

MEDIATION / ALTERNATIVE DISPUTE RESOLUTION CLAUSE 2021

[To be used together with the BIMCO Law and Arbitration Clause 2020 or any other law and arbitration/ jurisdiction clause, not in place of it.]

(a) In the event of a dispute or difference arising under, out of or in connection with this contract either party may at any time, either prior or subsequent to the commencement of any proceedings, invite the other to participate in an alternative dispute resolution (ADR) procedure including (but not limited to) mediation, early neutral evaluation and/or early intervention by written notice to the other party.

(b) The other party shall within fourteen (14) calendar days of receipt of such notice reply in writing either agreeing to participate or declining to participate, giving reasons for declining.

(c) If the parties agree to participate in an ADR procedure, they shall both take such steps as are necessary to progress the ADR procedure in good faith and without undue delay.

(d) The parties' participation in the ADR procedure shall not affect the rights of either party to seek such relief or take such steps as it considers necessary to protect its interests.

(e) Subject to subclause (g), the ADR procedure shall be without prejudice and confidential and no information or documents disclosed during it shall be revealed to any Tribunal and/or Court in any subsequent or on-going proceedings except to the extent that they are disclosable under the law and procedure governing the relevant proceedings.

(f) Unless otherwise agreed, each party shall bear its own costs incurred in the ADR procedure and the parties shall share equally any third party costs and expenses.

(g) If the other party does not agree to participate in any ADR procedure under this Clause, that fact may be brought to the attention of the competent Tribunal and/or Court and may be taken into account by such Tribunal and/or Court when allocating the costs of the proceedings as between the parties.

(Note: The parties should be aware that the ADR process may not interrupt time limits.)

EXPLANATORY NOTES

Forms of ADR are being used worldwide but with different names and different procedures. Commonly used forms of ADR are mediation, early neutral evaluation and early intervention. These forms of ADR are intended to facilitate the prompt and amicable resolution of disputes between parties (allowing them to preserve their commercial relationship and to operate sensibly their commercial contracts) and to help them avoid arbitration and court proceedings which can be protracted, costly and commercially disruptive. Mindful of the importance of developing a clause that has broad application, the clause is not limited to any one of the different forms of ADR. The clause has been drafted as an all-encompassing ADR clause but the title has maintained the reference to mediation for familiarity.

The clause allows for traditional mediation where the parties sit in one room or video conference with the aim to settle the dispute during that meeting. This is a relatively formal process and often takes place at quite a late stage of a dispute when proceedings are already on foot.

However, the clause also envisages parties engaging in early intervention mediation, where the mediator invites parties at an early stage (either before or after proceedings have been commenced) to review their claim and identify potential pitfalls. This is less formal and is often done by email exchanges, telephone conversations, or video calls.

In early neutral evaluation an independent and impartial evaluator is appointed to provide the parties to a dispute with an assessment of the merits of their case. The objective of an early neutral evaluation is to give parties a realistic indication of the merits of their respective cases to help inform the negotiations between them and, if the evaluator considers it appropriate, to put forward a figure or range for settlement.

The parties should consider the nature of the claim, guidance required and their relationship status before they decide on the ADR form to be used for solving their dispute.

Parties can refer their dispute to one of the ADR methods at any stage – before arbitration has commenced or during arbitration proceedings. Under the law of the primary venues where maritime disputes are resolved, there are no procedural differences between the ADR forms before or after legal proceedings have been commenced.

The ADR procedure can be conducted by mediators and evaluators who will have procedures/rules in place. Providers can be found in all the major venues.

The clause is intended to replace the BIMCO Mediation Clause 2020. The Mediation Clause has not found great acceptance in the market and is not much used. There is an increased interest in ADR worldwide and BIMCO believes that by developing a new clause dealing, in principle, with all types of ADR and promoting it widely, this will further encourage the use of ADR as an alternative to other more expensive and time consuming dispute resolution methods.

The clause must be used together with the BIMCO Law & Arbitration Clause 2020 or any other law and arbitration/jurisdiction clause chosen by the parties because it is not replacing a law and jurisdiction clause which is a vital part of the contract. The BIMCO Mediation/Alternative Dispute Resolution (ADR) Clause can be used in any jurisdiction agreed in the governing contract. This is important to note if the contract is governed by U.S. law as arbitration is considered as alternative dispute resolution.

GUIDANCE NOTES

The following explanatory notes are intended to provide some background to the thinking behind the BIMCO Mediation/ADR Clause. If you have any questions about the clause that we have not answered in the explanatory notes, please contact us at contracts@bimco.org and we will be happy to assist.

The clause is designed to enable parties to a contract to enter into an ADR process with a view to early and swift resolution of any disputes. Cautionary notes have been included at the beginning and end of the clause, specifying that the clause should be used together with the BIMCO Law & Arbitration Clause 2020 or another law and arbitration/jurisdiction clause and not in place of it and that the parties should be aware that the ADR process may not interrupt time limits. That means that if the parties want to prevent that their claim will be time-barred, they should commence arbitration/court

proceedings in accordance with the law and jurisdiction clause of the contract, though they can commence or continue with the ADR process as they wish.

Subclause (a) is the main operative part of the clause and allows either party, in the event of a dispute or difference arising under, out of or in connection with the contract, to invite the other party participate in an ADR procedure. As compared with the Mediation Clause 2020, which is only triggered by the commencement of arbitration proceedings by one party against another, either party may under the draft clause invite the other to participate in an ADR procedure prior or after the commencement of any proceedings. It is important to note that any unjustified rejection might have an impact at a later stage when it comes to the allocation of costs during legal proceedings. It is a matter of law and in the arbitrator's discretion to decide on costs consequences for a rejection to participate in ADR procedures which is also reflected in subclause (g).

As compared with the Mediation Clause 2020, the appointment procedure contained in subclause (b) has been simplified to a basic obligation to either agree or decline to participate in an ADR procedure as the procedural rules that apply will depend on the type of ADR. It is specified that if the other party declines to participate in the ADR procedure, reasons for declining should be given. It has not been considered necessary to impose a similar obligation to give reasons for accepting to participate.

Subclause (c) specifies that if the parties agree to participate in an ADR procedure they are to both take the necessary steps to progress the ADR procedure in good faith and without undue delay. Any attempt to delay the proceedings or a lack of cooperation could have consequences in later legal proceedings. To act in good faith means to act in the spirit of the contract and in accordance with the reasonable expectations of the other party. This includes acting fairly, not taking an unfair advantage of the other party and acting in accordance with the common purpose as agreed by both parties.

Subclause (d) clarifies that despite ongoing ADR procedures, the parties are not prevented from protecting their rights. This includes potential injunctions, arrests or other enforcement actions.

Subclause (e) is an important provision to protect the parties conducting one of the forms of alternative dispute resolution in accordance with this clause. The information and documents disclosed during any ADR proceedings cannot be used in potential subsequent/current arbitration or court proceedings. This means in practice that when the parties are making compromises to reach a settlement during the ADR procedure, this will not have any consequences and will not be considered as an admission of any liability etc. under any arbitration/court proceeding. The scope of the clause does not only cover the agreed jurisdiction but is extended to all jurisdictions. This could be important where legal proceedings are commenced in an incompetent court.

The cost allocation provision in subclause (f) is self-explanatory.

The provision in subclause (g) is a consequence of a potential rejection to participate in the ADR proceedings as set out in subclause (b).