

SEAFARER SUBJECT GUIDE

USING LAWYERS IN INDIA

This Guide deals in general terms with using lawyers in India. It aims to help a seafarer understand the legal profession in India, and how to select, engage, and if need be, change his lawyer. This Guide does not, however, constitute specific legal advice in relation to the use of any particular lawyer. If a seafarer is dissatisfied with his lawyer, he is strongly advised to consult another lawyer qualified to practise in India.

1. What is the structure of the legal profession?

- 1.1 Previously the Indian legal system, similar to that in other Commonwealth countries such as the UK and Australia, drew a distinction between a 'solicitor' and a 'counsel' also known as a 'barrister'. Under the previous system, solicitors were typically the first point of contact for persons in need of legal representation, who may then have referred legal matters to specific counsels or barristers who were specialists in court procedures, evidence, and in conducting advocacy in court.
- 1.2 More recently this distinction has been largely removed by the Advocates Act 1961 (the 'Advocates Act'). Under section 29 of the Advocates Act, the legal system now recognises, without distinction, any person duly qualified as an advocate in India, to 'practise the profession of law'. An advocate, once qualified in India, is entitled to appear before any Indian Court or other legal forum, provide legal advice, draft legal documents and undertake all such other legal tasks under the standards set out by the Bar Council of India.
- 1.3 However, in practice, and arguably as a result of India's quasi-federal legal system, lawyers in individual states in India have adopted varying means of practising law. For example, the legal profession, under the jurisdiction of the High Court of Bombay, continues to draw a subtle distinction between counsel and other advocates (that is, solicitors). However, this distinction is state-specific and does not necessarily reflect the practices of other jurisdictions.
- 1.4 As a consequence, it is advisable for a seafarer initially to approach a law firm with his specific legal query. On the basis of the particular query posed and its complexity, the law firm would be in the position to recommend engaging a specific counsel or other individual practitioner.

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2. How is the legal profession regulated?

- 2.1 Although Indian States have their own Bar Councils which regulate the admission and removal of advocates from their rolls, at the federal level the Bar Council of India (<http://www.barcouncilofindia.org>) (website in English) performs a supervisory function by laying down standards of professional conduct to which each advocate is required to adhere. Enrolment with a particular State Bar Council as an 'advocate' does not render the advocate ineligible to practise before all other state and central courts and tribunals in India.
- 2.2 All advocates must be registered with a Bar Council, and are bound by the Rules of Professional Standards dated September 6, 1975, issued by the Bar Council of India (the 'Bar Council Rules'). Failure to observe this code and the acceptable standards of practice provides the Bar Council with the authority under section 35 of the Advocates Act to initiate disciplinary enquiries and, where required, to strike off the advocate from the roll of advocates.
- 2.3 In addition to the rules and regulations laid down by the central and state Bar Councils, the Advocates Act and the respective courts (which exercise jurisdiction over a legal dispute), also set out standards for the conduct of advocates. More specifically, the Advocates Act contains a list of penalties that may be levied by a judicial authority in the event of a breach by an advocate of the standards of conduct expected of him.

3. How can a seafarer find a lawyer?

- 3.1 The Bar Council Rules prohibit law firms and advocates from advertising their services, whether on a website or elsewhere. Consequently, third party websites provide access to information regarding Indian advocates who specialize in maritime law and other fields.

Some examples of such websites are:

- .1 www.legal500.com (website in English)
 - .2 www.chambersandpartners.com (website in English)
 - .3 www.legalserviceindia.com (website in English)
 - .4 www.advocatesinindia.com (website in English)
- 3.2 Depending on the nature of the dispute, seafarers could consider approaching advocates who specialise in a specific area of law. For example, if a seafarer faces an

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investigation by the police or the Directorate General of Shipping concerning a criminal investigation into a marine accident or incident, the seafarer should appoint a criminal lawyer. Certain specialist maritime law firms have suitably qualified criminal lawyers in their firms. The seafarer may also find it useful to check the website of the Directorate General of Shipping (www.dgshipping.com) (website in English) which contains a list of shipping laws and notices applicable to seafarers.

- 3.3 A seafarer's trade union, such as the Maritime Union of India (www.mui.in) (website in English) or the National Union of Seafarers of India (www.nusi.org.in) (website in English) might also be able to recommend suitable advocates for the specific need of the seafarer. Moreover, if the incident concerns the operation of a ship, the shipowner's advocate may be able to represent the seafarer, provided there is no conflict of interest.

4. On what terms can a seafarer engage a lawyer?

- 4.1 Advocates typically set out their terms of engagement in a formal letter, known as a 'letter of engagement' or a 'retainer letter'. This retainer letter specifies the standard terms and conditions which will regulate the professional arrangement between the seafarer and the advocate (typically a law firm).

- 4.2 Some of the terms contained in a retainer letter may include:

- .1 the name(s) and designation (for instance, a partner in the firm or an associate) of the advocate(s) assigned to the case;
- .2 the scope of work proposed to be undertaken by the firm;
- .3 the basis on which the seafarer will be charged for work to be undertaken;
- .4 details of any advance payment required from the seafarer;
- .5 arrangements for rendering bills and terms of payment; and
- .6 the firm's responsibility and professional liability to the seafarer.

5. How will a seafarer be charged fees by his lawyer?

- 5.1 The billing pattern for advocates varies from advocate to advocate (or firm to firm, as the case may be). Advocates normally charge hourly at the rates set out in the retainer letter per appearance appearing as counsel. However, a number of factors can influence the billing pattern of a firm or an advocate. A few examples of such factors include the seniority of the advocate attending to the seafarer, the type and location of the advocate or law firm, and the complexity of the dispute.

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- 5.2 Depending on the nature of the dispute and the advocate or firm in question, the seafarer may also be provided with a fixed fee quote for the handling of the matter. It is also not uncommon for firms or advocates to provide a blended fee quote, consisting of a fixed billing charge for a specified number of hours of work followed by an hourly billing rate.
- 5.3 Further to the rates specified in the retainer letter, advocates will usually charge the seafarer all out-of-pocket disbursements they incur on behalf of the seafarer, such as travel expenses, applicable taxes, court fees, fees of any other professional advisors they may instruct, such as a medical expert in personal injury claim (with the prior authorisation of the seafarer).
- 5.4 The Bar Council Rules prohibit advocates from charging fees contingent on the results of litigation or otherwise to share the proceeds of litigation.

6. Can a seafarer get legal aid in a criminal case?

- 6.1 The ambit of article 21 of the Constitution of India, which deals with the 'protection of life and personal liberty,' has been clarified to include the 'right to free legal aid'. Consequently, a seafarer who cannot afford legal assistance is entitled to free legal aid at the cost of the State. Furthermore, failure by the Indian Courts to inform the seafarer of this right shall vitiate the trial.
- 6.2 Advocates assigned to a seafarer by virtue of the legal aid system may be restricted in the nature of work undertaken by them and their legal experience.

7. Can a seafarer get legal aid in a civil case?

- 7.1 In accordance with section 2(1)(a) of the Legal Services Authorities Act 1987 ('the LSAA'), legal aid can be provided to a person for a suit or any proceeding before a civil, criminal or revenue court and/or any tribunal or other authority constituted under any Indian law, exercising judicial or quasi-judicial functions.
- 7.2 The National Legal Services Authority ('the NALSA') (www.nalsa.gov.in) (website in English) has been constituted under the LSAA to monitor and evaluate the implementation of such legal services. Under the ambit of the NALSA and as prescribed by the LSAA, the following persons would be eligible to obtain legal aid:

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- .1 women and children;
- .2 members of scheduled caste or scheduled tribes;
- .3 industrial workmen;
- .4 a person under circumstances of under-served want – such as victims of mass disaster; violence, flood, drought, earthquake, industrial disaster;
- .5 a person with disability;
- .6 persons in custody in a protective home;
- .7 persons whose annual income does not exceed a prescribed minimum or victims of trafficking in human beings or a beggar

7.3 Consequently, a seafarer falling under any one of the categories mentioned above qualifies to receive legal aid from the regulatory authorities. The seafarer should, however, remain mindful of the probable limitations concerning the nature of work and legal experience of the advocates assigned to the seafarer under the legal aid system.

8. Can a seafarer get any other free legal advice?

- 8.1 In addition to legal aid mentioned above, legal aid services may also be granted in cases of great public importance and/or special cases considered to be deserving of legal services.
- 8.2 Under section 132 of the Merchant Shipping Act 1958 where, under the agreement with the crew, any dispute arises at any port in India between the master, owner or agent of a ship and any of the crew of the ship, it may be submitted to the shipping master- (a) where the amount in dispute does not exceed three hundred rupees, at the instance of either party to the dispute; (b) in any other case, if both parties to the dispute agree in writing to submit the dispute to the shipping master.
- 8.3 The shipping master shall hear and decide the dispute so submitted and an award made by him upon the submission shall be conclusive as to the rights of the parties. The services of the shipping master would appear to be free of charge.
- 8.4 An award made by a shipping master under section 132 may be enforced by a Judicial Magistrate of the first class or a Metropolitan magistrate.
- 8.5 By virtue of section 150 of the Merchant Shipping Act 1958, where the Central Government is of opinion that any dispute between seafarers or any class of seafarers or of any union of seafarers and the owners of ships in which such seafarers are

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employed exists or is apprehended and relates to any matter connected with the employment of the seafarers, the Central Government may constitute a tribunal consisting of one or more persons, and refer the dispute to the tribunal for adjudication.

- 8.6 No party to a dispute shall be entitled to be represented by a legal practitioner in any proceeding before the tribunal except with the consent of the other party or parties to the proceeding and with the leave of the tribunal.
- 8.7 The tribunal shall dispose of the reference expeditiously and shall, as soon as practicable on the conclusion of the proceedings, submit its award to the Central Government. On receipt of the award, the Central Government shall cause it to be published and the award shall become enforceable on the expiry of thirty days from the date of such publication. Where the Central Government is of opinion that it will be inexpedient on public grounds to give effect to the award or any part of it, it may before the expiry of the thirty days by order in the Official Gazette either reject the award or modify it, and where the Central Government does so, the award shall not become enforceable or shall become enforceable subject to the modifications, as the case may be.

9. Can a seafarer sue his lawyer?

- 9.1 A seafarer may sue his advocate where they have displayed a degree of ineptitude and/or negligence. The courts would generally be reluctant to penalise a seafarer on account of the conduct of his advocate, provided the seafarer is not responsible for, or has not contributed to, the conduct of his advocate.
- 9.2 However, in some cases even if the error is entirely due to the actions or inactions of the seafarer's advocate, the courts may choose not to pardon the seafarer entirely for his advocate's lack of diligence. Consequently, a seafarer cannot wash his hands of a matter in light of the fact that the seafarer has retained the services of a law firm or an advocate. If it has become obvious to a seafarer - as a layman - that there is a protracted delay or error, he cannot sit passively without directing any reminder or enquiry to his law firm or advocate and later expect to be exonerated from all blame.

10. How can a seafarer complain about his lawyer?

- 10.1 In the event that the seafarer's advocate or firm have displayed a degree of ineptitude and/or negligence, the seafarer may choose to initiate legal proceedings

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against the advocate or firm by means of a petition. In this petition, the seafarer can list the specific complaints against the conduct of the advocate or firm, and/or that the seafarer believes that the advocate or firm is in breach of the professional standards prescribed by the Bar Council of India, the Advocates Act and/or the applicable court rules.

- 10.2 Additionally, the retainer letter executed between the seafarer and the law firm may provide details of the steps which the seafarer can take if he is dissatisfied with the progress of his case or with the service he is receiving from his advocate. However, in most cases, this process would involve escalating the seafarer's concerns to a senior partner of the firm or the senior advocate.

11. How can a seafarer change his lawyer?

- 11.1 A seafarer may terminate the services of his advocate at any time by instructing his advocate, and may appoint a new advocate as a replacement. The seafarer's previous advocate will typically however be entitled to hold on to documents in his possession relating to the matter while there is still money owing to him for fees and disbursements. Despite the termination of all professional relations between the seafarer and his advocate, the advocate remains bound by statutory obligation to keep confidential all oral and documentary communication exchanged with the seafarer.
- 11.2 Furthermore, the retainer letter executed between the seafarer and the advocate may also contain a specific termination clause wherein a minimum notice period for termination is prescribed. If so, the seafarer will be contractually bound to adhere to the notice period.

12. Is a foreign seafarer treated differently?

- 12.1 Foreign seafarers who pursue claims or who face criminal prosecution in Indian courts are not treated differently to Indian nationals.
- 12.2 However, it is possible that a foreign seafarer, who is not resident in India, may be directed to provide security for the other side's legal costs of defending a claim.

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