Matthew Flynn

Matthew spent 10 years as a shipping litigator in London. Five years with More Fisher Brown and five as a partner at Fishers, he concentrated at that time on London based P&I Club work. Matthew is now back in his hometown, Auckland working at McElroys, specialising in Marine Insurance. If it floats he is interested.

WHEN DOES ALTERNATIVE DISPUTE RESOLUTION WORK?

1.0 Introduction

1.1 Most parties do not enter into business with the view to having disputes. Inevitably however they may arise and is worth looking at how these can be resolved. Most disputes do not end up in Court, but there are certainly ways in which the dispute can be approached by parties to minimise the commercial inconvenience, and to maintain commercial relationships if so desired. One of the key points is how the dispute can be identified early on and dealt with in such a way to achieve those objects.

1.2 This enquiry can be usefully divided into three topics:

(1) What is a dispute?

(2) By what process can the alternative dispute resolution process begin?

(3) If that process has begun, what must happen for that process to result in a resolution?

2.0 What is a Dispute?

2.1 As litigation lawyers, we do not generally get to look at a file comprising a perfect piece of business. Also in the context of commercial shipping, the people involved in the business generally do not need to be told they have a strong or a weak position. The reason we are usually involved is because there is a genuine issue between the parties which is not clear and on which issue the parties seek guidance and assistance to reach resolution. It is fundamental therefore, that to provide effective advice, we must understand what the parties need to talk about.

2.2 In my experience the most common reason for a dispute is the written word. This is usually derived from three sources:

(1) Legislation;

(2) Contracts;

(3) Written communications between the parties.

2.3 The law reports are a testament to the huge amount of judicial and legal input into deciding what words mean.

2.4 We are all familiar with all sorts of marine related legislation which has caused problems of interpretation over the years. The Marine Insurance Act, which is

common to all those jurisdictions represented here, has given rise to a great number of decisions as have the Hague and Hague-Visby Rules.

2.5 Most shipping business is done on the basis of written contracts between the parties. Many of these are pro-forma documents such as Gencon or NYPE charter parties which the industry has attempted to clarify by lengthy additional clauses, many of which create as many problems as they solve. Despite huge efforts to get it right, legal reports are full of cases concerning what the words mean despite the fact they have been negotiated freely between the parties. Bills of lading are another very pertinent example of this area of dispute.

2.6 Communications between parties give rise to a number of disputes. There are a number of decisions dealing with pre-contract negotiations where the issue is whether the contract has even been concluded or not, right through to cancellation of voyage and orders given to the ship. Many of these disputes will have a factual element. In the context of shipping disputes, this range of factual disputes can obviously be wide and varied. It is important therefore to identify at the outset whether there is a real factual dispute, the resolution of which will make the whole issue clear, or whether there is not really a factual dispute, but rather a dispute of interpretation of words. Obviously in many cases there will be both. Laytime disputes are an example where the dispute is frequently a combination of both.

2.7 It is important at the outset to focus the parties on the mechanics of the dispute. As outlined above the issues usually can be identified from answering the following preliminary questions:

(1) Is this a dispute over what words mean?

(2) Is the dispute over a factual situation?

(3) If so will the true story solve the dispute?

(4) Is it a combination of both?

3.0 Beginning the Process

3.1 The reason it is so important to identify what is in dispute is that this greatly assists the parties in identifying how easily the dispute can be resolved. If the real dispute is not over what happened, but how the outcome relies on the words used, then the parties ought to be able to identify the uncertainty and consider how to resolve it. That may involve an analysis based on earlier case law or rules of interpretation. In many cases it will simply be impossible to have a definitive view. When it comes to a consideration of settlement, that uncertainty will need to be reflected by the parties in their approach to resolving the matter.

3.2 If it is a dispute of fact, then it is important to realise the extent to which the dispute will turn solely on how the evidence is judged. A purely factual dispute may not easily be resolved unless a determination is made. Despite the best

efforts of every lawyer to find out whether his or her client is telling the truth, there is always a litigation risk in proceeding to hearing based on the witness's own factual account. Again, this will be an important aspect in assessing how the dispute may be resolved.

3.3 In my experience, the sooner the parties identify the issues, clearly both in their own minds and even on a joint basis, the greater the likelihood that they will be able to quickly move on to considering a process of resolution. It is worth noting in the alternative that if the dispute is really one which neither party feels is warranted settling on the terms which are offered at least this can have the effect of identifying the precise issues in dispute at a very early stage.

4.0 The Process of Alternative Dispute Resolution

4.1 I take *"alternative dispute resolution"* to mean finding a way of resolving the dispute amicably between the parties without having a final determination imposed by Arbitration, Tribunal or Court.

4.2 There can of course be compelling reasons for the dispute to proceed through to a final determination. There may be genuine uncertainty as to what words mean, and neither party is prepared to back down from a position where such uncertainty exists. In may cases the financial consequences are enormous and the incentive is there to have a court determine the dispute. If at any stage however, the parties involved and their advisers analyse the dispute and identify what needs to be determined, then a decision can possibly be taken early on as to whether the dispute as a whole can be resolved without the need for a final determination.

4.3 Early on therefore, the parties should be looking at alternative ways to resolve the dispute. In my experience the reasons for lawyers' involvement is that there is a problem which the client wants resolved as quickly as possible. Most people conduct business on the basis that disputes are not in their best interests.

4.4 Once this is done, then the parties should make their positions clear to one another. An exploration of the options is therefore extremely important. There are usually just two. Either the dispute is resolved by determination, or it can be resolved before that. The latter option can be done by either negotiation between the parties, negotiation between the lawyers, or increasingly, by the use of alternative dispute resolution processes such as mediation or facilitated settlement. In my experience, once a decision has been made to try and exercise one of those options, the result is generally a resolution prior to determination. This is usually because the parties realise the benefits of resolving the matter in this way.

4.5 An obvious approach is to assess the merits of early alternative dispute resolution against the costs of proceeding through to a final determination. The costs involved will often be the most important driving factor towards the parties moving towards a resolution. Uncertainty of outcome is the other

major reason. From a cost management perspective, litigation is uncertain, risky, expensive and often costs more and takes longer than expected.

4.6 Everyone knows there is no such thing as a certain winner in litigation but it is certain that there will be a losing party. This means there is almost always a chance that you will lose the dispute. The costs of losing can be enormous.

4.7 For that reason, the parties should be encouraged to take a view early on as to how far they wish to progress the dispute. In many cases the amount needed to be paid to lawyers could usefully be used as part of an amicable settlement.

4.8 To summarise each party must:

- Identify what it considers the dispute to be about;
- Consider what is really in dispute;
- Determine what their position is in relation to each of the disputed issues;
- Determine whether it would prefer to resolve the matter or to have it determined.

In most cases the parties would prefer to resolve it prior to a determination.

5.0 Going Through the Process

5.1 If a lawyer is involved in attempting to find resolution, the first step is to ascertain whether the parties can resolve the dispute amicably between themselves. The relationship between the parties can have an important bearing on how this procedure goes. If the parties are in an ongoing commercial relationship, then that can be an important factor in how negotiations take place.

5.2 There must be adequate communication between the parties if there is to be any prospect of a settlement. In my view, this requires the clear exchange of positions. The reason for this is that both parties must appreciate and understand each other's cases as clearly as possible.

5.3 It is desirable that, as part of that exchange, the parties identify what they "*agree to disagree about*". Many disputes turn on just one or two documents, or the evidence of just one or two people. In my experience it is useful if the parties can reduce the dispute to just those items on which they mutually disagree. That then enables an assessment of the risks with respect to each of those items in dispute.

5.4 An assessment needs to be made on the risks of failing on critical points. If an assessment is made and the prospects of success are no more than say 50%, then it would be reasonable to expect any settlement terms to reflect that risk.

In such cases therefore, lawyers should advise on the likely costs of proceeding, the certainty of the result and the benefits of trying to conclude a settlement. I believe it would be fair to say that lawyers tend to look at the resolution in a fairly detached manner - namely what needs to be done to resolve this dispute for the client so it ceases to be a problem for them.

6.0 Mediation

6.1 The mediation process is growing in popularity in the world of marine litigation. There are three reasons for this. Firstly, the cost of litigation is high, it is time consuming, risky, and forces a result on the parties. Secondly, the mediation process often aims at producing results which the participants have produced themselves rather than had imposed upon them. In my view this is a very important feature of mediation and will be discussed further below. Thirdly, it is the opportunity for the participants to express their own views, and to *"work through"* their problem in a controlled forum. This is not always possible in the adversarial process of court proceedings i.e. the parties 'own' the process rather than lawyers, judges and arbitrators.

6.2 The essential difference between when lawyers negotiate a settlement, and going through the mediation process, is the use of the *"third party facilitator"*. There are many styles of mediation which I do not propose to discuss here, suffice to say however, that the idea is that a third party will create an environment for the disputing parties to come up with a solution using the mediation process.

6.3 The criteria, however, is for each party to make its own assessment of the dispute. It is equally important that each party understands fully the position of the other party.

6.4 Mediation empowers the parties to take responsibility. As mentioned, there is a wide variety of mediation styles being developed, and they vary from mediator to mediator. The crucial aspect appears to be that it is the parties who have agreed to come together, generally with a view to resolving the matter on the day. There is the advantage of each party having the opportunity to *"voice"* opinion on the dispute and to feel that they have been heard. This is particularly so in relation to the actual participants in the dispute, not the lawyers. It is a good opportunity for example, for brokers to hear what each other has to say. In many cases they would not have realised the other sides position until they actually meet and talk to each other in the same room. Often the story at the mediation is quite different to that told to the lawyer in the privacy of the lawyer's office.

6.5 For mediation to work therefore, it is critical that:

(1) The parties understand their own position; and

(2) They come prepared to listen to and are prepared to understand the needs of the other party to the dispute;

(3) They resolve to try and come up with a solution which is acceptable to both parties.

6.6 One of the key successes in this resolution system is that there is a third party available to focus each party in its attempts to explain and reach a resolution. This, in some examples, can be of importance where unsuccessful attempts have already been made by the parties or their lawyers to resolve the matter amicably. A breakdown in those situations can lead to distrust which can ultimately result in the dispute then having to be referred to determination. In this circumstance, mediation can provide a "*neutral*" environment in which a further attempt at resolution can be made. The role of the "*third party*" can vary from someone who is prepared to voice an opinion and indicate to the parties which way a determination would go, as opposed to a completely "facilitative" approach in which the mediator offers no opinion at all, and simply provides a path down which the parties can travel towards reaching their own solution. I must confess a preference for the latter, as it is distinctly different from any form of "*determinative*" involvement by a third party. If the "*facilitator*" simply provides a path, then the parties can explore all points they need to raise as they go.

6.7 The critical point is usually reached where the parties have realised they can resolve the dispute during the course of the mediation. This explains the concept behind "*empowering*" the parties. They themselves create the solution. In my view, it is important that, at the end of the day, all parties have to walk away from a settlement knowing it was something that they agreed to. Generally the parties can cope with this result for this very reason.

7.0 Conclusion

7.1 No doubt, alternative dispute resolution works. By understanding the dispute from the most fundamental level, most disputes are capable of being resolved between the parties without the need for a determination. Whether it is by commercial negotiations between the parties, the use of lawyers to represent each side in those negotiations or by the involvement of a third party facilitator, the underlying requirements for dispute resolution to work are the same. To summarise these are:

(1) That a complete understanding is obtained as to what the dispute is actually about;

(2) That the precise issues in dispute, whether they be factual or contractual, are identified and preferably agreed as being in issue at an early stage;

(3) That both sides make an assessment of their own prospects;

(4) That all parties consider what the other party requires to reach settlement;

(5) That both sides make an accurate assessment of the alternative available to them if they do not settle.

7.2 If the criteria are followed, preferably early on, then there are good prospects for alternative dispute resolution to work, and even better to keep the lawyer's bills to the minimum.

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