# THE AGE OF MEDIATION IS HERE

## WHY WE PROMOTE MEDIATION

**Shipping is prone to disputes. How could it not be, given that the carriage of goods across the oceans is a complex and risky business, involving multiple countries and legal systems? There is also little doubt that we are living in a golden age for arbitration – most shipping related disputes these days head to arbitration, which has established a decent reputation in the shipping world, with arbitral awards being generally more easily recognised and enforceable across the world than court judgments.**

***Nicholas Fell***
*General Counsel,*
*BW Group Limited*

Also, the most commonly used forms in shipping, whether these be ship sale forms, newbuilding contracts, time and voyage charters, or supply contracts, often provide for arbitration as the default mechanism when a dispute arises. Indeed, Singapore is at the forefront of the arbitration scene and offers one of the very best bases and jurisdictions from which to conduct arbitration. The success of both the Singapore International Arbitration Centre (SIAC) and Singapore Centre of Maritime Arbitration (SCMA) is clear testament to this.

### Mediation

However, mediation is about to enter its own golden age in our industry. This is simply because those who have used mediation are spreading the word about its benefits and effectiveness. And the success rates speak for themselves - mediation is catching on. Furthermore, progressive lawyers, P&I Clubs, owners, charterers, and traders are actively promoting mediation and other alternative dispute resolution mechanisms.

So what then is mediation, how does it differ from arbitration or court proceedings, and what are its advantages?

## How mediation works

First of all, mediation is a voluntary and relatively informal method of resolving disputes. If the parties agree to a mediated settlement then the mediation has really, by definition, been successful. If the parties can't agree to settle their differences at a mediation, then they are free to continue their dispute by heading off to arbitration or to the courts. Control therefore rests squarely with the parties themselves to find a solution - not with an external adjudicator such as a panel of arbitrators or a judge. The role of the chosen 'mediator' is then is one of 'facilitation', not one of decision making or adjudication, and the best mediators are those who can tease out the real 'interests' of the parties, helping them find common ground.

Second, the parties are free to agree whatever they want. They can brainstorm in an environment which fosters collaboration, and agree to the kinds of things that arbitrators or judges simply cannot order. For instance, in a dispute which may at first sight just be about money, the parties could indeed agree to a monetary settlement, but they could also alter the terms of an underlying contract, provide for future business between themselves, or even include an apology in an overall settlement. Put more succinctly, mediation allows creativity to come to the fore, and the parties to identify what their own tailored remedy would look like. And this happens a great deal in mediations.

Mediation is about to enter its own golden age in our industry. This is simply because those who have used mediation are spreading the word about its benefits and effectiveness.

Third, mediations are generally speedy and typically

Mediations are confidential and anything said, admitted or proposed by a party cannot, apart from special circumstances, be later used if the mediation proves unsuccessful.

last just one or two days. This is far quicker than a typical arbitration or court hearing. Mediations are invariably less expensive by comparison with court or arbitration, and so are ideal for our industry which is rightfully sensitive about legal costs and the time taken to resolve disputes. This is in contrast with arbitration or court proceedings, where 'slow, formal and expensive' are perhaps words that commercial men and women may use to describe the process. Further, the formality of litigation and its adversarial nature can affect business goodwill and ongoing relationships. Shipowners, charterers and others involved in the shipping industry are, I think, generally far more interested in continuing positive business relations, rather than in preserving legal rights.

Fourth, mediations are confidential and anything said, admitted or proposed by a party cannot, apart from special circumstances, be later used if the mediation proves unsuccessful. This provides a backdrop for honest and candid discussions and even admissions between the parties and the mediator, leading to potential breakthroughs in negotiations during the day of the mediation.

## Singapore maritime mediation

A major boost to the profile of Singapore maritime mediation was the development of the SCMA 'Arb-Med-Arb clause' in 2015 which works hand in hand with the SCMA Arb-Med-Arb Protocol ('SCMA AMA Protocol'). The SCMA AMA Protocol provides that when an arbitration tribunal (typically consisting of one or three arbitrators) is formed following the start of an arbitration, the tribunal will 'stay' (or temporarily stop) the arbitration so that the dispute can be submitted within a reasonable time for mediation to a recognised mediation institution such as the Singapore Mediation Centre. Normally the mediator will not be one of the arbitrators, given that the role of the mediator is very different. This ensures that confidential discussions between parties and the mediator do not infect or prejudice the minds of the arbitrator(s).

Should the mediation be unsuccessful, the parties continue along with the arbitration as if nothing had happened. On the other hand, if as is often the case, the mediation is successful, the parties will have saved the time, expense and litigation uncertainties inherent in continuing with the arbitration. Additionally, parties can request to record their settlement in the form of a consent award, which is enforceable by using the arbitral tribunal's powers.

An attractive psychological feature of the SCMA AMA Protocol is that the mere existence of the Arb-Med-Arb clause in a document 'nudges' the parties and their lawyers to proceed with a mediation in good faith. Mediation may be something which a party or its representatives may have not earlier considered, but when faced with increasing costs, and angst, may become a more viable and appealing option.

## A viable alternative

Finally, the overall results of mediations appear to be extremely positive. Depending on where one gets the figures, it seems that three out of four mediations are successful – meaning that the parties themselves decide on an acceptable solution thereby avoiding full blown litigation. With figures such as these it would seem almost irresponsible not to try and mediate. The downside of failing is a few days preparation, travel to the place of mediation for a day or two of trying to be constructive - with a statistical chance of success, and a better chance of preserving a working business.

***If you are interested in learning more about mediation do look at: www.mediation.com.sg***