claim against Panama



- Panama is the principal “flag of convenience” State (9,367 registered vessels in 2019 according to Lloyd’s List).
- Ratified the American Convention on Human Rights in 1978.
- Also accepted the jurisdiction of the Inter-American Court of Human Rights (IACtHR), in 1990.
- However, while IACtHR judgments are binding under international law, the scope and the pace of compliance with judgments against the Respondent State (e.g. Panama) will depend on that State.
- Notwithstanding the prevalence of human rights abuses at sea and Panama being the flag state of approximately 17% of the world’s registered vessels, no claim appears to have ever reached the ICtHR against Panama in the maritime sector. This raises the question of the low level of awareness and accessibility of such fora.

## INTRODUCTION

## I – CHALLENGES IMPEDING PROTECTION OF HUMAN RIGHTS AT SEA

## II – HOW ARBITRATION CAN ENHANCE THE RULE OF LAW AT SEA

## II – HOW ARBITRATION CAN ENHANCE THE RULE OF LAW AT SEA

1. Putting the system in the hands of individual victims

2. Increased accessibility of adjudicative fora

3. Neutral and independent adjudicators

4. Specialised adjudicators

5. Shedding light on human rights abuse patterns and perpetrators

6. International enforceability by the victim

## 1. PUTTING THE SYSTEM IN THE HANDS OF INDIVIDUAL VICTIMS



The system we are proposing is victim-centered, giving the victim a direct right of action against the State, company and/or person alleged to bear responsibility for a given instance of abuse.

This is analogous to what was done in the international investment law context, where individual investors were allowed to pursue and enforce remedies directly against States, improving the overall efficacy of the system: see *e.g.* the Preamble to the 1965 ICSID Convention:

*"... Recognizing that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases;*

*Attaching particular importance to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire; ..."*

*« For the first time a system was instituted under which non-State entities – corporations or individuals – could sue States directly. » (Sir Elihu Lauterpacht)*



## ● 2. INCREASED ACCESSIBILITY OF ADJUDICATIVE FORA

### a. The procedural simplicity of arbitration increases its accessibility

- The uniform, streamlined procedural structure of arbitration is simpler for victims and their counsel to navigate and engage with as compared to the complex, idiosyncratic rules of domestic civil procedure.
- The notion of a single cross-border arbitration system is easily communicated and understood.

### b. The adaptability of arbitration increases its accessibility

- It is possible to devise procedural rules that are specifically tailored to the needs of human rights victims (quick, effective and low cost justice).
- Possibility of conducting arbitration in a language the victim understands.
- Possibility of holding hearings and hearing witnesses in an accessible place at no great cost to the victim, including by virtual means.

### c. Centralization of fora improves funding opportunities

- A centralized, arbitration-based system might be better placed to attract financial support and *pro bono* legal services.

### ● 3. NEUTRAL AND INDEPENDENT ADJUDICATORS

- a. It is a fundamental requirement in international arbitration for the members of the arbitral tribunal to be independent and impartial in relation to both parties.
- b. Parties have equal power in the constitution of the arbitral tribunal: once a dispute has arisen, each party can appoint an arbitrator and the presiding arbitrator can be chosen jointly by the parties, the co-arbitrators or by the designated arbitral institution.

## ● 4. SPECIALISED ARBITRATORS

- a. Appointing arbitrators specialized in international human rights, maritime law, labour law and/or relevant fields of national law will improve trust in the system and lead to better results.
- b. We have already received expressions of interests from potential arbitrators as soon as this project was announced.

## 5. SHEDDING LIGHT ON HUMAN RIGHTS ABUSE PATTERNS AND PERPETRATORS



Given the difficulties specific to the maritime setting, it is particularly important to incentivize victims to report violations directly.

Making it easier to raise claims in an arbitration-based system will bolster the rule of law not only through individual access to justice but also by:

- Having a deterrent effect on potential future abusers;
- Making States and the international community aware of patterns of violations, improving their ability to deploy enforcement and inspection resources where needed the most.

## 6. INTERNATIONAL ENFORCEABILITY

- a. Establishing a self-contained dispute resolution system such as the one created by the ICSID Convention, in which awards are enforceable in any Contracting State, would require a multilateral treaty.
- b. In this context, the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958 has a role to play: very wide reach – 163 State Parties and counting
  - 50 States have made the “commercial declaration” (Art. I.3) providing that the Convention will apply only to *“differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law”* of that State.
  - The term “commercial” has been interpreted widely, notably including contracts for shipment of goods and (at least in the United States) seamen’s employment contracts.
  - In order to avoid that inter-party relationships involving human rights abuse fall through the cracks, an alternative solution would be to require Parties to agree in advance that their dispute will be deemed “commercial” for purposes of the NYC.



## 6. INTERNATIONAL ENFORCEABILITY

For the most thorough guide to the New York Convention, see the UNCITRAL Secretariat's Guide at:

<http://newyorkconvention1958.org/>



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### III – CHALLENGES AN ARBITRATION-BASED SYSTEM COULD FACE AND POSSIBLE SOLUTIONS

1. Engaging stakeholders to provide consent to arbitration

2. Developing or adapting an arbitral institution to manage human rights at sea arbitrations

3. Lowering cost barriers

# 1. ENGAGING STAKEHOLDERS TO PROVIDE CONSENT

## a. Securing the consent of potential respondents is a fundamental objective

- States may consent to arbitrate human rights at sea disputes, either in their domestic legislation or in an international instrument;
- Businesses may consent to arbitrate in employment contracts with seafarers and other employees or contractors;
- States may also require businesses to agree to arbitrate human rights at sea disputes as a condition for the registration of ships or docking at their ports.

## b. Innovative solutions may include:

- Carrots or sticks offered by the financial sector to businesses operating at sea (e.g. participating banks with ESG focus provide more favourable financing terms to companies agreeing to offer consent to arbitration);
- Third-party beneficiary clauses in contracts between corporations operating at sea, *i.e.* an open offer to arbitrate disputes with third parties. This would make arbitration available to persons without a contractual relationship with one of the party (e.g. undocumented seafarers, with no formal contract of employment), but who have nevertheless been affected during the execution of that contract.

## ● 2. DEVELOPING OR ADAPTING AN ARBITRAL INSTITUTION TO CENTRALIZE KNOW-HOW AND FACILITATE DISCUSSION AMONG STAKEHOLDERS

- a. While human rights at sea can be arbitrated on an *ad hoc* basis, *ad hoc* arbitration places higher management burdens on the parties; relatively unsophisticated parties would benefit from institutional management.
- b. Optimally, the arbitral system would be high-volume and specialized, overseen by an institution with relevant know-how in terms of qualified arbitrator recommendations, template procedural rules, independent storage of sensitive evidence, management systems for protection of identities, etc.
- c. An arbitral institution would also facilitate discussion among stakeholders regarding constant system improvements.
- d. An arbitral institution would be able to collect funds for human rights at sea arbitrations (see next slide on Costs).

### ● 3. LOWERING COST BARRIERS

- a. While most costs of civil litigation and arbitration concern the same categories (*e.g.* legal fees, translations, travel, witnesses), arbitration entails in addition tribunal fees and costs as well as institutional costs
- b. Potential options to alleviate the burden on (often low-resource) victims of human rights abuses at sea:
  - Set-up of a special-purpose fund to cover the legal fees and costs; the fund could be fueled by State and maritime employer contributions, as well as charity donations. The proposed institution specialized in human rights at sea arbitration could manage this fund;
  - Legal aid;
  - Pro bono services or discounted fees.

● 4. UPCOMING WEBINAR WILL EXPLORE POSSIBLE SOLUTIONS TO THESE CHALLENGES



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