

Shipping dilemma about mediation?

I must admit the last 5 years, during almost 20 years of experience in shipping field, I had to develop and gain additional skills as an insurance broker, among which using initiatives, questioning everything and acting as intermediary to bring two parties together. Yet, these skills are the very same important skills of a mediator. I became mediator in 2012, accredited by CEDR and Greek Ministry of Justice, and I can imagine the role of mediator is particularly tough as the parties are looking at him/her to help them find a solution.

However, the point is different; mediation is a dispute resolution process, independent, third party assisted process. The mediator helps the parties to find a mutually accepted solution to their dispute but cannot really impose a solution. No solution is possible without the mutual consent of the parties based on their cooperation. Is this promising though and attractive in shipping? Shipping is business, and as such, supply of goods and/or services as well as the risk allocation is negotiated between two or more parties. Disputes may arise when one party may not accept responsibility – or is not prepared to do everything that the other party demands - and, so, refuses to do anything to put the problem right which drives the other party to some loss, even if there is a contract the terms of which bind both parties. It is considered clearly parties' failure to resolve the dispute despite the negotiating experience and expertise in the field.

Is this contradicting with mediation which is based on parties' cooperation to resolve their dispute? Is this truly the reason why shipping has not turned to mediation, yet, as an alternative way to resolve the disputes?

Mediation is not magic but the procedure can be beneficially used to settle international disputes between two or more parties. The advantages of mediation are many and not only refer to speed, cost effectiveness, private and confidential procedure, short hearings, control of the parties in discussion, option of lawyers, obligatory in Greece, but also any settlement is based on what each party is prepared to agree without having to prove any of the facts or what the law says. I have referred to stages of mediation in my previous article in this magazine, however, I believe one of the most essential points of the process is that settlement in mediation can be enforced without having to rely on local courts, in opposition to enforcement of arbitration award which some countries offer very little support. Settlement in mediation means a new contract is signed by both parties who both accept their agreement, and is enforceable under the law of the country where enforcement is sought. Parties can sign a deed of settlement to ensure enforcement which can be lodged with the court and any failure to comply will be treated as contempt of court.

Referring to law, we can see rarely winners in conflicts if one considers the cost, legal fees, emotional stress and time consumed from making money. Going to law has proved an expensive business.

How we can get parties to mediate? When disputes arise, parties' relationships have deteriorated to such an extent that they are no longer capable of agreeing on anything at all ensuring that litigation is the only way to end the dispute. Lawyers are appointed but do not necessarily make the best mediators, however, parties rely on them to resolve the problem

and consequently lawyers negotiate as if the problem was theirs. Litigation seems inevitable and in absence of choice to contrary a dispute will find itself before the courts. This is good news for lawyers but legal fees add to the problem, as referred previously. It really depends on the parties to realize that mediation is private, quick and inexpensive process and close cooperation between the lawyer and the client is extremely valuable to resolve the dispute which finally helps the relationship to continue. Parties maintain control over the decision making process than handing it over to lawyers, as there is an obligation to participate in the process but no obligation to reach a settlement, following which parties are free to proceed to arbitration or litigation. The mediator facilitates parties to find a way to settlement as it can even result in the unmoved party to realize that their stance is unrealistic, showing the way to a settlement.

Courts support mediation in shipping and solicitors have to realize that they have to take it seriously especially when mediation clauses exist into contracts which may bring disputes to a settlement earlier making the maintenance of relationships a priority for both parties. P&I Clubs are already looking to appoint mediators for this reason and insurers are already more cultured in their use of mediation.

Mediation is a serious process and has been used successfully to settle disputes involving very large sums of money, replacing a series of arbitrations and court actions, resulting in agreements which are easily enforceable before the courts. It can be used at a number of problems, to settle cargo claims, charter party disputes, collision claims, pollution claims, disputes between an underwriter and third parties or the assured with claims adjusters over related claims and more. However, in the absence of a mediation clause, parties rarely refer their disputes to mediation. Most of the industry conducts business on the basis of long established standard form contracts, the majority of which provide for arbitration or court. Nevertheless, contracts can be amended before they are concluded and the institutional bodies can offer alternative wordings to existing contracts. BIMCO is one of the world's leading private association of shipping companies with nearly 3,000 members in 125 countries who control a fleet of about 500 m DWT representing almost 70% of the world's merchant fleet and promotes mediation since 2002 as voluntary, confidential, without prejudice process. Charter parties are traditionally standard form but as charters are drafted by carriers it would be beneficial if local charters started to use mediation clauses and include place of mediation mutually acceptable by the parties, Greece, for instance, where accredited and continuously educated mediators can be found. It is more than certain in that respect that shipping would save huge amount of money spent in arbitration or litigation even if foreign advisors had still to be attained. As an example, I refer to a case that I was handling on behalf of one of my clients recently about a charter party dispute which provided for a range of resolution options and it was surprising the number of times the tribunal had to consider what process applies because the parties have failed to make an express choice. The result was expensive litigation in determining the governing law and jurisdiction.

Local mediation is not expensive and engagement of advisors from different parts of the world is easily pragmatic. Shipping is evolving, in Greece more as per daily press news, and

arbitration and litigation have an important role in the contracts, however mediation has much to praise itself and the industry should embrace the future of this process.

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