Conflict and compromise – maritime dispute resolution

Two or more parties with connected yet competing financial interests disagree on the financial outcome of a particular set of circumstances. How can they resolve their conflict?

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In shipping, the parties in disagreement are most often connected by some form of contract, for example a charterparty or a contract for services. Disputes also arise where the parties are connected only by the event itself, such as a collision or contact damage between a ship and the berth or other third-party property.

Shipping disputes can range from simple matters solved quickly through amicable discussions to complex, multi-jurisdictional legal actions worth millions of dollars. The following is an overview of the different methods available for solving disputes, including their advantages and the situations for which they may be best suited.

Factors influencing the selection of dispute resolution method

The methods through which such disputes are resolved can vary considerably and their success is dependent on various factors, including:

- typeof dispute;
- amountin dispute;
- relationshipbetween the parties;
- geographical locationof the parties;
- expectationsof the parties;
- involvement oflegal representatives;
- influence ofthird party interests, such as insurers; and,
- mindsetof the parties – commercial or legalistic?

The majority of disputes evolve from an underlying contract in which an agreed dispute resolution mechanism is precisely spelled out. One example is the express reference to New York arbitration in Clause 24 of the Asbatankvoy charterparty, for the resolution of ‘ *all differences and disputes*’ . The parties are bound by this unless they expressly agree to solve the matter through another method.

P&I clubs and other marine insurers will be directly involved in the resolution of maritime disputes for covered claims, either on behalf of their members and clients or through the right of subrogation. All International Group clubs offer Defence insurance, which is legal cost cover. When two International Group clubs are on both sides of the dispute, the negotiations may be handled club to club.

Direct negotiation

The majority of small to moderate disputes are solved through direct negotiations between the parties involved, without the need to involve any kind of formal dispute resolution mechanism. Direct communication saves costs. If both parties have been constructive and pragmatic in their approach, the long-term business relationship will be maintained or even enhanced.

Direct negotiations are most likely to be successful when the parties have a similar business culture, the amounts at stake are modest and there is little or no influence from third parties. Large differences in the parties' expectations or the way they conduct business can lead to direct negotiations breaking down, as can significant intervention from third party interests or legal representatives. Negotiations attempted before one or both of the parties have a full idea of their own position may lead to a reluctance to compromise, as the true value of the compromise is not yet known.

Blind-assisted negotiation

In some cases, the parties may seek to clarify their respective positions with the help of legal advisers either prior to or during direct negotiations. In an effort to preserve the informal nature of the negotiations, the fact that a party has involved legal advisers may not be disclosed to the other party.

One key advantage of this approach is that the involvement of legal advisers injects some objectivity into the arguments, allowing the parties to make more reasoned decisions when negotiating a possible solution. A further advantage is that the respective legal advisers will be well placed to carry the dispute over into an arbitration or court case in the event the direct negotiations fail. Some companies may even make the consultation of internal or external legal advisors a mandatory part of their dispute resolution process.

Costs must be considered and legal advisors should be reminded that their involvement is there to assist in achieving a pragmatic solution, not to pick apart the opponent's case and entrench positions. For disputes that fall within Gard's Defence Cover, in-house Defence lawyers assist, saving the member considerable legal fees.

Neutral evaluation

A step up from bipartisan negotiations can be to agree to a third party expert, legal or technical, to analyse the merits of the dispute and issue a neutral evaluation of the potential outcome should the case go to court or arbitration. The parties can agree that the expert's conclusion is binding or non-binding. If it is to be non-binding, it is important that the parties understand that the expert's evaluation is 'without prejudice' and in aid of confidential settlement negotiations. The main advantages of a neutral evaluation is that it saves costs and gives the parties an idea of how the dispute is likely to end and can thus guide their expectations. Neutral evaluation can be particularly effective where the essential facts are agreed and there is just one or two distinct legal or technical issues in dispute preventing the parties from settling.

Early intervention

This is a new method of dispute resolution where a neutral third party is appointed by both parties early in the dispute to assist the parties in mapping the way forward and in clarifying the real issues at stake.

The earlier an intervention takes place, the greater the potential cost savings. Most cases are settled, but often only after significant costs have been incurred in preparing for arbitration or legal action. For complex cases involving multiple parties and contracts, the savings will be even more apparent. Even cases that do not settle during the early intervention process may benefit, as the dispute will likely have been narrowed down to the issues which must be addressed in other fora.

Mediation

Abraham Lincoln when practicing as a lawyer once said:

" *Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser — in fees, and expenses, and waste of time .*"

Mediation is facilitated negotiation in which the parties to the dispute voluntarily agree to bring in a neutral third person to assist in reaching a compromise and avoiding litigation. The mediator does not take sides but helps the parties understand and focus on the issues at hand. Mediators can be professionals with formal training and long commercial experience, although in practice, anyone can act as a mediator as long as the parties agree.

Mediation is voluntary and confidential. The parties may agree to mediate at any point in the dispute resolution process. The format is not fixed but will usually involve a mixture of same-room discussions and 'break-out' sessions where each party retires to a separate room in order to discuss progress. The mediator will then go back and forth between the two in an attempt to bring about conciliation.

Mediation can be cost-effective compared to the more formal approaches of arbitration and court litigation. The success of mediation depends heavily on the willingness of all parties to avoid formal legal processes and make concessions in order to settle the dispute. It is generally not suitable for addressing points of principle or disputes where positions are heavily entrenched. Even parties with strong cases will be expected to compromise to conclude the matter. As Abraham Lincoln warned, the winner in litigation can be the ultimate loser. A good mediator will point out the losses in the commercial relationship by a continued conflict, not to mention management time, and irrecoverable expenses.

Litigation

The courts provide a public forum to resolve disputes through litigation. Judges are supposed to be impartial, free from political influence and cannot have a vested interest in any of the disputes before them.

The involvement of a particular court may depend upon a multitude of factors, including where the dispute arose, the location of the assets involved, the location of the owning or insuring entities involved, or, where permitted, by a law and jurisdiction agreement. The last factor is an important one, as the majority of parties seeking to resolve their differences in the courts will agree to defer to the courts and jurisdiction of one of the better known maritime nations, such as the United Kingdom. This is largely due to the established body of maritime law and the availability of maritime lawyers and other experts. The choice of jurisdiction can be part of a wider strategic move in the claims handling process, especially for collision claims where limitation of liability may be a consideration.

The key concerns of parties facing a potential courtroom battle are well known. The high costs of bringing a case to court may be prohibitive and cases may take years to mature, going through several appeals. However, one example of recent reforms aimed at cutting the cost and time of legal action is the introduction of rules regarding the exchange of electronic evidence in English law founded collision actions. In cases where electronic evidence, such as VDR data is available on both sides, the judge may dispense with expert witness evidence and even oral hearings, dramatically reducing the case handling costs and risks and making the Admiralty Court in England an attractive forum for these kinds of disputes.

For important points of legal principle, especially where the outcome has large financial consequences, litigation may be the preferred option.

Arbitration

Arbitration is a formal dispute resolution mechanism with arbitrators replacing judges. It is frequently found in maritime agreements which will refer to common seats of arbitration such as London, New York or, increasingly, Singapore.

The number of arbitrators will normally be agreed in the contract, and these arbitrators will be appointed subject to a set of rules. There is limited scope for appeal to a court so the losing party may have little scope for a judicial review.

Some jurisdictions have their own specialised maritime arbitration associations, the best-known being the London Maritime Arbitrators Association (LMAA). It has its own set of procedural terms that can be incorporated into dispute resolution agreements. These include special provisions for small and intermediate claims.

Arbitration is popular in international trade agreements because arbitration awards are easier to enforce than court judgements cross-border.

The cost of arbitrations vary widely. An arbitration tribunal has no power to enforce interlocutory measures such as injunctions, making it easier for parties to take steps to avoid enforcement of an award, such as transferring assets offshore. It is also easier for a stubborn party to slow the process down as arbitration may not be subject to the same rules of case management as the courts.

Conclusion

Deciding on the most appropriate method and forum for dispute resolution requires careful consideration of the costs and risks. Although the applicable law and forum will often be agreed in an underlying contract, the parties together are generally free to choose a different method of dispute resolution. It is not unusual to see disputes working their way through a variety of different forums, starting with informal bipartisan negotiations before moving on to mediation when progress stalls, and ending before a court or arbitration tribunal. Indeed, some contracts explicitly provide for a staged approach to dispute resolution and some courts, notably the US District Courts, require pre-litigation mediation.

Whether the matter is covered under Hull and Machinery, P&I or Defence policies, Gard is here with the technical and legal expertise to assist in determining the best option for dispute resolution.