

Marine & Offshore Expo 2015

Resolving Shipbuilding & Marine Offshore Disputes Through Arbitration In Malaysia

By

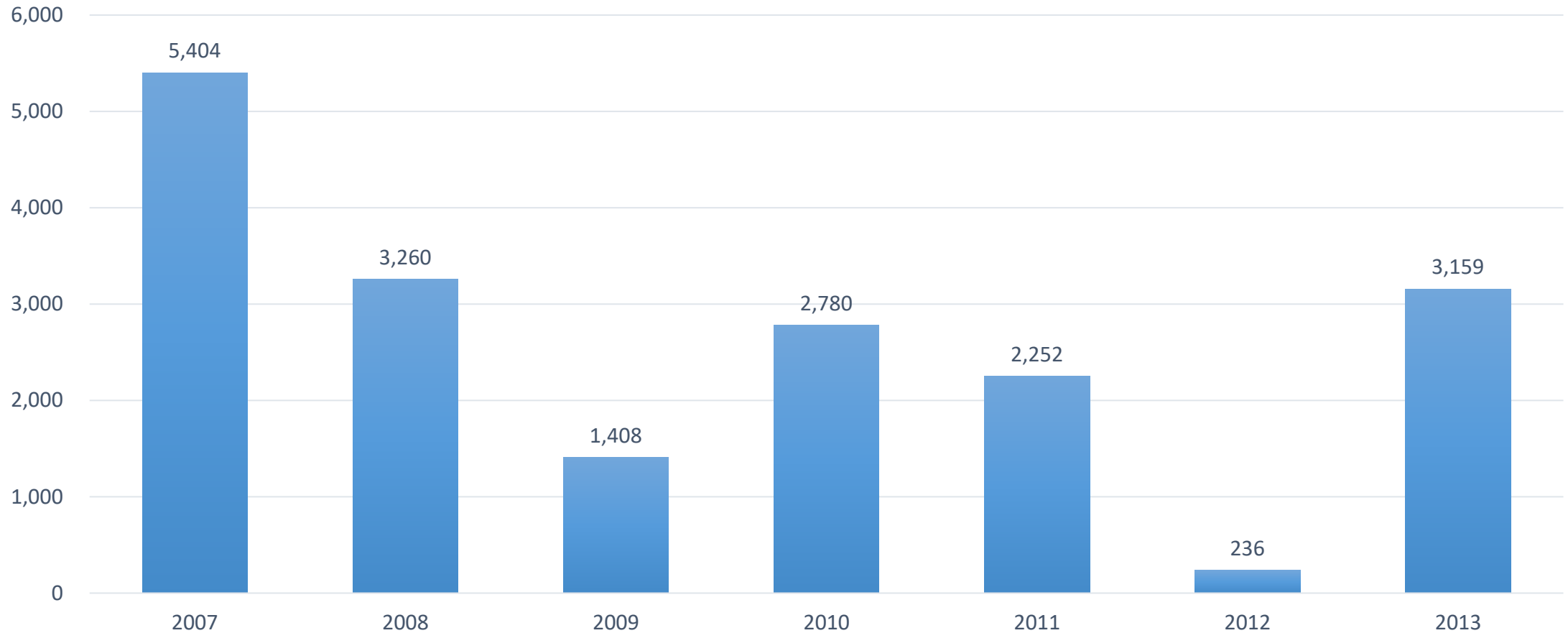
Jeremy M Joseph

Partner

JOSEPH & PARTNERS

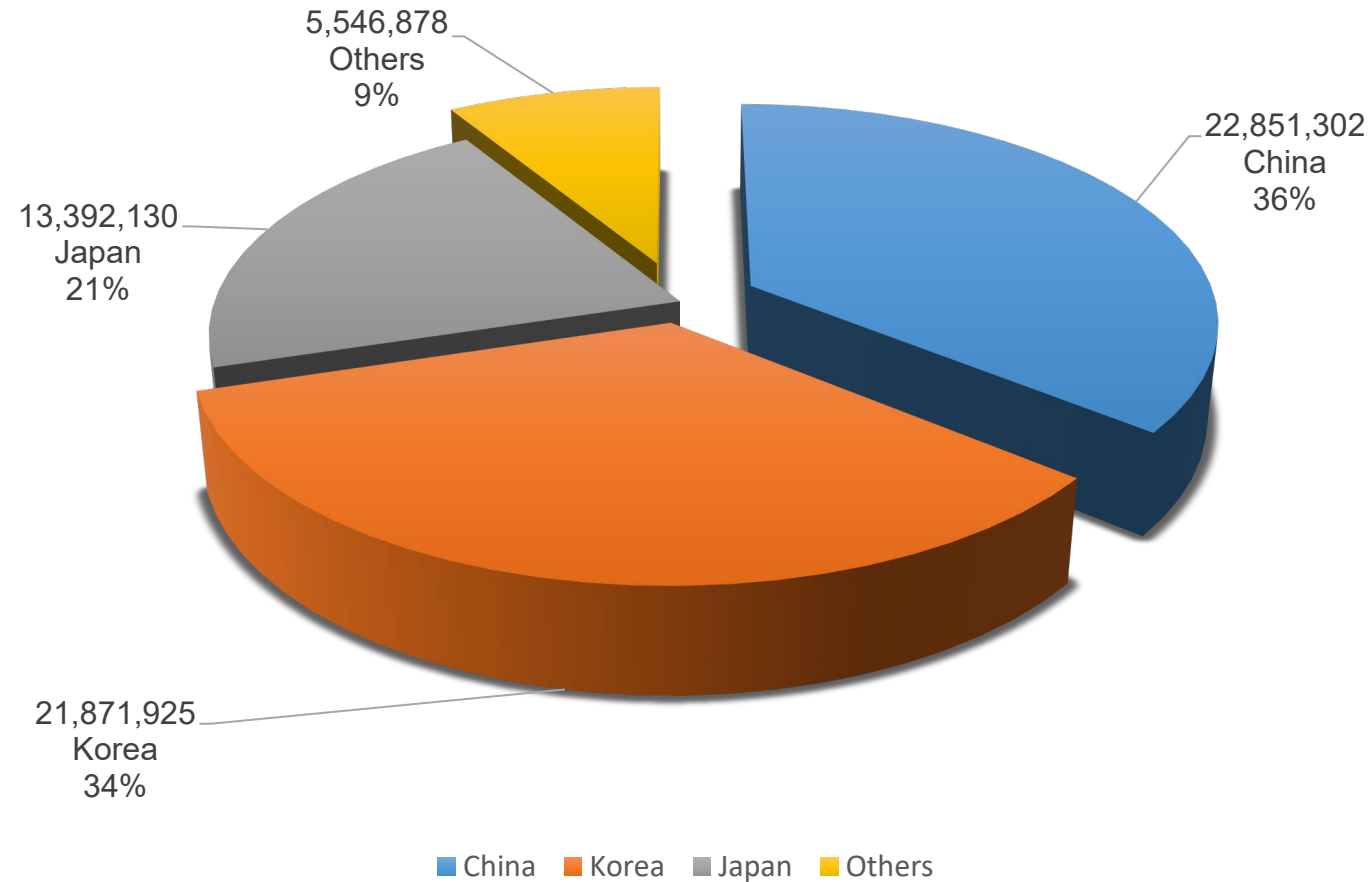
Shipbuilding Statistics 2007 to 2013

Number of World New Orders



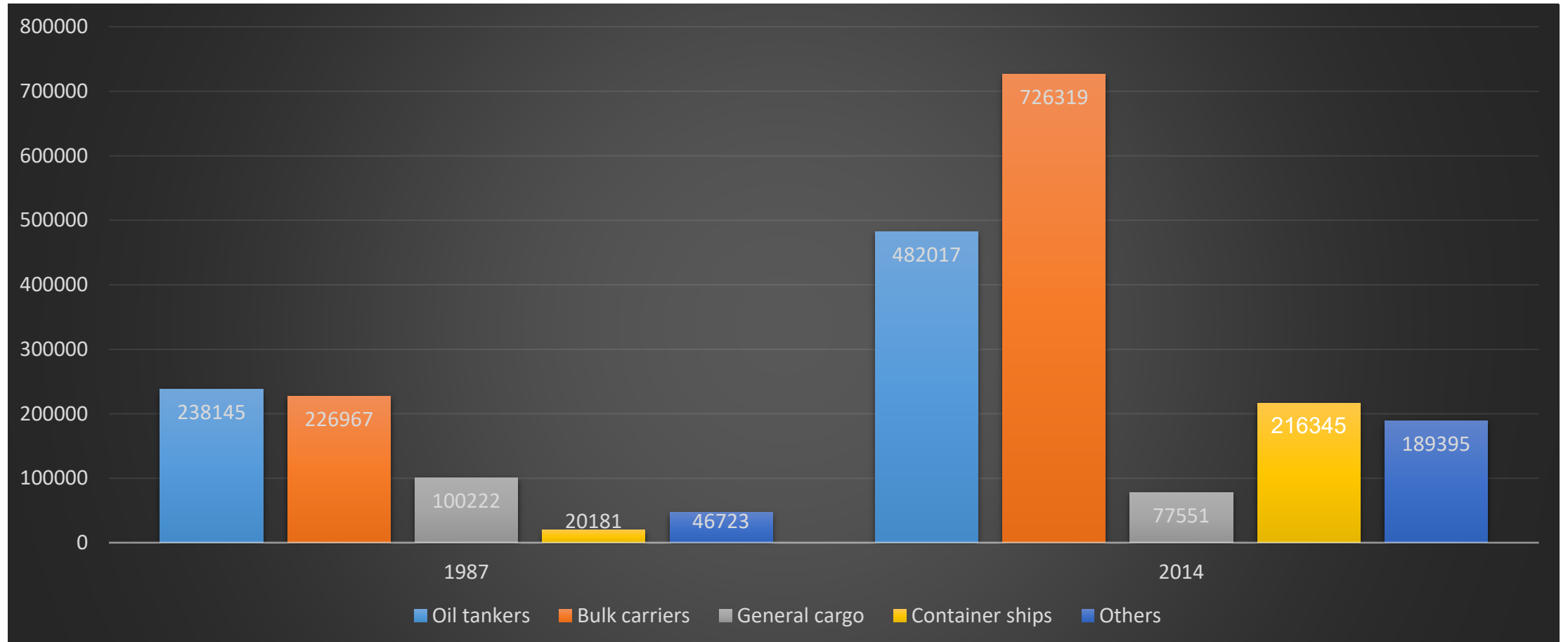
Shipbuilding by Country of Built, 2014

Measurement Gross Tonnage



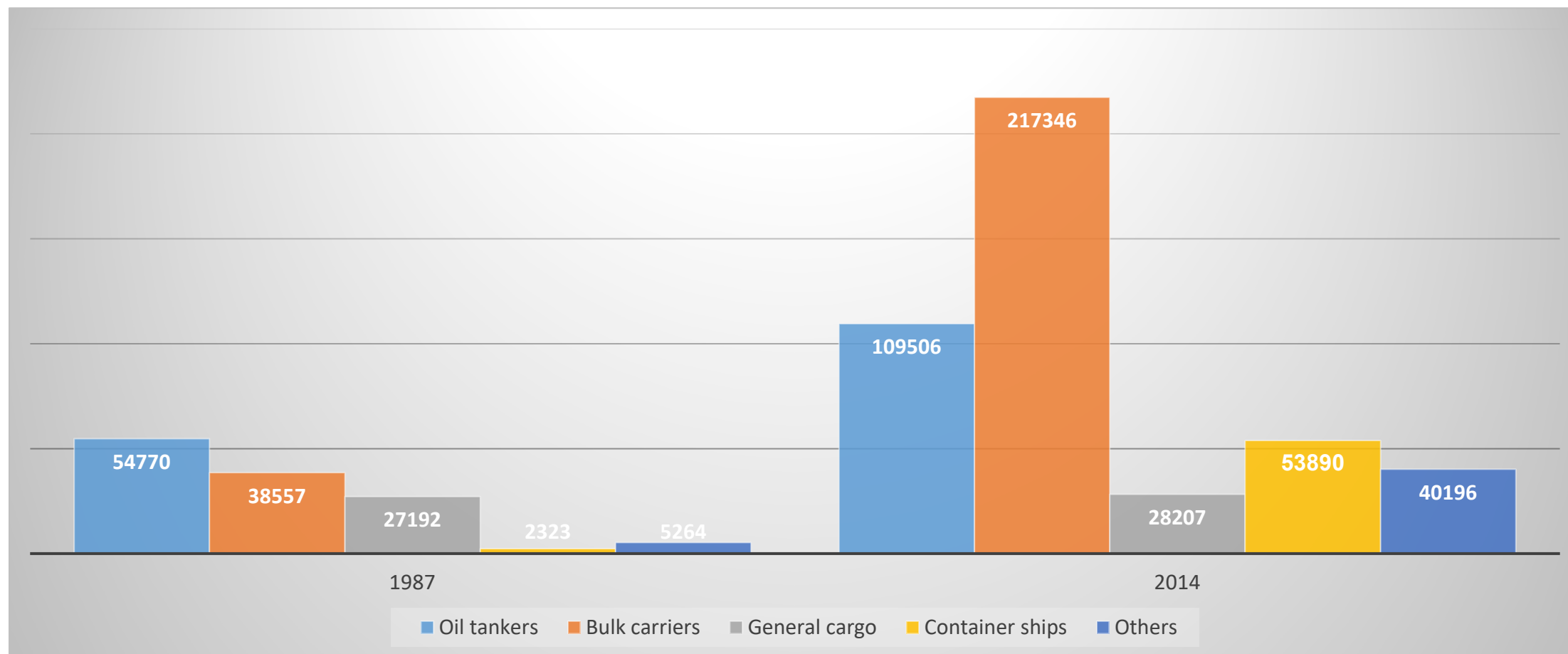
World Merchant Fleet by Type of Ship

1987 vs 2014 (Dead Weight Tons)



Asian Merchant Fleet by Type of Ship

1987 vs 2014 (Dead Weight Tons)



Typical shipbuilding disputes

44
42
40
38
36
34
32
30
28
26
24
22
20



Typical shipbuilding disputes

- Shipbuilding disputes can be usefully divided between pre-delivery disputes and post-delivery disputes.
- Pre-delivery disputes usually involve disagreements over the ongoing construction process, for example, whether or not the shipbuilder's work conforms to specifications, regulatory or class requirements or good shipbuilding practice.
- A builder may claim that the owner's requirements constitute upgrades or change orders that entitle the builder to increased compensation and extensions of time to perform.

Typical shipbuilding disputes

- On occasion, parties may agree to performance of contested owner demands, subject to post-delivery judicial or arbitral determination of whether the items were, in fact, required by contract, or constituted changes. Other pre-delivery disputes may require more immediate intervention in order to avoid delay or disruption in the shipbuilding process.
- More profound pre-delivery disputes involve the consequences of a party's insolvency or other barriers to performance, or the right of a party (usually the buyer) to terminate the contract based on the builder's failure to complete the vessel by a contractually-agreed date.

Typical shipbuilding disputes

- The resolution of these disputes will often affect not only the immediate contract parties, but also refund guaranties issued by those entities which underwrite the builder's obligation to refund installments of the contract paid by the buyer to the point of builder's alleged breach or failure.
- Post-delivery disputes often arise out of guarantee claims or the buyer's claims for indemnity based on third-party claims against the buyer by those not in privity with the builder.

Typical shipbuilding disputes

- Given that the ship is by then delivered to the owner or its order, the same pressures for expedited arbitration do not exist. And, in most cases, the refund guaranty is no longer at issue, while guaranty claims, if they are secured, are usually backed by smaller purchase price retentions and guaranties by engine suppliers and other major equipment manufacturers.
- Consideration should be given to the involvement of other persons who are not parties to the shipbuilding contract but who are critical to the process. Equity and debt investors have their own views on what is acceptable by way of dispute resolution.

Standard Form Shipbuilding Contracts

- Standard Shipbuilding Contract, adopted by the Association of European Shipbuilders and Ship Owners (“AWES”)
- Japanese Standard Shipbuilding Contract (“Jcon”) (English version)
- MARAD Form of Shipbuilding Contract
- Newbuildcon – Standard Newbuilding Contract BIMCO
- China Maritime Arbitration Commission (“CMAC”) Standard Newbuilding Contract (Shanghai Form) (English Version)

Typical OSV Disputes



Typical OSV Disputes

- Offhire
- Early Termination
- Consequential Damages
- Pollution
- Property Damage
- Personal Injury claims

Standard Form Offshore Service Vessel Contracts

- Supplytime 1989 and 2005
- Towcon 2008
- Towhire
- Generally the standard forms are a little more favorable to ship owners

Why Arbitration ?

Rules of evidence in arbitration

- Litigation
 - Rules of procedure are fixed
 - Oral hearings compulsory
 - Admissibility of evidence is governed by the Evidence Act
 - E.g. in order for documents to be admitted into evidence, the maker of the documents must be called as a witness, and be cross-examined.
- Arbitration
 - Generally, the procedure to be adopted in arbitration is for the parties to determine by agreement
 - Failing agreement, it is for the arbitrators to determine
 - General discretion on arbitrators to dispense with oral hearings unless requested by one party.
 - Arbitrators have the power to determine such matters such as admissibility, relevance, materiality and weight of any evidence

Drafting Arbitration Clauses

- A. Governing Law
- B. Seat of Arbitration

Preferred Forums for Maritime Disputes

- According to recently published statistics, there is no meaningful commercial shipbuilding underway in the United Kingdom, yet a large number of shipyard contract disputes are apparently decided by LMAA (London Maritime Arbitrators Association) arbitration under English law.
- As the concentration of shipbuilding projects has moved through the developed and then developing world over time, China, as a relative newcomer to this industry, has seen the greatest number of vessels built in the past decade.

Preferred Forums for Maritime Disputes

- Not many non-Chinese owners, if any, have agreed to arbitrate shipyard disputes under Chinese law under the rules of the China Maritime Arbitration Commission (“CMAC”).
- Also in the picture is Hong Kong and Singapore, promoting the use of their own arbitration. Even LMAA arbitrators are registering as arbitrators in HK and Singapore.

Malaysia as a forum for Maritime Arbitration



Latest developments in Malaysia

- Arbitration Act 2005 and the Arbitration (Amendment Act) 2011
- Kuala Lumpur Admiralty Court (Established in 2010)
- Kuala Lumpur Regional Centre for Arbitration (KLIRCA)
- Revised KLIRCA Arbitration Rules and Fast Track Rules 2013

The Kuala Lumpur Regional Centre for Arbitration **Sulaiman Building**



KLIRCA Fast Track Arbitration Rules and the KLIRCA Arbitration Rules

- **Number of Arbitrators**
- Unless the parties agree otherwise, an arbitration conducted under KLIRCA Arbitration Rules is heard by a panel of 3 arbitrators whereas arbitration under the KLIRCA Fast Track Arbitration Rules will be conducted by a sole arbitrator (cf. Article 4).

KLRCA Fast Track Arbitration Rules and the KLRCA Arbitration Rules

- Documents-only Hearing
- Under the KLRCA Fast Track Arbitration Rules, claims which are less than/unlikely to exceed RM150,000 (in a domestic arbitration) and USD75,000 (in an international arbitration) shall immediately proceed as a documents-only arbitration unless a substantive oral hearing is deemed necessary by the arbitrator upon consultation with the parties.

KLRCA Fast Track Arbitration Rules and the KLRCA Arbitration Rules

- Time Frames
- The time frames for submission of statements, hearings and the making of awards differ. Arbitration under the KLRCA Fast Track Arbitration Rules must be completed within a maximum of 160 days whereas arbitrations under the KLRCA Arbitration Rules are estimated to take between a year (365 days) to a year and a half (547 days) to be completed.

KLIRCA Fast Track Arbitration Rules and the KLIRCA Arbitration Rules

- Costs
- Arbitration under the KLIRCA Fast Track Arbitration Rules is more cost effective. Furthermore, the rules have been drafted so as to make the assessment of costs more predictable. The KLIRCA Fast Track Arbitration Rules comprises a schedule of Arbitrator's Fees which arbitrators must have regard for albeit are not bound by while fixing fees. Also, the costs of arbitrations under the KLIRCA Fast Track Arbitration Rules are capped. For documents-only hearings, costs must not exceed 30% of the total amount of the

KLRCA Fast Track Arbitration Rules and the KLRCA Arbitration Rules

- Evidence
- In view of expediency, the KLRCA Fast Track Arbitration Rules restricts the use of expert evidence or supplementary expert evidence. In order for such evidence to be adduced as evidence, the party wishing to do so must first request for permission or leave from the arbitral tribunal within 14 days after the Statement of Reply or service/exchange of expert reports have been delivered.



Malaysia a Viable Alternative

THANK YOU

Jeremy M Joseph

Email : jeremy@jnplaw.my | Mobile : +6012 3955 594