Giselle Villanueva: A back to basics guide to arbitration and mediation

English law allows for several different forums to resolve disputes, as an alternative to litigation in court. Given the costs and resource requirements of court proceedings in England and Wales, these Alternative Dispute Resolution (“ADR”) methods are now actively encouraged by the courts.

There are many types of alternative dispute resolution mechanisms available to parties today, including adjudication and conciliation. This article provides an overview of the most important features of the two most common alternatives used in the context of maritime law disputes, namely arbitration and mediation.

Arbitration

During arbitration an impartial tribunal reaches a decision that is binding on the disputing parties. The guiding principles of this procedure are defined in the Arbitration Act 1996 (“the Act”) and summarised below:

- Obtaining a fair resolution by an impartial tribunal without unnecessary delay or expense.
- Parties should be free to agree how their disputes are resolved.
- The court should not intervene except as provided by the Act.

How does it work?

Although parties can reach an ad-hoc agreement on how to carry out the arbitration, the basis of the procedure is usually agreed in a clause within a wider commercial contract.

The parties will often choose a range of standard arbitration rules from an established arbitral body (e.g. LMAA or ICC). In choosing a standard set of rules, the basic terms of the process will be set out therein. The parties will decide where the arbitration is to take place and will often determine the jurisdiction that will govern the process too.

The appointment of the arbitrator(s) will also be defined in the rules. However, if parties wish to deviate from this then any changes should be outlined in the contract to avoid future misunderstandings.

In order to enforce an Arbitration Award in England & Wales, the winning party would apply to the Courts for permission.

Advantages of arbitration

1. It can be quicker.
2. It is considered less formal.
3. The decision is not published (unless the parties agree) but is still binding on the parties.
4. Parties can appoint arbitrators who have the relevant experience.
5. International recognition ensures that awards can be enforced widely around the world. For example, the New York Convention has been adopted by 145 countries.

Disadvantages of arbitration

1. It is not always cheaper. Complex and/or high value cases can take a long time to resolve.
2. Certain remedies, such as injunctive relief, may not be available or less effective.
3. The ability to appeal an arbitration award is usually more restrictive than appealing a court judgment.

Mediation

During mediation parties agree on an impartial third party (“the Mediator”) to help facilitate a negotiation. Unlike in arbitration, the Mediator will not consider the merits of each case but will instead aim to find common ground between the parties so that a resolution can be achieved.

How does it work?

Each party will usually have a representative present, who may be accompanied by their legal advisors. There are certain formalities that will need to be complied with, but this is discussed at the beginning of the process between the lawyers and the Mediator.

The parties will often start the day in separate rooms and the Mediator will discuss the problem with each party privately. This allows the Mediator to gain a better understanding of the contentious points, where the parties may be willing to concede and what each party would like to achieve by the end of the process.

Sometimes the Mediator will move between meetings with each party. Ideally each party will begin to better understand their opponent’s position and have time to reflect critically on their own stance. Where appropriate, at some point the parties may be brought together for face-to-face discussions.

Advantages of mediation

1. It is often a very short process in comparison to court or arbitration.
2. It is confidential and without prejudice.
3. The parties can choose the most appropriate mediator.
4. The process is flexible.

5. It is more conducive to an ongoing commercial relationship than adversarial proceedings.

Disadvantages of mediation

1. There is no guaranteed decision.
2. It can add time and money to finding a resolution if unsuccessful.

These options generally seek to provide cost effective and practical solutions. However, where a dispute is particularly complex these options may not be suitable. The suitability of arbitration or mediation will very much depend on the circumstances of the particular case and the ultimate objective Members have in mind.

For further advice on arbitration and mediation, please contact the Club’s LCC team who can discuss the options with Members and help them decide on the appropriate steps to take in each circumstance.