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Your Dispute Resolution toolbox: making mediation a default option

John Sze and Punit Oza | Sep 17, 2021

When a disagreement between contractual parties arises, disputing parties invariably agree at the outset that an amicable resolution is better than letting the matter be determined through litigation.

It is also true that a great majority of disputes do in fact get amicably resolved between parties without legal intervention. In fact, only small percentage of disputes do end up in litigation.

Unfortunately, when amicable negotiations do lead to the path of litigation, it is fair to say that the relationship between parties are very unlikely to be positive. Parties will often consider each other to be taking unreasonable positions, not having a commercial mindset, and mutual desire to communicate in order to understand each other, and a desire to find common middle ground will most likely be absent. The more you hate each other, the less you are able to communicate openly.

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Yet, apart from legal determination through arbitration or the courts, the only way to at least potentially resolve disputes is through a constructive dialogue. With the greatest respect, passing communications through brokers, engaging lawyers to take legal positions and take protective steps (correctly or otherwise) frequently run counter to constructive dialogue.

This is where mediation comes into play. Mediation involves the engagement of a 3rd party, usually a qualified, trained mediator, perhaps a senior member of the maritime bar, or from the maritime industry, could help parties explore how to bridge differences. Mediators do not determine disputes, but they may sometimes ask parties to consider carefully the

merits of their legal positions and the consequences of a negative outcome, however confident they may be of their legal rights.

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Mediation has come a long way from between just an avenue for parties to negotiate a resolution of disputes between them. There are now specialist mediation centres set up in major disputes resolution centres around the world, including in Singapore, with training facilities to equip potential mediators with the skills and tricks as a mediator. Many countries now have legislation protecting the confidentiality of mediations and enforceability of mediated settlement agreements. And to top it all off, the Singapore Convention of Mediation seeks to allow cross border enforcement of mediated settlement agreements, which is particularly important for maritime disputes, which are often cross-border in nature.

The 12 September 2021 was the first anniversary of the coming into force of the Singapore Convention. As of 17 September 2021, the convention has 55 signatories, consisting of major maritime powers and trading hubs such as The United States, China, India, South Korea, Brazil, Australia to name a few, giving significant weight to the desire for mediated settlement agreements to be enforceable in major players in the maritime and international trade sphere.

While mediation continues to evolve, arbitration is still one of the most common alternative dispute resolution methods to resolve disputes, especially in the commercial space. Singapore Chamber of Maritime Arbitration (SCMA) is a specialist arbitration institution which provides a neutral, cost-effective, and flexible framework for maritime and international trade arbitrations.

As SCMA continues to evolve and enhance its relevance, it has also embraced mediation and created a hybrid dispute resolution in Arbitration-Mediation-Arbitration (Arb-Med-Arb). Launched in 2015, this solution provides parties with great flexibility and cost savings.

The process is quite simple. The parties incorporate the Arb-Med-Arb clause (available on SCMA's website) into their contract during the negotiations. Subsequently, a dispute may arise under the contract and the parties, not being able to resolve their differences, commence arbitration. Typically, at this stage the parties are quite entrenched in their positions and do not have a complete understanding of the other parties' position and arguments. As the arbitration progresses, the parties will most likely appreciate the arguments presented and may well lean towards a settlement. Majority of arbitration cases tend to eventually settle midway through the case. Is it too late for them to "change their mind"?

Arb-Med-Arb is a perfect tool for the parties to "change their mind", pause the arbitration and go to mediation, with a much clearer and firmer intention to settle the matter. With a clause in the contract allowing parties to do this, the party proposing mediation is not seen as "waving the white flag" or not perceived as having "a weaker case". This is a huge psychological benefit.

The next question the parties may ask is whether this detour to mediation will considerably delay the process? SCMA has clear time-bound protocols in place with Singapore International Mediation Centre (SIMC) and Singapore Mediation Centre (SMC). Parties are free to mutually agree on other mediation centres as well.

With a self-administered model, SCMA does not charge any filing or administration fees and there is no frontloading of fees. This "lack of sunk-in costs" is a huge motivation for the parties to consider mediation even after the arbitration is in an advanced stage.

If the parties succeed in the mediation, the settlement agreement can simply be converted into a consent arbitration award and therefore can be enforced in over 160 contracting states that are signatories to the New York Convention. This provides greater peace of mind, in case the parties need to fall back on this to enforce the settlement agreement. If the parties fail in the mediation, they can simply restart the paused arbitration to resolve the dispute.

It is truly the best of both worlds and parties who are smart and alert to clarifying the issues involved and, resolving the disputes, while preserving relationships at the same time, will see the value in such a hybrid solution. There is no question

that the ideal time to mediate and attempt an amicable resolution is at the start of any disputes. But, until there is full and final determination of the disputes following judgment or an arbitral award, the opportunity to mediate and settle the remains available to parties. Mediation will not resolve all disputes, but it could hold the key to finding a solution where none appear to exist.

For more details on the SCMA Arb-Med-Arb protocol, please refer to SCMA's flyer at https://bit.ly/3hANOV0 .

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John Sze is the Deputy Managing Partner of Joseph Tan Jude Benny LLP, a leading maritime law firm. Having spent the most part of two decades litigating maritime disputes, he has seen the evolution of mediation as a forum for parties to resolve disputes without the need to roll the dice with litigation outcomes. In this article, John makes a pitch for mediation as a dispute resolution tool, in this age where recognition of cross border mediated settlement agreements are increasingly becoming the norm.

Punit Oza, Executive Director of the Singapore Chamber of Maritime Arbitration, introduces in this article the novel Arbitration-Mediation-Arbitration (Arb-Med-Arb) concept. Having worked in commercial shipping for over 25 years, he brings the user as well as arbitration centre's perspectives. Punit presents this concept as the best of both worlds and one that provides the parties with the flexibility to use the solution – arbitration or mediation – which is most relevant at that stage and ensures a cost-effective resolution of the dispute as well as preserves the business relationship.

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