"MEDIATING SHIPPING DISPUTES"

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PROFILE

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"MEDIATING SHIPPING DISPUTES"

INTRODUCTION

Mediation is a dispute resolution process. It is extensively used for the settlement of commercial disputes. The roots of the modern mediation movement date back to the mid nineteen eighties when, frustrated by the expense and delay involved in litigation and the uncertainties of jury trial, a small band of businessmen and lawyers in the United States started to experiment with alternative ways of settling commercial disputes. The experiment was a resounding success and in excess of 40% of all civil disputes are now settled by mediation in the United States. Increasing the process is being used on a global basis for the settlement of both domestic and international commercial disputes, ranging from the supply of goods to allied services such as banking, insurance and transportation.

There is little doubt that the process is making a valuable contribution to commercial dispute resolution. This is self evident from the fact that it is has been firmly embraced by the commercial community. This is because mediation, when it works, is speedy and cost effective. Furthermore, unlike litigation, be it through the courts or arbitration, mediation tends to facilitate the maintenance of ongoing business relationships.

Mediation is not a magic "cure all". It does not render litigation and arbitration redundant. Each dispute resolution process has advantages and disadvantages. Ideally disputants should use the process most appropriate for the resolution of a given dispute. The aim of this paper is to examine when mediation can be beneficially used to settle International Trade and Transport disputes, highlighting the conditions that need to exist in order for the parties to a dispute to avail themselves of the process, together with an examination of how and why the process works.

SOME OF THE PROCLAIMED ADVANTAGES OF MEDIATION

- Speed – days to weeks rather than months to years to commence the proceedings.
- Short hearings – one day is often sufficient – witnesses and experts are rarely called.
- Private – no press reports or adverse publicity – proceedings are privileged / not admissible in subsequent court proceedings and not recorded : all records and evidence are destroyed or returned to the parties apart from the written settlement agreement.
- Cost - relatively inexpensive – due to short hearings and absence of discovery processes and cross questioning.
- Convenient location- two rooms in a hotel or offices are all that is needed – in the country of choice of the parties and the mediator.
- Informal – no judges, robes, official recorders or court procedure.
- Lawyers are optional – though expert advice is very desirable. Self representation is permitted.
- The parties remain in control – there is no judge and no enforceable judicial award – so there is little to lose from taking part but potentially everything to gain.
- Works domestically and internationally – ideal for international trade and maritime disputes - and more sympathetic to multi-cultural issues.
- Linguistically flexible – can be conducted in the language of choice of the mediator and the parties.
- Not restricted to legal solutions and thus more flexible than going to law.
- Not restricted to the law of one country – so truly international solutions possible.
- More amenable to the preservation of business relations – less likely to result in outright winners and losers – enables the parties to retain "face" and where possible to continue trading after ending the dispute
- Mediators are experts drawn from the industry and understand the issues and the business – whereas few judges have worked in commerce of in the maritime industry.
- Multi-party mediations are possible and can include interested parties such as banks, financiers and insurers and inter-related business partners – particularly useful in international chain sales involving transportation

THE NATURE OF THE MEDIATION PROCESS

Mediation is an independent, third party assisted, negotiation process. The role of the mediator is to help the parties to find a "***mutually acceptable***" solution to their dispute. Unlike an arbitrator or judge, the mediator cannot impose a solution. Each party maintains control of the process. No solution is possible without the consent and cooperation of "***both***" parties. Mediation is thus deemed to be the most "***consensual***" of all the available alternatives to litigation.

Business is the art and practice of the negotiated purchase or supply of goods and/or services. Business practice is about cost effective management and delivery. The "***art***" of business lies in striking the right balance between profitability and the risks inherent in any given ventures. It is usual for the sales and service contract to identify a number of different foreseeable factors that could go wrong during the course of the venture and allocate the risks of those factors occurring to one or other of the parties. Sometimes this risk allocation is keenly negotiated between the parties, indicating that the parties are competent and experienced negotiators themselves. However, frequently the allocation is based on pre-established pro-forma contracts where the parties merely adopt established business practice reflecting the market price for the product.

Business disputes tend to arise because one party perceives that some loss causing event has occurred, which in his opinion is contractually the responsibility of the other party, whereas the other party refuses to accept that the problem is his responsibility or, even if he does accept responsibility, is not prepared to do everything that the complainant demands to put the problem right. Alternatively disputes often arise as to how to deal with an unusual problem that subsequently arises which is not governed by or anticipated by the terms of the contract. It is the failure by the parties, despite their negotiating experience and expertise, to find or negotiate an agreeable solution to such problems that gives rise to the disputes.

The question that has to be answered is "***How can mediation, which relies on mutual consent and cooperation, solve a dispute when negotiations between the parties has already failed to do so ?"*** Put another way ***"If experienced negotiators have already failed to solve the problem between themselves why might a mediator succeed where they have failed ?***" The answer lies in the fact that frequently the parties to a dispute develop tunnel vision. The longer a dispute goes on the harder it becomes for the parties to separate themselves from their view as to who is responsible, what the contract requires them to do and most significantly of all, what will happen if a solution is nor found. As an independent outside observer the mediator is able to take a fresh, objective view of the situation and help the parties to re-evaluate the risks that they will be exposed to. The mediator is not a magician or miracle worker. A mediator cannot make the parties agree and cannot impose a solution. The mediator's skill lies in the art of communication and to help the parties to explore solutions which are in their best commercial interests. Disputes generate a climate of animosity where parties will frequently chose to take a course of action which is commercially detrimental to their organisation simply to prevent the other party gaining an advantage. If a party can prove that the chances of success at litigation are high and that it will produce the greatest advantage to their organisation, mediation is unlikely to succeed. However, where the chances of success are evenly spread between the parties and the likely outcome is less advantageous than settlement, an experienced mediator should be able to guide the parties towards a settlement.

There is an added value to mediation, in that mediated settlements are frequently more evenly balanced than party negotiated settlements. I often hear business people in this region stating that they do not have disputes. Either they have simply been lucky up to date or business people in the region are very reasonable and sensible and always manage to negotiated solutions to trading problems. A more likely explanation is that frequently the stronger of the parties is able to force the weaker party to compromise without any genuine negotiation taking place and without a meaningful evaluation of their respective commercial rights and duties. Mediation can address this problem.

MEDIATION AND LITIGATION OUTCOMES CONTRASTED

Mediation has been described as a "***WIN/WIN***" process, whereas litigation is considered to be a "***WIN/LOSE***" process. What does this mean and why ?

In litigation a third party arbiter, that is to say a judge or arbitrator, is asked to decide a specific question, namely which of the parties is responsible for a loss causing event. Once this is determined the arbiter will proceed to assess how much money, if any at all, is due to be paid by the person responsible to the other party. Frequently the loser will also be required to pay the costs of the trial and the legal expenses of the other party. In effect litigation results in a "WINNER" and a "LOSER". There is no middle ground. Whilst there are legal mechanisms that can reduce the award, perhaps because the winner has in some way contributed to his own losses by for instance failing to take steps to mitigate or limit the amount of harm suffered after the event or by failing to take precautionary self protective measures which resulted in more harm being suffered than would otherwise have been the case, these factors apart there is no scope for the arbiter to share the costs of the problem between the parties. Put bluntly, it is not the job of the arbiter to cut the cake. One party gets the whole cake. The other party gets nothing. There is no requirement that the decision be either "fair" or "just". It has been famously stated by a judge in session that "This is not a court of justice. It is a court of law."

The arbiter makes a determination of fact, applies the applicable law to the facts and circumstances of the case, as proved before him in the court or tribunal and thereby produces a decision or ruling. The scope for decision making by the arbiter are limited by the law. If the law is just and fair then there is a chance that the decision will be but that is not always the case and where it is not it is unlikely to be the arbiter's fault. Why might it be that the law cannot guarantee a fair or just outcome ? A number of examples will suffice to show how this can occur.

Wining on a technicality : As discussed above, the circumstances when an arbiter can apportion responsibility under the law are severely limited and restricted. However, frequently neither party has acted in a particularly irresponsible manner and the loss causing event is simply the result of a combination of unfortunate circumstances. In the absence of a clear contractual allocation of risk for the loss neither party is likely to be prepared to shoulder responsibility and frequently comes to believe that the loss must be due to some form of failure or wrong doing by the other party, often fuelled by hindsight. In effect the allegation becomes "If he had done X the problem would have been avoided, so it is his fault." Foreseeing the need to do X at the time may not have appeared prudent, though clearly after the event it is easy to see why it would have been a good thing to do. The decision of the arbiter in such circumstances is likely to appear to be an arbitrary decision based on legal technicalities. Whilst a fair result might be to share the responsibility evenly between the parties, as discussed above, this option is not available to the arbiter.

The unhelpful trading partner : Many loss causing events are the result of a combination of actions and events which both parties have to a greater or lesser extent contributed to. Often one party could have done something to assist the other party but had no legal duty to do so. The failure to assist may have been due to an oversight, self protection or because it would have involved financial loss or inconvenience, albeit perhaps relatively minor compared to the problem it would cause the other party. Whilst perhaps harsh or callous it may well have been perfectly lawful to fail to provide assistance. In the absence of wrong doing the law cannot apportion loss between the parties to take account for such harsh or careless conduct. The law will limit itself to apportioning loss on the basis of proven wrong doing alone.

Proving facts : The ability to establish in court what actually occurred is fraught with difficulties. The tribunal decides on the basis of what is presented to it what in the opinion of the court occurred. There is no guarantee that this will be what actually occurred. The tribunal draws a conclusion on the basis of the credibility of the witnesses and their ability to recall and describe the events. A witness with a poor reputation for reliability may not be believed by the tribunal even if telling the truth. Witnesses frequently have a distorted view of events which they portray to the tribunal in a very convincing and compelling manner. Time has a tendency to play tricks on memory. The party who has kept the best records or events and perhaps engaged in the most written communication has a distinct advantage in court.

Quantifying loss : Establishing the amount of loss that has been sustained as a result of the wrong doing of the other party is a question of fact for the tribunal. Evaluating the loss is more of an art than a science and the outcome is often far from predictable. The failure to recover sufficient damages in court to cover the winning party's perceived losses because of problems in proving the losses often leads to dissatisfaction with the judicial process.

Interpretation of contracts : The precise meaning of the terms of contract is a question of fact for the tribunal. Both parties may be convinced that they know what the contract meant and assert that the contract provides in their favour. However, the contract can only have one meaning and hence, even though the decision may appear arbitrary and based on a technicality, one party will inevitably lose. The loser is unlikely to derive a sense of justice or fairness out of the decision.

Causation : Many of the follow on consequences of loss making events are not legally recoverable. The law only allows a party to recover losses directly arising out of an event. Indirect losses can however frequently be far more significant for one or even both path parties and can outweigh the costs to either party of solving the problem quickly at minimal cost at the outset.

Conclusion : There are rarely any real winners in conflict. No one ever recovers all their costs and expenses from litigation, which is also emotionally draining and time consuming. Furthermore, litigation is disruptive and detracts from the real business of making money. Where it is clear that a party is in the wrong and cannot win, all that litigation achieves is to postpone the time when they will have to account for their wrong doing. An early settlement, even at full cost will save on legal expenses. The other party may well be prepared to accept a lesser sum in order to avoid the costs and risks of litigation and view the discount as beneficial particularly where it maximises cash flow at an early date. The mediator, by outlining the advantages of settlement to both parties, can often bring about a settlement in the most difficult cases and unlikely circumstances.

This is not to say that litigation is never necessary. Where the rights and wrongs of a situation are not clear the parties may only be prepared to accept the decision of a judge, particularly if the decision will help establish guidelines for future relationships. A loss resulting from a court judgment may be easier to justify to stake/shareholders or to superiors than a negotiated settlement on terms that might otherwise be open to criticism, and so a judgement is needed. Finally, where a wrongdoer is totally unwilling to take responsibility for their actions the other party may be left with no option but to go to court.

THE ROLE OF SUBSTANTIVE LAW IN MEDIATION AND LITIGATION CONTRASTED.

With the exception of the rare ***"Ex Aequo Bono"*** equitable arbitration process where parties agree to an arbitrator settling a dispute on the basis of fairness without reference to law, courts and tribunals apply the law governing a dispute to the settlement of the dispute. Much time will be spent proving facts to the satisfaction of the court or tribunal. International trade and maritime law is complex. Legal advisors in such areas tend to be experts and charge a great deal for their services and judicial proceedings often involve protracted legal argument about the law. Going to law for the settlement of trade and maritime disputes is by common agreement an expensive business.

In a mediation the parties do not have to prove any facts to the mediator. Nor do the parties have to prove what the law says they are entitled to. The reason for this is because the mediator does not make a decision. A mediation settlement is based on what each party is prepared to agree. Often a party will pay more than he believes he is strictly required to pay under the law or agrees to settle for less than he believes he is legally entitled to. Unlike a court judgement, a mediated settlement represents what each party considers is fair, just or practicable and amounts to what they consider to be the best deal that can be achieved in the circumstances. Where the wrong doer is in severe financial difficulties and is not in a position to pay any award made against him there is a strong likelihood that an award will drive the wrong doer into bankruptcy. Apart from some sense of justice, the winner will reap little or no commercial benefit from the judgement. A settlement agreement however could include joint financial measures or even the terms of a take over, of mutual benefit to both parties. Courts and arbitrators cannot achieve such results.

The fact that mediation is not a judicial process does not mean that law has no role to play in the negotiation settlement. In fact law is crucial to the effectiveness of the process. The legal alternative to mediated settlement is the principal reason for reaching a settlement and the legal requirements that would be enforced at law set the framework for shaping the actual settlement itself. The courts are essential for the enforcement of mediation settlements.

Any mediated settlement, whilst inevitably not a mirror or what a court would award, is likely to be shaped by the legal rights and obligations of the parties, subject to concessions financed out of the avoided cost of litigation, rapid cash flow benefits and uncertainty as to exactly how much might be recovered from a court or tribunal. The primary instrument of persuasion for the commercial mediator is the "***REALITY CHECK***".

The reality check and claimants :

Risk Assessment : The starting point is the potential recovery sum through litigation. The mediator will invite the claimant to evaluate both the strengths and weaknesses of the claim or claims based upon both the legal ground or grounds that would be relied upon and the ability to discharge the burden of proving relevant facts. The assessment might reveal that in the claimant's view the claim has a 75% chance of success overall, but that whilst the claim is for $100,000, even if the claim succeeds $80,000 is a more realistic assessment of what the court would be likely to award.

Cash Flow : If the mediation fails the claimant will have to proceed to litigation which could take from between 6 months to several years. During this time the claimant will be deprived of any money that might be available as a settlement sum and will have to finance the trial. Even if successful claimants rarely recover all their legal costs and it is likely that the claimant will incur lost opportunity costs in allocating time and energy to a trial that could be better used in commercial endeavour.

Enforcement : Whilst court orders are readily enforceable, recourse to the courts may be needed to enforce an arbitration award. The claimant needs to consider whether the defendant will have any money at all at the time of enforcement and most particularly whether that money would be available to the enforcing court.

Assessing an offer to settle : If the defendant were to offer immediate payment of a sum of between $60-70,000 in full settlement of the claim the 25% risk of losing would be negated, cash flow would receive an immediate boost without any need for additional finance to prosecute the claim and immediate payment would avoid enforcement problems.

The reality check and claimants :

Risk Assessment : The mediator will invite the defendant to evaluate both the strengths and weaknesses of the defence based upon both the legal ground or grounds that would be relied upon and the ability to discharge the burden of proving relevant facts. The assessment might reveal that in the defendant's view he has a 60% chance of successfully defending the claim. Furthermore, the defendant feels the claim, should it succeed, is worth only about $70,0000. However, if the claimant succeeds, the defendant will have to bear both parties legal costs and the cost of the court / tribunal, all of which could cost an additional $50,000.

Cash Flow : Whilst putting off payment produces a short term cash flow benefit, it might be necessary to set aside a contingency fund to cover the risk of losing, so cash flow may not benefit as much as it would at first sight appear to do.

Enforcement : If litigation goes against the defendant, resisting payment would only increase legal costs and would probably not be economic where the defendant intends to remain in business and has no intention of liquidating the business.

Assessing an offer to settle : If the claimant were to indicate a preparedness to settle for a sum of between $60-70,000 in full settlement of the claim the 40% risk of losing would be negated, the accountants could immediately set up a financial plan to move forward and an outside risk of having to pay out in excess of $120,000 would be avoided. The defendant could therefore potentially save $50-60,000 and maximise opportunity costs immediately.

Conclusion : It is only by having a reasonable understanding of the relevant law as it would be applied in a court seized with jurisdiction over the dispute that the parties can assess the legal implications of the claim and defence. Whilst the degree of legal knowledge and expertise required to litigate is far higher than in mediation, a lack of legal understanding during the mediation process can result in undue optimism or excessive pessimism, leading either to a failure to make realistic concessions or alternatively to uncalled for generosity.

ENFORCEMENT OF AWARDS AND SETTLEMENTS

Enforcement of Court Rulings : The effectiveness of court rulings varies from country to country. The courts of a country with a poor or ineffective enforcement regime will be distinctly unattractive to the parties to an international commercial dispute, though parties to local domestic disputes will be left with little alternative. The most significant limitation on the power of enforcement of any court is that the court's power is limited by national jurisdiction. A number of International Court Award Enforcement Conventions or Treaties, e.g. The Brussels Convention between member states of the European Union, result in a broadening of enforcement to the courts of participating states, but such agreements are very limited in terms of international coverage. In International Trade and Maritime disputes it is unlikely that both parties will reside in and have assets in the same country. National courts are often reluctant to accept jurisdiction over disputes unless security can be secured to ensure that the court can effectively enforce attendance by the defendant and subsequently enforce its rulings. A court ruling against a foreign citizen outside the jurisdiction and without assets in the jurisdiction is often not worth the paper it is written on.

Enforcement of Arbitration Awards : Arbitration awards rely entirely upon the courts for enforcement. Domestic arbitrations rely on the domestic courts and thus the awards are or no more nor less value than the enforcement effectiveness of the domestic court. Sadly, in some countries the courts act as if they are in competition with arbitration and may offer little support to the arbitral process or even be obstructive. Fortunately, the large number of states that have signed up to the UNCITRAL MODEL LAW and now actively support arbitration means this is less of a problem than previously. However, it is in international arbitration that arbitration has distinct advantages over domestic courts. In excess of 126 nations have now signed up to the New York Convention on the Enforcement of Arbitral Awards. This Convention allows for the international enforcement of arbitral awards. If the losing party fails to comply with an international arbitral award the winning party can apply to a court of any signatory state for enforcement. This means the claimant can chase the assets of the defendant around the world and hiding places are few and far between. Sadly however, as might well be expected, the effectiveness of court enforcement is not of a universal standard world wide.

Enforcement of mediation settlements : The enforcement of mediation settlements differs radically from court and tribunal award enforcement. A mediated settlement is the equivalent of a new contract which replaces the original contract. The agreement is enforceable as a simple contract under the normal law of the land of the state where enforcement is sought. Mediated settlements tend to be in the nature of a debt and are more easily enforceable than general contract terms since there is no need for the court to determine the meaning of the terms of the contract. Most national courts will enforce mediation agreements. Often a settlement can be lodged with a court and any failure to comply will be a treated as contempt of court. Alternatively, it may be advisable to sign a deed of settlement to ensure enforcement. Frequently payment is made immediately after the settlement agreement is signed and before the parties leave, which renders enforcement unnecessary unless the payment proves to be defective. Immediate direct electronic cash transfers are one way of ensuring payment.

Enforcement of international mediation settlements : In a few countries such as the Lebanon the courts reserve the sole right to amend contracts and thus the enforcement of mediated settlements is problematical in these jurisdictions. This will only prove to be a problem if recourse is made to a court in such a state for enforcement. If the paying party has assets in a foreign state which enforces mediation settlements then by ensuring that the settlement agreement is made subject to the law and jurisdiction of that state, problems of enforcement can be avoided. It should be noted that there is neither a need nor a requirement for the settlement agreement to retain the choice of law and jurisdiction provisions that governed the original disputed agreement. Indeed unless the defendant is a resident of that state or has assets there, it would be unwise to do so.

GETTING INTO MEDIATION

If Mediation is such a useful process, how can a party to a dispute ensure that the dispute is submitted to mediation ? The answer is that unless the contract provides for mediation it may be very difficult to do so. It is impossible to make a party actively engage in mediation, though in some countries the law may impose financial penalties on defendants who refuse to use the process and may even prevent claimants from going to court unless an attempt at brokering a mediated settlement is attempted. However, the law cannot force parties to agree. At the best it can encourage active participation but no more because by nature agreement is a purely voluntary process.

It is increasingly common for contracts to contain a mediation provision. In the absence of a mediation clause it is possible for parties to agree after a dispute has arisen to submit to mediation but such agreements are rare because relationships have often deteriorated to such an extent that the parties are no longer capable of agreeing on anything at all at that late stage, ensuring that litigation is then the only way of ending the dispute. On the other hand in 2001 P&I Clubs used ad hoc mediation to settle trade and maritime disputes with a combined value in excess of £2 billion, simply because of the large savings that could be made by avoiding litigation. Mediation can be used at a number of different points in the Maritime Insurance Claims process :-

i) To settle personnel disputes, cargo claims, charterparty disputes, collision claims, pollution claims and sale/supply disputes.
ii) To settle disputes that arise when a claimant / assured disputes a claim adjuster's evaluation or a claim rejection is challenged
iii) Disputes between the underwriter and third parties in subrogation of the assured's legal rights following a pay-out to an assured.
iv) A multi-party mediation between the assured as plaintiff, third party as defendant with claims adjusters for both underwriters in attendance.
v) Inter-underwriter negotiations over linked claims.

Sample Mediation Clause : "Any dispute between the parties arising out of this contract to be settled by mediation ……" Whilst this would be sufficient a further number of provisions is recommended.

It is useful to specify the rules for the conduct of the mediation by for instance making it subject to the rules of an organisation. In particular many problems can be avoided by ensuring a mechanism for the appointment of the mediator, a factor covered by most institutional mediation rules. It is advisable to provide for an alternative form of dispute settlement to ensure an effective trial is available in the event that the mediation fails. The mere existence of the fall back process is often enough to ensure that the mediation process is taken seriously by both parties.

The local courts will always be available for the settlement of domestic disputes if the mediation fails, but if arbitration is perceived of as a preferable fall back process then a Mediation / Arbitration clause is advised. For the reasons outlined above, arbitration is the most common method of settling international trade and maritime disputes and thus a Mediation / Arbitration clause is highly recommended.

Incorporating Mediation agreements into Trade and Maritime contracts : The greatest barrier to the use of mediation in international trade and maritime disputes lies in the fact that most of the industry conducts business on the basis of long established standard form contracts. The majority of these at present provide for arbitration or a choice between court or arbitral settlement. Sometimes the arbitral institution is specified, sometimes it is not. However, few standard form contracts currently provide for Mediation / Arbitration.

Where there is no standard form provision, if mediation is required, the contract needs to be deliberately amended before it is concluded. This is not as difficult as it might seem. Most institutional bodies providing mediation and arbitration provide free and ready access to standard form mediation/arbitration agreements which can be electronically down-loaded from the web and inserted as an addendum to the contract. These include the Chartered Institute of Arbitrators, The American Arbitration Association and the International Chamber of Commerce amongst others. The UNCITRAL RULES provide model clauses and model rules for both conciliation (another word for mediation) and arbitration which can be incorporated into contracts.

Trade contracts tend to use in house standard form contracts, incorporating standard international provisions by reference only, for example c.i.f. INCO TERMS 2000. INCO TERMS itself is silent on dispute resolution leaving it to the parties to incorporate separately along with the other details of the sales contract. There is nothing therefore to prevent a traders legal drafting department from incorporating a mediation / arbitration clause into the contract.

Charter party contracts are traditionally standard form. The shipper tends to dictate the terms so incorporation should be relatively straightforward. This could be facilitated if a standard form version were to be made available of common charters used in the trade. Thus, if the AFA were to produce a version of the Red Sea Charter Party which included a mediation / arbitration clause as an option, this would do much to encourage use of the process by members.

Contracts of carriage independent of charters are normally drafted by carriers as are bills of lading. It is likely that if local charters started to used mediation / arbitration clauses, the convenience of contracts of carriage reflecting the terms of the charter would result in carriers adapting their contracts to include mediation/arbitration.

It is anticipated that as the standard form contract providers update their contracts the option of using mediation / arbitration will become more common. Already the insurance industry is voluntarily availing itself of the process even without express incorporation.

Contractors need to be aware of the importance of establishing a dispute resolution process at the contractual stage. Many standard form charter parties provide a range of dispute resolution options which require the parties to choose a particular process and to choose the relevant ruling law and jurisdiction. It is surprising the number of times the courts have had to consider what process applies because the parties have failed to make an express choice. Making the choice is not difficult. All it involves is crossing out the unwanted alternatives and filling in the blank spaces, but all to often nothing is crossed out and the blanks are not filled in. The result is expensive litigation, not to resolve the dispute, but merely to determine which dispute resolution process should be used and to determine the relevant governing law and jurisdiction.

A sample NADR mediation / arbitration clause governed by NADR mediation and arbitration rules is provided below. Note that the clause enables the parties to determine in advance the time for the commencement of mediation and if mediation fails for the subsequent commencement of arbitration. The parties also need to chose the governing law and jurisdiction.

NADR MEDIATION / ARBITRATION CLAUSE

Any dispute hereafter arising between the contracting parties / any dispute hereafter arising out of or in respect of this agreement (delete as required) to be referred to the

National Association for Dispute Resolution Inc, US [
Nationwide Academy for Dispute Resolution UK Ltd [delete as required]*
Nationwide Academy for Dispute Resolution (M) Sdn Bhd [

for mediation, subject to the relevant Mediation Rules, Regulations and Codes of Practice of NADR applicable at the time of reference. Unless the parties otherwise agree, mediation to take place within ..... days (insert the required figure) of referral of dispute to mediation. Any agreement arising out of the Mediation to be immediately enforceable before any court of law. The main agreement, and this mediation clause are governed by ..... Law** (insert the governing law). The mediation process is a pre-requisite to adjudication, arbitration and or judicial settlement. This mediation clause is independent of and severable from the main agreement and will remain in force irrespective of whether or not the main agreement is lawfully enforceable. The main agreement and this mediation clause are subject to the jurisdiction of the courts of ..... ***(insert required jurisdiction).

In the event that the parties fail to reach a negotiated settlement at mediation, the dispute to be referred to NADR as above stated*, for arbitration, subject to the relevant Arbitration Rules, Regulations and Codes of Practice of NADR applicable at the time of reference. Unless the parties otherwise agree, reference to arbitration to take place within ..... days (insert the required figure and delete as required) of referral of dispute to arbitration. The Arbitration Award to be immediately enforceable and binding. The main agreement, and this arbitration clause are governed by the law stated above**. The arbitration process is a pre-requisite to judicial settlement. This arbitration clause is independent of and severable from the main agreement and will remain in force irrespective of whether or not the main agreement is lawfully enforceable. The arbitrator to have full jurisdiction to decide matters in relation to the scope of this arbitration agreement and in relation to the enforceability of the main agreement. The main agreement and this arbitration clause are subject to the jurisdiction of the courts stated above***. In the event that any provision of this Agreement is invalid, the parties agree that all remaining provisions shall be deemed to be in full force and effect.

NADR RULES FOR MEDIATION

1. **Definition of Mediation.** Mediation is a process under which an impartial person, the mediator, facilitates communication between the parties to promote reconciliation, settlement or understanding among them. The mediator may suggest ways of resolving the dispute, but may not impose his own judgment on the issues for that of the parties.
2. **Agreement of Parties.** Whenever the parties are required or have agreed to mediate, through the provisions of a Dispute Resolution Agreement, by operation of law, by Policy or otherwise, they shall be deemed to have made these Rules, as amended and in effect as of the date of the submission of the dispute, a part of their agreement to mediate.
3. **Mediator Appointment.** The mediator shall be selected and appointed by the Executive Director of the Nationwide Academy for Dispute Resolution, U.K. Ltd., for the time being, from the Nationwide Academy for Dispute Resolution, U.K. Ltd's list of mediators. The Mediator shall act as an advocate for resolution and shall use his best efforts to assist the parties in reaching a mutually acceptable settlement.
4. **The Mediator.** The Mediator shall not serve as a mediator in any dispute in which he has any financial or personal interest in the result of the mediation. Prior to accepting an appointment, the Mediator shall disclose any circumstance likely to create a presumption of bias or prevent a prompt meeting with the parties.
5. **Authority of Mediator.** The Mediator does not have the authority to decide any issue for the parties, but will attempt to facilitate the voluntary resolution of the dispute by the parties. The Mediator is authorized to conduct joint and separate meetings with the parties and may also offer suggestions to assist the parties achieve settlement. If necessary, the Mediator may also obtain expert advice concerning technical aspects of the dispute, provided that the parties agree and assume the expenses of obtaining such advice. Arrangements for obtaining such advice shall be made by the Mediator or the parties, as the Mediator shall determine.
6. **Commitment to Participate in Good Faith.** While no one is asked to commit to settle his/her case in advance of mediation, all parties commit themselves and their representatives to participate in the proceedings in the fullest good faith with the intention to settle, if at all possible.
7. **Parties Responsible for Negotiating Their Own Settlement.** The parties understand that the Mediator will not and cannot impose a settlement in their case. They recognize and agree that they are responsible for negotiating a settlement acceptable to them. The Mediator, as an advocate for settlement, will use every effort to facilitate the negotiations of the parties. However, the Mediator does not warrant or represent that settlement will result from the mediation process.
8. **Authority of Representatives. PARTY REPRESENTATIVES MUST HAVE FULL AUTHORITY TO SETTLE AND ALL PERSONS NECESSARY TO THE DECISION TO SETTLE SHALL BE PRESENT.** The names and addresses of such persons shall be communicated in writing to all parties and to the Mediator.
9. **Time and Place of Mediation.** The Mediator shall fix the date, time and location of each mediation session. The mediation <u>may also</u> be held at any convenient location agreeable to the parties and the Mediator, or at the offices of the Mediator or of Nationwide.
10. **Identification of Matters in Dispute.**
    a) Prior to the first scheduled mediation session, each party may provide the Mediator with a <u>Confidential Statement</u> of their position and reasons. They may also provide all parties and their attorneys, if any, with a Position-Statement setting out their position with regard to the issues that need to be resolved.
    b) On or before the first session, the parties will be expected to produce all information reasonable required for the Mediator to understand the issues presented. The Mediator may require any party to supplement such information.

11. **Privacy.** Mediation sessions are private and confidential. The parties and their attorney, if any, may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the Mediator. The Mediator shall exclusively determine what other persons, if any, may attend each Mediation session or parts thereof.

12. **Confidentiality.**
    a) Confidential information disclosed to a Mediator by the parties and/or by witnesses in the course of the mediation shall not be divulged by the Mediator. All records, reports or other documents received by a Mediator while serving in that capacity shall be confidential. The Mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceedings or judicial forum. Any party that violates this agreement shall pay all fees and expenses of the Mediator, N.A.D.R. and all other parties, including reasonable attorneys' fees, incurred in opposing the efforts to compel testimony or records from the Mediator.
    b) The parties shall maintain the confidentiality of the mediation. Accordingly, they stipulate and agree that no party or their representative shall rely on, attempt to, or introduce as evidence in any arbitral, judicial or other proceeding: a) views expressed or suggestions made by another party with respect to a possible settlement of the dispute; b) admissions made by another party in the course of the mediation proceedings; c) proposals made or views expressed by the Mediator; or d) the fact that another party had or had not indicated a willingness to accept a proposal for settlement made by the Mediator.

13. **No Stenographic Record.** There shall be no stenographic, electronic or any other record of the mediation process.

14. **No Service of Process at or near the site of the Mediation Session.** No subpoenas, summons, complaints, citations, writs or other process may be served upon any person at or near the site of any mediation session upon any person entering, attending, or leaving the session.

15. **Termination of Mediation.** The mediation shall be terminated: a) by the execution of a settlement agreement by the parties; b) by declaration of the Mediator to the effect that further efforts at mediation are no longer worthwhile; or c) by a written declaration of a party or parties to the effect that the mediation proceedings are terminated.

16. **Exclusion of Liability.** The Mediator is not a necessary or proper party in judicial proceedings relating to the mediation. Neither the Mediator(s) nor any law firm or mediation firm employing Mediator(s) shall be liable to any party for any act or omission in connection with any mediation conducted under these rules.

17. **Interpretation and Application of Rules.** The Executive Director of the Nationwide Academy for Dispute Resolution, U.K. Ltd., shall have the sole and exclusive power to interpret and apply these Rules.

18. **Fees and Expenses.** The Mediator's fees and expenses shall be assessed and set by the Nationwide Academy for Dispute Resolution, Malaysia, Ltd., and each party shall deposit and pay their assessment at least twenty one (21) days in advance of the date of each mediation session. The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the mediation, and the expense of any witness and the cost of any proofs or expert advice produced at the direct request of the Mediator, shall be borne equally by the parties unless they agree or have agreed otherwise.

19. **Waiver of Forfeiture of Mediation.** The failure, refusal or neglect of any party to timely comply with the mediation procedure, the payment of any assessments or deposits or otherwise to cooperate in setting up and/or participate in a mediation may operate as a waiver or forfeiture of any right to the mediation of their claims, dispute or controversy. Upon the complaint of any party to the Nationwide Academy for Dispute Resolution, U.K. Ltd.,. that any other party is engaging in such activities, Nationwide, in its' sole discretion, may terminate the mediation procedure and permit the immediate filing of a demand for arbitration.

20. **Emergency Proceedings.** Neither the request for, nor the use of any Nationwide A.D.R. Emergency Arbitration Procedure(s) shall be inconsistent with, nor a waiver of any right to mediate under these Rules. Once those Emergency Arbitration Procedures are concluded, a mediation may proceed under these Mediation Rules. The concurrent use of Court process to enforce the Award(s) of an Emergency Arbitrator while a mediation is pending or being conducted is expressly permitted by these Rules.

21. **Revisions of the Rules. NADR** U.K. Ltd., shall enjoy the right to modify and amend these Rules at any time and without Notice to any person. Those Mediation Rules in effect on the date(s) when any particular mediation is actually being conducted before the mediator shall govern those proceedings.

AVOIDING MEDIATION

Can a party to a contract with a mediation provision go to court or arbitration and over-ride a mediation provision ? The answer is YES if the other party agrees to over-ride the provision or takes an active part in litigation, providing the courts or the arbitrator do not object.

In Australia, Canada, Greece, Hong Kong, Singapore, the US and the UK the courts will often object and insist that the parties attempt mediation and will only go ahead with a trial if the defendant refuses to mediate or if the mediation has failed to settle the dispute. The same will apply to the whole of the EU if the current mediation proposals of the European Commission Report on ADR are adopted.

The courts of most other countries will accept jurisdiction over the dispute in the absence of an objection by the other party. The courts of many, but not all, states will stay a legal action pending mediation if the defendant objects and the contract contains a mediation clause.

It is essential that the mediation process be over-ridden at the request of a claimant if a defendant refuses to take part in a mediation, since otherwise the claimant would be denied justice.

In the UK, the US and a number of other states a party who fails to take an active part in mediation when it is specified in the contract or is recommended by the courts may suffer financial cost penalties in that even if they prevail in litigation the court may refuse to award costs and even order payment of the costs of the other party if the court feels it is justified in the circumstances of the case. Thus the rule that "***costs follow the event***" is overturned in such circumstances.

WHAT HAPPENS IN A MEDIATION ? A typical commercial mediation is described below :

Where will the mediation take place ? A mediation can normally be convened at a location mutually acceptable to the parties and the mediator. Local mediation, avoiding expensive foreign travel and the engagement of foreign advisors is both easily attainable and desirable.

Arrival and Registration. The parties will normally be met by a receptionist and directed to separate waiting rooms. Once everyone has arrived the parties assemble in the mediation conference room. The mediator then invites everyone present to be seated, introduces himself and invite everyone present to introduce themselves.

The Opening Joint Session. Whilst each mediator will have his own particular style, the mediation will then proceed as follows, though not necessarily in the order described below.

The mediator will invite each of the parties and their representatives in turn to briefly set out their position and how they view the events leading up to the mediation. Mediators often seek to get the parties to confirm that they have the legal power to settle the dispute and to provide assurances that they will actively participate in the process and negotiate in good faith with the view to settling the dispute.

The parties can exchange documents and give the mediator copies of anything new disclosed or exchanged at that time not already supplied to him in advance. The scope of the dispute is established at this time so it is essential that the parties listen to what is said and do not interrupt. The parties are not likely to agree with each others views and in order to prevent tempers becoming frayed it is essential that the parties treat each other with respect and civility There are plenty of opportunities later for the parties to comment on anything said during the opening joint session.

The mediator may choose to briefly summarise each party's submissions at this stage, following which he will explain how the mediation will proceed establishing ground rules for the conduct of the mediation and providing the parties with any information about the facilities available, such as smoking areas, use of mobile phones and refreshments.

Witnesses (if any)**.** If the parties have chosen to call witnesses this is likely to be the time when they will be invited to give evidence and an opportunity provided for the other party to ask the witness questions.

Private Sessions / Caucus. At the end of the opening joint session the mediator will usually invite one of the parties to accompany him to a private meeting room. The mediator will then meet each of the parties in turn for private sessions or what is known as "***caucus***". (If the mediator considers that the best way to proceed is by round table discussions between the parties everyone will remain in the same room and the joint session will continue.) The mediator will use his discretion to decide which party to commence the private session with. There is likely to be a series of these private sessions with the mediator commuting between the parties.

The mediator will exercise his discretion and judgement to decide how much time is needed in any particular session to take the negotiations forward and at the end of each session will indicate how long he is likely to spend with the other party at the next session.

The purpose of private sessions is to afford the parties the opportunity to explore the situation freely with the mediator without prejudice to their position. The mediator will discuss with each party in turn the reasonableness of their position and as and when appropriate, in the light of information he/she has gathered from the other party, give the parties an indication of whether or not their position is acceptable to the other party.

The mediator may well suggest potential avenues for settlement that the parties might wish to explore. Private sessions are confidential. The mediator will only convey information and documentary evidence to the other party that he has been authorised to disclose. The mediator will not disclose anything to the other party without consent and is likely to summarise what has been offered in a session and confirm that he has authority to disclose / convey that information to the other party at the end of a private session before going to meet the other party again.

The mediator will use his discretion to decide if, as and when, to disclose such information to the other party and may well chose not to do so if an offer, for instance, is likely to be regarded as totally unacceptable by the other party and disclosure at that stage might harm the mediation process. Instead the mediator may indicate a willingness to move without specifying how much movement is on offer.

Final Joint Session. If, as and when the mediator considers that the differences between the parties have been bridged and that an agreement can be concluded, he will reconvene the joint session for a final time so that the parties can finalise and sign the agreement. The mediator will draft the agreement with the assistance of the parties and have it reproduced in a presentable form for the parties to sign and witness. Payment is likely at this stage. As discussed above, it is advisable in international settlements that where immediate payment is not made, that enforcement procedures and governing law and jurisdiction for enforcement form part of the settlement.

Interim Joint Sessions. On occasions, the mediator may decide that it is necessary to interrupt the private sessions and convene one or more joint sessions in order to either conclude agreements on particular aspects of the dispute or to break stalemate situations, following which, private sessions will resume. The mediation will normally continue in session for as long as it takes to broker a settlement. A settlement can usually be reached in one day. If it becomes apparent to the mediator that a settlement is not possible the mediation will end. Either party may chose to end the mediation session at any time without concluding an agreement. Attendance at and participation in the mediation process is entirely voluntary. There is no obligation to conclude an agreement and particularly, there is no obligation to sign a totally unacceptable settlement.

Continuation Sessions. Often even when the parties fail to reach an agreement, the parties having had time to reflect on the process, agree to return some time later and continue the mediation at which time a settlement is usually reached.

Time Scales : It is often possible to conclude a commercial mediation in a half or full day session. Tight deadlines tend to concentrate the mind and produce better and speedier results. It is often a mistake to schedule a commercial mediation over several days, since it allows the parties to harden their positions and makes it more difficult to broker a settlement.

CONCLUSION

There is nothing wrong with commercial disputes. It is inevitable that from time to time commercial partners will be confronted with problems that lead to disputes. Often settlement negotiations provide solutions to wider problems and help to keep the partners in tune with current trends in the industry. The problem is that commerce cannot maintain its momentum without settling disputes. In the absence of choice to the contrary, a dispute will find itself before the courts. This is good news for lawyers. It is expensive to engage the services of lawyers. Even the best and most efficient judicial systems tend to be slow and laborious. However, State courts enjoy a great deal of power and have the authority to enforce the process. Confidence in the judicial system is the court's greatest asset. The legal knowledge and understanding of a judge may be highly valued by the parties. Judges are perceived as being dispensers of justice. Many maritime disputes are settled before the courts despite the problems of cost and delay. Indeed, delay often suits a party who does not want to pay, whilst the coercive powers of the court are the only way to ultimately ensure that a recalcitrant party appears at a hearing and is ultimately brought to account.

Mediation shares many of the benefits of arbitration in that it is private, quick and relatively inexpensive. However, the parties themselves maintain control over the decision making process rather than handing it over to a third party. There is an obligation to participate in the process but no obligation to reach a settlement. If no settlement is achieved the parties are free to proceed to arbitration or litigation. However, having canvassed the issues thoroughly in advance during the mediation process pre-trial preparation will be at an advanced stage and many side issues will have been resolved resulting in a quicker and more efficient trial.

At a mediation, the mediator acts as a go-between, exploring issues with each of the parties in turn, facilitating them to find a way to broker a settlement. The process has much to offer where the parties realise that a settlement is necessary and are prepared to broker a settlement. Many court cases settle on the steps of the court. Mediation achieves a similar result but involves the parties directly and leads to far more satisfactory settlements than are brokered by the hands off approach of settlement through the auspices of lawyers. Mediation settlements frequently include agreements for the future conduct of business rather than a mere settlement of the dispute at hand.

Mediation has less to offer, apart from a reality check on the parties, in situations where one party simply adamantly refuses to recognise any liability whatsoever and refuses to pay or perform a service or put something right. Even here, participation in the process can result in the recalcitrant party realising that their stance is unrealistic, paving the way for a settlement. Apart from being relatively inexpensive mediation is a valuable tool for repairing damage to commercial relations. Mediation is a serious process and has been successfully used to settle disputes involving very large sums of money. A great advantage of mediation is that it lends itself to multi-party dispute settlement and can therefore replace an entire series of arbitrations or court actions. Mediation agreements are readily and easily enforceable before the courts if the mediation agreement is breached.

Arbitration and litigation have a valuable role to play in the future of maritime dispute settlement. However, mediation has much to commend itself and the industry will be well advised to take a close look at what is now on offer. The maritime industry is continually evolving. The same is true of the dispute resolution industry. The industry must embrace change in order to prosper.

