Mediation: Is there an art to the deal?

Mediation as a maritime dispute resolution tool can be an effective and cost-effective way to avoid litigation. The practice is widespread in the United States and becoming increasingly popular in the United Kingdom. We talked to those familiar with mediation either as mediators or participants to find the keys that can unlock a successful resolution.

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Mediation – an alternative to arbitration or litigation in court

Mediation is facilitated negotiation in which the parties to the dispute voluntarily agree to bring in a neutral third person to assist in reaching a compromise and avoiding litigation. The mediator does not take sides but helps the parties understand and focus on the issues at hand. Mediators can be professionals with formal training and long commercial experience, although in practice, anyone can act as a mediator as long as the parties agree.

Mediation is voluntary and confidential. The parties may agree to mediate at any point in the dispute resolution process. The format is not fixed but will usually involve a mixture of same-room discussions and 'break-out' sessions where each party retires to a separate room in order to discuss progress. The mediator will then go back and forth between the two in an attempt to bring about conciliation.

Mediation can be cost-effective compared to the more formal approaches of arbitration and court litigation. The success of mediation depends heavily on the willingness of all parties to avoid formal legal processes and make concessions in order to settle the dispute. It is generally not suitable for addressing points of principle or disputes where positions are heavily entrenched. Even parties with strong cases will be expected to compromise to conclude the matter. As Abraham Lincoln warned, "The winner in litigation can be the ultimate loser." A good mediator will point out the losses in the commercial relationship by a continued conflict, not to mention management time, and irrecoverable expenses.

Reaching beyond the dollars – US practice

In the United States, the majority of maritime litigation involves personal injury. Claimants include US seamen, longshoremen, pilots, surveyors, passengers and others injured while aboard or working around ships. In US Federal Courts prior to trial, an effort to resolve the case will be required via a settlement conference or mediation depending on the district. If not required, mediation is encouraged in the State Courts. Private mediation is common and requires consent by all parties.

One of the most critical success factors identified by Michael Leahy, President of Gard's New York office, is the message from the mediator in the opening session that "on this day, the claimant has the opportunity to control the outcome of the claim and that the opportunity is lost if the case proceeds to trial where his or her fate is in the hands of strangers". An equally important message to the Gard representative and the client is "the opportunity at that time and that day to get the deal done".

Mediator Jacob Munch agrees that he must be clear from the outset about the goals of the session. He sometimes schedules a pre-mediation telephone conference to make sure claimants, lawyers and other parties understand what to expect. Claimants may use the mediation to "air how they feel that they have been wronged". It is important that the other side is willing to listen. "Recognizing difficulty, recognizing injury is not accepting liability." Acknowledging the human aspect can be beneficial as long as it is sincere.

Sandra Gluck, both an arbitrator and mediator, feels that a mediation helps to 'humanize' the defendant – particularly if the defendant is a corporation because the company and insurance representatives can interact directly with the claimant. "An apology, within the parameters permitted by counsel, or expression of genuine empathy can work wonders to break down resistance and allow the parties to concentrate on the issues that are capable of being resolved."

All the Americans agreed that the parties must 'do their homework' beforehand. The lawyers representing both sides need to come prepared to acknowledge the weak points of their case as well as the strong points and the mediator must have the experience to understand the legal as well as factual aspects of the case. Sandra notes that the mediation session may be 'unsuccessful' in the sense that the parties do not reach an agreement at the time; yet the process may well end up in a settlement a week, a month or at some later point with or without the continued involvement of the mediator. That is because the act of coming together and hearing the other side's 'pitch' often allows each side to better appreciate the weaknesses of their position and the strengths of their opponent's case.

During the pandemic lockdowns, mediations were held virtually. There are platforms that have options that cater for confidential break-out sessions and allow the mediator to go back and forth between the parties and their lawyers just as if he or she were walking between rooms. Remote mediations may also prove useful when the parties are geographically separated, and travel is difficult. Having acted as a mediator in virtual sessions, Sandra cautions that it may not be as effective as an in-person mediation which allows for more immediate interaction between the parties.

Seeing success through a non-legal lens – UK practice

Mediation in the UK is voluntary and generally used as a settlement tool in the maritime context for disputes between two or more sophisticated commercial entities. Thus, a fundamental difference between US and UK practice is the types of parties and claims involved. Because there are commercial parties on both sides, Mediator Stephen Mills comments that empathy is not as important as it may be in the United States. Those engaged in shipping are familiar with contractual disputes and tend not to take them personally. "So the challenge may not be taking the heat out of the settlement discussion, but re-focusing it and trying to redefine what may be the parties' pre-conceived idea of 'success' in the negotiation".

Stephen told us that the parties come into the mediation looking at the case through the eyes of their own lawyer, who has been asked to give a best estimate of their prospects in the dispute, and may not wish to stray far from them in settling. The frame of mind he needs to change is the 'win/lose dichotomy' - compromise is an outcome where both parties 'win' because they have settled their case. Christen Guddal, Chief Claims Officer in Gard, agrees. "The parties are not there to 'win'. They are there to try to resolve their dispute". He adds: "If we at Gard, say yes to mediation, we create a reasonable perception that our goal is settlement so we better be genuine. A party who is not genuine about this risks making the relationship between the parties even more adversarial."

Enhancing the chances of a successful compromise

Those interviewed, American and British, mentioned these common factors that contribute to a successful outcome.

• Include the true decision makers. Mediation is informal and, sometimes, deals are more likely to be made between the parties when their lawyers are not in the room.
• Lawyers do play a vital role. They need to be knowledgeable and prepared to listen to the other side. The wise lawyer will carefully explain the strength of arguments on the other side and the weaknesses in his or her client's position.
• Timing is important. Mediation may be too early if the essential facts are unknown. Mediation just before a trial may fail because the parties are entrenched, and the high cost of trial preparation has already been incurred. Mediation too early is better than mediation too late and there is no reason not to try again after an unsuccessful early mediation.
• Mindset of the parties, including insurers, is paramount. All must come together with the genuine goal of resolving their dispute.
• A mediated settlement saves money for everyone. In addition to the cost, litigation is also time consuming with years between the initial claim and the resolution. Time and money are important considerations for the parties, their lawyers and insurers.

Some cases go to Court when there are important principles involved, although these cases are rare. For the vast majority of disputes, settlement options should not be ignored. Mediation is flexible and informal leaving room for creative solutions that address the financial outcome for the parties as well as the non-monetary needs and concerns of the participants. Moreover, mediation is without prejudice should negotiation fail.

We conclude that there are factors that contribute to prospects for settlement but no single formula for success. Getting the deal done is an art not a science. Gard continues to support mediation as an essential tool to achieve our core purpose – to help our Members and clients manage risk and its consequences.

We wish to thank our external participants for their time and insightful views.

Jacob Munch is a practicing maritime lawyer and certified mediator and arbitrator. He is located in Tampa, Florida and mediates disputes in multiple jurisdictions.

Stephen Mills is founder of Sea Mediation Chambers in London. He devotes full time to mediating shipping and marine insurance disputes.

Sandra Gluck is a maritime lawyer and member of the Society of Maritime Arbitrators, New York. She was President of Gard North America from August 2005 to August 2018 before developing her practice as a mediator and arbitrator.