

Mediation for Maritime Disputes in India

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ABSTRACT:

Mediation is an effective means of settling disputes in a cost effective manner, this research article aims at bringing out the reasons as to why mediation in maritime sector should be encouraged, what the country needs in order to make mediation a preferred choice and what are the challenges which pose in India with respect to mediation in commercial matters.

Litigation can turn out to be vexatious, costly and time consuming. Mediation is an alternative dispute resolution mechanism which carries in itself a huge scope to decrease the backlog of cases and create a friendly environment between the corporates which can get into heated disputes. This research article aims at making the reader more wary about the laws, regulation and scope in the maritime mediation sector in India.

Keywords: *Code of Civil Procedure, dispute resolution, maritime mediation, regulatory framework*

I. INTRODUCTION

The market for maritime industry in India is becoming more and more attractive as more and more efforts are being done by the government to increase trade. As times are changing a robust maritime logistics sector with modern and efficient port infrastructure is needed to meet with the demands this was also observed by the Ministry of Shipping in its hand book named Sagarmala.¹

According to the Ministry of Shipping, around 95% of India's trading by volume and 70% by value is done through maritime transport. Up to 100 per cent Foreign Direct Investment (FDI) has been allowed under the automatic route for port and harbor construction and maintenance projects, which will increase investment opportunities.²

It has been noticed that maritime mediation in India is not going up at a high rate, one of the possible reasons can be, lack of an existing framework for the same. India in terms of alternative dispute resolution already has an existing framework for commercial arbitration which goes hand in hand with maritime arbitration, one can refer to the Rules of International Commercial Arbitration, but no proper framework is established for mediation specifically for commercial disputes.

¹Ministry of Shipping.(n.d.).Sagarmala, *National Perspective Plan* -Executive Summary. Degree 360 solutions.

² Forbes. (2017, May 3). *Indian maritime sector—on the cusp of revolution*. Retrieved October 21, 2018, from Forbes India: <http://www.forbesindia.com/blog/life/indian-maritime-sector-on-the-cusp-of-revolution/>

In terms of mediation, the government of India came up with an action plan in order to reduce government litigation provided and for “The Promotions of alternative dispute resolution mechanisms- encourage mediation as the preferred form of dispute resolution in service related matters”.³

II. OPTING FOR MEDIATION IN MARITIME DISPUTES IN INDIA

No matter what the complexity is, no one can understand the pain of the parties than the parties themselves. As both parties come forward and reach a successful settlement, only then does the settlement become enforceable on them, mediation makes more sense as it is comparatively cost effective. As per Dr. Dhananjaya Y. Chandrachud “Mediation at one level of perception is a means of avoiding the pitfalls of litigation.”⁴

One of the reasons to opt for maritime mediation in India is the complexity of such disputes. Multi-jurisdictional cases can arise as a ship in the Indian waters can be subject to innumerable amount of contracts, domestically and internationally. A series of disputes can arise while travelling by the sea.

The laws governing the Admiralty sector are complex and tend to cause a significant amount of uncertainty. This is because the ships can be governed by a variety of legislations during their movement through international waters and different ports around the world.⁵

Maritime cases are fit for mediation because as any other sector, the benefits which mediation provides easily weigh more than the benefits provided by any other dispute resolution mechanism. The parties are free to choose the mediator, negotiate, and the best feature is that the reputation and the relationship with the other party are mostly not hampered because it's settled amicably. Confidentiality of such matters helps in providing the companies.

III. EXISTING FRAMEWORK WITH RESPECT TO MARITIME MEDIATION IN INDIA

In India the terms ‘mediation’ and ‘conciliation’ are used synonymously; this was clarified in the judgment of the Supreme Court in its decision in Afcons Infrastructure Ltd v M/s Cherian Varkey Construction.⁶ Hence adhering to this definition, it can be interpreted mediation is encouraged by the judiciary. The judicial system has been encouraging litigants to look towards alternate dispute resolution (ADR) mechanisms, the recent arbitration and conciliation (amendment) bill 2018 also encourages for the same. One such method that is

³ Department of Justice .(2017). *Action Plan to Reduce Government Litigation*. Retrieved October 20, 2018, from Department of Justice : <http://doj.gov.in/sites/default/files/action%20plan.pdf>

⁴Chandrachud.D. (n.d.).*Mediation*. Retrieved October 23, 2018, from Law Commission of India:
<http://www.sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf>

⁵Khare Legal Chambers.(2018). *Maritime Law-Overview*. Retrieved October 22, 2018, from Khare Legal Chambers:
<http://kharelegalchambers.com/maritime-law/>

⁶ [2010] (7) SCALE 293

picking up some converts is mediation.⁷

Civil Procedure Code was amended in 2002 in order to incorporate section 89 which includes mediation as a mechanism for ADR. The Rules framed by the Supreme Court and the 24 High Courts provide for reference by courts to mediation. In case of failure in mediation on court-referred mediation the matter shall go on in litigation. In case the efforts of the mediator succeed in helping parties reach a settlement, a report is to be provided to the court by the mediator.

In all, it can be said that mediation may take place in two stages, the first one being pre-litigation and the other stage being the court-referred mediation.⁸ When the parties by themselves enter into mediation instead of opting for litigation at the first place, it is known as pre-litigation mediation, also known as voluntary mediation. Court referred mediation works on the basis of section 89 of the CPC as mentioned in the above paragraph.

During this research it was observed that recent court referred mediation in maritime disputes turned out to be successful in cases like Startrek Shipyards Private Ltd v/s Chennai Port Trust⁹ and M/S Chindambaram Shipcare Pvt Ltd v/s Owners and parties¹⁰, interested in the vessel M/V coastal, hence court referred mediation does exist in maritime disputes.

Part III of the Arbitration and conciliation Act is applicable to private mediation. Hence private mediation can also be practiced in maritime mediation disputes, Part III consists of provisions for the appointment and role of mediators, conduct of proceedings, communication and disclosure of information, status and effect and enforcement of settlement agreements, confidentiality, not resorting to arbitral or judicial proceedings during mediation (except when necessary to protect rights), costs, non-admissibility of evidence in other proceedings, etc.¹¹

The Industrial Dispute Act sets up a conciliation framework to resolve disputes between workmen and their employers. As per Section 4 of the Act .The conciliation officers are appointed by the government.

IV. TIME FRAME – MEDIATION COMPARED TO OTHER ADR METHODS

In litigation, an adumbrate outlook given in a chapter on maritime law by the International Comparative Legal Guides on shipping law provides that, as far as the Indian courts are concerned, it depends upon where the court

⁷Souza.N. (2010, September 28). *Mediation in Indian Courts*. Retrieved October 23, 2018, from Forbes:

<https://www.forbes.com/2010/09/28/forbes-india-judiciary-encouraging-mediation-reduce-baclog.html#4c3f833e1044>

⁸Mediation and Conciliation Project Committee, *Supreme Court of India*.(n.d.).Supreme Court of India. Retrieved October 24, 2018, from Mediation and Training Manual of India: <http://www.sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf>

⁹Sivangam, T. (2016, April 29). *Star Trek Shipyards vs Chennai Port Trust*. Retrieved October 23, 2018, from Indian Kanoon: <https://indiankanoon.org/doc/111960684/>

¹⁰Rajendran, B. (2015, April 9). *M/S ChindambaramShipcare Pvt Ltd vs Owners and Parties Interested*. Retrieved October 23, 2018, from Indian Kanoon: <https://indiankanoon.org/doc/41513158/>

¹¹Panchu.S, R. a. (2017, November).*Mediation-India*.Retrieved October 23, 2018, from Getting The Deal Through: <https://gettingthedealthrough.com/area/54/jurisdiction/13/mediation-india/>

proceedings are being held. As far as the proceedings in the Bombay High Court are concerned it would take between 7 and 10 years to be heard and decided finally.¹²

In arbitration, as per section 29 A of the Arbitration and Conciliation (Amendment) Act, the arbitral tribunal is required to give its award within a period of 12 months of the formation of the tribunal. Hence it makes it mandatory that an award shall be passed in a particular matter within a period of 12 months off the arbitral tribunal entering upon the reference.

The biggest plus point of opting for mediation is the time frame. Mediation proceedings can be completed within a year or close to it. Thus the time frame can depend upon the negotiations and complexity of the case, as there is no set time frame ordered to them by law. The only prerequisite is that in order to succeed the consent of all parties is mandatory.

V. CHALLENGES FACED IN MARITIME MEDIATION

The maritime sector, being a complex sector requires mediators to be highly skilled at maritime law and mediation skills, the people who are skilled at this are very hard to find as this combination of people are usually into arbitration because of better rules and existence of a proper framework.

Mediation in itself as an alternative dispute resolution mechanism has a long way to go. Lack of proper regulatory framework makes it a tough choice for implementation of in contracts involving huge sums of money as the question of its enforceability outside the purview of Section 89 of the Code of Civil Procedure, which only deals with court referred mediation still prevails.

As per the law commission of India there is also a need to modify section 89 off the CPC, the requirement that the court must formulate the terms of possible settlement places a significant burden on the court, even before referring the parties to the process of mediation. This leads to spending of considerable amount of time and effort in imploring the parties to settle their dispute and draw up the terms of a possible settlement.¹³

Lack of clear distinction in laws relating to arbitration, mediation and conciliation also poses as a challenge and absence of a proper mediation culture. Practitioners of Alternative Dispute Resolution methods have noticed that the Mediation and Conciliation rules of 2004 are somewhat similar to the provisions that are covered in the Arbitration and Conciliation Act, 1996.¹⁴

In terms of private mediation: A settlement agreement in a private mediation is not enforceable under Sections

¹²Thaker.S. (2018, July 16). *Shipping Law, India*. Retrieved October 24, 2018, from International Comparative Legal Guides: <https://iclg.com/practice-areas/shipping-law/shipping-2017/india>

¹³Chandrachud.D. (n.d.). *Mediation*. Retrieved October 23, 2018, from Law Commission of India: <http://www.sci.gov.in/pdf/mediation/MT%20MANUAL%20OF%20INDIA.pdf>

¹⁴Pandey.A. (2017, August 10). *Ten things the Government should do to make Mediation effective in India*. Retrieved October 23, 2018, from iPleaders: <https://blog.ipleaders.in/ten-things-government-make-mediation-effective-india/>

73 and 74 of The Arbitration and Conciliation Act, 1996. This is evident as in the Delhi High Court case of Shri Ravi Aggarwal vs Shri Anil Jagota (EFA (OS) No. 19 of 2009). The Hon'ble High Court of Delhi refused to enforce a settlement agreement in a private mediation under Sections 73 and 74 of 1996 Act.¹⁵

VI. CONCLUSION

Mediation can only be successful in commercial cases relating to the maritime sector if a proper framework is brought into place and encouraged by all sectors of the society. Section 89 of the CPC can only help in increasing mediation up to a certain extent. Our country is becoming an economic hub as more and more countries are investing in India keeping in view its bright future.

Unless and until voluntary mediation is not encouraged by urging companies to enter into mediation clauses, by including new mediation clauses, Arb-Med-Arb or Med-Arb clauses in agreements, increasing pre mediation in India will pose as a basic challenge for all.

Keeping this in view, as imports and exports in India are rising and most are usually done through the sea route, because of economic advantages. With an increase in import-exports and shipping infrastructure in India there is a huge possibility of disputes to arise. Having a better regulatory framework in place will help corporate engage in maritime sector to tap the mediation processes more effectively, and hence increase the chances of reducing the burden of going through litigation or constraining their scope only to arbitration in order to settle a dispute.

¹⁵Natarajan.A. (2017, August 3). *Mediation: More Myths Busted*. Retrieved October 24, 2018, from Live Law: <https://www.livelaw.in/mediation-myths-busted/>