GNLU SRDC ADR
MAGAZINE
VOLUME IV | ISSUE I

THE CATALYSTS OF CONCORD IN THE SEAS: AN ANALYSIS OF THE IMPLEMENTATION OF ADR MECHANISMS IN MARITIME DISPUTES

AUTHOR(S)

Aaditya Bajpai
IV Year Student at Maharashtra National Law University, Nagpur

Shreya Bajpai
V Year Student at Maharashtra National Law University, Nagpur

Introduction

The significance of oceans is growing. Maritime issues dormant for decades are again being discussed at political summits. The prospect for instability over marine space is growing as we approach a new age of maritime politics. Increasing marine conflicts may be attributable to a number of causes, including globalisation, climate change, the need to move towards net zero, and the evolution of economic landscapes.[1] The tensions of war in Ukraine amidst the Russian invasion of Ukraine have had major impacts on the maritime industry, which was not just confined to the Black Sea but had its wings spread across the world.[2]

As the prospect of the Blue Economy is rising, i.e., a practice of shifting to ocean-based resources, tensions related to the maritime boundaries across the world are rising. Maritime Border disputes arise majorly due to the overlap created between the claims of adjacent or opposite states, as was the *case of Bakassi Peninsula*[3] in *Cameroon v Nigeria*[4] before the International Court of Justice ["**ICJ**"]. Through this article, the author aims to establish that the prompt and meticulous implementation of maritime arbitration mechanism emphasises the importance of harmonious maritime governance, transcending the complexity of protracted litigation battles and providing unwavering jurisprudential rectitude to tangled webs of the law, all while maintaining a delicate balance that protects the world's seas and the emerging boundaries of international and domestic laws. Hence,

[1] Andreas Osthagen, 'A Sea of Conflict? The Growing Obsession with Maritime Space' (*The Arctic Institute, Centre for Circumpolar Security Studies*, 2019) <https://www.thearcticinstitute.org/sea-conflict-growing-obsession-maritime-space> accessed 29 May 2023.
[2] George Lambrou, 'Hot Topics for International Maritime Arbitration in 2023' (*CIArb News*, 2023) <https://www.ciarb.org/news/hot-topics-for-international-maritime-arbitration-in-2023/> accessed 29 May 2023.
[3] J.G. Merrills & Malcolm D. Evans, 'The Land and Maritime Boundary Case (Cameroon v Nigeria), Preliminary Objections' (1999) 48 The International and Comparative Law Quarterly 651.
[4] *Cameroon v Nigeria* I.C.J. Rep. 1988.

through this research, the author aims to provide the importance arbitration holds in the maritime sector by first providing an insight into how the current arbitration system in the international maritime sphere has been working. In furtherance of the same, the author has analysed several cases that have helped develop maritime arbitration jurisprudence internationally. Post this, the author has dealt with the Indian position in the matter of maritime arbitration. Then, the author has provided his analysis of how arbitration is the key to a better maritime atmosphere.

Conflict Over-Seas: Insights into International Maritime Arbitration

The increasing and ever-expanding importance of the maritime sector has majorly led to the adoption of arbitration for the settlement of issues in the sector; hence, it is essential to have an insight into the realm of international maritime arbitration. A peaceful resolution of maritime conflicts is crucial to provide a conducive setting for trade and commerce since the marine sector is widely acknowledged as one of the most economically plausible sectors for promoting sustainable development. The historical idea of sea hegemony as a representation of political power has given rise to the modern significance of the maritime domain.[5]

The presence of laws reflecting the importance of resolving disputes through alternative dispute resolution methods is seemingly evident. For instance, the United Nations Convention on the Law of the Sea ["**UNCLOS**"] can be taken into consideration. As pointed out by McDougal and Burke,[6] "*The historic function of the law of the sea has long been recognised as that of protecting and balancing the common interests, inclusive and exclusive of all people in the use and enjoyment of the oceans, while rejecting all egocentric assertions of special interest in contravention of general community interest*."[7] Article 280 of the UNCLOS states that the countries in dispute are urged to refer to "*whatever peaceful measures of their own discretion*" and that the nations shall try every possible dispute resolution method before turning to judicial processes.

The International Court of Maritime Law is an autonomous entity set up to preside over arbitration hearings concerning matters of international maritime commerce and transactions. It has also formed a partnership with the Paris Chamber of Maritime Arbitration to facilitate arbitration for the settlement of disputes arising in the international economic system.[8] Overseas, various nations

[5] Ekundayo Oluwaremilekun Babatunde, 'Arbitration Mechanisms in Nigeria's Maritime Disputes Settlement: Challenges and Prospects' (2019) 6 Brawijaya Law Journal 1, 2.
[6] Myres S. McDougal and William T. Burke, 'Crisis in the Law of the Sea: Community Perspectives versus National Egoism' (1958) 67 The Yale Law Journal 539.
[7] S.K. Kapoor, *International Law and Human Rights* (22nd edn, Central Law Agency 2021) 255.
[8] Bhupinder Singh & Neha Singh, 'Contextualizing Maritime Arbitration – A Key Tool in Maritime Dispute Resolution' (*Journal of Territorial and Maritime Studies*, 2021) <https://www.journalofterritorialandmaritimestudies.net/post/contextualizing-maritime-arbitration-a-key-tool-in-maritime-dispute-resolution> accessed 29 May 2023.

have been progressively getting engaged with Maritime Arbitration, with England being the prime example of the same. Considering the international counterparts, a worthy mention is the Emirates Maritime Arbitration Centre ["**EMAC**"] of UAE, which was established under Sheikh Rashid's leadership. With respect to the Middle East and North African region, EMAC has been a frontrunner in the field despite being a new Centre. It also became the first Middle Eastern nation to host the International Congress of Maritime Arbitrators in 2022.[9]

The London Marine Arbitration Association, which has close ties to the London Court of International Arbitration and the International Chamber of Commerce, continues to ensure London's prominence as the preeminent venue for maritime arbitrations. It was also reported that in 2019, the London Maritime Arbitration Association had been successful in deciding approximately 96% of arbitrations.[10] These statistics establish how, internationally, considering the depth and scope of maritime disputes, arbitration has been viewed as an efficient tool to ensure the proper functioning of the maritime sector.

Nitty-Gritties of Maritime Arbitration: Analysis through Cases

Various courts and tribunals, on an international scale, have lent their hands in developing the maritime arbitration jurisprudence. With regards to the duties and obligations of an arbitrator, the case of *Wael Almazeedi v. Michael Penner and Stuart Sybermsa*[11] could be referred to wherein it was settled that disclosure has to be made by the arbitrators in order to maintain transparency in the matter. In another case of *Halliburton Company v. Chubb Bermuda Insurance Ltd.,*[12] it was held that arbitrators have a legal obligation to reveal the necessary information that raises justified questions that they are prejudiced, and the breadth of their obligation of disclosure relies on the inferences that a knowledgeable observer may draw that may give rise to a potential bias.

Regarding the question of jurisdiction of the arbitral tribunal in deciding maritime issues, in the case of *MVV Environment Devonport Limited v. NTO Shipping GMbH and Company MS Nortander*[13] it was held that Arbitral Tribunal cannot exercise jurisdiction over anyone whose name appears to

[9] Vishva Shanmugam & Nagarjuna S., 'Maritime Arbitration in India: The Analysis of a Redundant System' (*SSRN*, 11 November 2022) <https://ssrn.com/abstract=3588284> accessed 29 May 2023.
[10] Bhupinder Singh & Neha Singh, 'Contextualizing Maritime Arbitration – A Key Tool in Maritime Dispute Resolution' (*Journal of Territorial and Maritime Studies,* 2021) <https://www.journalofterritorialandmaritimestudies.net/post/contextualizing-maritime-arbitration-a-key-tool-in-maritime-dispute-resolution> accessed 29 May 2023.
[11] *Wael Almazeedi v Michael Penner and Stuart Sybermsa* [2018] UKPC 3.
[12] *Halliburton Company v Chubb Bermuda Insurance Ltd.* 2018 EWCA Civ. 817.
[13] *MVV Environment Devonport Limited v NTO Shipping GMbH and Company MS Nortander* [2020] EWHC 1371 (Comm).

be as the owner on the bill of lading because the shipper, whose name also exists there, lacks express or implied authority to bind the owner to the contract.

A noteworthy example of the settlement of maritime disputes by means of arbitration could be the case of *Guyana v. Suriname*[14] at the Permanent Court of Arbitration. The major issue this case was dedicated to was the delimitation of the maritime boundary of Guyana with Suriname and the contended breaches of international law by Suriname. The Tribunal employed the method outlined in Article 15 of UNCLOS to determine that unusual navigational conditions warranted a departure from the median line in delimiting the maritime border in the territorial sea. Although the Tribunal found that the Surinamese navy's operations in the disputed territory amounted to a threat of use of force in violation of international law, it decided against Guyana's plea for financial compensation. The Tribunal ruled that neither party had fulfilled its commitment to adopt practicable temporary arrangements for delimitation under Articles 74(3) or 83(3) of UNCLOS.

The Indian Perspective on Maritime Arbitration

In India, with regard to the regulatory protocol of maritime arbitration, there exists a set of maritime arbitration rules, i.e., the Maritime Arbitration Rules of the Indian Council of Arbitration. The emphasis of these rules is to engage in the regulation of both domestic and international matters of maritime arbitration. Rule 3(1) of the above-mentioned rules lays down the establishment of a Maritime Arbitration Committee, which shall entail the functions, as laid down under Rule 4 such as empanelment of arbitrators, appointment, review of cases, and so on. In furtherance of the aim of facilitating maritime arbitration procedures in India, the Gujarat International Maritime Arbitration Centre has been formulated as a specialist Alternative Dispute Resolution ["**ADR**"] centre having the aim of regulating arbitration proceedings related to maritime and shipping.[15]

The development in Maritime Arbitration is of huge importance today because of the fact that India shares its maritime boundary, a coastline of 7500 km, and Exclusive Economic Zones of approximately 23 lakh square kms, with seven different nations, namely, Pakistan, Maldives, Sri Lanka, Bangladesh, Myanmar, Thailand and Indonesia.[16] The determination of the border around Sir Creek is at the heart of India and Pakistan's maritime conflict. Land boundaries between the two nations were determined by the UN Tribunal up to the Western Terminus, but the border

[14] *Guyana v Suriname* ICGJ 370 (PCA 2007).
[15] GMU, 'Gujarat International Maritime Arbitration Centre' (*GMU*, 27 February 2023) <https://gmu.edu.in/about-gimac/> accessed 30 May 2023.
[16] Rahul Roy Chaudhary, 'Trends in the Delimitation of India's Maritime Boundaries', (1999) 27(2) 22 Strategic Analysis by IDSA.

beyond that point remains unclear.[17] The Indo-Bangladesh maritime conflict centres on competing claims to sovereignty over a small island and divergent perspectives on how the maritime border should be drawn. The oil-rich Ganges-Brahmaputra delta in the Bay of Bengal is at the centre of the dispute over the island, considering the island itself is not the primary issue.[18] These types of issues do call for an efficient maritime ADR mechanism to be followed in India.

Is Arbitration the Answer for Maritime Disputes?

A business that is no longer cantered on a select group of individuals or a single nation, but rather is dispersed globally, with practically every coastal nation leaving its marks on its growth, carrying with it the essential flavour of international shipping and, by extension, international problems.[19] The need for arbitration in matters, especially of high significance like that of the maritime and shipping sector has been, time and again, emphasized by the courts of law. For instance, in the case of *Kargil International S.A. v. Bangladesh Sugar and Food Industries Corporation*[20] it was highlighted that the arbitration clause acts as the determining authority in the contract as to where shall the jurisdiction lie, and based on that in this case the seat of arbitration was appointed at London.

The way forward in this field has been subjected to the optimism that arbitration is the answer for maritime and shipping issues, and for the same nations have been focussing on developing laws and regulations for the same. The maritime arbitration system in South Korea, a peninsula nation with a renowned and newly expanding shipping sector, has shown encouraging indications of development. The Korean Commercial Arbitration Board ["**KCAB**"] was established in 1966 and is the sole Korean entity with the legal authority to arbitrate international disputes. On April 20, 2018, the KCAB formed 'KCAB International' as a separate section to address the increasing need for international business dispute services in Korea. KCAB International has around 5% of its docket dedicated to maritime conflicts.[21]

However, like the history of International Law has showcased, the implication and strength of the same is determined by whether strong nations oblige by it or not. A major reference to this can be taken from the never-ending dispute sparked by China, by claiming its ultimate sovereignty over the South China Sea, which has been contested by nations and has been denied by the Permanent

[17] ibid.
[18] Mohd, Khurshed Alam, 'Regional Maritime Cooperation under the Auspices of South Asian Association for Regional Cooperation' (1997) 18 BIISS Journal 30.
[19] Gautam Khurana & Pankaj Kapoor, 'India shifts its focus in Maritime Arbitration' (*India Business Law Journal*, 18 March 2021).
[20] *Kargil International S.A. v Bangladesh Sugar and Food Industries Corporation* [1998] 1 W.L.R. 461.
[21] Kaili Ang & Arie C. Eernisse, 'A Tale of Two Maritime Hubs: The Rise of Regional Maritime Arbitration Centers in Asia' (*Wolters Kluwer*, 9 November 2021) <https://arbitrationblog.kluwerarbitration.com/2021/11/09/a-tale-of-two-maritime-hubs-the-rise-of-regional-maritime-arbitration-centers-in-asia/> accessed 30 May 2023.

Court of Arbitration in The Hague. The main reason behind these tensions concerning the South China Sea is that this water body acts as a beacon for high-end commercial activities for many nations, and hence these nations including India have been propagating for it to continue being international waters.[22] A very recent amongst the many issues was in 2016 when the Philippines filed a case against China in a conflict regarding China's sovereign claims over the South China Sea. The Permanent Court of Arbitration ruled in favour of the Philippines and held that China's claim of sovereignty over the "Nine Dash Line" has no legal backing and hence it cannot be sustained.[23]

Now the said ruling holds utmost importance because it is something that not just concerns China and the Philippines here, but has a wider effect, i.e., on China's international relations with the Philippines and other nations, and even on the determination of the authoritativeness of the order so passed by the Arbitration tribunal here. China's past attitude with respect to this issue was that it stood with the view that the issue should be sorted out via diplomatic talks because the court has no authority over the said matter as it's a dispute of territorial waters and not the legal definitions of the same.[24] So, post the 2016 ruling of the Permanent Court of Arbitration, it is essential to examine China's response because the same has two main impacts over the international law realm, i.e., if it peacefully accepts the decision, then that shall lay down a milestone determining the authority and strength of International Maritime Arbitration, or else if it rejects then that shall set a precedent for other omnipotent nations to defy the said rulings of international courts.

Conclusion

> *The sea lies all about us. The commerce of all lands must cross it. The very winds that move over the lands have been cradled on its broad expanse and seek ever to return to it. The continents themselves dissolve and pass to the sea, in grain after grain of eroded land. So the rains that rose from it return again in rivers. For all at last returns to the sea-to Oceanus, the ocean river, like the ever-flowing stream of time, the beginning and the end.*[25]

"*Cooperation and Collaboration are the primary keys for us to coordinate together for the betterment of the maritime realm*", stated by Indian Navy Chief Admiral R Hari Kumar,[26] while he was stressing on the fact

[22] Nandini Jawli, 'South China Sea and India's Geopolitical Interests' (2016) 29 Indian Journal of Asian Affairs 85.
[23] Israel Kanner & Assaf Orion, 'Maritime Claims on the Rocks: The International Arbitration Ruling on the South China Sea' (2016) Institute for National Security Studies.
[24] ibid.
[25] Rachel Louise Carson, (*The Sea Around Us,* 1951, Oxford University Press 1989) 212.
[26] Press Trust of India, 'Future maritime environment may be even more challenging, says Indian Navy Chief' (*The Economic Times,* 4 March 2023) <https://economictimes.indiatimes.com/news/defence/future-maritime-

that unprecedented world today might possess a rough future for the maritime environment for there will be an inflow of new challenges on an increasing basis, and hence there's a need for the nations to work together. Arbitration is the answer, and that is undisputed because it entails in itself the one primary advantage that it allows the parties involved to have a sense of complacency because they can avoid the lengthy litigation. Furthermore, with the expansion of the arbitration tribunal's role and powers under the new National & International legislations, arbitration has unavoidably grown into the preferred way of resolving international disputes. Hence, in order for the nations to reap benefits of a speedy redressal mechanism, they should be focussed majorly on two points, i.e., working towards the establishment of a strong and stringent maritime arbitration regulation in their domestic realm, and paying respect and heed to establish the authoritativeness of the international courts as well.

environment-may-be-even-more-challenging-says-indian-navy-chief/articleshow/99990449.cms> accessed 11 November 2023.