MEDIATING COMMERCIAL DISPUTES: HOT TOPICS AND PRACTICAL TIPS

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Dina El Gazzar and Pia Mithani

Stewarts Law LLP
9 Bond Court
Leeds, LS1 2JZ
England

+44 113 394 9493

del-gazzar@stewartslaw.com

pmithani@stewartslaw.com

Eleni Polycarpou, Withers LLP, UK

Michael Pauli, Heuking Kuhn Luer Wojtek, Germany

Rim Ben Ammar, Iustica, Belgium

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Mediation Procedure

1. What is the typical mediation procedure in your country?

   Court Rules governing pre-litigation conduct (the Pre Action Conduct Protocols) require the parties to consider ADR at the outset of a dispute. Additionally, the Protocols state that "parties should continue to consider the possibility of reaching a settlement at all times, including after proceedings have been started".

   The courts have stopped short of forcing a party to mediate, but the court's general approach is to strongly encourage the parties to attempt ADR. English courts have complete discretion as to costs (CPR 44.2) and are ready, willing and able to penalise in costs parties whom it considers have unreasonably refused to mediate or to properly engage in the ADR process. The court can of its volition order a stay to facilitate mediation in appropriate circumstances.

2. Is mediation popular in your country? Why? Why not?

   In short, yes. In May 2014 the Centre for Effective Dispute Resolution published a Mediation Audit[1] which reported that 9,500 commercial mediations were performed over the 12 month period, indicating that the UK mediation market had grown by 9% from the previous 2012 Audit.

   The audit also indicated that approximately £9 billion worth of commercial claims were mediated and that since 1990 the total value of mediated cases was approaching £65 billion.

   The popularity of mediation in the UK stems from a combination of the court's encouragement to consider ADR and the potential for cost saving.

3. How does mediation differ from arbitration/state court proceedings in your country?

   With mediation, the neutral third party encourages all the parties involved to consider their commercial interests and aims to get them to agree to a compromise that will benefit both sides; unlike court proceedings or an arbitration, the mediator does not issue a ruling on a case, it simply encourages the parties to reach a consensual agreement. Mediation is flexible, potentially cheaper and non-binding unless an agreement is signed (parties can walk away).

   If the negotiations are successful and all parties agree to observe the outcome, their signature to the agreement makes it legally binding. If the negotiations are unsuccessful and an agreement is not reached, the parties can still take the outstanding issues to arbitration or litigation. All discussions during a mediation are kept confidential and are not permitted to be referred to in court proceedings, should the mediation fail.

[1] CEDR The Sixth Mediation Audit, 22 May 2014

Arbitration

In arbitration all the parties involved are bound by the decision reached by the arbitrator .Parties usually agree to arbitrate issues of fact or law contractually– this is often the case where a transaction or agreement concerns international parties who want to agree a neutral forum to resolve their disputes, rather than the courts in which they are individually based. Commonly arbitration occurs where the agreement that is subject to the dispute is subject to an arbitration clause. An arbitration seat must be selected in order for that country's mandatory national laws to be applicable to the arbitration. Arbitration is less flexible than mediation and generally more costly.

There are a number of well regarded arbitration centres which parties use (e.g. the ICC or LCIA). These forums have their own procedural rules which the parties can subscribe to. If parties agree to resolve their disputes through arbitration, they can elect how many arbitrators they want to hear a case and whether one or other of them should have some specific legal or industry expertise that is relevant to the dispute.

There is a right of appeal under Section 69 of the Arbitration Act 1996. However, in practice, the courts generally respect the tribunal's award as the decision of the parties' choice and only sparingly exercise the power conferred by Section 69.

The right of appeal is subject to the following limitations:

- It is available only if not otherwise agreed by the parties. Parties routinely waive the right of appeal, either by express provision in the arbitration clause or by incorporating institutional rules that exclude it.
- Even where the right of appeal has not been waived or excluded, only questions of law – not questions of fact – can be appealed.
- The appeal can be initiated only with the agreement of all parties or with leave of the court. Leave will be granted only if a number of conditions are satisfied. These include that the arbitral tribunal's decision on the question that is the subject of the appeal must be either obviously wrong or, where the question is one of general public importance, at least open to serious doubt.

Litigation

In order to litigate, parties must have locus standi. Litigation is often more time consuming and costly than both mediation and arbitration.

All the parties involved are bound by the decision reached by the judge in the first instance.

Generally permission is required in order to appeal a court's decision (CPR 52.3). The basic test for granting permission is whether the appeal has a real prospect of

success. An appeal is brought by filing the appeal notice. This must be done within 21 days after the date of the decision of the lower court, unless the lower court has directed some other period for bringing the appeal (CPR 52.4). In summary, it is only possible to appeal a decision on a point of law, not on a factual finding. Once an appeal notice has been filed it must be served on each respondent as soon as practicable, and in any event within seven days after being filed (CPR 52.5).

4. In your country, what are the typical disputes where mediation works? When does mediation not work?

When mediation works

Most cases are suitable for mediation. However, mediation can be particularly useful in resolving disputes on confidential matters and the parties do not want to attract press attention through a public court hearing - for example, if they involve industrial secrets or commercially-sensitive terms of trade.

Mediation is also a good way of dealing with disputes where the parties want to maintain their business relationship. This is because the object of the exercise is to create an outcome from which all parties benefit, and also because the confidential nature of the proceedings means that no-one is seen publicly to 'lose'.

The use of mediation to resolve family disputes is on the rise and family mediation is the family courts' preferred way of dealing with family matters and family legal cases including divorce, disputes over money, debts, the family home, finances, property, pensions and arrangements for children.

When mediation does not work

Mediation can be difficult where one or more of the parties refuses to accept that there is a problem and is entrenched in their position, or is reluctant to engage in negotiations. For mediation to be successful, both parties have to accept that they may need to concede some points and not get everything they want – in other words, they need to be willing to compromise. If either party cannot come into a mediation with this open mind set, the chances of success are diminished. Even though the courts are putting increasing pressure on disputants (through the award of costs) to try negotiations before going to law, they may accept that it is reasonable to refuse mediation in such circumstances.

Parties to a dispute may also be reluctant to resort to mediation when they have an interest in having a court or arbitral tribunal set a precedent on a particular point of law.

Mediation does not stop time running therefore limitation periods remain a concern. So if time for issuing a claim is about to run out, ADR would not be suitable.

5. What psychological aspects need to be taken into account in your country like negotiation tactics and cultural aspects?

The website 'Leadership Crossroads' produced an article[2] which referred to a book about national negotiation traits by Lothar Katz[3]. The excerpt gave a number of examples of British cultural idiosyncrasies which will affect the way negotiations and, by extension, mediations are carried out in practice.

It explained that in Britain, negotiation is seen as a 'joint problem-solving process', which is 'cooperative', and states that 'it is strongly advisable to avoid any open confrontation and to remain calm, somewhat formal, patient, and persistent'. The excerpt notes that in Britain, negotiators 'may be open to compromising if viewed helpful in order to move the negotiation forward' and says that pressure tactics are used 'only as long as they can be applied in a non-confrontational fashion'.

The excerpt further explains that 'British negotiators may spend considerable time gathering information and discussing details before the bargaining stage of a negotiation can begin'.

Katz explains that in Britain, negotiators 'often work their way down a list of objectives in sequential order, bargaining for each item separately, and may be unwilling to revisit aspects that have already been agreed upon'. He argues that this sets Britain apart from cultures in Asia, Arab countries, Southern Europe and Latin America, where a more polychronic approach may be taken.

All of these psychological and cultural aspects of negotiation need to be taken into account when mediating in the UK. At the same time, it should be remembered that London is the seat of a number of international disputes, and parties mediating in such disputes will therefore require an awareness of a broad spectrum of cultural, psychological and national negotiation characteristics.

As with mediations taking place in any culture though, parties always need to be of the right mindset otherwise mediation is doomed to fail. They have to be willing to compromise and to avoid "grand standing".

6. Is there a particular style/approach to mediation in your country? Do mediators tend to approach mediations in a neutral/facilitative way (acting as an intermediary between negotiating parties) or do they adopt an evaluative approach (expressing views/opinions as to merits and/or likely outcomes)?

   The role of the mediator is to help parties reach a solution to their problem and to arrive at an outcome that both parties are happy to accept. They are simply responsible for developing effective communications and building consensus between the parties. The focus of a mediation meeting is to reach a common sense settlement agreeable to both parties in a case.

[2] http://www.medius-associates.com/wp-content/uploads/2012/06/Negotiating-with-the-British.pdf

[3] Katz, Lothar. *Negotiating International Business – The Negotiator's Reference Guide to 50 Countries Around the World'*, BookSurge Publishing, 2006

There are a number of different styles of mediation, but the most common in the UK is facilitative mediation, in which, unlike a judge or arbitrator, the mediator will not decide the case on its merits but will work to facilitate agreement between the parties. Occasionally, mediators may be asked to evaluate the claim or issue or identify the strengths and weaknesses of a particular case. Usually the parties will meet together with the mediator to discuss their respective positions. They will then break out into separate rooms and the mediator will travel between the rooms to facilitate a negotiation. The process is flexible depending on the needs of the parties.

Mediator

7. How is the mediator chosen/appointed in your country? Is there a list?

   All parties must agree on the appointment of a mediator, or else they must agree a process for a third party (such as a mediation service provider) to nominate a mediator for them.

   Some professional advisers believe that it is preferable to have a mediator with subject matter experience, i.e., an expert in the field in which the dispute has arisen. Others, however, consider that it is more important that the mediator should have impeccable mediation skills, and that his or her technical knowledge of the matter in dispute is less important.

   Complex commercial matters tend to use QCs as mediators. Many QCs/barristers also qualify as mediators and build a practice alongside their normal litigation work.

   There are lists of specialist mediators available, for example the government's online Family Mediation Directory service enables people to search for mediators specialising in family matters by postcode.

8. Who is an eligible mediator? What hinders a mediator from accepting mediation?

   In the UK any person can act as a mediator as mediators do not have to be licensed or hold a particular qualification. However, in practice most mediators have some form of accreditation following assessed training by regulated bodies.

   A mediator must be impartial and therefore cannot act if there is a conflict of interest.

   The Civil Mediation Council (CMC) was established with support from the Ministry of Justice, members of the judiciary and prominent and distinguished mediators drawn from different professions as an unofficial umbrella organisation for the professional mediation bodies.

9. Can a lawyer mediate in your jurisdiction? Does he need training to be eligible?

   Lawyers can be mediators. No specific training is required but it is recommended.

The Civil and Commercial Mediation Accreditation Scheme covers mediations arising from all types of civil and commercial disputes. While scheme members may have expertise in certain kinds of civil and commercial disputes, it is expected that they are able to demonstrate awareness and knowledge of general dispute resolution and mediation skills and issues.

ADR Group, which was the first company in the UK to provide ADR services, followed by the Centre for Effective Dispute Resolution (CEDR) are the leading providers of ADR services, including training.

10. Can a Judge/Court be a mediator in your jurisdiction? If so, are there separate mediation sessions or can a mediation also occur within State Court Proceedings?

    Judges can act as independent, impartial mediators in the same way that solicitors or barristers can do.

    However, mediation is conducted as a private forum separate to the court proceedings and mediations are confidential. Therefore the trial judge could not act as a mediator for the parties.

Mediation legislation / Relationship between State Courts and Mediation

11. Is there any state law regulation of mediation or mediators in your country? If so, what are the fundamental principles of such law?

    There is no current state control, in England and Wales, of training, appointment or performance of mediators. There is no regulating body and neither are there any statutory qualifications to mediate.

12. Do the Courts encourage or impose mediation, or impose sanctions for failure to explore mediation, or is it a purely voluntary process?

    Courts are increasingly encouraging mediation at an early stage. The Allocation Questionnaire that parties must complete before a case goes to court requires legal representatives to confirm that they have explained to their clients the various ADR options. A court may order a stay of proceedings on its own initiative if it considers it would be valuable to permit the parties time to mediate, and can impose costs sanctions where it considers that a party has unreasonably refused to attempt to mediate.

    The following quote is now often referred to when discussing mediation: "all members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR". This quote comes from the case of Halsey v Milton Keynes General NHS Trust (2004)[4].

[4] Halsey v Milton Keynes General NHS Trust Court of Appeal (Civil Division) [2004] EWCA Civ 576

Conversely, in this case the judge refused to award costs against the successful defendant on the basis that the Claimant "had come nowhere near showing that the Trust acted unreasonably in refusing to agree to a mediation". However, in general the decision affirmed the support for mediation and has been referred to in a number of cases in support of mediation.

Referencing the decision in Halsey, in Garritt-Critchley v Ronnan [2014][5] the defendants were ordered to pay the claimants' costs on an indemnity basis, as their failure to engage in mediation or any other serious alternative dispute resolution had been unreasonable. Further, in Laporte v Commissioner of Police of the Metropolis [2015][6] a police commissioner was found to have failed, without adequate justification, to have engaged in the alternative dispute resolution process, and that was to be reflected in the costs order made.

It should be noted, however, that the Court of Appeal held in Halsey that forcing parties to mediate may breach their right to a fair trial under Article 6 of the European Convention on Human Rights.

13. Is an agreement reached during mediation enforceable? Does it need to be confirmed by a Court? What would be the consequences of said confirmation?

    A settlement agreement entered into at a mediation governs the contractual relationship between the parties and is therefore enforced as a contract. If proceedings are already on foot, the parties usually seek a court order to stay those proceedings on a permanent basis, append the confidential settlement terms. That way, if the settlement agreement is breached, the proceedings can continue again without needing to be restarted.

14. Are the mediation proceedings confidential? Is it possible for a party to submit in court elements revealed during the mediation proceedings? How?

    Generally, mediation proceedings are confidential. Agreements to mediate will usually include express provisions regarding confidentiality. The model agreements used by the two leading mediation organisations, ADR Group and CEDR, incorporate confidentiality clauses. It is not only the mediation itself that is confidential; the sessions between the mediator and each party before, during and after the mediation will also usually be confidential. Even in the absence of a confidentiality agreement, discussions during a mediation will generally be held to be confidential, given their character. Further, they are conducted on a "without prejudice" basis, meaning that submissions made in an attempt to reach settlement will not usually be admissible in later court proceedings relating to the same subject matter, subject to the following exceptions:

    - Where there is no actual dispute sufficient to allow the privilege to arise

[5] Garritt-Critchley v Ronnan [2014] EWHC 1774

[6] Laporte v Commissioner of Police of the Metropolis [2015] EWHC 371

- Where the other party behaves with what is called "unambiguous impropriety", amounting to serious misbehaviour such as uttering threats of violence or amounting to blackmail, applying economic duress, or other conduct amounting to a demonstration of serious bad faith
- To ascertain whether or not a binding settlement has been reached
- To cast light on the proper interpretation of the terms of a disputed settlement
- Where what the other party said or did within the "without prejudice" discussion has been acted on to the significant detriment of the complainant, giving rise to an estoppel which in effect binds the parties[7]

Any express confidentiality provisions in essence reinforce the without prejudice nature of the mediation. However, where the parties agree, the "without prejudice" nature of the mediation can be waived and the court has power to enquire into the mediation, even to the extent of calling the mediator as witness: this is very rare.[8]

Conclusions

15. What are the pros and cons of mediation?

This has largely been covered in the answers above, but in summary:

Pros:

- Confidentiality
- Speed
- Cost Efficiency
- Flexibility
- Maintaining business relationships
- Eliminating litigation risk
- The clients have active participation in the mediation process and control the outcome.
- The parties have complete choice (subject to agreement between themselves) over the selection of the mediator and can therefore choose the mediator who is most appropriate for the dispute.

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7 Confidentiality – a guide for mediators, www.cedr.com

8 Commercial Mediation – a Comparative Review, Linklaters, 2012

- High rate of settlement: Although there are no hard statistics on success rates in mediation, most experts say that 75-85% are successful.

Cons:

- Both parties must agree to mediate. It may not work.
- One or both of the parties may be completely unwilling to cooperate/compromise.
- Mediation may not save time or money - If unsuccessful, mediation will add time and cost to the process of resolving the dispute.
- There is a fear that mediation will expose the client's hand or strategy.

16. Is the mediation practice in your jurisdiction influenced by other countries' mediation practices?

    The EU Mediation Directive (the "Directive") entered into force on 13 June 2008. The Directive had to be implemented into the national law of member states by 20 May 2011. The Ministry of Justice considered that law and practice in England and Wales already complied in large part with the Directive, but a statutory instrument came into effect on 20 May 2011, which implemented the outstanding provisions of the Directive, relating to confidentiality of mediation proceedings and the suspension of the limitation period while a relevant mediation is on-going.

    The Directive covers cross-border civil and commercial disputes.

    Certain key provisions which took affect altered the law on mediation in England and Wales. It implemented into English law the principle that, where all the parties to a mediation settlement agree that it should be made enforceable, they (or one of them) may apply to the court for a mediation settlement enforcement order. Under the Directive such an order may then be recognised and enforceable in all other member states in accordance with the Brussels Regulation (44/2001). The Directive also placed the principle of confidentiality on a legislative footing.

    Finally and most controversially, the Directive proposed that any limitation period should be suspended while the parties are engaging in mediation. The Regulations in England and Wales implementing this Directive are subject to a number of conditions and only apply to EU cross-border disputes.

17. Are costs of mediation perceived to be high/low in your country? Who pays for the mediation?

    In England mediation is perceived to be a relatively low cost mechanism of settling disputes, due to the reduction in potential legal fees and court fees that earlier settlement provides. The level of costs can depend on the choice of mediator – senior QCs and other barristers can be expensive, but it may be worth it for the experience they can bring to mediation, to encourage settlement.

Who bears the cost is a matter for agreement between the parties. A common approach is to split the cost of mediation. However, one party may agree to pay all of the expenses as a way of encouraging the other party to mediate.

It is becoming increasingly common for parties to agree that if mediation is unsuccessful, the court should assess all costs, including the legal costs incurred for mediation (this does not affect the confidentiality of the mediation proceedings). The consequences of this are that the losing party ends up paying for the winning party's legal costs of the mediation.

18. Are there current mediation trends in your country?

The CEDR Mediation Audit 2014 notes the following trends relating to mediation in the UK:

- Just over 75% of cases settled on the day of mediation and another 11% shortly after.
- The proportion of mediators appointed directly (rather than through ADR organisations) decreased to 66% (from 71%).
- The dominance of lawyer mediators as a proportion of total mediators has shrunk to 52%.
- On average there are 16 hours input from a mediator on a case, but the time is spent differently according to experience.
- For the first time the CEDR Audit reports a decrease in fee levels. The increased competition has had an impact on billing rates and overall income levels. Average fees of the experienced mediators have fallen to £3,820 (a decrease of 10.7%).
- Most mediators regard the market conditions as the biggest challenge for the development of their mediation practice, particularly the combination of an insufficient level of demand and an over-supply of aspiring mediators.

In February 2015 a Civil Justice Council report on Online Dispute Resolution was published which proposed a process whereby low-value civil court cases in England and Wales could be dealt with by an online disputes system similar to that used by eBay. The report submits that settling non-criminal cases of less than £25,000 online would reduce the expenses generated by a court.

The report, written by Professor Richard Susskind, the Lord Chief Justice's IT Adviser, urged all political parties to give their support in principle to new legislation to set up a new body to be known as Her Majesty's Online Court (HMOC). It singles out the success of eBay, the auction site, in pioneering a system of mass Online Dispute Resolution (ODR) to deal with disagreements between traders and buyers over sales.

It has since been reported that the first online dispute resolution (ODR) system for divorcing and separating couples in the UK is to be launched by Relate in spring this year[9].

In relation to online disputes within the EU, in May 2013 the EU ODR Regulation came into which included a requirement that, from 9 January 2016, all businesses selling goods or services online within the EU carry a link on their website (and in some cases in their contractual terms) to the ODR Platform.[10]

The UK Department for Business, Innovation & Skills (BIS) has now confirmed that it has been advised by the EU Commission that the 'go live' date for the ODR Platform has been delayed to 15 February 2016. BIS has confirmed:

'We can reassure you that although the date of 9 January remains in our Regulations, we fully understand that it will not be possible for businesses to meet this date as the ODR platform will not yet be launched. There will of course be no question of enforcement action before 15 February".[11]

19. Do you use any other forms of Alternative Dispute Resolution ('ADR') in your country? If so, please give a brief description of each of those.

There are a number of forms of ADR used in the UK in addition to mediation:

Non-Binding Processes

Negotiation

Parties can negotiate to seek agreement on matters in dispute without the presence of a third party. Negotiations usually take place on a without prejudice basis. The advantages of this mechanism are that it saves time and cost in relation to other ADR methods; it is flexible and informal; and because it is a private mechanism, it can maintain relationships between parties and not prejudice parties' rights if negotiations are unsuccessful. Parties can request that the chairperson make a binding determination.

Conciliation

This is a similar mechanism to mediation with the main difference being that the third party is more proactive in helping the parties to settle the dispute (they may for instance provide their own suggestions regarding possibilities for settlement).

Early neutral evaluation

In this mechanism, the disputing parties appoint an independent third party to produce a non-binding opinion on the merits of either the whole case, or a

[9] http://www.legalfutures.co.uk/latest-news/exclusive-relate-to-launch-uks-first-divorce-odr-system

[10] http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/adr-odr/index_en.htm

[11] https://www.businesscompanion.info/en/news-and-updates/online-dispute-resolution-platform-postponed

particular issue within it. The third party will consider the facts of the case as well as applicable law. The non-binding opinion is often produced in the hope that it can assist subsequent negotiations or settlement between the parties. The Commercial Court makes provision for this method of ADR.

Executive tribunal ("mini-trial")

A representative of each party makes a formal presentation of their case to a panel of senior executives for the parties in dispute, as well as an independent chairperson. The panel will then discuss the dispute, with the chairperson usually acting as a mediator between the senior executives. This ADR mechanism is often used for significant commercial disputes. The chairperson will not usually make a binding determination (unless the parties request this). The advantages of this mechanism are its without prejudice nature, confidentiality and privacy.

Binding Processes

Arbitration

This is a method used as an alternative to litigation to settle disputes. All of the parties need to agree to refer the dispute to arbitration. It is a private mechanism where an independent arbitrator makes a binding award to finalise the dispute. The parties cannot meet the arbitrator privately. Parties usually agree to arbitrate issues of fact or law contractually. Once an arbitrator has been selected, each party will present their case, and the arbitrator will then make an award which can be enforced. Arbitrations in England are governed by the Arbitration Act 1996.

Med-arb / Arb-med

This is a mechanism comprising a combination of mediation and arbitration. In med-arb, if mediation is unsuccessful in whole or in part, the parties can agree for the mediator to take on the role and responsibilities of an arbitrator, to enable them to produce a final and binding award on unresolved matters. The disadvantages of this method are that parties may be reluctant to discuss matters fully with the mediator during mediation beforehand (although to surmount this problem, any outstanding issues can be referred to another independent party for ADR during the mediation). Alternatively, in arb-med the chosen arbitrator will try and mediate the dispute, but if a resolution is not forthcoming they will return to being an arbitrator.

Expert determination

An expert will evaluate a specific issue within their expertise and then provide an opinion which is contractually binding on the disputing parties. This is an informal process. The expert is deemed to themselves be a tribunal, so the process is not subject to arbitration legislation or court supervision.

Adjudication

This is a method of ADR often used in the construction industry. An adjudicator will normally decide on disputes as they occur during the course of a contract. Usually an adjudicator's decision is deemed to have interim binding effect, meaning it is binding subject to the parties agreeing to alter its effect or to seek to determine the issue in litigation or arbitration.

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