The Marine Assistance Industry Journal

Volume VI; July 2011

FEATURES:

Questioning Arbitration's Seaworthiness

By John K. Fulweiler, Esq.

As a lawyer, my stage is crowded with both victories and losses. That is the nature of the beast and the best I can hope is that at the end of the day, my victories outnumber my losses. While some losses you can walk off, a loss that lacks a reasoned explanation can be very frustrating. Like the occasional court decision, not every arbitration award will be an example of prosaic reasoning, but unlike a court decision, there is typically no meaningful appeal process by which to seek relief from being caught behind a frail and dottery arbitration award that lacks an understandable explanation for its outcome. This, along with other issues unique to arbitration, makes it important that a party understand the pros and cons of agreeing to arbitration.

An arbitration is a private forum that the parties have agreed to use to decide a dispute. Unlike mediation, the decision issued by the arbitrators (often referred to as an "arbitration award") is typically binding on the parties absent a narrow set of circumstances, such as when it can be shown that the arbitrators exceeded their powers or where there was a manifest disregard of the law. From a practical perspective, because the threshold to overturn an arbitration award is generally high, a party considering arbitration is probably best served by simply realizing that the arbitration award will be final and binding. End of story.

How an arbitration will unfold is driven by the rules of the arbitration forum. In some instances, the process only requires written submissions which the arbitrators use to base their decision. Sometimes the parties submit written submissions and the arbitrators convene hearings during which live testimony from various witnesses is received into the record. In general, the rules of evidence are very relaxed in an arbitration forum meaning that what you believe is unreliable evidence may be considered by the arbitrators whereas it may not have been in a judicial setting. Likewise, the conduct of attorneys, in my personal opinion, is not as strictly regulated in an arbitration as it would be in a courtroom setting which may allow for arguments and procedural issues to be raised that would never be raised before a judge or jury.

Another consideration in electing to use arbitration is that the arbitrators may be known in and have involvement with the parties' industry. This is particularly the case in maritime arbitration where some of the maritime arbitration programs actually require that the arbitrators posses maritime experience. One or both parties may find that this is a positive factor as the conflict or circumstances may be better understood by someone, in the lexicon of the wordsmith L.L. Cool J, who is from 'round the way'. Still, there are probably good and convincing arguments against allowing someone from 'round the way' to rule on your maritime dispute when you hail from a different neighborhood.

In a court house setting, the appellate process forces the trial court to explain its reasoning and get its facts right. Thus, while it is easy to lose in grand form before the trial court, it won't be at the fickle whim of the judge. In not finding your witnesses credible and disagreeing with your interpretation of the law, the trial court judge will almost always issue some form of explanation that, at a minimum, will give the losing party a measure of understanding as to where the claim got off the rails and may, sometimes, provide a basis by which to appeal. In my personal opinion, this is not always the case with arbitration where I have seen arbitrators regurgitate each party's respective arguments at length while only providing a short statement on how the award was actually reached. Without a meaningful basis to appeal and no reasoned explanation for a

loss, arbitration can sometimes lead to bouts of dry heaving as you attempt to swallow an unfavorable ruling. That is, in my experience an arbitration award may read more like a papal dictate than a reasoned explanation.

Look, lots of times you will hear arbitration championed because it is supposedly quicker and cheaper than the judicial process. My response in general to such assertions is to ask: "Okay, but at what ultimate cost?" Arbitration will always be good for certain claims and will always be able to trumpet certain inherent advantages over litigation, but after having paddled around in the arbitration waters for more than decade, I am increasingly circumspect. I query whether the ultimate costs of arbitration (both monetarily and otherwise) are, in fact, less than the judicial process.

The bottom line is that before you elect to pursue arbitration, sit down with your attorney and have a real chat about the arbitration process and the arbitrators that may rule on your claim. If you intend to nominate an arbitrator or you are deciding between arbitrators, ask your attorney for some of the arbitrator's previous awards. Read them and ask yourself whether you understand the outcomes and how they were reached or conversely, whether they sound more like papal dictates. You may decide that the arbitration forum is a good fit, you may have good prior experiences with arbitration, and you may favor its streamlined approach to decision making. Whatever the case, the point is that you should take the time to understand the pros and cons of arbitration before you toss the trial court over the side rail.

Underway and making way.

--- John K. Fulweiler

- John K. Fulweiler, Esq. (John is an admiralty attorney and licensed mariner. He can be reached via e-mail at john@fulweilerlaw.com or at 401-667-0977.)