Guest Column

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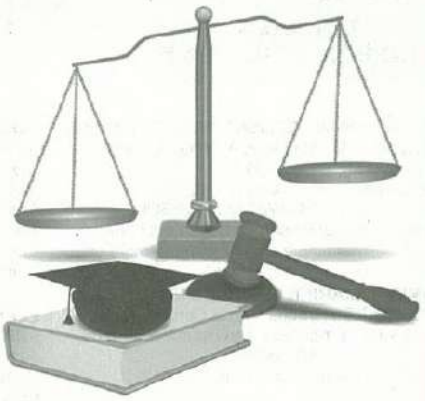

Mediation Or Arbitration - In International Commercial Disputes

Arbitration and Mediation are both alternate ways of resolving disputes other than litigation that may involve considerable time, effort, and money. Although both Mediation and Arbitration can be construed as Alternate Dispute Resolution (ADR) there are differences in their approach and enforceability, especially in the context of international commercial disputes in shipping.

In mediation, the mediator, who is a neutral third person is chosen by the parties to the dispute. There is more flexibility in mediation as the parties are directly involved in the discussions. Although a mediation procedure may vary depending upon the nature of the dispute, the most commonly adopted procedure followed may go this way- each party meets the mediator separately with a summary and submission of vital documents, followed by a joint meeting of the mediator with both parties. In this meeting, the mediators role in assisting resolve the dispute will be set out and each party may present their side of the issue and what they intend to achieve by mediating. The mediator may then talk to the parties separately and if there is a promise of settlement, he will facilitate the process and draw up a settlement agreement.

Shipping contracts may or may not have a mediation agreement incorporated. Shipping contracts may be very complex wherein the parties may include detailed dispute resolution clauses that may include mediation, arbitration, and even litigation. These are tiered clauses and have to be drafted and interpreted carefully to give effect to what the parties actually intend. Are these clauses that may state mediation as a precursor enforceable, will depend totally upon again, the intention of the parties and whether they are reflected effectively in the mediation agreement. In Wah v Grant Thornton Hilyard J says

"... The court has been in the past, and will be, astute to consider each case on its own terms. The test is not whether a clause is a valid provision for a recognised process of ADR; it is whether the obligations and/or negative injunctions it imposes are sufficiently clear and certain to be given legal effect."

The difficulty here is- in that if the mediation is enforceable then can arbitration be commenced without mediating or is there an option or flexibility in the procedure? Will then the arbitrator have jurisdiction? Ultimately the meaning lies in the words that needs to not only be drafted very carefully but also clearly and unambiguously set out the parties intentions.

Arbitration is more structured and follows the procedure as enshrined in the statutory provisions. The arbitrator acts in the place of a judge and the parties follow the procedure under the relevant Act. The Arbitrators are chosen and paid by the parties. The fact that the parties have agreed to arbitrate means that they have agreed to abide by the decision of the Arbitrator reached by means of a final award. The arbitration award is enforceable and is seen to work well in shipping disputes that may cover various parties in several jurisdictions. In view of the certainties and complexities, shipping disputes are more often than not submitted to arbitration rather than mediation.

Arbitrations are conducted in the event of the existence of a valid arbitration agreement that may be a part of a charter party, bill of lading, or sale contracts. English law does recognise the concept of an implied agreement but not as a normal course but rather only where necessary. In Almare Societa di Navigazione S.p.A.v. Derby and Co. Ltd. (1989) the dispute was with regards to cargo shortage under a bill of lading. Arbitration was invoked by claimants and the proceedings continued for 4 years, when the respondents claimed that the arbitrator did not have jurisdiction. The respondents contention was based upon the fact that the claimants were not a party to the bill of lading contracts. The arbitrators ruled on their own jurisdiction and held that although the claimants were not a party to the bills of lading, the parties had by their conduct conferred jurisdiction.

The question arises then whether especially in international commercial shipping contracts would it be preferable to mediate or arbitrate? Mediation is simpler in terms of procedure, flexibility, involvement of the parties and the freedom of the parties to accept or not accept the final outcome. However, the parties may not wish to submit to a formal albeit flexible procedure such as mediation if they in the first place thought that the complex issues could have been sorted out amicably. And besides, to mediate may result in incurring additional expenses and unnecessary waste of time. Arbitration has been seen to be offering a more attractive option lacking the rigidity of the courts but ensuring an award which is enforceable and effectively challengeable. With changing times and perceptions, a combination of both the methods seems more and more attractive. A multi-tiered ADR agreement which is flexible in its approach without imposing strict diktats may provide the desirable result.

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