KISH P&I CLUB

Information Updates KISHPNI-IU-10-2021
(Arbitration & Court Proceedings in Maritime Disputes)

Maritime Jurisdiction:

The term "jurisdiction" is defined as "the power of a court to hear and decide a case or make a certain order". When combined with the word "maritime", however, the term "maritime jurisdiction" gains a wider meaning. It does not just refer to the judicial power of a "court" to decide a "case", but the judicial, legislative, and executive power of a "State" to have control over a body of water, and over persons and living and non-living things on and under the water. For example, whether or not a State can arrest a foreign-flagged vessel in its territorial waters (executive power), prosecute a crew member of the vessel in its courts (judicial power), regulate navigation of all vessels within a particular body of water (legislative power), or have sovereign rights over the living and non-living resources therein, are all matters of "maritime jurisdiction".

The rules governing States' maritime jurisdiction are determined by international law, in particular, the United Nation Convention on the Law of the Sea (UNCLOS). Any dispute between States regarding their maritime jurisdiction over a body of water or persons or things on or under the water, (failing agreement through negotiations) should be resolved by the International Court of Justice located in The Hague or by special tribunals established under the relevant provisions of UNCLOS. The concept of "maritime jurisdiction", therefore, is closely associated with the international law of the sea.

Maritime Arbitration:

A maritime dispute (or any other dispute for that matter) may be resolved in two ways: inside or outside the courts. When it is resolved through the courts, it is called "litigation"; and when outside the courts, it is called Alternative Dispute Resolution (ADR). The most effective form of ADR in international trade, is "arbitration" where the parties agree to submit their existing or future disputes to appointed arbitrators in an arbitration centre. London and New York are the dominant traditional maritime arbitration centres, though China and Singapore are attracting more and more cases in the Asia-Pacific region.

Arbitration is the dominant method of settling disputes in international trade and is usually preferred to litigation due to the following reasons.

First, since the parties may (and often do) come from different legal and cultural backgrounds, it is hard to find a court in a State that has jurisdiction over their dispute and perceived by both parties to be neutral. Even if determining such a court is straightforward, the parties will not have control over the time, place or the procedures of litigation. Arbitration, on the other hand, allows the parties to "choose" the time, place and length of arbitration, and also to choose an arbitration centre and third-party arbitrators that the parties both perceive to be neutral and efficient.

Second, unlike litigations, arbitrations can be confidential and the parties are not obliged to have their commercial disputes (especially those with highly sensitive financial or technical details) aired in public.

Third, it is usually easier to enforce an arbitration award in a foreign jurisdiction than it is to enforce a national court order.

This is because most States are parties to the New York Convention that requires the national courts of contracting States to enforce arbitration awards that are made in other contracting States. Finally, arbitration is usually cheaper, quicker, and far less complex than litigation.

Main Differences

A few important distinctions can be drawn between "maritime jurisdiction" and "maritime arbitration".

First, while maritime arbitration involves resolution of "civil" cases and disputes, maritime jurisdiction covers both civil and "criminal" matters. For instance, a criminal case involving a crew member on a vessel can only be heard and decided by a competent court and not through arbitration.

Second, maritime arbitration cases involve "private" parties only whereas parties to a maritime jurisdiction case are "States" (countries) rather than individuals or companies. Third, under maritime arbitration, disputes are settled "outside the courts" in arbitration centres, but disputes regarding maritime jurisdiction are heard and decided in a "court", the International Court of Justice.

Finally, maritime arbitration cases are usually governed by private law but maritime jurisdiction disputes fall within the realm of public international law.

Clarification

It should be noted that the term "jurisdiction" independently and without the adjective "maritime" before it, has a specialized and narrower meaning in the context of carriage of goods by sea where there is no arbitration clause in the contract of carriage. In such cases, although the parties are generally still free to opt for arbitration, there is no widely accepted international convention that determines which court in which State should have jurisdiction. The Rotterdam Rules contain Articles governing whether a particular court has "jurisdiction" and if so, how a claimant may commence court proceeding. However, it seems unlikely that the Convention will ever come into force. The Hague Choice of Court Convention did come into force but is not widely ratified and the issue therefore remains.

Thus, if "arbitration" is contrasted with "jurisdiction" in the context of maritime contracts, then there will be only one important difference: arbitration settles the dispute outside the courts but jurisdiction refers to a situation where the claimant seeks to resolve the dispute through a competent court.

Arbitration is usually the better choice for the reasons mentioned above.

*** *** ***

KISH P&I CLUB

There has always been the question amongst maritime transport parties and operatives as to whether "arbitration" or "approaching legal proceeding" in a court will suit their specific case. There are various conceptions & ideas present; the following TEN (10) notes will try to shed some light on those views.

1) Arbitrations are mainly divided into two types: ad hoc arbitrations and administered arbitrations. In ad hoc arbitrations, the arbitral tribunals are appointed by the parties or by an appointing authority chosen by the parties or else the administrations may oblige the parties to enter arbitration processes.
On the other hand; practitioners see a difference between ad-hoc arbitration, (i.e. a procedure designed by the parties themselves and/or by the arbitrators, apart from the existing legal provisions) and institutionalized arbitration (i.e. a private institution providing special arbitration rules and costs tariffs). Actually, both systems are adopted, without meeting practical differences as far as the procedure itself is concerned. There are countries, where ad-hoc arbitration is not en vogue (routine/fashionable) or even not allowed, amongst them being the Mainland China.

2) The main difference between arbitration and litigation law (approaching the court) is that court is involved in the case of litigation, as it is a lawsuit, whereas, in arbitration, a settlement between the parties is done outside of court.

3) It is often alleged that arbitration
–is more specialized than an ordinary court procedure,
- costs less than a court procedure, and
- lasts less long than a court procedure.
However, more important, and thus finally decisive, appear to be the quality, the flexibility and the conduct of the arbitration procedure practiced in the place of dispute.

4) Procedures: While a court is in existence before a legal dispute arises and has its own procedures & regulations for entering jurisdiction procedures, the parties to that dispute have to accept an already existing procedure as well as judges already being in their place. Admittedly, there are specialized courts for special disputes. However, in arbitration, from the very beginning, a party itself may appoint an arbitrator who comes from that particular trade which has brought about that kind of dispute, which is the kernel of the party's own dispute. That is why often a "commercial man" is appointed as an arbitrator. Such an arbitrator may suggest to the parties his/her own procedural rules being in line with his own commercial experience, and which are apt for solving the dispute, or to apply the rules of one of the specialised arbitration institutions.

Often, arbitrators invite the parties to a preliminary meeting where a detailed time table is discussed and agreed upon. In that meeting, arbitrators occasionally suggest how many written pleadings may be submitted by the parties (for instance: at first claimant, then respondent, and then claimant again commenting on the arguments raised by respondent & so on). In a way, this may limit the freedom of the parties and one may not forget the fact that the arbitrator, leading the proceedings, has the authority to suggest to the parties to extend or to shorten their submissions.

5) Terms of reference & evidence presentation: As an example; there was a Paris arbitration where it took about one year before the parties finally agreed on their Terms of Reference. It is also uncommon that parties' lawyers, once arbitrators have been appointed, before the proceedings proper really begin, undertake long lasting searches for collecting evidence, for instance for interviewing witnesses. In some countries, this is being done well before the decision was made to start proceedings. Future witnesses are not then interviewed. There are countries where, occasionally, one spoke of “having instructed the witnesses”. Another problem is discovery. In some places, neither judges nor arbitrators are used to order that beforehand all papers are submitted which might be of interest. It rather is a matter for the parties to present the documents they are relying on. In case a party fails to do so, the arbitrator may order that party to act. Of course, the tribunal may draw its own conclusions once a party fails to submit certain documents. It is by no means a task for arbitrators to sort out the documents a party is relying on.
It often happens that parties present too many means of evidence, even such that, later on for the decision of the tribunal, did not play a role at all. Once, as stated by an arbitrator; in a London arbitration, each of the arbitrators received from claimant 56 letter-files. During the hearing, they stood in bookshelves behind; and when during the hearing reference was made to a particular document, got up to take that document out from the relevant file. At the end, quite a number of these files, and parts of many, were even not referred to by the parties and were not used at all by the tribunal for deciding the case and, in fact, definitely had not been needed for doing so. The parties, of course, are free to comment. Differently in some countries, it is the arbitrator who actively leads the proceedings, by directing the course of the debate, by asking questions, by referring the parties to particular factual aspects or to particular legal aspects (for instance even to what a party might have overlooked, but which, in the arbitrator's opinion, could be relevant for deciding the dispute). Further on and even more important is the fact that the arbitrators usually follow the maxim: “Iura novit curia”: the courts do know the law.
This is a doctrine providing that, because a tribunal is presumed to know and apply the law, it will be accepted by the courts if necessity arises.

6) Commenting & arbitrating: An arbitrator will, in the course of the proceedings, build his/her own views on the case. Meaning that he/she comes, in his/her mind, step by step to the conclusion as to which relevant facts & legal reasons, are the base for his/her decision, and which are not. As already mentioned, the tribunal decides which means of evidence are relevant. A certain technic how to structure the case, which a lawyer has learned in university learning times, or during further legal education. In other words: He/she considers which legal rule (either contractual provision or statutory provision) might justify the claim (or not) and which are the facts presupposed by that rule. That is what “commercial men” would learn by practicing.

7) Customarily, two or three arbitrators act in a case. Some institutionalised arbitration rules so provide expressly that how many arbitrators are to decide the case, with - what should not be forgotten to mention in the applicable rules - the expressly provided possibility for them to appoint another arbitrator once they are unable to find a common decision, either procedural order or award. One reason for this might be that the shipping circles accepting these Rules in most cases do know each other quite well, among them in particular the arbitrators, so that consequently no risk exists of partial opinions being expressed. In many international cases; it sometimes appears to be preferable to have three arbitrators, because, possibly, inter alia, the three arbitrators had not met before, thus not knowing each other. One never is sure of a surprise. When speaking on the number of arbitrators, would have to mention multiparty cases. Many procedural rules provide that in such cases the multiple claimants as well as the multiple respondents both have to appoint one arbitrator only.

In this connection, should also mention cases where a chain of contracts exist; under each of them the same legal issue is disputed. To give an example: A ship-owner sued his time charterer for damages suffered by his ship during the performance of the contract; the time charterer took recourse against his sub-charterer and this one took recourse against the stevedore which in fact had caused that damage, all this happening in the same one process. In the arbitration which took place in New York, all parties had appointed arbitrators except the sub-Charterer which, with the stevedore, had not agreed upon arbitration. The sub-charterer, therefore, available in the States, opened court proceedings against the stevedore who finally was held to join the arbitration proceedings. In one strike the liabilities under four contracts were dealt with.

8) Under some countries’ legislations; whether a judge or an arbitrator, in the same case, they may act as conciliator/mediator. Different opinions have been published. Some laws strictly provide that the mediator, if the mediation fails, cannot act as an arbitrator. Leaving it up to the parties to a conciliation/mediation procedure to agree that once the conciliation has failed, the conciliator may go on as arbitrator.

9) Another aspect, with regard to arbitration rules, is the following. It often happens, that at the beginning of the oral hearing the arbitrators suggest to the parties to discuss and to sign a protocol which contains some additional procedural rules, which so far might not be contained in already existing pre-formulated provisions. Such are for instance, as the case may be: The parties confirm that − the dispute is covered by the arbitration clause of their contract, − they are in agreement on the appointment of the arbitrators, − all claims and counterclaims (if any) are covered by the arbitration clause- etc. Such agreements may help to avoid future disputes on procedural issues.

10) Time consumed: It appears to be impossible to even guess which time is consumed during an arbitration in comparison with the length of a court procedure. Various reasons can be given: Applications of the parties counsels' to prolong certain time limits, availability of witnesses and experts, necessary discussions amongst the arbitrators & the complexity of the case. One relative advantage for the arbitration process, of course, is that there is no possibility to appeal against an award. It is understood that arbitrators are obliged to conduct the proceedings expeditiously and to render their award within a reasonable period of time. It should be added that some arbitration rules oblige the arbitrators to render their award within a certain period of time. Some of them mention that the secretariat of the institution involved may prolong the available time. We all know that court cases may be prolonged almost limitlessly.

Conclusion:

A) **It usually is alleged that arbitration is more specialised than an ordinary court can be. This statement, in general, can be confirmed.**

B) **It is also alleged that arbitration costs less than a court procedure. This does not appear to be always correct. In fact, the fees charged by a court of first instance are much lower than arbitration costs, compared with the fees charged by an arbitration institution (if any) and by the arbitrators. But court charges of course increase considerably once the first instance is followed by a second instance (court of appeal) and by a third instance (e.g. Federal Court), not to mention the possibility of a further appeal with the High Constitution Court , etc.**

C) **Arbitration proceedings may last relatively long in comparison with a first instance court case. However, this conclusion changes once a court of appeal is called upon or even by the Federal/High Court. In other words, it very much depends on the development & circumstances of the case.**

D) **When comparing the court procedure with the arbitration procedure, all depends on what is aimed at by a party before deciding where to go. To give an example: If an arrest order is wished to be obtained; the available court procedure together with its decision most probably is preferable to a corresponding order of an arbitration tribunal; however, an arbitration procedure might be more appropriate for say an international intellectual property (material) argument or in many carriage contract/Charter party disputes.**