News

Shipping

Mediation in shipping and insurance? Give it a chance

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INTRODUCTION

Litigation has always been high risk, and no more so than today both in terms of uncertainty of outcome and costs. For any well advised client, litigation must be the course of last resort. All available alternatives should be considered.

Alternatives are available. Arbitration is one alternative. Whilst arbitration has the advantage of allowing for the appointment of an arbitrator with expertise on the matters in dispute, it achieves no greater certainty of outcome and may well achieve no saving of time and costs.

Increasingly, the alternative of choice today is mediation. In some jurisdictions, the law recognizes the value and importance of mediation as a social necessity.

GROWTH OF MEDIATION

Internationally, alternative dispute resolution (ADR) is seen as a dispute process built around "commercial common sense". Alternatives to the two established and traditional methods of dispute resolution, namely litigation and arbitration, are included in the term ADR. However, mediation is regarded as the core of the ADR process.

When mediation – third party assisted negotiation – was introduced to the UK in the early 1990s, there was much resistance to the concept. Litigants and lawyers both protesting that it would not work nor be relevant to their legal system.

The new English Civil Procedure Rules (CPR) were introduced in April 1999 with the overriding objective of enabling the Court to "deal with cases justly" through active case management". Active case management was partly defined as "encouraging the parties to use an alternative dispute resolution procedure ... ". Courts were able to do this with or without the agreement of the parties. At a stroke, mediation was firmly placed as a central feature of the new civil litigation landscape. Two recent cases, *Dunnett v Railtrack* (February 2002) and *Hurst v Leeming* (June 2002) have great implications for anyone bringing cases to Court. *Dunnett* broke new ground. The successful litigant won at trial, but lost the subsequent costs award because of an unreasonable refusal to follow the court's earlier suggestion to mediate the dispute. In *Hurst v Leeming*, the claimant withdrew his claim, but argued that costs should be borne by the defendant because he had refused offers to mediate both before and after proceedings had been issued. Mr Justice Lightman viewed the refusal to mediate as reasonable but warned that refusal is a "high risk course to take".

Court directed mediation is also to be found in jurisdictions like Australia, the USA and Singapore. The arbitration community too has been alive to these trends. Increasingly, arbitral institutions have adopted mediation rules (for example, the Chartered Institute of Arbitrators and the International Chamber of Commerce) and arbitrators are considering how to introduce early settlement initiatives into the arbitration process.

In Hong Kong, a recent consultative paper of the Chief Justice's Working Party Report on Civil Justice Reform proposes rules making mediation mandatory in defined cases unless exempted by court order.

Hong Kong is responsive to international developments and is responding to the growth of mediation. Mediation, which is inherently flexible, can respond to change quickly and cost effectively. Mediation seeks a commercial solution not strictly a legal one and is therefore more likely to protect and even enhance working relationships. Relationships are important in Asian cultures.

Clearly, the development of mediation has been driven by pragmatic commercial considerations. Modern business requires speedy decisions (most mediation takes only 1 or 2 days), flexibility, negotiated control of outcomes, costs savings and a process that will not damage continuing business relationships.

The power of mediation is evidenced by its success. Despite the fact that most disputes are in total deadlock when they come to mediation, mediated settlements are achieved in the majority of cases. The Centre for Effective Dispute Resolution (CEDR) boasts an 80% success rate in achieving mediated agreements. A report this summer monitoring the British government's commitment to using ADR revealed an 89% success rate in cases referred to ADR by government departments.

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The need for an alternative to litigation and arbitration is broadly accepted, particularly because of time and costs problems. However, mediation can never entirely replace arbitration and litigation since it cannot deal with parties who are determined not to settle a case. Mediation is inappropriate in the following situations:

- The other party will not consider it;
- A legal precedent is needed; or
- An injunction or other rapid action to preserve an asset or evidence is required.

In the last situation it is still possible to proceed to mediation after a preservation order has been obtained.

MEDIATION FOR THE MARITIME AND INSURANCE INDUSTRY

Mediation has struggled for acceptance in the shipping and insurance industries. These industries are beginning to realize its attractions. However, the industry needs to become more than just aware of its benefits. Mediation needs to be incorporated into the industries' daily conflict avoidance, conflict management and conflict resolution procedures.

Mediation clauses now increasingly appear in commercial maritime contracts, like charterparties, insurance policies, LOF 2000 and even the new BIMCO Standard Ship Repair Contract. This rate of growth looks set to continue.

The Joint Hull Committee (JHC) launched its new international hull clauses on 1st November 2002. Clause 53 of the new clauses states that underwriters and insured may refer any disputes to mediation as an alternative form of ADR to resolve disputes. The JHC, a joint initiative of the International Underwriting Association of London and Lloyds Underwriters Association, created a new set of hull insurance clauses to accurately reflect the needs and requirements of today's shipowners and insurers. The marine insurance market has made itself familiar with the benefits of mediation and the process itself through its marine market mediation initiatives. A mediation option in the hull clauses is a natural progression.

BIMCO has reviewed its "standard dispute resolution clause" which provides for the possibility of mediation. This is part of the move to increase the shipping industry's awareness of new mediation techniques. The London Maritime Arbitrators Association has published the LMAA Mediation Terms (2002). A potential penalty for unreasonable behaviour is also a feature of the BIMCO clause and the LMAA terms, The BIMCO clause provides that if a party does not agree to an offer to mediate then this fact may be brought to the attention of the arbitration tribunal and taken into account when the tribunal is allocating the costs of the arbitration. The LMAA terms provide that the mediator may order a party whose conduct has been unreasonable to pay the mediation costs.

Other major commercial players in the maritime world are considering mediation clauses as a standard feature of their contracts. Some have already done so (for example, Cargill).

Long term changes in the shipping and marine insurance industry are likely to support this trend.

Mediation is not an easy option. It offers a forum for possibly tough negotiations and a broad brush resolution of a dispute. Mediation enables a party to resume, or sometimes to begin, negotiations. The very presence of a mediator changes the dynamics of the negotiating process. The mediator brings negotiating, problem solving and communications skills to the process. These skills are deployed from a position of independence and neutrality, making real progress

possible where direct negotiations have stalled. The majority of mediations do settle issues. For those that do not settle, mediation is still useful as it helps to reduce the issues in conflict, thereby paving the way for renewed negotiations.

Some lawyers are trained to advise on mediation. Check your panel solicitor's mediation experience. Insurers and those in shipping circles can afford good advice. They are entitled to expect knowledgeable and authoritative advice on civil procedure and the alternative forms of dispute resolution.

For insurers, mediation appears to have little downside, but they are reluctant to turn to mediation. You cannot be half hearted about mediation. Claims and insurance managers must be ready to fully participate in the mediation process.

To maximize cost savings mediate as early as possible. Train your claims staff to act independently if preferred. Legal representation is not necessary if a claim is within the grasp of your claims staff. If a claim does not settle at mediation, do not assume that this is the end of any amicable outcome. Mediations often lead to settlement soon after, the parties having used the process as a way of moving towards a later agreement.

Parties in shipping and insurance disputes may not yet fully appreciate the comparative benefit of mediations. However, P&I Clubs and insurance companies projecting astronomical figures for legal costs in conducting or defending disputes in arbitration or in court over the next decade, need to encourage their insured to consider mediation. The marine fraternity (not necessarily lawyers only) should embrace this important dispute resolution concept, train themselves in it, and practice it intensively. In doing so, they will gain the appropriate experience required to master mediation.

For Hong Kong to establish itself as the pre eminent regional center for international shipping dispute resolution, mediation cannot be ignored. The Hong Kong International Arbitration Centre (HKIAC) maintains a panel of accredited mediators including mediators with the requisite shipping and insurance experience. The Hong Kong Maritime Arbitrators Group, a division of the HKIAC, does likewise. The Hong Kong Federation of Insurers and the Hong Kong Mediation Council, division of the HKIAC, launched their Insurance Industry Mediation Pilot Scheme in July 2003, which is administered by the HKIAC. To encourage the use of mediation in insurance in Hong Kong, mediators under the scheme provide their service up to a maximum of 16 hours for an honorariam of only HK$200, for disputes involving sums of up to HK$2 million.

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CONCLUSION

My message is simple. Give mediation a chance. Give it a chance at the earliest opportunity before heavy legal costs are incurred, for it is those costs that can prove the greatest obstacle to a settlement. In litigation there is only one winner. I leave it to you to guess who that might be. In the case of mediation, everyone can be the winner, the costs can be small, the result may be achieved in a short passage of time and personal relations may be maintained. Mediation is not a universal panacea: it has its limitations and it is not always applicable. But where it is available, no conscientious litigator or party will likely reject it if you fairly raise the alternative, namely litigation. Any adviser who fails to suggest mediation may be inviting a professional negligence suit before too long.

FURTHER INFORMATION

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