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DANISH MEDIATION IN A GLOBAL AND MARITIME CONTEXT

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Introduction

In November 2003, a Danish shipowner undertook to transport a consignment of machinery goods from Nicaragua to Piraeus, Greece, for a Bulgarian company. The Bulgarian company would then transport the machinery goods itself by road to Bulgaria. The Danish shipowner decided to use the "VESSEL X" for the transport, as it would be in Nicaraguan waters at the time of shipment in December 2003. VESSEL X was chartered from a German shipowner under a three-year charter party.

The goods were shipped from Nicaragua as planned, and VESSEL X then sailed to an American port where additional cargo was to be loaded for another charterer. The shipping company applied for and obtained all permits necessary to call at the American port, and the loading went according to plan.

VESSEL X arrived at the roadstead off the coast of Piraeus at the end of January 2004. While awaiting permission to call at the port, word came from the American authorities that they had changed their opinion about the documentation submitted to them in connection with the vessel calling the American port and that they had now come to the conclusion that the permits were not in order. The cargo from Nicaragua was the problem.

After fruitless negotiations with the American authorities, the Danish shipowner realised that he had to obtain the requested documents and present them to the American authorities as his vessels would otherwise not be allowed to call American ports in the future. However, on top of new documents the American authorities now also demanded that the cargo be inspected, and despite objections from the Bulgarian charterer, the Danish shipowner had to sail back to the American port which the vessel called in March 2004.

The American authorities immediately seized the machinery goods and arrested the master of the vessel. He was later released though and the vessel was allowed to leave the port, but without the machinery goods which were not released by the American authorities.

The Bulgarian charterer maintained that he could not be blamed for the problems in the US.

On the contrary, he claimed that the Danish shipowner was liable in damages for the loss of the cargo or at least for the release of the cargo from the American seizure. The Danish shipowner claimed that he had acted in good faith and denied any liability. All documents were in order and had initially even been approved by the authorities. The Bulgarian charterer immediately initiated arbitration proceedings in New York in accordance with the forum selection clause of the voyage charter party entered into with the Danish shipowner.

The charterer of the load which had been taken on board in the US suffered a loss due to the delay and initiated legal proceedings against the Danish shipowner before the Maritime and Commercial Court in Copenhagen in accordance with the charter party entered into between the two parties.

VESSEL X left the American port for Liverpool to bring cargo on board, but here she was immediately seized and detained by the Bulgarian company who wanted security for its claim for damages.

While detained, the charter party entered into with the German shipowner expired and the German shipowner then initiated arbitration proceedings against the Danish shipowner in Hamburg in accordance with the time charter party. After the provision of security from the Danish shipowner's P&I Club, the vessel was released from detainment.

The Bulgarian charterer now turned to the courts to have his right to detain the vessel established by initiating legal proceedings in Liverpool.

At that stage, arbitration proceedings were pending in New York, legal proceedings were pending in Denmark, arbitration proceedings were pending in Hamburg and legal proceedings were pending in London. The Danish and the German shipowners were represented by counsel in the High Court of London to which the detainment proceedings in Liverpool had been referred.

The number of legal proceedings was a serious burden to all parties and after several years of exchanging pleadings, taking witness statements, retrieving information, etc., the Danish shipowner aired the question if the interests of all parties would not be best served by all actions being submitted to mediation with one mediator.

Dispute resolution, tradition and thinking in grooves

The above case represents a scenario in which all parties, professionally and without thinking alternative dispute resolution methods, apply the legal remedies mutually agreed to be safe and fair in order to obtain a fair and correct legal settlement of their dispute. It is clear to all parties

involved that actions must be brought - either before an arbitration tribunal or before the ordinary courts - and there is no hesitation in using whatever legal remedies are available.

This case also shows that the parties, irrespective of nationality and cultural differences, seek enforcement of their believed legal rights through the arbitration tribunals ordinary courts, although they are fully aware that this means becoming involved in a serious legal battle which may, at the end, result in significant losses. It is part of the legal tradition in all countries that a matter must be brought before the courts immediately to seek the courts' assistance in enforcing one's believed rights.

The case also shows, however, that it was necessary, due to the international complexity and urgency of the matter, to initiate the proceedings and to accentuate the parties' views in order to be able to proceed after having set up the framework of the dispute.

None of the parties felt comfortable about doing nothing and they all felt a need to position themselves in the best way possible, based on the rules which the parties had agreed were to apply to the individual disputes.

The suggestion to refer the cases to mediation with one mediator came from the Danish shipowner, who had heard about ADR as a dispute resolution model and had seen an opportunity to settle all cases individually or together, which would save both time and money for all parties involved.

The initiative did not come from the involved arbitration tribunals or the courts which were actually hesitant about the whole idea when introduced.

The arbitration tribunals and courts were of the opinion that it was the duty of arbitration tribunals and courts to render decisions in accordance with applicable law, whereas, by contrast, the whole idea of mediation is not to render decisions at all since, in fact, applicable law does not necessarily have to play a decisive role in the settlement of a dispute.

A proposal for mediation was, therefore, not an idea that immediately suggested itself to the various tribunals and courts.

The legal battles began in 2004 and since then mediation has been much more accepted in commercial life. Today, at least Danish courts have a different view on mediation and are actually required to suggest mediation of a case, when it is first filed.

Why mediation?

The Danish shipowner presented his proposal to the other parties pointing out that they had been business partners for many years, and that he assumed that they all wanted this relationship to continue in the future.

The Danish shipowner also referred to the substantial costs involved in these cases for all parties – not just the legal fees and the costs of arbitrators and experts, as to some extent they were covered by insurance - but in particular the indirect costs to the individual companies, more specifically the time and negative energy invested by the companies at all levels, e.g. in providing the lawyers with information and documents, participating in meetings with lawyers, taking witness statements and participating in meetings with experts.

The Danish shipowner also pointed out that none of the parties would be completely satisfied when all the proceedings were closed and that there could be so much bitterness between them that it would be impossible to restore the business relations even after the proceedings were properly closed.

He also pointed out that he could not imagine any of them being interested in using the right that they all had to obtain a decision which could create a precedent to future conflicts, as none of them could imagine similar cases, let alone involving themselves, or that any of them felt called upon to be the ones that created precedents for other parties.

The proposal received a positive, but hesitant response, and the Danish shipowner had to admit that he also had to consider one specific problem: The executives that had to decide on the proposal and maybe be part of settlement negotiations were more comfortable with leaving such decision to others. A too positive attitude towards mediation could even be interpreted as a sign of weakness, and the timing in terms of presentation of the proposal was thus decisive.

Nobody wanted to admit to mistakes which had led to great losses for their respective companies, but most importantly of all, nobody wanted to admit mistakes and loose face. It was obvious that a lost case could be explained by mistakes on the part of the lawyer, but above all the cases could not be closed for many years and the relevant employees would then have moved on to new positions.

The Danish shipowner had to emphasise that awards and judgments would not just settle the cases, but also reveal where to put the blame for the mistakes, whereas mediation would lead to the parties finding a solution without awards or judgments and not place guilt or disclose mistakes.

Consequently, the decision whether to choose mediation had to be made at top management level, but once again the Danish shipowner encountered an obstacle as the CEO of the Bulgarian company had to submit the entire issue to his board of directors and he did not want to lose face to the board either.

The Danish shipowner also faced a problem in respect of some of the involved lawyers who were generally negative towards the suggestion, as they were uncertain of the outcome of mediation which was to be based not on applicable law, but on the various interests of the parties.

After many discussions, it was finally possible to get all parties to commit to mediation.

The parties asked their lawyers to find a suitable institution in London that could suggest a relevant mediator with knowledge of the industry. The lawyers succeeded in finding such institution and the mediator convened a meeting in London.

All parties were represented by an authorised officer who was also authorised to accept a settlement, if any. All parties participated together with their respective lawyers. After two days of discussions led by a mediator in both joint and separate meetings, a draft settlement agreement was made.

The final agreement was made by the lawyers and the mediator in co-operation, an agreement which, incidentally, was performed in the course of a few days.

Some of the parties have resumed their business relations.

Mediation in Denmark

In Denmark mediation is regarded as a negotiation process that - through a mediator - facilitates the parties' solution to a disagreement out of court. The solution is based on the parties' business interests and not on legal rules and arguments. Through mediation it is possible to find a solution that all parties can agree to as opposed to a judgment, where there will, most often, be a winner and a looser.

In this case and in many other cases mediation can save the parties both time and money.

Court fees can be avoided, if the mediation process is commenced before a case is filed and lawyer's fees can also be kept low because of the rapid negotiation process. In the present case where the legal disputes had dragged on for years, an agreement was reached within a few days, and that is in fact the standard.

Mediation is consequently much faster and cheaper than both arbitration and legal proceedings.

Today, when a case is filed in a Danish civil court, unless it is clear that a settlement cannot be reached through mediation, at first instance the court is required to try to mediate a settlement between the parties. This normally takes place by the court suggesting mediation in a written notice to the parties or during an initial court meeting. Although the Danish courts adhere to this obligation they seldomly push the parties very hard to accept mediation.

An appeal court can also mediate a case, but it is not mandatory and seldom happens.

If the court facilitated mediation results in a settlement it will be entered in the court records and can that way become immediately enforceable.

Also, the court is, upon a party's request, required to appoint a legal mediator who can facilitate a solution to the parties' disagreement, so-called legal mediation. The mediator appointed by the court can be a judge or a lawyer. Legal mediation is confidential and optional and the mediation will be ended if a party requests it.

Thus, if the present case had taken place today, the Danish court by itself would have suggested mediation and would not have been hesitant about mediating the dispute.

Instead of commencing mediation after filing a case in court, parties can decide to refer their dispute to mediation prior to filing a case in court. Many dispute resolution clauses already include escalation clauses that include mediation but this is not required in order for mediation to commence as mediation can always be suggested by one party.

When mediation is not carried out through the courts, the parties will themselves agree on a mediator, have their lawyers agree on a mediator or have a mediation institute appoint or recommend a mediator.

If the parties choose to use a mediation institute, the institute will have a set of rules that will apply to the mediation. In Denmark, for instance, the Danish Mediation Institute and the Danish Institute of Arbitration offer mediation.

In Denmark these rules usually imply that the mediation is confidential and optional. Parties can at any stage in the mediation process decide to end the mediation and instead commence legal proceedings. Thus, there is no way of forcing the parties to reach a solution through mediation – something that would inevitably be against the entire idea of mediation.

The rules will normally also have certain requirements which a mediator have to fulfil, e.g. a mediator will have a duty of confidentiality and will be required to be impartial and independent. The mediator will normally be a lawyer who is also a certified mediator.

Mediation in a global context

In this case, the proposal for mediation as an alternative dispute resolution was suggested by the Danish shipowner.

The parties chose to participate in the solving of their own disputes. This opened up to the possibility of making decisions on a commercial level without the parties being bound by different legal assessments of the facts applied by arbitration tribunals and courts around the world.

Due to their different nationalities, commercial and cultural backgrounds, the parties had a more or less clear perception of how everyone (the others) should have acted, but the fundamental decisive factor was the opportunity presented by mediation to reach a commercially reasonable solution.

Whereas the solution may have been commercially reasonable, the legal basis obtained through the exchange of documents etc. no doubt stimulated the parties' decision to submit the dispute to mediation and formed the basis of the expectations of the parties to a final settlement.

Conclusion

The involved parties were all professional companies working on a global level, and they all saw a chance for settling the dispute using the set of rules that they felt comfortable with and which they all shared, namely the commercial rules. They were able to agree on a solution to their dispute which they had reached on their own as opposed to legal solutions being forced upon them by their own but also foreign legal systems that they were not completely familiar with.

This case highlights the progress of alternative dispute resolution and especially mediation in the last five to ten years. In 2004 when the legal battles started mediation was not immediately suitable for handling by the courts. At that point the courts were mostly designed to make decisions in accordance with applicable law and not to facilitate the negotiation process between parties. Today a Danish court is fully capable and also required to facilitate mediation both within and out of the courtroom.

This case also shows that some lawyers in 2004 and maybe also today are reluctant towards using new and alternative dispute resolution methods – even though the positive results experienced around the world speak for themselves and can save their clients considerable assets.

In addition, the case shows that alternative dispute resolution can save the involved parties a lot of resources, both financial resources and human resources but it may also save an otherwise doomed business relationship since a consensus is reached through dialogue.

Finally, the case shows that not only the immediate parties involved are saving resources. In fact, a lot of the legal fees and costs associated with the case had to be paid by the insurance companies and P&I Clubs behind the parties.

These insurance companies and P&I Clubs may, in the end, have just as large an interests in mediation as the primary parties involved since cases can be closed faster, money can be saved and reserves for specific cases kept for a shorter period.

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