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Mediation in Maritime Conflicts

Ladies and Gentlemen,

For about sixteen months now mediation has been a buzz word in the legal realm. This is due to the mediation law which implemented an EU guideline with significant delay. Without going into detail here, I would like to note that mediation has now become part of legislation. Up to now, mediation has mainly been used for in-house conflicts relating to bullying and problems in the team, and also in family law. Mediation in conflicts between business partners and in particular in conflicts between larger companies, notably in the maritime business, has not yet gained ground. This is very unfortunate for a number of reasons. Mediation is a fast and cost-efficient method to solve conflicts. In some cases, it is actually the means of choice.

Mediation - and I would like to particularly emphasize that - is not a method of dispute settlement or dispute decision, but solely a method which helps the parties to solve their conflict themselves. From this approach, various conclusions result with regard to suitability. Mediation is suitable whenever both parties experience the conflict as rather unbearable and need to solve it as quickly as possible, either because there is significant time pressure or because both parties have an interest in continuing their business relationship free from the burden of the conflict.

In shipping conflicts, mediation is particularly advisable when there is little time or if a legal proceeding or other litigious dispute would harm the business relationship.

The second category of cases mediation is particularly suitable for are all those conflicts which would require that a mediator, arbitration expert, arbitrator or arbitration court be familiarized with a very complex factual or very complex technical issue. If a third party is recruited for dispute settlement or dispute decision, they have to be able to sufficiently assess the structure of the dispute and the technical problems in order to make a settlement proposal. The mediator, on the other hand, does not have to investigate the issue, but the parties will do that themselves. Since

mediation is a method of conflict solution which is managed by the parties themselves, it is sufficient that the parties agree on a particular issue and that the mediator feels that there are no differences with regard to the issue or the technical evaluation respectively. By drawing on mediation to keep each other informed about their views on the technical context and on the overall issue, and by explaining to the other party their views, both parties gain clarity with the regard to the problem and thereby are in a better position to evaluate the risks inherent in their own views and assessment. This can be very helpful in particular with regard to disputes resulting from shipbuilding contracts and the attribution of technical defects or nautical conduct in charter contracts.

Mediation is less suitable for all those cases in which complex legal issues which might be difficult to assess have to be decided on. As long as the parties are not prepared to solve their conflict independent of the actual legal situation, the legal basis and the applicable norms have to be thoroughly assessed, which in most cases is only possible with the help of attorneys. If legal questions remain unclear, these often have to be decided by a third party, since none of the parties want to take the risk to give up important economic positions despite a favourable or seemingly favourable legal position.

It can therefore be stated that the higher the pressure to negotiate and solve the conflict, the more suitable it is for mediation. Mediation is the means of choice if it is necessary to determine in advance the division of responsibility in the handling of an average or damage. If everything has already been handled and what remains is just the distribution of costs, an arbitration proceeding might be better suited to solve such conflict than mediation. The same applies with regard to a shipbuilding contract. If problems arise already in the construction phase and if there is disagreement about whether a particular form of execution is contractually owed or not, mediation is very suitable. If a contractor declares interferences or additions during a repair job, addressing the conflict by drawing on all available means, including preservation of evidence and technical/expert evaluation, might lead to a delay in the execution of the contract or even the refusal of the taking-over of the ship. In all such cases mediation is very well suited to help the parties achieve a quick solution of the conflict, since each party can present their respective technical view on the issue in a meeting held and structured by the mediator and does not have to fear that this will later constitute a disadvantage in a legal proceeding. Each party can become more aware of their interests and also realize in how far their interests are agreeable or acceptable for the other party.

It is helpful in this respect that mediation has its roots in negotiation techniques applied in negotiations that have become stuck and in communication problems that arise due to conflicts. Mediation has as its goal to remain in dialogue even if

communication is heavily affected by a conflict, be it for emotional or material reasons: Mediation is always helpful when the parties intend to enter into legal proceedings or to involve a third party to come to a dispute decision. The disadvantage of involving a third party in a dispute decision is that the conflicting parties do not find a solution themselves, but a decision or settlement might be imposed upon them which they cannot accept or which they do not want. All this is avoided in mediation, since the procedure is voluntary and designed to only pursue those solutions which take into account both parties' interests. It is an essential aspect of mediation to consider solutions which would not even arise in a strictly legal or economic assessment. It is the art of mediation to expand the range of possible solutions together with the parties and to include emotional and psychological factors and parameters.

A disadvantage of mediation is that it does not always lead to a solution of the conflict, since the mediator does not have full power to make a decision. The principles of complete voluntariness and mediator's multipartiality, in particular, however, the principle of each party's full acceptance of any suggestions, render any dispute decision impossible. In order not to compromise the mediator's neutrality, he is not allowed to give his opinion, neither for legal nor for technical reasons. He can only try to raise each party's awareness of what they do not want or do not want to decide and which insecurities they are willing to accept.

The advantage of mediation is that solutions come into view which would not be considered during normal legal disputes. That way, a solution can be found which both parties can accept. Due to the principle of voluntariness, whole aspects of factual, legal or technical clarification can be ignored after careful consideration of the potential risks. The parties have to agree that they do not want to investigate these issues any further, but are prepared to accept insecurities in this respect. For a repair order, for instance, the question whether there is old damage or repair-induced damage, may remain unsolved if both parties are interested in the timely and prompt execution of the order, and both parties accept insecurities in this regard for the sake of the joint goal of a proper and timely repair. If such questions remain unanswered, the disadvantage to not have realized a justified claim needs to be weighed against the advantage of a mutually agreed timely and successful repair.

It is advantageous in mediation that the parties try to find a solution themselves. It is not necessary to familiarize a third-party with complex issues and technical procedures; no files, expert opinions or assessments are necessary, and no costly lawyers', auditors' or technicians' services are required to prepare the case for legal proceedings. The disadvantage for lawyers is obvious – they lose income and the opportunity to work on a possibly interesting case. In mediation, the parties decide

not to address the legal issue, since the economically reasonable and faster decision of the conflict by coming to an agreement with the other party renders the decision of the legal issue obsolete.

If mediation is chosen before things become very bad, i.e. the initial preferred solution is no longer attainable anyway and the damage incurred is already so substantial that neither party can accept liability for it anymore, mediation is recommended. The time required is minimal in comparison to the preparation of a lawsuit. The time required by both parties in the event of mediation is not lost. Should mediation fail, the conflict has become much more clearer and precisely defined throughout the process and potential risks can be better assessed since the opposing party's point of view is already clear. The only expenditure is the mediator's fee, who, however, usually charges hourly rates comparable to those of other legal or technical advisors. Conflicts arising out of repair orders, shipbuilding contracts or questions of liability with regard to charter-contracts should usually be settled in 2-3 2-hour sessions . Therefore, there is very little expenditure.

In particular with regard to ship building contracts of technical novelty which require various in-between certifications are very suitable for mediation parallel to construction. In such cases, the parties agree at the outset that any dissent in relation to the ship building contract will be handled by a mediator nominated by the parties. Hence, in the event of future conflicts arising from that same contract, the mediator is already familiar with the generalities of the particular contract. He knows the parties and the bases of the contract and therefore also the inherent conflict potential, which saves more time and can make mediation even more successful. If mediation during construction fails for one aspect of a conflict, the parties do not incur any disadvantages, since they are in no worse position than if mediation had not been attempted. For ship building or other large construction contracts, an experienced inspector with good communication skills and integrity or a skilled construction supervisor can be very beneficial in the event of a conflict. If an experienced mediator does not succeed in solving the conflict, the only options that remain are to continue the work with reservations, pay a security or whatever other solutions are possible in a law suit.

In summary, I am of the opinion that mediation constitutes a very good option for conflict solution with regard to a whole range of maritime issues. Generally speaking, mediation does not mean that time or money is lost, but that it offers a particularly reasonable opportunity to avoid a lengthy and costly law suit.