

MEDIATION 101

FOR THE DREDGING INDUSTRY



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Despite being a commercially mature industry, the international dredging and maritime construction industry, remains quite devoid of the use of mediation as an appropriate tool for Alternative Dispute Resolution. This is likely the result of unfamiliarity with the process as well as perceived uncertainty regarding enforceability in an international context.

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The approval of the final draft for a Convention on the Enforcement of Mediation Settlements at the 51st Session of the United Nations Commission on International Trade Law in June of 2018 and its signing as the Singapore Convention on the Enforcement of Mediation Settlement Agreements in August 2019 heralds a new period in that context; making it directly relevant to the international maritime construction and dredging industry and warranting a closer look at this junction in time.

Introduction

In an early discussion held on 2 January 1818 and in the application for Royal Chartership for the Institution of Civil Engineers (Anon, 1928), Henry Robinson Palmer – the British civil engineer who would later become famous for the design of the world's first elevated railway but possibly of more direct influence on the maritime construction industry by means of his description of the principle of containerisation for the transport of goods – probably made one of the more poetic references to mediation when he said 'an engineer is a mediator between the philosopher and the working mechanic; and like an interpreter between two foreigners must understand the language of both'.

Though clearly not intended as a reference to mediation as a form of Alternative Dispute

Resolution (ADR), it is intriguing to note the skills of interpretation and comprehension being put centre stage in a pure engineering context here whilst one would likely expect them to be of equal, if not more, relevance to ADR. It is even more intriguing when one considers that mediation as an ADR process has – to date – not found a large inroad at all in the world of international maritime civil engineering and construction. The latter is a particular pity as mediation offers some distinct advantages when it comes to dispute settlement or de-escalation that other processes simply cannot offer. This lacuna is more than likely the result of unfamiliarity with the process and some deep-rooted misconceptions.

What is mediation?

For the sake of simplicity, mediation can be defined as a process supervised by a third independent party, in which the parties are facilitated in a strictly confidential setting in order to resolve the dispute between them.

There is another form of mediation, namely evaluative, in which the mediator is asked to give a (normally) non-binding Opinion on the merits of the matters in dispute. This Opinion can be provided at various stages of the mediation process. It could be provided before the participants meet with the mediator where the Opinion is thereafter

used as a basis of settlement discussion between the participants to the mediation at the mediation itself. An alternative to the provision of an Opinion prior to the participants meeting with the mediator is for the mediation to commence and then after a set time, the mediation is adjourned to another set date for the mediator to provide an Opinion in the meantime to be discussed at the next date. This has the advantage of the Opinion being able to take into account what has been said at the earlier part of the mediation. Also, a break in the mediation can let the dust settle and potentially wiser counsels to prevail.

In order to understand the mediation process properly, it is important that those involved are fully aware that the role of the mediator is not one of an active judge, adjudicator or other decision-making person resolving the matters in issue between the parties, but rather that of a supporting helping hand in negotiating their own settlement of the difference or dispute. It is therefore the participants to the mediation that are and remain the owners of the dispute and its solution. They and they alone decide whether there will be a settlement and on what terms and conditions it will rest. It is therefore important that the party representatives who are delegated to a mediation actually have the necessary decision-making power for the party they represent.

Thus an important difference between mediation and more formal dispute resolution processes, such as Court proceedings or tribunal or arbitration, is that the parties retain control over the dispute and its settlement. Once formal dispute resolution procedures have begun, they will often continue along established procedural routes and will be subject to a timetable set by the body that presides over the resolution of the disputes. For example, the parties in that situation no longer have any control over events and they often find their way to a final hearing and accompanying decision almost passively. All this is in stark contrast with mediation where the parties are in full control of the procedure, and in fact also participate fully in it. The parties are free to decide whether they wish to withdraw from the mediation process at any time and whether they come to a settlement or not. It is this control over the process that the parties obtain that gives them the full, true, ownership of the dispute and its resolution and probably also explains why when resolution is achieved, it tends to be honoured and respected by the parties later on.

Having said that, the mediator obviously plays a central role in assisting the parties in the mediation to reach a settlement. Mediators are generally well trained, not only in negotiation techniques, but also in techniques to break through the blockages or stalemates in the negotiation process between the parties and intervene where necessary in the unproductive deflections that all too often find their way inside a negotiation. In addition, a mediator should ideally have insight into the commercial and technical aspects of the dispute but he should not necessarily be an expert in the matter.

Another essential feature of the mediation process is its confidentiality. In fact, mediation is confidential on two levels: first, the entire

mediation process itself is a private and confidential process. Only the parties and their advisers are aware of the mediation and the details of the possible settlement that is reached. The latter will, however, lapse if the parties record a formal judicial agreement as these normally get openly published. More on that is set out further on in this article.

In the second instance, everything that is said in a private meeting between one of the parties and the mediator is also confidential. Such a meeting is usually called a 'caucus' after the old English term for a meeting of members of a certain political party without outsiders. The mediator – acting as a de facto broker – may not transfer information to the other participant to the mediation without the express permission of the participant imparting the information. The advantage of this is that the mediator and the relevant participant can safely talk about possible options which is obviously to the benefit of the mediation.

Since everything that is said within the mediation cannot be referred to in further legal proceedings and it is also not binding until an agreement is concluded, it is a very credible process for the parties to step into. It is important that the mediator is at all times independent from the parties, without interest in a particular outcome. It must be clear to the parties – and also clearly seen in this way – that the mediator actually does not choose a side and has no interest in a particular settlement.

The process

In its most stylised form, mediation is truly a 'process' that people go through. There are no formal binding steps and various organisations tend to advocate slightly different templates or formats but in general, one can identify five steps or phases: Preparing, Opening, Exploring, Bargaining and Wrapping up.

Depending on the circumstances, some of these may be more pronounced or more blurred or there might be some iterative feedback between, say, the exploration and the bargaining phase, which may then get translated into some shuttle diplomacy in-between various caucuses or subsequent meetings, but in general the above gives a good thread for the novice to the process.

Apart from selecting a mediator, the preparation phase heralds a time where the mediator, once appointed, contacts the parties and gets the process moving. This tends to include the exchange of (a joint) written case summary. This period should not be underestimated as it offers the parties a time to reflect on their positions, their needs, their wants and, to put it bluntly: do their homework. Because no ownership of a process ever comes without responsibility, all should put in their best effort. The opening meeting is the point in time where all are reminded again of their respective roles, the process and when and where the respective formal opening statements can be made. This is often a good point in the process – under a ceaseless encouragement of thoughtful engagement and constructive dialogue – to also capture topics or agenda points for development later on in the process.

Once the exploration phase commences, the attention should be firmly coaxed from the past to the present and the future. This is where all have an invaluable opportunity to explore options, think around the problems, and essentially put forward possibilities. At some point, as the dialogue evolves, there will be an almost natural flow into the bargaining phase. Here it is important that offers get properly framed and conveyed either directly between the parties or with the help of the mediator. Gradually, as this progresses, the shape of a potential settlement will start to emerge. This is where the wrapping up phase comes into effect. This means conducting some sense checks on, for example, the detail and workability of terms, drawing up some Heads of Agreement, or even a full Settlement Agreement and, ideally, even signing off on it.

Why does mediation work?

Tilman and Wijnant (2016) reported in their Mediation Barometer 2016 that the chances of achieving a (written) agreement during mediation are very high. For judicial mediation (i.e. a mediation imposed on the parties by

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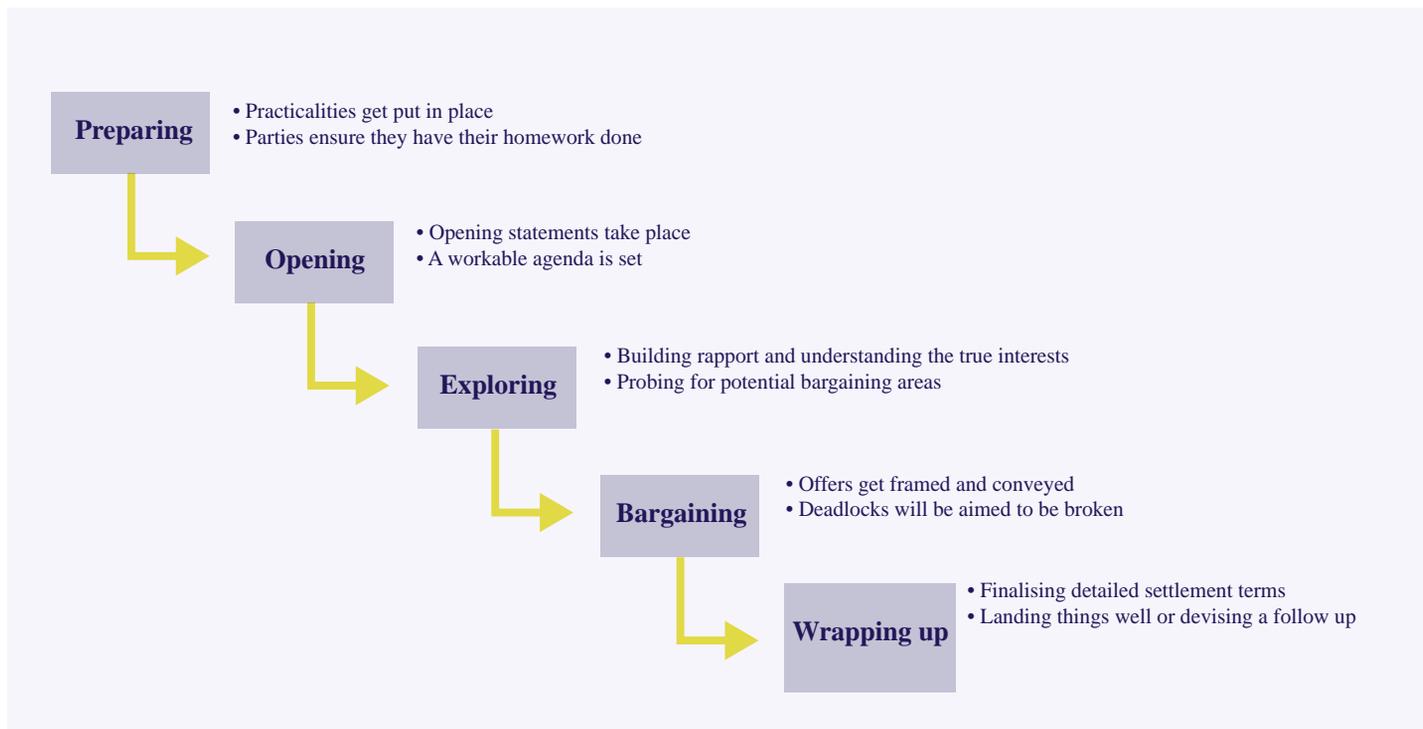


FIGURE 1
Flow chart depicting the common stages of mediation.

the Court), their statistics show only a 63% success rate but as high as 74% for voluntary mediation. These numbers are also reflected in a recent report entitled 'The Eighth Mediation Audit' (CEDR Staff, 2018) which reports an overall mediation success rate of 89%.

These high chances of success are probably the result of the most obvious reason, and that is that it brings the parties together and gives them a chance – which otherwise would not occur – to genuinely resolve a dispute. With mediation, the senior management of a firm can, for example, hear the strengths and – perhaps even just as important – the weak points of the affairs of the various parties. Often, those in decision-making positions who are normally informed only by their own personnel or advisers – whose opinions and interpretations cannot by definition be taken at face value as being wholly impartial, and perhaps may even be self-administered – will have a chance to hear the different sides of the arguments.

Of course, in mediation, the mediator actually brings the parties together. His presence is

likely to contribute enormously to the process of reaching settlement because he can come to independent factual conclusions and independent insights that can help the parties in their own views. In addition, he tries to identify the real issues that separate the parties and to focus the participating people on them instead of on the differences perceived by themselves (which all too often tend to be incorrect). He can try to bring the real needs and interests to the forefront with the parties, instead of those that are put forward in public and that may well be somewhat different.

The mediator can investigate the strengths and weaknesses of a position in order to emphasise the possible weak points that may not have been observed by the party itself. Thus, a party can start the mediation process erroneously in the belief that it has few weaknesses if any, and the mediator can investigate the true strengths and weaknesses with that party in a safe setting such as a caucus. The mediator will also be able to investigate – and test – the strengths and weaknesses of the other party's position.

Mediation will often begin once the informal negotiation process has reached a deadlock. Here, also, the mediator is in a unique position because he can overcome such deadlocks or avenues that appear to lead nowhere and, perhaps most importantly, help the parties to save face by moving on from what would have been unshakeable positions in the public arena. This simplifies reaching the Zone of Possible Agreement (ZOPA). The mediator can propose ways to discover new avenues which may hold 'added value', or he can help to split up the problem into discrete elements, each of which can be developed independently and without regard to the apparent deadlock. Alternatively, at times a stepping back from the issues and finding a more neutral way of accounting may prove to be helpful. Those familiar with the work of Thaler (1999) will know that although we all tend to believe that we are 100% objective and matter-of-fact in our business dealings, the truth is that we tend not to be. The good news is, though, that in commercial matters and mediation, the options for resolution are really only limited by the human imagination.

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And mediation, unlike traditional litigation or arbitration, through the freedom and ownership it warrants, can bring that fully into play.

Finally, the mediator throughout the entire mediation process will focus the parties' thoughts on sustainable resolution and strive to look to the future instead of an approach of constantly re-examining and reviving the past. Above all, he will provide an invaluable embedding of what should be a driving axiom in the process, namely that of being hard on the facts and easy on the people. As the statistics show, this approach – though deceptively simple – does give a positive outcome in the majority of cases (CEDR Staff, 2018).

When to use mediation?

The only real requirement for mediation is for there to be a dispute between the parties. Except for the existence of a disagreement or dispute between the parties, there are actually no set rules for whether to mediate at all or when the right time has come to mediate.

In some cases, especially when there is an imbalance between parties, the parties may find it appropriate to mediate their dispute before taking more formal legal proceedings such as arbitration or litigation. Perhaps this will be the case even if the dispute is still fresh and the positions of the parties are not yet anchored. As a matter of fact, and as an example of a budding trend, mediation is now encouraged by numerous civil Courts such as those in England and Belgium. The latter country has not yet reached the proportion

that it causes a real flow of legal resolution towards mediation (Tilman and Wijnant, 2016)but the trend is clearly present. CEDR Staff (2018) found a similar trend in England where scheme-related mediations – such as those used by the National Health Service, leading employers, the Court of Appeal and other Courts – now account for 37.5% of all mediation activity.

Regarding the timing of mediation during a more formal dispute resolution process, there are no hard rules (yet). In many aspects, however, it can also be argued here that the sooner the mediation is started, the better. This is because the costs of the legal process or arbitration will still be reasonably low and they will therefore be less of a factor in (not) reaching an agreement. If mediation only takes place shortly before the end of a lawsuit when both parties have incurred significant costs, the possible liability for the costs can conceivably form a stumbling block to the settlement of the actual subject of the dispute. This is possibly why legally enforced mediations tend to have a lower chance of success. However, it is not uncommon for at

least one of the parties to want to go through one or more stages of a formal legal procedure in order to be able to assess how outsiders perceive their case before actually entering into mediation. Nevertheless, one should also be aware that too early mediation can also have its own problems. For example, this is the case if insufficient preparation has been carried out by one or more parties, for instance when assessing the quantum of the requested amounts. Here, the lack of insight and knowledge about this can then become a stumbling block for reaching an agreement. P6, as it is often said in colloquial English, is apposite: Proper Planning & Preparation Prevents Poor Performance. There simply is no better recipe than sound preparation and planning to prevent poor performance.

Although it is thus clearly impossible to indicate with complete certainty when is the best time to mediate, the literature indicates that, if you want to save time and money, starting mediation – coupled with the aforementioned favourable chances of success – is a good choice regardless of the exact timing when it is undertaken. Carroll and

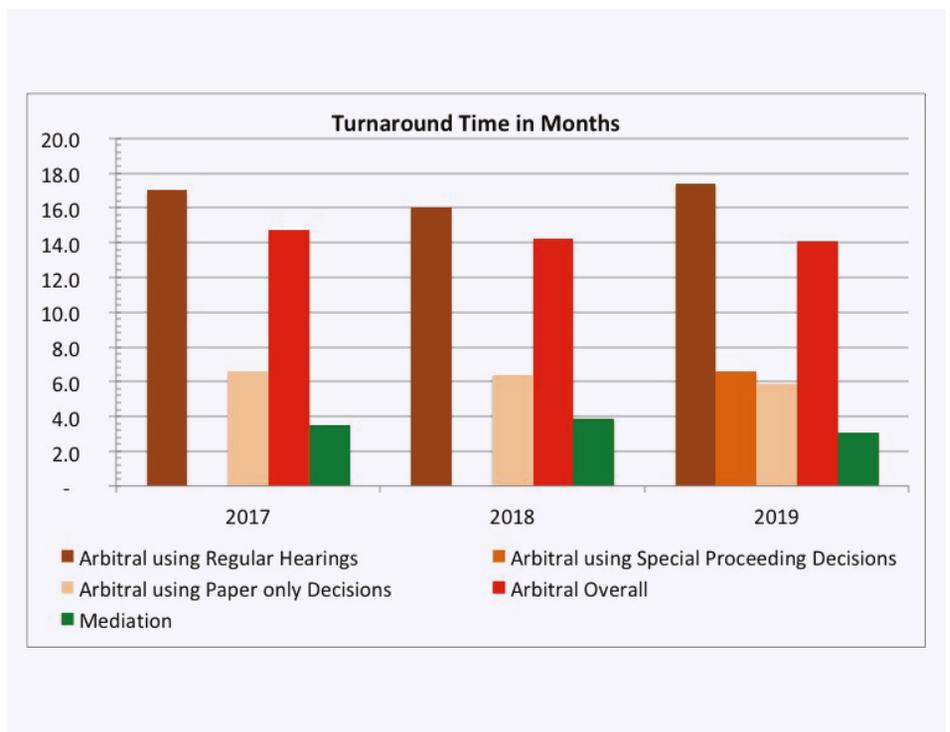


FIGURE 2 FINRA data on the turnaround time in months for both Arbitration and Mediation.

Mackie (2006) give a sample calculation of a specific case in which the entire mediation in connection with a dispute of USD \$20 million in order to reach a commercial agreement lasted two to six months, took 100 hours of management time, notched up a mediation cost of USD \$17,000 and legal fees of USD \$90,000. Arbitration according to their estimate would have lasted 24–36 months, 700 hours of management time and USD \$400,000 to \$600,000 in legal fees with a further USD \$350,000 to \$750,000 in tribunal costs. Tilman and Wijnant (2016) in Belgium reported from their statistics that in civil and commercial matters, the standard runtime turns out to be two months, with the mediator seeing the parties three times for a session of three to four hours each. Presently, these tend to be smaller cases than those that tend to circle maritime projects but a look at England, where it is often said that cases tend to be of a larger nature, shows similar figures and reports that for a day's mediation participation the parties can expect to pay between GBP £1,512 to £3,627 in mediator fees (CEDR Staff, 2018). The Financial Industry Regulatory Authority or FINRA,

which is authorised by the USA Congress to protect America's investors by making sure the broker-dealer industry operates fairly and honestly, oversees more than 634,000 brokers across the USA and analyses billions of daily market events. In this capacity, they also operate the largest documented securities dispute resolution forum in the USA applying both arbitration and mediation. Their data set (FINRA Staff, 2019) shows mediation to be by far the most time effective methodology.

Although the foregoing only shows a large saving in time, it does not show the cost saving involved. This angle can be gleaned from e.g. the 2018 Dispute Resolution Statistics as published by the International Chamber of Commerce (ICC Staff, 2019). Here it is reported that in 2018, the disputes registered under mediation covered a wide range of business sectors whereby construction and engineering disputes were the most frequent, accounting for almost 35% of cases, followed by disputes relating to energy and telecommunication. The value of these disputes ranged from USD \$250,000

to \$860 million, while the reported average costs of proceedings in which mediators were appointed (covering ICC administrative expenses and the fees and expenses of the neutral) reached only USD \$18,500. Had these disputes been addressed using an ordinary tri-arbitrator approach, the costs would have been far higher as illustrated in figure 3.

The above does not only confirm the suitability of mediation for a wide range of disputes, including high value disputes, but also underlines its cost-effectiveness. These views had earlier already been echoed by de Castro and Schallnau (2013), who presented figure 4 to succinctly depict the findings of their study.

It is clear that all the above time and cost allocations are each far less than what would be the case if an arbitral or classical litigation approach was taken in the same matter and reflects what Glahn and Derugeris (2014) reported on the use of Courts for dispute resolution. It is probably from this realisation and similar views on the matter that legal

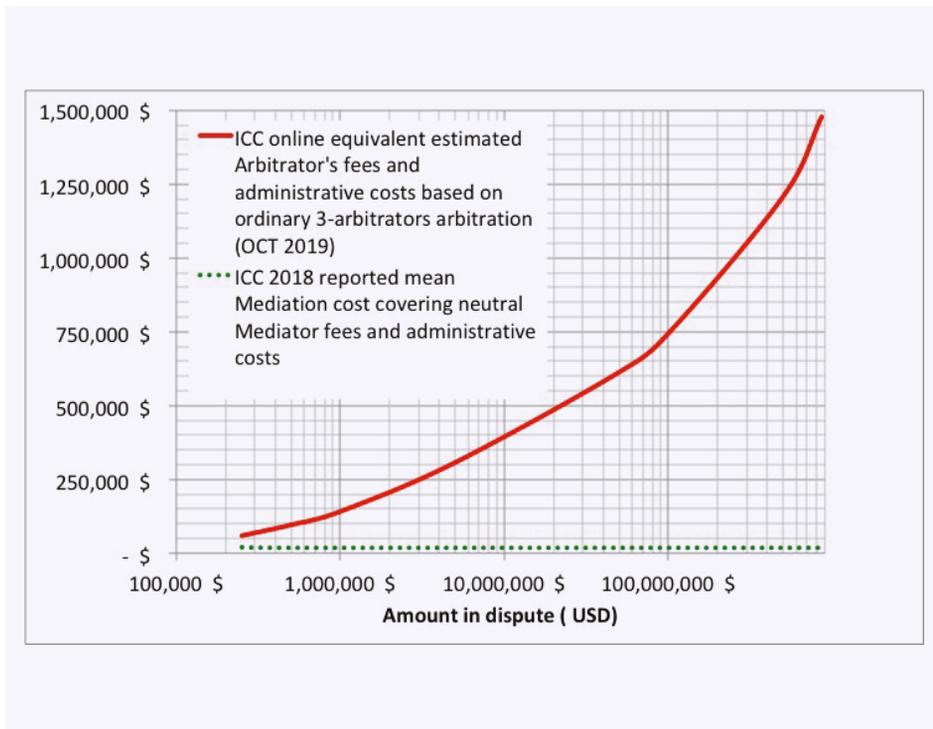


FIGURE 3
ICC expected ordinary tri-arbitrator cost vs mean mediation cost therefore in 2018.

There simply is no better recipe than sound preparation and planning to prevent poor performance.

assistance insurances now also become more and more financially involved in mediation and no longer only in the traditional litigation cases (Cleeren, 2014).

Given its flexible nature and cost effectiveness, some readers may at this stage be pondering on the potential of mediation during the process of contract formation. It would lead us too far from the initial premise of this article but recent work indeed underlines its usefulness in that application because co-operative agreements between contractors, employers, consultants, legal advisers and public authorities will be needed more than ever (Kinlan, 2016). Traditionally, contracts have been for the most part based on a fairly standard form of contract, been static in nature and been provisioned with rather standard dispute resolution clauses. The reality of today, however, is that we and our projects all exist in a highly variable and interconnected space where these traditional approaches of contracts and their formation have come to meet their limits. There is a genuine need for all parties to come to a more adequate manner in which to address change and engage disagreement, and to embed those matters that can be agreed in a final, legally binding, contract to govern major long-term projects or programmes.

The international view

Cleeren (2014) reported that Legal Assistance & Recovery (LAR) – one of the largest claims representative and legal aid firms on the Belgian market – stated that in 2014, 75% of the Belgian population had never heard of mediation. Worldwide, the numbers do not appear to be much better. Naturally, such low numbers do not help to make the process a go-to approach in cross-border disputes. This appears to be underscored by the study of Tilman and Wijnant (2016) who found that only 7% of the conducted mediations in their research contained cross-border elements. The element that was decisive in this respect was apparently for the most part that one of the parties was established abroad. They also found that this percentage was the same for both civil and commercial matters as for family matters. It is therefore not clear whether the topic of the mediation as such was deliberately cross-border by nature (e.g., as in the case of an overseas agency contract, an overseas commercial agency, an international build, or an international shipping contract, etc.) or that the

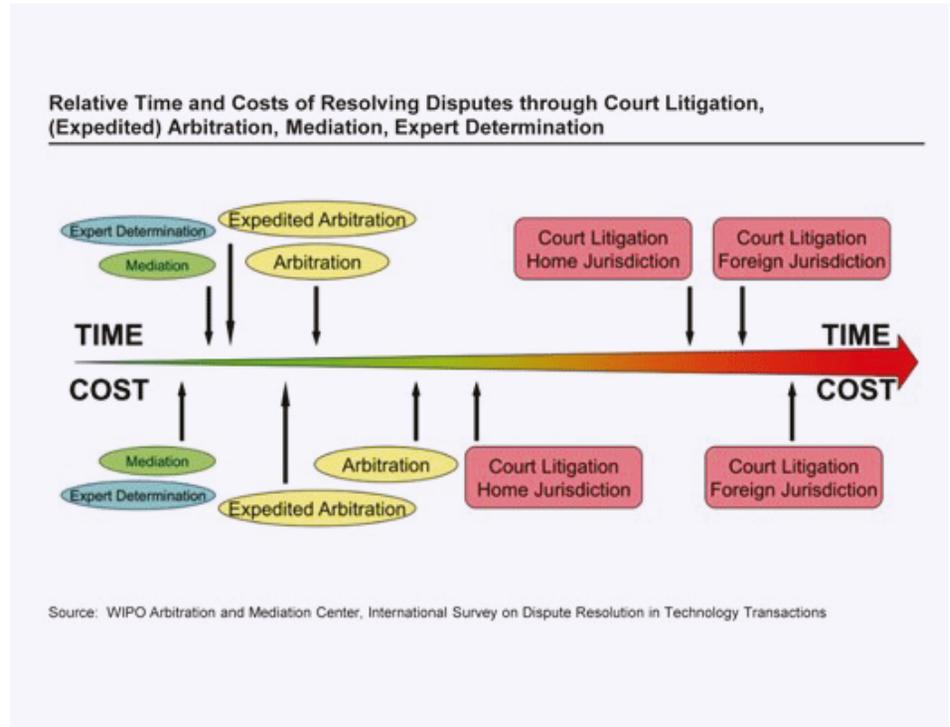


FIGURE 4

Depiction of the WIPO Center's survey result on cost and duration regarding dispute resolution.

element that one of the parties established abroad was rather coincidental. There is also no information available at the moment as to what extent we are dealing with European mediation only here or whether this finding also extends beyond European borders. Given mediation's procedural flexibility and increased mediation numbers, this is all likely to gradually change for the better in the sense that in an ever increasingly interconnected world, cross-border cases will continue to rise, leading to a much clearer picture on that side of the study.

Mediator appointment

The appointment of a mediator tends to differ between legal territories and between mediation organisations. If we cast an eye on the Belgian situation we see that, as stated by the Belgian Federal Public Service (FPS) Economy, Small-to-Medium Enterprises (SMEs), Self-employed and Energy, there are two types of mediation:

- the free or voluntary mediation where the initiative comes from (one of) the parties in a dispute, and
- the judicial mediation that comes from the judge in a traditional piece of litigation.

The mediator in these can be accredited or unaccredited. The Belgian Federal Mediation Commission (FMC), based on if and when the mediator meets certain set criteria of initial and continued further professional training, does the accreditation in Belgium. The FPS Justice keeps a list of these accredited mediators – listed according to their specialty and place of residence – that can be requested via the Federal Mediation Commission (FMC). The use of an (un)accredited mediator is not without its consequences. The agreement reached in a Belgian Mediation can only be homologated by the Courts – at the request of the parties – if the services of an accredited mediator have been invoked. The agreement then obtains the same legal value as a judgment and becomes binding. Another important impact of using an (un)accredited mediator is that on legal timelines. The legal clock or timeline is suspended or frozen from the moment of the signing of the mediation agreement resulting in the staying of on-going litigations if an accredited mediator is appointed but not so if an unaccredited mediator is engaged. The parties are, however, not obliged to call on an accredited mediator,

but then they lose the not unimportant benefits listed above; in a purely Belgian affair, of course.

History shows us that it is not uncommon for parties from different countries to fail to agree on the appointment of an arbitrator, a mediator or even an expert from one of the countries of origin of the parties in the dispute. It is therefore not unusual to appoint someone from a third country. The presence of, say, British professionals is then often a common occurrence. When they do not act independently, they are often found initially through such independent organisations such as the Centre for Effective Dispute Resolution (CEDR) from London or the International Chamber of Commerce (ICC) from Paris. In itself, this might be construed as a somewhat overly cumbersome approach. As it stands, mediators in Belgium, the UK and Europe as a whole are well aware of the European Code of Conduct for mediators and a clear mediation protocol or mediation agreement to which also the mediator is to adhere should be able to offer the parties adequate peace of mind. Although the European Code of Conduct for Mediators (European Commission Justice Directorate, 2004) started life as a voluntary code of conduct, its elements have been included in the legislation on mediation in most countries across Europe (Blake et al., 2012). However, despite this, in cross-border disputes, the previously described belt and braces approach is still rather the rule than the exception. It is perhaps surprising in this context that most mediation clauses in contracts or dispute-specifically drawn up mediation agreements or protocols do not specifically list, for example, London as the seat of the mediation which according to the 2018 International Arbitration Survey (Friedland and Brekoulakis, 2018) remains the most preferred seat for international arbitration and for good reasons. The latter (London) could easily offer further comfort to any disputing parties. One further point worth considering is whether any particular contract being drafted should have a 'mediation agreement' requiring any mediation to be done in a particular country with the mediator selected in a particular way. An 'arbitration agreement' is a common clause in contracts but it may well be sensible to include a 'mediation agreement' as well. Mediation provisions generally are discussed further on in this article.

Confidentiality

When one goes beyond the scope of a monolithic jurisdiction and one deals with agreements, disputes and parties that extend across several legal territories, the management of (often unexpected) legal interactions becomes an almost inextricable tangle with many possible pitfalls for the parties.

Increasingly, mediation as a condition precedent to entering into a judicial or arbitral procedure is included in large international contracts. But even if this is not the case, the parties are encouraged to do so. For example, in the FIDIC Red Book (FIDIC Staff, 1999), a frequently used set of Conditions of Contract for Construction for buildings and engineering works designed by the Employer, Art 20.5 encourages the parties to settle the dispute amicably. Whether this should be done with or without mediation as a formal process is not explicitly stated but it is argued that it should – unless the parties decide otherwise – start the clock to possibly go to arbitration (being 56 days after the notice of dissatisfaction) at that point. This would contribute to:

1. encouraging the parties to come to an agreement quickly, but also
2. encouraging them not to hold their cards close to their chest.

The fear expressed in the second point – keeping cards close to their chest – may be the result of the consideration by a party who worries that, if they put their cards openly on the table, they may possibly be used against them later on. Specifically, the latter could for example be the case in the United Arab Emirates. 'Without prejudice', 'off the record offers', and 'private and confidential' communications are not accepted there by the local courts as an adequate shield and may be referred to in further legal proceedings (Essam Al Tamimi, 2014).

In order to address this fear of confidentiality and the possible undesirable interaction between different jurisdictions, the use of caucuses in international mediation has almost become a sine qua non. When applied properly, these offer – as mentioned above – a second layer of confidentiality that enormously promotes the safety of the entire process and still gives the parties a lot of peace of mind. Thus, the process of mediation is able to cope rather elegantly with the

thorny issue of confidentiality under various legislations without handicapping the process itself.

Enforceability

It is sometimes argued that enforceability in a mediation is not an issue since the agreements resulting from a Mediation result from a negotiation between the parties. This is in sharp contrast to an arbitration or a judicial ruling that could be argued to be imposed on the parties to a large extent. Of course, it could be argued that this is a somewhat all too rosy depiction of the mediation process because rarely will parties be negotiating in a truly amicable state of mind throughout the entire process. The other view therefore states that the parties often still like to see the hard-earned result of mediation become legally binding. If the two parties are all of the same legal territory, say Belgian, and the dispute is located in that territory, Belgium, then this is normally less of an issue. However, if one of the parties is not Belgian and the subject of the dispute is possibly subject to yet another legislation, it will for sure no longer be obvious. The risk – or at least the fear that one of the parties might feel less compelled to comply with the agreements made after the mediation, and even after signing the joint agreement or settlement – will get a more prominent place in the minds of the parties.

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On one hand, it is the recognition of that exact fear, but on the other hand the clear advantages that mediation offers, that have led to the United Nations Commission on International Trade Law (UNCITRAL) Working Group II (Dispute Settlement) also including this in the discussions at their 66th Congress in February 2017 at the United Nations headquarters in New York. Currently, some 157 countries have joined the 1958 New York Convention (NYC, UNCITRAL Secretariat, 2015) and the associated UNCITRAL Model Law (ML, UNCITRAL Secretariat, 1994) has sometimes been verbatim adopted in respective local legislation. The UNCITRAL Model Law is after all a pro-forma piece of commercial arbitration model legislation that can be implemented by nations in their national legislation framework. At the moment, 74 countries have introduced an arbitration legislation based on this model format to various degrees. The success of this is due in large part to the finality given by an arbitral award in that the award is enforceable in many places and thus actually 'definite' in form. Arbitration as a 'definitive' solution in an international commercial dispute would be much less attractive if one could not guarantee that outcomes would be recognised and enforceable by different national Courts. Such a lack of finality undermines legal certainty and, in turn, international trade; which in a period of the apparent reintroduction of trade barriers (Petersen et al., 2016) may become all the more important.

Looking at the success of international arbitration and its enforceability, the UNCITRAL had already been looking for a similar instrument for mediation that could also put mediation further on the international map. However, problems already started with the anomalies that existed on a language level with regards to mediation. The UNCITRAL traditionally refers to '(re)conciliation' rather than 'mediation'. In some jurisdictions these

can lead to quite different interpretations. In Belgium, for example, the term 'conciliation' would lead parties to have to consult the Judicial Code Articles 731 to 734, whilst the term 'mediation' would lead them to Judicial Code Articles 1676 to 1723. If language would already not be an obstacle, then there is the relative unfamiliarity with mediation that separates countries and their respective legal systems. Some of these countries have only just begun making their first steps in international arbitration even, let alone mediation. All of this makes the search for a national and international legal framework instrument for mediation not exactly uncomplicated. The UNCITRAL meetings work on a consensus model so it understandably takes quite some time before a clear picture is created of where matters are going. Some of the important issues that UNCITRAL was struggling with were among others:

- Whether the legal instrument resulting from the UNCITRAL discussions should be a Model Law (i.e. guidelines for nations to consider and accept or not, with or without their own changes) or a convention (i.e. a legal framework that countries simply adopt such as the 1958 New York Convention) or possibly both, and should the parties in the conciliation be asked to endorse it or not, should these come into being?
- How is it constituted that an agreement is the result of a mediation?
- What is to be done with partial agreements or possibly 'non-commercial' results?
- A particularly sensitive area is the formulation around the area of possible challenge by parties regarding recognition and enforcement, for example, resulting from the alleged (mis-) conduct of the mediator such as not disclosing conflicts of interest or inappropriate pressure on an individual party to reach an agreement.

It can be seen that these are not trivial matters at all. It is also worth noting that the previous UNCITRAL Model Law on International Commercial Conciliation (2002) at the time of writing has only been reflected by legislation based on or influenced by that very Model Law in 33 states in a total of 45 jurisdictions. Canada, for example, would be considered a state in this, and Nova Scotia considered a separate jurisdiction. Notably, in the context of the present article, it is perhaps worth pointing out that Belgium adopted it in 2005 as a suitable format under its legislation whilst the United Kingdom to date has not. However, having said that, the mediation process is well recognised in the Civil Procedure Rules and, in addition to that, steps have been taken to implement the Mediation Directive and implement the Cross-Border Mediation (EU Directive) Regulations 2011 for cross-border disputes. All the above does, however, not mean that mediation, due to a perceived lack in enforceability, will remain the poor cousin to arbitration that at first glance it appears to be. This is so because, following three years of debate by the UNCITRAL Working Group, the 26 June 2018 saw the final drafts for a Convention on the Enforcement of Mediation Settlements and accompanying Model Law being approved at the 51st Session of the United Nations Commission on International Trade Law (UNCITRAL). The Convention, which in its final form has now been named by way of shorthand the 'Singapore Mediation Convention', and applies specifically to the settlement of international commercial mediated disputes with the intention of making enforcement of them far easier, was signed at a ceremony in Singapore on the 7 August 2019 by, already, no less than 46 countries. The Convention must, post-signing, be ratified by at least three member states to come into effective force. After which, the world will have formulated an international framework and methodology for the enforcement of mediated settlements, similar to NYC, for the enforcement of arbitral awards. The full text approved on the 26 June 2018 as it stands can be found in the annexes of the Report of the United Nations Commission on International Trade Law - 51st Session (UN-CITRAL Secretariat, 2018 and 2019).

For the time being, though, one could say that we are not out of the woods yet and that until the above final evolution takes place fully, the outstanding questions concerning

The use of caucuses in international mediation because of the mix of laws and their interactions has become the norm rather than the exception.

international finality and enforceability of a post-mediation agreement remain. It might, however, now be assumed that the parties will be able to rely on the presumption that a renewed trust found during the mediation process between the parties will ensure that the agreement will be honoured no matter what jurisdiction it has been concluded under. This may not be unreasonable to presume if the parties still have a long future between them. However, this may just as easily not be the case in the settlement of a one-off deal or ad-hoc collaborations. If the parties still want to add extra security, it does not seem unwise for the time being to have their post-conciliation agreement or post-mediation agreement translated into, for example, a Tomlin or consent order by an appropriate tribunal.

Conclusions

From the sections above, one can rightly conclude that mediation is a process that is flawlessly appropriate to be deployed in the international maritime construction and dredging industry. The mediator can perfectly use his or her skills to bridge cultural gaps, and the process itself can contribute to an

accelerated and cost-effective solution of a dispute; thus addressing the main concerns regarding traditional litigation and also arbitration, where time is not too infrequently found to slip away as fast as costs are found to be rising.

The use of caucuses in international mediation because of the mix of laws and their interactions has become the norm rather than the exception. This is both a logical and sensible approach. Although this apparently (partially) alleviates the concern about the creation of a safe environment for negotiation, some questions surrounding international enforceability of the mediation agreement reached remains. Until the point in time where the Singapore Mediation Convention comes into force, there is no clear solution and in this context, the authors suggest that the post-mediation parties might wish to have their mediation agreement translated into a consent order by an appropriate tribunal, should this be required. However, the parties can best (as discussed above) provide for this option when constructing the original underlying commercial agreement. This

issue should not, however, outweigh the overwhelming merits of mediation, for all the reasons set out above in this article.

There still remains some considerable work to be done to make mediation known, not only in domestic disputes but also international ones, as being an excellent tool to resolve them. The signing of the Singapore Mediation Convention, however, not only goes a very long way already to bolster the recognition of the process and its validity but it also considerably adds to the attractiveness of the finality and enforceability of the mediation process in an international setting. As such, given the nature of the international maritime and dredging construction industry, mediation is likely to become more and more prevalent in the commercial side of the business. So, when asking, in parallel to the question 'What is the next big thing?', the question 'Is mediation going to be the new and improved arbitration?', the authors believe that it will become so. Moreover, although not fully realised at the moment, it is clear that, as an industry, the international maritime construction and dredging industry stands only to gain from it.

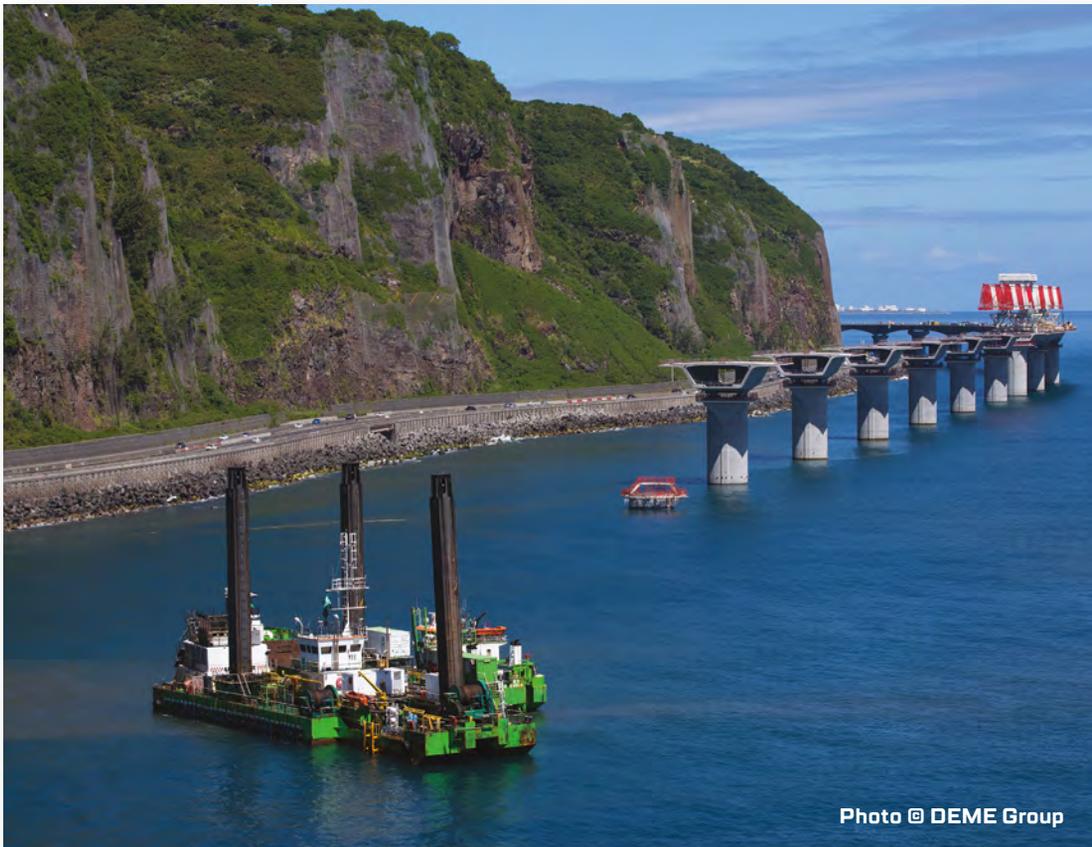


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FIGURE 5

Given the nature of the international maritime and dredging construction industry, mediation is likely to become more and more prevalent in the commercial side of the business.

Summary

This article aims to provide the reader with a solid introduction to what mediation is. It explains the process and elaborates on the steps that already presently can be taken to ensure confidentiality and address enforceability.

Mediation is outlined from a state-neutral perspective, and when the need arises for a more territorial setting, this is done against a Belgian or English legal backdrop. Given the nature of the industry, the outlook will be directed internationally to try and gauge the applicability of mediation in such a multinational setting. Questions that will be examined in that context are: what could be some of the special issues that possibly arise in cross-border mediations within such a context; and how can they be dealt with?

It is not possible to give a complete picture given the inherent limitation of the article's length. Nevertheless, the reader will find a number of thought-provoking points of interest which will be summarised briefly in the final discussion and conclusions. The goal is to help in broadening familiarity with mediation, increase confidence in the process and inform about the benefits mediation can bring to the industry at large.



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