



MEDIATION AND THE ENFORCEMENT OF INTERNATIONAL SETTLEMENTS - A UK PERSPECTIVE

Alexander Scard

Kyiv Arbitration Days 2019
13 September 2019

Overview

Use of mediation for international commercial disputes - a UK perspective

Certain technical aspects of mediation in English law

Mediation and international enforcement

Use of mediation in the UK

- Mediation is well established in common law jurisdictions such as USA and UK
- Mediation can be used in a wide range of disputes
- Reports of high success rates when parties resort to mediation:
 - The proportion of cases that achieve settlement on the day of mediation is 74%
 - Another 15% of cases settle shortly after mediation
(*“The Eight Mediation Audit: A survey of commercial mediator attitudes and experience in the UK”* - CEDR, July 2018)
- Mediation is well suited to international disputes

Use of mediation in commercial disputes

Generally, mediation is a suitable form of Alternative Dispute Resolution (“ADR”) for commercial disputes, except perhaps where:

- there are allegations of fraud - PJSC Aeroflot v Leeds & another (Trustees of the estate of Berezovsky) [2018]
- there is obviously no prospect of success in a mediation; attitudes of the parties
- there is a specific need for a court order
- the case turns on a point of law which needs to be determined
- there is a need for precedent in the courts

Can parties be compelled to mediate?

- Mediation clause
- English court will not compel mediation: Halsey v Milton Keynes General NHS Trust [2004]; Article 6 of the European Convention on Human Rights
- However, there can be strong “encouragement” to mediate in the litigation context:
 - Pre-action protocols
 - Statements by the judge encouraging the parties to use ADR if appropriate (Civil Procedure Rules (“CPR”) Rule 1.4(e))
 - Threat of adverse costs orders
 - Is refusal to mediate reasonable?
- There is less pressure to mediate in the context of international arbitration but encouragement all the same (ICC Arbitration Rules, Appendix IV “Case Management Techniques”, paragraph h))

Timing of mediation

- Timing may be pre-determined; e.g. multi-tiered / escalating dispute resolution (“**DR**”) clauses
- Time and costs considerations
- Understanding your opponent’s case
- Other objectives in mediation?
- Statute of limitation

Escalating DR clauses (English law)

- Traditionally, promises to negotiate or “*agreements to agree*” are unenforceable.
- A clause requiring parties to “*negotiate in good faith*” was held unenforceable: DS-Rendite-Fonds v Titan Maritime SA [2015]
- Escalating DR provision enforceable where sufficiently certain ADR procedure: Cable & Wireless plc v IBM United Kingdom Ltd [2002]
- Danger of ignoring pre-arbitration ADR - ADR as a pre-condition to the jurisdiction of the arbitral tribunal.

The sources of English “mediation law”

- General law of contract: mediation agreement & settlement agreement
- Law of confidentiality
- Rule of Without Prejudice Privilege
- Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (the “**Mediation Directive**”)

Typical components of a mediation agreement (English law)

1. Mediator's statement of independence, impartiality and neutrality
2. Conduct of the mediation; mediator as facilitator, not adviser or decision-maker
3. Confidentiality undertakings
4. Without prejudice privilege
5. Undertaking to participate in good faith
6. Warranty of authority to conclude a binding settlement
7. Mediator's fees; parties to bear their own costs or costs in the case?
8. Liability of the mediator, immunity and indemnity
9. Termination of mediation

Confidentiality in mediation

- Confidentiality covers all information disclosed during the mediation process
- Confidentiality applies to all people involved including the mediator
- Situations in which confidentiality may be overridden: Farm Assist Ltd v Secretary of State for Environment, Food, Rural Affairs [2009]

Without prejudice privilege in mediation

- Without prejudice (“WP”) rule: statements made in a genuine attempt to settle a dispute cannot be relied upon in court against the party that made them
- The WP rule applies to negotiations generally including mediation
- Exceptions to the WP rule

The mediation process

- Mediation is supposed to be relatively informal. However, in complex and cross-border disputes ...
 - mediation statements and supporting documents
 - requests for documents
 - requests for further information; e.g. on quantum
 - presentations at the mediation itself
- Timing of settlement
- Ongoing assistance of the mediator?

Typical components of a settlement agreement (English law)

1. General law of contract applies
2. Full & final settlement
3. Payment, release & discharge
4. Termination or stay of proceedings
5. Covenant not to sue
6. Indemnities & hold harmless
7. No admission
8. Confidentiality, except, for example, where disclosure required for enforcement of legal rights
9. Arbitration or jurisdiction clause

International Enforcement (1): Mediation Directive

- Mediation Directive implemented into English law by the Cross-Border Mediation (EU Directive) Regulations 2011 (SI 2011/1133)
- CPR 78.24: settlement enforcement orders

But Brexit ...

- The Cross-Border Mediation (EU Directive) (EU Exit) Regulations 2019

International Enforcement (2): generally

- Drafting protection into the settlement agreement; e.g. payment as a condition precedent to release or settlement as a whole; payee's options to sue
- In England, a settlement agreement can be converted into a “Tomlin Order” to avoid the need to commence new proceedings
- Ultimately, though, enforcing a settlement agreement is an action for breach of contract
- Arbitration/jurisdiction clause in settlement agreement
- Service of process

Mediation versus arbitration?

- False dichotomy
- Complementary rather than competing
- Will that change with the Singapore Convention on Mediation? ...

 @KennedysLaw

 [linkedin.com/company/Kennedys](https://www.linkedin.com/company/Kennedys)

[kennedyslaw.com](https://www.kennedyslaw.com)

Kennedys