



THE MARITIME ARBITRATION: ISSUES, RECENT TRENDS AND COMPARATIVE PROSPECTS

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ABSTRACT

Alternate dispute resolution is used for getting speedy justice without going into the procedures of the Court. This form of dispute resolution is used by maritime people as it has various advantages to them such as keeping the confidentiality of their work, no tension of getting into the dispute of jurisdiction, no time taking procedures.

Arbitrators are also chosen by the people itself who have proper knowledge in this field, keeping in mind many other factors for choosing arbitrators. Many more such advantages and disadvantages of using this method will be discussed in the paper such as the fact that Arbitration was traditionally developed to give speedy and affordable justice to the parties, however it has lost its essence nowadays.

Although using judiciary as a form of resolution may on the other hand help in less expense to the parties. Therefore, advantages of judiciary as a method shall also be discussed. Maritime arbitration is different from the general method of arbitration that is used these days.

Many recent developments have been made in maritime arbitration such as proper

procedure for making counter-claims, more detailed statement of claims and statement of defects etc. These help in proper functioning and effective resolution of the disputes with less trouble to the parties involved.

KEY WORDS:

Alternate Dispute Resolution, Arbitration, Judiciary, Judicial Settlement, Maritime Arbitration,

INTRODUCTION

Alternate Dispute resolution methods had been developed for speedy and easy decision making, keeping in mind the burden of work on the judiciary. One of which is arbitration. In arbitration, disputes are resolved, with binding effect, by a person or persons acting in a judicial manner in private, rather than by a national court of law that would have jurisdiction but for the agreement of the parties to exclude it.¹ Arbitration has been a successful alternative to litigation for the maritime community for hundreds of years.² For example, organizations like the Society of Maritime Arbitrators have thrived as resources for alternative dispute resolution by adopting rules based in part on the Federal Arbitration Act (“FAA”) to achieve the goals of cost efficiency, speed and fairness.³ The advantage of using this method rather than litigation is that the parties involved are allowed to choose

¹ Mayer Brown, *An Introduction To Arbitration*, International LLP (Lexis Nexis).

² Lucy Martucci, *Using Principles And Policies Of Maritime Arbitration To Guide Responsible Parties In Oil Spill Claims Resolution*, Cardozo Journal of Conflict Resolution 251, (2012).

³ Ibid.



judge(arbitrators) and procedure of their own choice , which results in faster and burdensome justice. Uniformity in ancient international maritime law developed in response to inevitable disputes that arose in trade, in order to minimize surprises and support, rather than restrict, commerce.⁴ Nevertheless, Maritime Arbitration is somewhat different from the general arbitration in following ways:

1. It has some form of distinctiveness as far as sources of law are concerned, the arbitration agreement is usually included in contracts based on uniform forms drafted and periodically updated by maritime organizations such as the Baltic and International Maritime Council (BIMCO), the Association of Ship Brokers & Agents (ASBA) and the Japan Shipping Exchange (JSE): these are, among others, time and voyage charter-parties and other kind contract for transport of goods (e.g. bareboat charter agreements, contracts of affreightment), shipbuilding, ship repairing and ship scraping contracts, salvage agreements.⁵
2. The arbitrators make their decision by an alternative to International and National source of law which is the **lexMaritima** i.e. rules that have been evolved through the use by maritime community.⁶
3. Another difference is the object of the matters involved i.e. under maritime arbitration, the disputes are usually related to non-fulfilment of transfer of goods,

damaged goods, insurance claims, tort liabilities etc. These issues basically do not involve the arbitrators getting into proper factual or legal questions but rather demand the arbitrator's knowledge of history of maritime traders etc.

4. Usually this is the reason, maritime arbitration generally required the use of Ad Hoc arbitrators who have certain expertise and knowledge of the dispute in hand relating to maritime issues.
5. The choice of arbitrators is also based on an important aspect i.e. nationality. Generally, the disputes may involve the parties to be of different nationality. E.g. As in the case of collision at sea, so the arbitrators are required to be unbiased and not favouring a particular nationality rather than deciding on the basis of law.

ADVANTAGES OF MARITIME ARBITRATION

The advantages of Maritime Arbitration are classified as follows:

1. The parties can choose to avoid the procedural and structural characteristics involved in litigation.
2. Generally, the courts do not have judges that have experience in maritime disputes so it is likely that they will decide the matters in hand by applying general methods of law or the laws of their states etc. rather than applying the traditional customs of maritime.
3. Another advantage of using arbitration in these matters is that, if national courts are involved in solving the disputes it may result in biasness as one of the parties may get advantage from it.

⁴ Supra Note 2.

⁵Gregori, Marco, Maritime Arbitration Among Past, Present and Future, New Challenges in Maritime Law: De LegeLata et De LegeFerenda 329-349 (2015).

⁶ Ibid.



4. Using arbitration as a method of resolution may also prevent disputes regarding jurisdiction which are generally the matter in maritime disputes.
5. Another advantage is that, it may keep the confidentiality of matters involved.
6. The finality of the award, which implies the preclusion of judicial redetermination of arbitrated disputes and a general limitation of the right to judicial review granted by national regulations.⁷

Issues & Challenges Involved in Maritime Arbitration:

Although, the Maritime arbitration is very popular and advantageous method of dispute resolving, it also has some issues that are needed to be solved. These are:

1. The Maritime arbitration suffers from some procedural problem i.e. the arbitrators generally does not have that much power as compared to the judiciary, therefore some matters require the support from the judiciary.
2. Arbitration was traditionally developed to give speedy and affordable justice to the parties, however it has lost its essence nowadays. A recent survey on the use of international commercial arbitration conducted among a number of major corporations, across different industry sectors (including shipping and commodities trading), shows that while, overall, arbitration remains the preferred dispute resolution mechanism for transnational disputes, many respondents express concern over the issues of costs and delays of international arbitration proceedings, as well as fear of

“judicialisation” which results in a procedure more and more sophisticated and “regulated”, with control over the process moving towards law firms and away from the actual users of this process.⁸

A famous case involving maritime arbitration is **Mauritius v. United Kingdom**, which involved the issue of the Government of UK to create a Marine Protected Area in British Indian Ocean Territory. An arbitration proceeding was held on this matter between the two countries. The government of Mauritius challenged this action of the UK government on the ground that there is involvement of Sir Christopher Greenwood in the proceedings which can result in biasness as he was the foreign and Commonwealth legal adviser of UK. Although, this claim was not accepted by the arbitration tribunal. Another dispute that arose in the proceedings was regarding jurisdiction. The matter was finally resolved in 2015 by announcing the award that the marine protected area cannot be made by the UK Government as it was not in accordance with the provisions under Article 2(3), 56(2) and 194(4) of the convention.⁹

Another case is, the case of **Philippines v. China**, relating to the South China sea and four issues were raised in the proceedings. Firstly, the challenge was regarding the rights over the South China Sea, Secondly, issues relating to entitlements of certain maritime zones, Scarborough Shoal and Spratly Islands, lawfulness of China’s actions in the South China sea were also

⁷ Supra Note 5.

⁸ Supra Note 5.

⁹ Supra Note 5.



challenges, lawfulness of action of China by restricting the access of Philippines at Second Thomas Shoal.¹⁰ The tribunal by the use of Satellite imagery etc. found that China has no entitlement to any maritime zone. It further found that China has breached Articles 77(25) and 56(26) of the conventions and Lastly, the Tribunal did not find it necessary to make any further declaration, owing to the fact that both the parties are already parties to the Convention and are already obliged to comply with it.¹¹

Advantages of Solving Maritime Matters Through Judiciary:

Solving maritime disputes through judicial process can be done under three courts of law. These are:

1. International Court of Justice (ICJ)- It is the major international judicial organ which has fifteen members or judges, elected separately by the U.N. General Assembly and the Security Council for a term of nine years.¹²
2. International Tribunal for the law of the sea- Particularly for the settlement of maritime disputes, the International Tribunal for the Law of the Sea is one of the notable creations established in October 1996 with its seat in Hamburg, Germany.¹³
3. Commission on the limits of the continental shelf-Commission on the

limits of the continental shelf has been established under Annex 2 of the LOS Convention, the Commission consists of 21 members, experts in the field of geology and physics.¹⁴

The decisions made by an arbitrator may often be put to appeal in front of judiciary and thereby the decisions are not as strong as the verdict of a judge. In Judicial settlement, no extra expenditure for the appointments of judges of court or tribunal is necessary like arbitration.¹⁵ Judicial process does not involve high expenses and high fees paid to the Judges and court registrars, together with rental expenses of premises in which proceedings are carried on; all costs of the ICJ are borne by the UN.¹⁶ In this process there is no scope of making delay regarding appointment of Judges or member of court or tribunal like arbitration because the court or tribunal is established institution.¹⁷



RECENT DEVELOPMENTS IN MARITIME ARBITRATION

New Rules of The Maritime Arbitration has been development in 2017 by The Maritime Arbitration Commission. The summary of these rules are as follows:

1. **Statement of Claims:** The statement of claim should be more informative e.g. Contact details of parties, phone no., email for urgent communication etc. Previously the time for making any changes in the

¹⁰ <http://rsilpak.org/case-brief-on-the-south-china-sea-arbitration/>

¹¹ Ibid.

¹² Md. Monjur Hasan, *A Comparative Study between Arbitration and Judicial Settlement as Means of Maritime Boundary Dispute Settlement*,9 BEIJING LAW REVIEW, 75-86 (2018).

¹³ Ibid.

¹⁴ Supra Note 9.

¹⁵ Supra Note 9.

¹⁶ Supra Note 9.

¹⁷ Supra Note9.



statement of claims was 30 days, which was reduced to 15 days by the new rules.

2. **Statement of defence:** The content for the statement of defence is also different now, a new procedure was developed for submitting counter-claims and set-offs.¹⁸
3. A proper procedure was developed for calculating the amount of claim for the parties and the fees amount to be calculated by 3% of the total amount claimed money.
4. Recent rules also involve that if different disputes are governed by same arbitration agreement then they can be consolidated together in order to save time and money. The only point is that they should be same in merits and all parties to the disputes should agree for the proceedings to be consolidated.
5. Third party making no claims against the parties to the arbitral proceedings may be involved or joined in the arbitral proceedings provided that there is an arbitration agreement covering parties to the proceedings and the third party, or all parties to the proceedings and the third party agree to such effect.¹⁹
6. The tribunal from the very beginning had the rule of 2 arbitrators, according to the new rules it came about that if the claim of a dispute is not more than USD 15,000 then one arbitrator should solve the dispute.
7. The introduction of an appointing committee was also part of the new rules, according to which if a party fails to decide who should be an arbitrator for

their dispute, the committee shall decide the same for them. The Committee shall also decide on matters of termination of arbitrators.

8. In accordance with the new MAC Rules, the confidentiality requirements are extended not only to MAC and its staff, and arbitrators, but also to the parties, their representatives and other persons involved in arbitration.²⁰

CONCLUSION

The issues involving maritime disputes can be solved by two ways i.e. judiciary and arbitration. These differ from each other in various aspects such as number of judges, parties spend more money in arbitration, arbitration decisions are arbitrary in nature while court's decisions are binding in nature, arbitration procedures are governed by agreement while court procedures are governed by law, judicial method is more time consuming etc. Although both have their advantages and disadvantages, maritime arbitration is more popular in usage than the other. It has many advantages such as confidentiality of matters, prevention from biasness, does not involve jurisdiction issues etc. While using judiciary as a method for solving issues on the other hand may involve less expense as the expenses are generally borne by the government. Many recent developments have been made in maritime arbitration such as proper procedure for making counter-claims, more detailed statement of claims and statement of defects etc. These should be properly complied with for the justice to be served timely and with efficiency.

¹⁸DarriaZhdan-Puskina, *Review of new Rules of The Maritime Arbitration Commission at the Russian Chamber of Commerce and Industry*, REDSTONE CHAMBERS (2017).

¹⁹ Ibid.

²⁰ Ibid.