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## **Resolving Maritime Disputes**

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It is not unusual for parties to a maritime contract such as a towage agreement or vessel charter, to have a dispute. This article addresses the alternatives for resolving such disputes in ascending order of cost and inconvenience.

### **Face-to-Face Meeting**

The least expensive and perhaps least used means of resolving a dispute is a face-to-face meeting between the parties. Some maritime contracts actually contain a provision requiring the parties to make a "good faith" effort to informally resolve any dispute before resorting to other dispute resolution methods.

The parties should select a neutral meeting place (i.e. not one party's office), and bring all relevant documentation including invoices, logs, photos, charts and/or statements, as appropriate, to the meeting. Ample uninterrupted time should be allowed for the face-to-face meeting to permit an adequate review of the disputed issues and the documentation each party has brought.

A dispute is more likely to be resolved when the issues can be addressed with specifics not merely discussed in the abstract. The agenda for a face-to-face meeting should always include a realistic assessment of the costs and delay associated with the alternative means of resolving the dispute.

The advantages to a face-to-face meeting are the minimization of attorneys' fees and costs and the opportunity for a prompt resolution of the dispute, perhaps preserving the parties' business relationship. The disadvantage is the potential disclosure of information that might not otherwise have been disclosed.

### **Mediation**

Mediation involves the participation of a neutral third party, such as a mediator or facilitator, in the dispute resolution process. The parties must, of course, jointly choose the mediator. The parties are usually represented by counsel in the mediation process.

There are different types of mediators. A mediator can be an attorney who maintains a law practice as well as a mediation practice. However, practicing attorney mediators cannot have a professional relationship with any party to the dispute because such relationship would present a conflict of interest. Some attorneys work as full time mediators and no longer actively practice law. Occasionally, non-attorneys act as mediators in resolving certain types of disputes, for example, labor disputes, and are chosen by the parties for their expertise in a particular industry.

Mediators usually have special training in mediation techniques. Some specialize in the mediation of certain types of cases, such as maritime cases. Mediators generally are paid by the hour, with fees and expenses split equally among the parties.

There are also businesses that provide mediation services. Those businesses employ retired judges and attorneys as mediators. Their fees are based on an hourly rate and their fee schedules often specify a half-day or day minimum as well as non-refundable administrative charges.

Mediation procedures vary depending on the mediator. Usually the mediator requires counsel to submit a mediation statement before the mediation session. The mediation statement gives



the mediator the fundamentals of the dispute. It may contain legal authorities supporting the party's position. Relevant documents may be attached. The mediator consults with counsel and decides whether mediation statements are to be exchanged or kept confidential.

At the mediation session, the mediator may first meet with counsel and the parties jointly. During the joint meeting, counsel will explain their clients' positions and address the evidence supporting those positions. The mediator will then meet separately with each side. If mediation statements were exchanged, the mediator may dispense with the joint meeting. In what is often described as "shuttle diplomacy", the mediator may meet with each side many times relaying demands and offers. During the process, the mediator helps the parties recognize the strengths and weaknesses of their positions and hopefully negotiates a satisfactory resolution of the dispute. Many mediators say the mediation has been successful if the dispute is settled and the parties are unhappy with the mediator. That is, the mediator convinced one side to pay more than it wanted to pay and the other side to accept less than it wanted to accept.

The advantage to a mediation is a more prompt resolution of a dispute for a relatively small cost. The disadvantage is the lack of a decision on the parties' claims and defenses leaving the legal issues unresolved for the future.

### **Arbitration**

Many maritime contracts contain an arbitration clause requiring the parties to arbitrate any disputes arising under the contract. The contract may specify the number of arbitrators (usually one or three) and who they will be. It may also specify where the arbitration will take place. Courts regularly enforce arbitration clauses unless they are the result of overreaching by one party.

There are two types of arbitration, non-binding and binding. The parties to non-binding arbitration have recourse to other dispute resolution methods if they are unsatisfied with the award. The parties to binding arbitration have no recourse if they are unsatisfied with the award except under very limited circumstances such as an arbitrator's non-disclosed conflict of interest or an award exceeding the arbitrator's authority.

There are different types of arbitrators. Like mediators, arbitrators customarily are lawyers or retired judges. However, arbitrators also can be non-lawyers. For example, many contracts require arbitration before members of the Society of Maritime Arbitrators of New York. The members, who conduct countless arbitrations of maritime disputes, are not lawyers but have a wide range of maritime experience and are considered "learned men of the sea" or "commercial men".

Unlike mediators, arbitrators decide factual and legal issues after the presentation of evidence in accordance with the governing arbitration rules. Some arbitrators strictly follow the rules of evidence in determining what is admissible at the hearing and others adopt a more relaxed approach permitting the introduction of evidence not otherwise admissible in court. Sworn testimony from percipient and expert witnesses may be presented at the hearing. The arbitrators then apply the relevant substantive law to the facts and render an award. Some arbitration awards are published and can be cited as precedent.

The advantages to arbitration are a lesser cost than litigation and a more prompt resolution of the dispute. The disadvantage may be the lack of discovery to enable the parties to learn about the bases of their opponents' position. Non-binding arbitration may give rise to significant fees and expenses if the case must be presented twice, first at the non-binding arbitration hearing



and later at trial if a party is unsatisfied with the arbitration award. Further, a favorable decision after non-binding arbitration gives the prevailing party a psychological advantage and may impede settlement discussions. The disadvantage to binding arbitration is the lack of recourse from an unfavorable award.

### **Litigation**

Litigation should be the last resort in resolving a maritime dispute. The expense, inconvenience, and delay associated with litigation can be disproportionate to the amount in dispute. Moreover, litigation is unlikely to preserve the business relationship.

In their maritime contract, the parties can select the place for their litigation. The parties may also be able to select what law they want to apply to their dispute. The courts usually enforce the parties' choices.

When a matter is litigated, the parties cannot select their judge; judges are assigned by the court clerk randomly. Accordingly, the judge making rulings in the case may have no experience with maritime law or the maritime industry, which, in turn, may lead to an unsatisfactory result and the cost and delay associated with an appeal. An equally unsatisfactory result may occur if the matter is tried to a jury, a group of diverse community members who also are unlikely to have knowledge of maritime law or experience in the maritime industry. Years may elapse before a dispute is finally brought to trial and taken through appeal. Those years translate into significant fees and costs.

Litigation involves the presentation of percipient and expert witnesses either for deposition and/or trial. They may not be located in the place where the litigation is pending. Their personal appearance at deposition and/or trial may involve significant cost and disruption of business. Moreover, by the time a deposition is taken or the case is actually tried, the witnesses may no longer be available to testify, making it difficult to prove or disprove a point.

Even if the dispute is litigated, the parties may be required to mediate or arbitrate it before being allowed to start trial. Many state and federal courts in the United States mandate the parties' participation in an "ADR" (Alternate Dispute Resolution) process. A very high percentage of cases are resolved through the ADR process but only after significant litigation expenses have already been incurred.

The advantages to litigation may be the precedential value of the judgment and the right to appeal an adverse ruling which right is not available after binding arbitration. The disadvantages are the cost, delay, inconvenience, and adversarial environment, which often ends a business relationship.

Any lawyer worth her salt should always recommend the client consider alternatives to litigation. And, the client should always ask the lawyer about alternatives to litigation. Litigation may not be the best alternative for resolving a maritime dispute. A face-to-face meeting, mediation, or arbitration may yield a less expensive and quicker resolution of the dispute with a better chance of preserving the business relationship.