

The Charterer

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Mediation – facilitating a negotiated settlement

By Richard Bokszczanin

When reading the Law Reports I have to confess sometimes wondering why certain disputes ever reached court in the first place. In such cases the issues raised may appear clear and the outcome, whilst judgements are always interesting to read, reasonably predictable, and yet the dispute ended in court. There may of course have been sound reasons why, one often never knows and yet may be justified in wondering what attempts were made to settle the dispute amicably. However, for various reasons this does not always happen and one may be left thinking whether the parties, and when I refer to parties I include underwriters, would have benefited had they taken outside assistance to help try to achieve settlement when their own efforts failed.

Whilst mediation (an expression often used interchangeably with “ADR” Alternative Dispute Resolution although mediation is only one of a number of ADR processes) has been in existence for some time it is only in the last decade that it appears to have gained any prominence in the UK in shipping matters.

This article is neither a guide to what a typical commercial mediation entails nor does it in any way suggest litigation should be abandoned in favour of mediation because clearly there will be occasions where it shouldn't; its purpose is simply to serve as a reminder that where negotiations have broken down there are alternatives available to try resolving the dispute amicably rather than resorting to litigation.



Richard Bokszczanin

Unlike litigation, mediation is not ‘win or lose’ and of course there will be times where a ‘win or lose’ solution, not a settlement, is the best solution. The mediator ought to act as a neutral aiming to facilitate settlement rather than provide an evaluation (on the merits). As with most negotiated settlements mediation should be without prejudice, the parties’ oral and written submissions not disclosed to the court, and the contents of the mediation confidential. The mediation should take place at an agreed venue and the parties are free to choose whichever mediator they can agree on. Mediation may not in some cases take more than one, possibly two, days and if at the end of the mediation the dispute remains unresolved that should neither preclude negotiations continuing thereafter (and hopefully a concluded settlement) nor, be a bar to commencing or resuming litigation. Rather, I think it should be considered as an aid to negotiations (particularly if those negotiations have broken down) where negotiated settlement remains the best solution. I recently saw this point in a draft clause (not in a matter that had anything to do with shipping) which I set out below merely for illustrative purposes only:

“Before resorting to [arbitration pursuant to cl [...]] [legal proceedings] the parties shall attempt to settle by negotiations between them in good faith all disputes or differences which arise between them out of or in connection with this Agreement. The parties further agree that (provided both parties consider that such negotiations would be assisted thereby), they will appoint a mediator by mutual agreement, or (failing mutual agreement) will apply to the [President of the London Chamber of Commerce] to appoint a mediator, to assist them in such negotiations. Both parties agree to co-operate fully with such mediator, provide such assistance as is necessary to enable the mediator to discharge his duties, and to bear equally between them the fees and expenses of the mediator.”

Whilst the mediator should possess the skills to facilitate settlement, these skills will be of little use unless there is also a genuine desire on the part of all parties to settle, rather, for example, than embark on a ‘fishing trip’, and here perhaps lies one of the attractions of mediation because if control of the dispute has been passed to an external party at some stage prior to the mediation, mediation can return the

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dispute back to the parties allowing them to regain its ownership and its resolution. I say this because there will be times when a dispute in litigation is one where the parties (and again remember that I am including underwriters) appear for all practical purposes to have handed over control of the dispute to a third party yet all they have really achieved is to pass on their own problem for someone else to deal with. The need for the parties to retain control of a dispute rather than handing it over to someone else is merely my way of saying that settlement ultimately is in the parties hands

and, if a deadlock is reached during negotiations, then the intervention of a mediator may assist in freeing up the log jam whilst still leaving control of the settlement with the parties themselves, and, when it is all over and if the claim has been settled, in addition to feeling a sense of relief and perhaps achievement, the dispute's associated litigation risk, and continuing costs and use of management time in handling the dispute (even at arms length) will (hopefully) no longer be a concern. ■

THE "HAPPY DAY" A landmark Judgement for Charterers



Justin Draeger



Andrew Leir

Few decisions in the maritime world have caused as much controversy in recent times as the Commercial Court judgment in the "HAPPY DAY".

The dispute concerned the tendering of notice of readiness under a voyage charterparty and the facts behind the decision were not unusual. The vessel arrived at the discharge port at 16:30 hours on the 25th September 1998. On arrival, the vessel was unable to enter the port because she had missed the tide. The Master nevertheless purported to give notice of readiness. The vessel only resumed her voyage into the port at 10:16 hours on the 26th September 1998, where she berthed at 13:15 hours, and later that day commenced discharging. The unloading was protracted and the owners sought to recover demurrage. The charterers countered with a claim for despatch.

The dispute was put to arbitration. The Tribunal found that the charterparty was a berth charter and that the notice of readiness which had been tendered was invalid. The Tribunal, however, went on to conclude that laytime commenced at 08:00 hours on the 29th September 1998, which was the earliest possible time at which laytime could have commenced under the charterparty.

On appeal, the Commercial Court decided that because no valid notice of readiness had been tendered, laytime never began to run. The owners were not entitled to demurrage and, conversely, the charterers were entitled to despatch.

The decision of the Commercial Court was supported, in the main, by charterers who felt that the decision accurately reflected the understanding of the position amongst commercial men. Owners thought the decision wrong, saying that the result achieved was highly uncommercial and unfair.

The owners appealed the judgment to the Court of Appeal. The Court of Appeal overturned the Commercial Court decision and held that the charterers had waived their entitlement to a valid notice of readiness. Lord Justice Potter, who gave the Court of Appeal judgment, considered that, in a commercial context, silence in response to the receipt of an invalid notice of readiness (in the sense of a failure to advise owners of the rejection of it) might in combination with some other step amount to the waiver of the invalidity of the notice of readiness. He concluded that when the vessel arrived at the berth, neither the owners nor the Master received any indication from the charterers or charterers' agents of a rejection or a reservation as regards the validity of the notice of readiness. Although the charterers were obviously not under a contractual duty to indicate rejection of the notice of readiness, their failure to do so, together with their agreement to the commencement of the discharging operations, intimated to the owners, and the owners were entitled to conclude, that the charterers had waived both reliance upon the invalidity of the notice of readiness and any requirement for the tendering of a further valid notice.

The key passage in the judgment is the following:

“...if (i) in purported compliance with the terms of the charterparty the Master serves on the charterers or their agents for service NOR which is in fact invalid because the ship has not yet arrived, and (ii) thereafter the charterers and/or the receivers to whom NOR is required to be given become aware of the actual readiness of the vessel; and (iii) the charterers and the receivers’ agents, being aware of the facts giving rise to the invalidity, do nothing to indicate any rejection or reservation in respect of the NOR, but instead commence unloading, then there is every good reason for the reasonable shipowner to assume an intention and acceptance by the charterers that laytime should start to run without the formal necessity of a fresh notice, such intention and acceptance being unequivocally communicated by involvement in the operation of unloading.”

The Court of Appeal clearly concluded that the Commercial Court’s decision achieved an uncommercial result, unfairly penalising owners for one documentary failure. Owners will doubtless say that the Court of Appeal’s decision achieves a sensible commercial balance. On the other hand, charterers will likely counter by saying that where the parties have contracted for a particular notice of readiness arrangement, then charterers are entitled to expect owners to adhere to it.

We anticipate that the judgment will lead to much more attention being paid to precisely

what is said between the parties and their representatives at the load or discharge port at the time that notice of readiness is tendered and loading or discharge commences. When an invalid notice of readiness has been tendered, owners will want to be able to point to circumstances which amount to a waiver on the part of the charterers of the requirement for a valid notice of readiness. Charterers will want to protect their position by carefully reserving their rights as regards the validity of the notice of readiness, always making it clear that they are not to be taken to have waived their right to a valid notice of readiness regardless of whether loading or discharge has commenced. ■

• **Andrew Leir**

Andrew is a Canadian who qualified and practised in British Columbia and also acquired his Master’s Degree in Law in London. He joined Holman Fenwick & Willan in the mid 1980’s and became a partner in 1997. He specialises in international trade and marine litigation.

• **Justin Draeger**

Justin gained BA, LLB and LLM degrees from University of Natal, Durban and went on to become an Advocate of the Supreme Court of South Africa in 1985.

He was admitted as an English Solicitor in 1991 and also as a Solicitor Advocate in 1994. Justin joined Holman Fenwick & Willan in 1994 and became a partner of the firm in 1999. He specialises in reefer cargoes and gas carriers

Sextant Logo

Michael Else and Company was established in 1976 but the sextant emblem by which it is now so well known was not adopted until the early 90’s.



The aim of the company has always been to provide up to date quality products with service based on traditional values.

As the traditional navigation tool of the seafarer for centuries providing accuracy and reliability, the sextant embodied everything to which the company aspired and designers were instructed to prepare the appropriate logo.

Shortly after the logo was adopted the founder of the company and present Chairman,

Michael Else, bought a sextant at auction and with it came an interesting history. The previous owner gave an account of its use while in his care which is recounted below:

THIS GERMAN NAVY SEXTANT

Made by C. Plath of Hamburg

With Certificate DEUTSCHE SEEWART No 2602

Was issued to me by the Royal Navy, as a replacement for my personal one, which had got lost through fire.

I put it to considerable use during the pre invasion exercises, not so much for astronomical observations, but for taking shore “Fixes” by the Station-Pointer method, which gives very precise accuracy.

I became Staff Navigator to the Deputy Senior Naval Officer Assault Group, “Sword Area” and as such put the first wave ashore in that area during “Overlord” (Normandy).

As was planned, as soon as the beach area was secure, we, that is D.S.O.A.G. staff, took over all

