CASE SETTLEMENT MECHANISMS - A MARITIME FOCUS

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INTRODUCTION

The scope of this paper is to examine various types of case settlement mechanisms both inside and outside the court system with specific reference to a maritime practice.

With the proliferation of litigation in past years, two of the main perceived difficulties by parties settling disputes by way of the traditional court system are not only cost but also delay. In the British Columbia court system, depending on the length of trial, one used to be able to obtain following the close of pleadings a trial date one or two years away with a reasonable assurance that a judge would be available. At present, there is no guarantee of a judge. Increasingly, parties are preparing for trial, only to learn on the eve of trial or in some instances on the trial date that the matter will not be proceeding and must be adjourned. This is one of the factors which in British Columbia has contributed to the recent burgeoning growth of alternate, although in some instances complementary, forms of dispute resolution. These range from binding resolution of disputes by way of arbitration at one end of the spectrum to various forms of non-binding mediation at the other.

One definition of "mediation" is a non-binding process where a mutual, impartial third party with no decision making authority attempts to facilitate a settlement between disputing parties. However, the role of the mediator may differ significantly depending upon the type of mediation involved. In the private sector in British Columbia, mediators are said to use both "interest-based mediation" and "rights-based mediation". The interest-based approach is said to be more common. Interest-based mediation involves framing the dispute between the parties in terms of their underlying concerns and needs and helping them to formulate a resolution in terms of options which satisfy

as many of them as possible. With rights-based mediation, the dispute is more likely framed in terms of the legal rights and position of the parties in court which is then used as a guideline toward approaching settlement.[1] Other styles of mediation are said to include settlement-oriented and therapeutic mediation.[2] The growth of organizations said to specialize in Alternative Dispute Resolution ("ADR") has flourished and is largely attributable to the growing cost and delay in resolving disputes through the traditional legal system, not only within but also outside the courts.

PRIVATE DISPUTE RESOLUTION ORGANIZATIONS AND INDIVIDUALS

In the maritime and marine insurance area, various organizations have been set up, some very recently, to provide for ADR. In most instances, while they may also provide for conciliation, they provide primarily for a binding decision. The Vancouver Maritime Arbitrator's Association has been active since 1987. More recently, a marine insurance panel was set up this year in cooperation with the Association of Marine Underwriters of British Columbia and has simplified rules to expedite hearings. While designed for claims less than $50,000, it could equally apply to larger claims. The Insurance Brokers Association of British Columbia is presently considering an ADR facility as is Seattle in the marine insurance area.

In addition to private organizations set up to provide ADR services in the maritime or marine insurance area, there are a small number of retired lawyers and practicing lawyers who are acknowledged specialists in the maritime and marine insurance area. Most belong to one of the above organizations, who are available for dispute resolution, whether by way of arbitration, mini-trial or mediation.

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[1] British Columbia Ministry of Attorney General, Dispute Resolution Office, Litigation Management Committee Report, October 14, 1997.

[2] Kathleen Kelly, Alternative Dispute Resolution, The National (Canadian Bar Association), June, 1997

Other organizations, not industry-specific, include the British Columbia International Arbitration Centre (the "BCIAC"). While its mandate was initially confined primarily to international arbitrations, the BCIAC will now also be offering services complementary to litigation. At the beginning of 1998, the BCIAC will offer arbitrators in place of judges to hear matters in cases where a trial did not proceed on the scheduled trial date in the British Columbia courts due to non-availability of judges. The BCIAC proposes to have an arbitrator available within 24 hours of the date requested. The parties will have to agree on the procedural rules to be used. These would normally be the BCIAC rules or the B.C. Supreme Court Rules.

ADR Chambers, while originally established in Toronto in 1995, now has a branch in Vancouver. Consisting primarily of retired judges and some retired lawyers, it offers arbitration, mini-trials and mediation, as well as a private appeal process. The hourly rate is presently $300 per hour plus disbursements.

Outside the formal organizations there are lawyers, psychologists, other professionals and lay persons who have offered their services as mediators. The Dispute Resolution Office of the B.C. Ministry of Attorney General (the "DRO") supports the use of qualified mediators in the settlement of civil disputes. Training in mediation has flourished. However, the debate continues as to what the qualifications of mediators and their approach to mediation should be. The input and advice received by the DRO is that training should be such where the mediator does not offer an opinion as to the probable outcome or take a rights-based approach in dealing with the parties although the legal rights of the parties may be considered.[3]

[3] British Columbia Ministry of Attorney General, Dispute Resolution Office, The Mediation Roster Consultation Paper, November 4, 1997

SETTLEMENT MECHANISMS - THE BRITISH COLUMBIA SUPREME COURT

Rule 35 of the B.C. Supreme Court Rules provides that a judge may direct that a mini-trial or settlement conference be held either on a request being received by a party or on his own initiative. However, a direction to attend a settlement conference or mini-trial is rarely imposed upon the parties in the absence of their agreement. They are essentially voluntary and if held result from a request by the parties. At a mini-trial, the court in camera and without hearing witnesses gives a non-binding opinion on the outcome of the trial. At a settlement conference, the judge is to explore all possibilities of settlement of the outstanding issues.

Anecdotal information is to the effect that mini-trials have not been used to a great extent in the B.C. courts. The type of case where they may be more likely is where the legal issues are complex and a lengthy trial is anticipated. Unless requested, the adjudicator does not try to mediate the dispute but delivers a non-binding opinion on the likely outcome at trial. Normally, the parties attend the mini-trial with counsel.

On June 13, 1997, a Notice regarding the Supreme Court Mediation Initiative was issued by Chief Justice Bryan Williams.[4] It was a court initiative to encourage interest-based mediation if requested by the parties to a proceeding. The judge conducting the mediation was to begin with opening remarks intended to set a positive negotiating environment, following which the parties would present a brief explanation of the issues in dispute and their respective positions on each issue. The parties would also be asked to participate where possible to assist in an understanding of the issues underlying the positions and the judge was to attempt to understand the interests that were the basis of the positions taken. The mediation was to be entirely on a without prejudice basis.

[4] See Schedule "A"

On September 22, 1997, the Chief Justice by Notice to the profession advised that the Initiative had raised concerns regarding the extent to which the court is to be involved in the mediation process and confusion as to what functions are encompassed under Rule 35 of the Supreme Court Rules.[5] The June 13, 1997 Notice was suspended so that the Alternate Dispute Resolution Committee of the Court could reconsider the matter and prepare a report for an upcoming meeting of the court to be held on November 7, 1997. The Chief Justice stated that the court will continue to assist litigants with the resolution of disputes by conducting mini-trials and settlement conferences under Rule 35 of the Supreme Court Rules. No Notice has been circulated to the Bar since the meeting of November 7, 1997. The role and function of the court in the mediation and settlement process remains under review.

The British Columbia Ministry of Attorney General is also grappling with the issue of dispute resolution, including what the role of judges should be in dispute resolution, whether mediation should be the function of the court and/or the public sector in civil matters and whether it should be mandatory as opposed to voluntary. These matters are the subject of ongoing study by the DRO. No early resolution of the issues is expected. While the role of the courts in mediation of civil disputes in Supreme Court is presently unresolved, in family law matters dealt with by Provincial Court judges as opposed to Supreme Court judges, mediation is more prevalent, as is the case in small claims matters where settlement conferences are mandatory.

SETTLEMENT MECHANISMS - THE FEDERAL COURT

The only provision in the present Federal Court Rules which refers to settlement is Rule 491 which provides that settlement of the action or any issue in dispute is one of the matters to be discussed at pre-trial conference. While the extent to which settlement is discussed at a pre-trial conference may vary from judge to judge, in my

[5] See Schedule "B"

experience, there are normally no serious settlement discussions at a pre-trial conference. This is also the case in B.C. Supreme Court.

Under Rule 5101 of the proposed Federal Court Rules, 1998, the court may either at the request of a party or on its own initiative order a proceeding or issue be referred to a dispute resolution conference to be conducted in accordance with Rules 5102 and 5103 and any directions set out in the order. A dispute resolution conference is defined under Rule 5100 as follows:

> ... a structured process in which a case management judge or prothonotary ...
>
> (a) in conducting a mediation, assists the parties by meeting with them together or separately to encourage and facilitate discussion between them in an attempt to reach a mutually acceptable resolution of the dispute;
>
> (b) in conducting an early neutral evaluation of a proceeding, evaluates the relative strengths and weaknesses of the positions advanced by the parties and renders a non-binding opinion as to the probable outcome of the trial or hearing; and
>
> (c) in conducting a mini-trial, presides over the presentation by counsel for the parties of their best case for trial or hearing and renders a non-binding opinion as to its probable outcome.

Provision for an early neutral evaluation of a proceeding and a mini-trial in which the court renders a non-binding opinion as to the probable outcome at trial is rights-based. Rule 5104 gives the court a discretion to stay proceedings on the basis of an undertaking by the parties that they will refer the matter to an alternative means of dispute resolution other than a dispute resolution conference. In the event of a reference to a dispute resolution conference, the Rules are silent on whether a mediation, an early evaluation of the proceeding or a mini-trial are to be conducted. It is not clear whether the mediation services offered by the court are to be rights-based, interest-based or otherwise. Nor do the Rules indicate when in the course of the

litigation, whether before or after examinations for discovery, the court may refer a proceeding to a dispute resolution conference.

Failure to specify the type of mediation, which particular dispute resolution process is to be employed and its timing may have been intentional for the purpose of giving flexibility to the parties and the judge. However, if it is intended that the court will take an active role on its own initiative in requiring matters to be referred, for example, to mediation and determining the process in which mediation is to be conducted, it would be useful if counsel could be advised of the type of approach which is contemplated. As mentioned earlier, there is a considerable difference in the approach which may be taken by a mediator, whether rights-based and/or interest-based.

CASE SETTLEMENT MECHANISMS AND MARITIME LAW

With respect to maritime law, subject to certain exceptions, much of the practice involves commercial clients. As a supplement to direct negotiation, I expect the preferred type of dispute settlement mechanism apart from a process which is binding upon the parties would normally be rights-based rather than interest-based.

There are no hard statistics so far as I am aware regarding the proportion of maritime cases in which settlement is negotiated short of trial, or the stage at which settlement is negotiated. In my experience, and from anecdotal information, a far higher proportion of maritime cases involve settlements negotiated prior to trial, either before or after examinations for discovery are concluded, than in most other areas of the law. I suggest the three major reasons for this include the cost of litigating many types of maritime disputes, the knowledge and approach of clients to the litigation process and the relatively small and specialized nature of the maritime bar.

On the question of cost, many maritime disputes are multi-party and often involve non-residents. A typical cargo claim in British Columbia might involve a South American

shipper, a British Columbia consignee, a foreign shipowner, a foreign charterer, a local dock operator and a local ship's stevedore. In the absence of a very large claim, the high cost of litigation often dictates negotiation of settlement before all examinations for discovery are concluded or, in any event, short of trial.

The clients are in many cases insurance companies pursuing subrogation claims or defending their assureds. Alternatively, the risk manager of a corporation or its claims manager may be the person to whom one is reporting and from whom instructions are received. Insurers, risk managers and claims managers are normally familiar with the litigation process and appreciate the risk of proceeding to trial. They may be more likely to accept recommendations of counsel with respect to settlement than clients with no prior exposure to the litigation process.

The majority of lawyers practicing in the maritime field specialize in the area. This being the case, most lawyers in the maritime bar are familiar with the applicable law. In my experience, the majority of cases which proceed to trial are those in which there is an irreconcilable difference in the facts as recalled by the respective parties or where the law is not clear.

In the absence of settlement of a claim by direct negotiation, whether a supplementary dispute resolution process is likely to succeed and, if so, what type of process is appropriate, may depend not only on the complexity and type of dispute and the cost of proceeding to trial but also on the parties and their legal counsel. Where a lengthy trial is scheduled in a case where there are numerous complex issues, a mini-trial, possibly followed by rights-based mediation may be appropriate. While it is desirable to have the parties attend with counsel, this may not be practical where the parties are from outside the jurisdiction, as in the case of a foreign shipowner entered in an English or European P&I Club. In matters involving a trial scheduled for one or two days, subject to delay in getting to trial, the cost of proceeding with a mini-trial may not be justified from a cost point of view.

Private mediation/mini-trials have resulted in settlements outside the court system in the maritime industry even though the practice is not yet wide spread. In one cargo claim in which I was involved within the past year and a half, following discovery of documents and prior to examinations for discovery, counsel recommended and all parties agreed to a non-binding form of "mini-trial" before a non-practicing lawyer who had specialized in maritime law and was recognized as being very knowledgeable by all counsel concerned. The hearing was attended only by counsel who had not anticipated that any settlement would be achieved that day. However, by the end of the day, the lawyers for the four defendants had agreed as to what they would respectively recommend by way of contribution and the lawyer representing the plaintiff had agreed to recommend the global figure. The matter was subsequently settled before proceeding to examinations for discovery. While settlement of a multi-party cargo claim prior to any examinations for discovery is somewhat unusual, provided the parties and their counsel are prepared to mediate a dispute and wish to effect a compromise, mediation may be a very effective supplement to litigation.

In some instances, cost will eventually bring parties to mediate a dispute which might otherwise be dealt with by arbitration or the court. In one matter heard locally by way of arbitration, following several weeks of hearing, the parties decided to mediate. One of the main reasons was the anticipated cost of continuing the hearing. A settlement resulted. In another matter, a contract between two owners of a fishboat contained a shotgun clause. A dispute arose over which party had the right to buy or require the other party to buy the respective interest in the vessel. There was an arbitration clause. However, the parties decided not to proceed to arbitration but to mediation, which was primarily interest-based, and the dispute was settled.

Apart from arbitration and other forms of binding dispute resolution, in my experience and from anecdotal information, there has not yet been any significant shift in the maritime practice to mediation. However, the situation may change, particularly as both

courts and industry associations become more involved in alternative dispute resolution.

THE FUTURE ROLE OF THE COURTS IN RESOLUTION OF MARITIME DISPUTES

It is my view that the courts should encourage mini-trials and/or mediation and that such a service should be offered by or within the court system but the parties should also be encouraged, should they wish, to go outside the court system for non-binding dispute resolution.

Lawyers and judges from their training are a product of the adversarial system. Whether in the maritime field or elsewhere, one factor which in the past may have deterred both lawyers and clients from proceeding with mini-trials or mediation may be a perceived concern that by doing so the other side may obtain information which might adversely affect the client's negotiating position and its position at trial, even though the dispute resolution process is entirely without prejudice. Another may be the possible perception that a request for mediation indicates weakness in one's case. Nevertheless, the growth in mediation generally suggests that for whatever reason, both lawyers and their clients are now turning more to alternate means than the court by which to resolve their disputes.

The dispute resolution provisions of the Federal Court Rules, 1998 provide an opportunity to lawyers and their clients to utilize the services of the court in dispute resolution.

It is not yet clear what type of mediation is contemplated. If considering mediation, I expect clients from the maritime industry would generally prefer mediation to be primarily rights-based as opposed to being interest-based. I do not mean to suggest that legal rights need be the entire focus of a mediation since there are certainly other factors such as commercial interests, legal costs and the cost to the party of the

litigation which may enter into the equation. However, I would not expect there to be as much interest in the maritime industry in a mediation process, the primary focus of which was interest-based.

Another factor which may influence the parties in deciding to proceed either privately or through the dispute resolution process offered by the court is the person put forward as the adjudicator or mediator. If there is only one judge available to the parties as an adjudicator and the parties are not all agreeable to that judge acting as adjudicator, this may result in the parties going to the private sector. While the Court given financial and work constraints may only have a limited number of judges participating in dispute resolution, it may be worthwhile considering offering the parties some choice, where possible, of the judge or prothonotary who will adjudicate the dispute. It may in numerous instances be of considerable importance in reaching a resolution of a dispute, particularly in rights-based mediation, that the adjudicator is familiar with the applicable maritime law.

I am less certain of the role that the courts should play in interest-based mediation in the maritime field if what is meant by that term generally precludes reliance on the legal rights of the parties. While commercial factors and other non-rights-based factors may affect resolution of a dispute, they may generally be seen by the maritime industry and the maritime Bar to be of less importance than rights-based factors.

While I consider the court should encourage counsel and their clients to consider ADR through the courts, it is my personal view that mediation, so far as maritime disputes are concerned, should be voluntary rather than mandatory. Mediation is a process where the parties mutually agree to try to resolve their dispute. It is one which I suggest requires the parties to act in good faith for the purpose of reaching a resolution. If the parties are not at the stage where they wish a mediator to be involved, I have considerable doubt that compulsory mediation of maritime disputes is likely to be successful.

The dispute resolution rules of the Federal Court Rules, 1998 have yet to come into force. I believe the dispute resolution services to be offered by the court could be of considerable assistance to maritime counsel and their clients. The extent to which they will be used by the maritime Bar and their clients remains to be seen and may be influenced by the approach of the court in implementing the rules.

My first exposure to ADR in the Federal Court was during a recent pre-trial telephone conference in which the pre-trial judge mentioned to counsel, without any compulsion, that one option might be to consider mediation or a mini-trial. If the case is not settled within the next month, I expect to recommend to may client that it consider the dispute resolution process offered by the court, Whether it proceeds to a mini-trial or mediation may then depend on the agreement of opposing counsel.

SCHEDULE "A"

THE HONOURABLE BRYAN WILLIAMS
CHIEF JUSTICE

THE SUPREME COURT
OF BRITISH COLUMBIA

THE LAW COURTS
800 SMITHE STREET
VANCOUVER, B.C.
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NOTICE

RE: SUPREME COURT MEDIATION INITIATIVE

I am announcing today a mediation initiative by the Court. A number of judges and masters, each of whom has attended at least one training session on interest-based mediation, have agreed to conduct such mediations at the request of the parties to a proceeding in this Court.

Court registries throughout the province will be supplied with a list of those judges and masters available to conduct mediations. The parties may select the judge or master of their choice. In certain cases, the Court may assign the judge or master, depending on the circumstances.

Bookings for mediations will be taken by the trial coordinator in the registry in which the proceeding was commenced. Counsel or the parties will be expected to prepare and file in advance a concise brief setting out the facts and issues in the proceeding. The judge or master will have sufficient time to review the brief in preparation for the mediation. The parties to a mediation must agree to abide by the terms of the protocol attached to this notice. A telephone conference will be scheduled before the mediation to ensure that all materials have been provided and exchanged, and to confirm the agreement to abide by the protocol.

The mediations will take place in a courtroom or conference room. If the location is Vancouver, one of the conference rooms constructed for the purpose on Level 2 of the Vancouver Law Courts may be used.

This is a court initiative. The Ministry of the Attorney General is considering other approaches to dispute resolution. I view this initiative as phase 1 of an ongoing experiment designed to be responsive to the current demand for dispute resolution mechanisms that avoid the usual adversarial process. The Court is open to comments and suggestions as to how this service can be altered and improved. A committee of the bench and bar will be established for this purpose.

June 13, 1997

Chief Justice Bryan Williams

Mediation Protocol

Purpose

The objective of *interest based* mediation is to achieve a negotiated agreement that works for all of the parties. In order to meet this objective, the parties are encouraged to pursue a process of mutual disclosure of information focusing on the *interests* and *criteria* upon which their original *positions* are based.

The goal of each individual mediation is to settle all issues in dispute. Whether that goal is achieved is entirely up to the parties.

A secondary goal is to resolve as many issues as possible in the hope of reducing the number of trial days.

If the matter is to proceed to trial an attempt should be made to settle admissions during the conference and if possible, reach an agreement on the issues requiring a decision of the court.

Procedure

The judge or master conducting the mediation will begin with opening remarks which are intended to set a positive negotiating environment.

The parties will each present a brief explanation of the issues in dispute and their respective *positions* on each of the issues. Where possible, a joint statement of issues and *positions* is preferred.

With the assistance of the judge or master, the issues will be listed in order of priority. One issue at a time will be addressed.

Where possible the parties will be invited to participate so as to assist in an understanding of the issues underlying the *positions* taken by the parties. The judge or master will attempt to understand *interests* or *criteria* that are the basis of the *positions* taken by each party.

If an agreement is reached it will be recorded in writing, on computer or on tape and, if desirable, form part of a court order. A party may wish to signal an agreement on a particular issue, subject to the resolution of subsequent issues. Any such agreement is without prejudice and may be withdrawn if a satisfactory agreement cannot be reached on subsequent issues.

Rules

Statements by counsel are made without prejudice unless an agreement is reached.

Statements by clients are made without prejudice and are not to be used for purposes of cross examination at trial on the issue of credibility.

The judge or master conducting the mediation will neither act as the trial judge nor reveal any of the discussions between the parties to the trial judge.

The parties may caucus at anytime, with or without the judge or master.

If the judge or master, with the consent the parties, elects to meet privately with any party, anything said by that party or counsel is to remain confidential unless the confidentiality of the communication is waived.

Suggestions

All participants should approach mediation with a commitment to reach a settlement on all issues.

At times, success is more likely if the easy issues are disposed of first.

The parties do not have to wait for the judge or master to suggest a caucus. More often they are in a better position to anticipate the right moment. If the judge or master declines to caucus or believes a caucus is premature, she or he will state such a view, at the outset of the conference.

SCHEDULE "B"

THE HONOURABLE BRYAN WILLIAMS
CHIEF JUSTICE

THE SUPREME COURT
OF BRITISH COLUMBIA

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NOTICE

RE: SUPREME COURT MEDIATION INITIATIVE

On June 13th this year, I issued a Notice re: Supreme Court Mediation Initiative along with a Protocol outlining some purposes, procedure and rules.

The initiative has raised some concerns regarding the extent to which the Court as a whole is to be involved in the mediation process and some confusion as to what functions are encompassed under Rule 35 of the Rules of Court.

This issue was discussed on September 13th at a meeting of the Court, and it was decided that more time was needed in order for the Court to properly consider the scope of its role in this process. I have also had the benefit of some discussion with the Bar at the Litigation Management Committee Meeting on September 20th. Accordingly, I have decided to suspend the June 13, 1997 Notice until later this year so that the Alternate Dispute Resolution Committee of the Court can reconsider these matters and prepare a report for the upcoming meeting of the Court on November 7th.

In the meanwhile, consultation with the Bench and Bar will continue on the whole process of judicial dispute resolution.

The Court will continue to assist litigants with the resolution of disputes by conducting mini-trials and settlement conferences in accordance with Rule 35 of the Rules of Court.

September 22, 1997

Chief Justice Bryan Williams