MEDIATION AS A FORM OF DISPUTE RESOLUTION

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Abstract

Whilst mediation is a recognised form of alternative dispute resolution ("ADR") for commercial parties, there are distinctions between the processes parties will follow depending on the jurisdiction they are acting under.

Within the courts of England & Wales, a dialogue on meditation has most recently posed the questions of how far the legislature can compel parties to mediate, and whether a failure of parties to mediate will attract adverse costs consequences.

This conversation is directly linked to the "*credibility gap*" in England & Wales concerning mediation.[2] The effect of this is that the use of mediation to all types of parties, whether sophisticated businesses or laypeople is likely to be promulgated. Many steps have already been taken by various organisations, as well as by the courts, to advocate for ADR, and mediation specifically, as tools to save time, money and court resources. This also became an important factor for disputes during Covid-19 when the courts were significantly overwhelmed.

That being said, arguments against mediation include the fact that it unnecessarily uses costs and wastes time, detracting from the court process.

This article will provide an introduction to mediation, the general mediation process, as well as background as to the current landscape in England & Wales.

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[2] Lord Neuberger, President, Supreme Court, Keynote Address at Civil Mediation Conference: A View from on High (May 12, 2015).

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INTRODUCTION

Commercial disputes are often resolved through court proceedings or arbitration, both are formal adversarial proceedings subject to binding judicial rulings at their conclusion. Mediation, on the other hand, is a form of dispute resolution which is a voluntary and party-led process facilitated by a third-party impartial mediator who assists negotiations between parties. Parties can agree to mediate at any juncture of the proceedings. Though mediation is commonly used in litigation, there has recently been much discussion about integrating mediation into arbitrations.

The goal of mediation is to reach a mutually agreeable solution and the process is heavily dependent on the parties cooperating in good faith. Should one or more party not be willing to engage, the process will serve only to waste time and costs, and potentially jeopardize court proceedings.

The benefits of mediation include speed (the majority of civil mediations are concluded in a day), confidentiality, lower costs compared to litigation and arbitration, and a greater chance at maintaining the business relationship. Furthermore, since the mediator is not tasked with issuing a binding judgment but with assisting to reach a common agreement, the parties have more scope than in litigation or arbitration to advocate their commercial interests and collaborate to reach a mutually commercial solution.

The general process of a mediation is set out as follows:

General Mediation Process

Mediator

Mediation is a private forum which is confidential. Usually, it is up to the parties to choose a mediator and, unless agreed otherwise, mediation costs are shared by the parties equally. Parties are expected to attend the mediation.

While there is no prescribed skill set to consider when selecting a mediator, which is challenging at times, some key factors to consider are:

- Mediator's background (professional experience and expertise): depending on the type of dispute, selecting a mediator with experience/expertise in the relevant field to which the dispute relates, is likely to assist parties as the person will be well-versed in the issues and able to offer

valuable insights and knowledge about the industry and the legal issues that may arise;

- Mediator's general experience: an experienced and effective mediator is likely to close or narrow the gap between parties' positions;
- Communication skills;
- Mediator's fees: mediators usually charge on a fixed or hourly rate basis, as may be agreed by the parties in advance. In order to have a cost-effective mediation, it is recommended to consider the basis of the mediator's charges (fixed or hourly); scope of work to be done by the mediator before and after the mediation; the mediator's expenses; and any cancellation fees;
- Personality and style: it is important to consider whether the personality and style of the mediator will match the parties; and
- Mediator's ability to remain impartial.

Mediation Agreement

In advance of the mediation, parties need to sign a Mediation Agreement. The key elements of the agreement include that:

- The parties agree to attempt in good faith to settle their dispute at the mediation.
- The mediator agrees to conduct the parties to participate in the mediation in accordance with the terms set out in the Mediation Agreement.
- The person signing the Mediation Agreement on behalf of each party warrants having authority to bind the party to the terms of any settlement.
- Unless disclosure is required by law or to implement or enforce terms of the settlement, every person involved in the mediation will keep confidential all information arising out or in connection with the mediation, including terms of any settlement, unless otherwise agreed by the parties in writing but not including the fact that the mediation is to take place or has taken place.

Role of the Mediator

The mediator is impartial and independent and does not take sides or express a view about right or wrong. The mediator works with all parties equally and helps the parties to focus on the dispute and assists to resolve it. There is no room for blame in mediation.

If a party is unhappy with the mediator's service, there is a right to complain. In the first instance the complaining party should raise it with the mediator who will try to resolve it and, if the mediator's response is unsatisfactory, the party has a right to complain to the mediator's own professional body or to another body as may be prescribed in the mediator's engagement terms.

Format of Mediation

The common format of mediation is face-to-face. However, recently, remote mediation (over Zoom/Microsoft Teams) has become popular owing to its flexible, low-cost and low-stress capabilities. It prevents the strain of putting both parties in the same room, which may prove helpful in particularly hostile disputes. It is also accessible to people in different time zones, thus avoiding the costs of travel and time and enabling parties with busy schedules to attend without delay.

Mediation Phases

Ahead of the mediation, the mediator speaks to parties separately to listen to their perspective and position on the claim. A joint meeting is then facilitated with the parties, where each party recounts their position on the claim. Parties then move to their individual rooms and the mediator continues the dialogue between the parties.

Whilst mediation should result in an agreed conclusion of the dispute, the parties are at all times in charge of the process and can terminate or step away from the process at any time, without having to accept a proposed outcome.

At the end of a mediation, if the parties have reached a settlement, an agreement will be signed which is enforceable as a legally binding contract. Mostly, agreements will be complied with voluntarily by parties and "*are more likely to preserve an amicable and sustainable relationship between the parties."* (EU Directive[3] on certain aspects of mediation in civil and commercial matters). However, the enforcement of mediation agreements is a consideration. A development in this area occurred on 12 September 2020 when the UNCITRAL Convention[4] on International Settlement Agreements Resulting from Mediation (the "Singapore Convention") entered into force. To date, this has been signed by 56 countries, including the UK (on 3 May 2023). The Singapore Convention is intended to complement the New York Convention (on the recognition and enforcement of foreign arbitral awards) in providing that international mediated settlement agreements be directly enforceable by the

[3] Directive 2008/52/EC.

[4] General Assembly resolution 73/198 of 20 December 2018, (A/RES/73/198).

courts without a party needing to bring a claim for breach of contract or litigate the case on the merits.

If parties do not reach settlement of the dispute, it is still not entirely a failed mediation as parties get to understand each other's perspective which may lead to settlement soon after or agreement on some points, which leaves fewer areas to litigate over and potentially less costs incurred in formal proceedings.

Mediation Across Jurisdictions: US, Europe, India and the UK

Although the mediation process is similar across jurisdictions, the practice and cultural perception of mediation varies.

US

Mediation in the US has a strong history and is widely and successfully used to resolve disputes across various sectors. The use of mediation is an accepted part of the process of dispute resolution in commercial agreements (whether litigation is or is not anticipated) and is part-and-parcel of the court process. One reason for the integration of mediation into the US disputes landscape is the US litigious costs regime since costs are not generally recoverable for the successful party. This will be a large factor in parties contemplating bringing action.

Europe

Prior to 2004, mediation in Europe was not widely engaged in. 2004 saw the European Commission attempt to change the adversarial tradition of resolving disputes by issuing a **Code of Conduct for Mediators** and a **European Parliamentary Directive Proposal** on mediation in civil and commercial matters. The Directive's main objective was to facilitate access to alternative dispute resolution and to encourage mediation since it operates in a balanced relationship with judicial proceedings. Directive 2008/52/EC[5] was adopted in May 2008 (Member States being obliged to bring the provisions into force by May 2011) with the recitals stating mediation *"should not be regarded as a poorer alternative to judicial proceedings"* and Article 5 specifically providing that courts invite parties to use mediation to settle disputes.

[5] Council Directive 2008/52, 2008 OJ (L 136) 3 (EC).

Although Member State implementation of the Directive has been largely unproblematic,[6] the use of mediation in all cases in the EU in 2014 was still less than 1%.[7]

India

Significantly, the Mediation Act 2023 received the President of India's assent on 15 September 2023 and was notified in the Gazette of India.[8] The Act provides for a Mediation Council of India to be established and headquartered in Delhi to discharge the functions of the Act (Section 31). There is scope for further offices to be established in India, and abroad, signifying the underlying hope that India will become a strong location for domestic and international mediation. It is hoped that the Act will support and enable individuals, commercial entities, and communities (under Sections 43 and 44) to engage with the mediation process as an effective complement to dispute resolution, and as a *standalone* method of resolving conflicts.

Echoing the changing landscape in the English courts, Section 7 of the Act allows a court or tribunal to refer parties to undertake mediation. Although parties will not be under an obligation to come to a settlement, any signed and authenticated Mediated Settlement Agreement will be final and binding (Section 27). Mediated Settlement Agreements may be challenged under the process outlined at Section 28, which may be viewed as an advantage, or disadvantage, depending on the parties involved. The intention of Section 28 is to ensure fairness of such Agreements, with challenges allowed on grounds including fraud, corruption, impersonation, or if the dispute was unsuitable for mediation under Section 6. However, the scope of uncertainty for parties is clear where a final resolution is challenged and potentially nullified, increasing costs in settlement and the dispute.

Accessibility and efficiency are core features of the Act's provisions. In this regard, the Act allows for online mediation under Section 30, which for some parties will be of vital importance, especially where disputes are cross-border. Complementing this, parties under Section 8 are able to agree appointment of a mediator of any nationality (subject to certain requirements). This is of especial importance for disputes that require knowledge of a specific jurisdiction, or which would benefit from a foreign mediator.

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6 European Implementation Assessment, The Mediation Directive (PE 593.789), *Directive 2008/52/EU on Certain Aspects of Mediation in Civil and Commercial Matters*, 2016.

7 EU DG for Internal Policies, 2014, *'Rebooting' the mediation directive: Assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU*, Policy Department C: Citizens' Rights and Constitutional Affairs.

8 The Mediation Act, 2023, No. 32, Acts of Parliament, 2003 (India).

The Act is overall a welcome adaptation in the jurisdiction, not only since it brings fluidity to dispute resolution in India, but also as it is hoped to relieve pressure on Indian courts and allow access to justice in a timely manner. It is further hoped that the Act, through its flexibility and accommodation for the nature of global disputes, will enable India's development to becoming a robust centre for international mediation.

UK

Historically, mediation has been used in England since as far back as the 11th century.[9] For whatever reason, after the early to late medieval times, mediation did not resurface until 1996. The resurgence was most likely due to proposals by Lord Woolf to promote alternative dispute resolution. Since 1996, the use of mediation and ADR has increasingly become a topic of debate.

Today, solicitors of England & Wales have a duty to advise their clients about mediation and ADR. Requirements for parties to engage in ADR are also included in various Court pre-action protocols, the Civil Procedure Rules ("CPR") and court guides i.e., the Chancery Division encourages parties to consider the use of ADR both before and after proceedings have commenced.[10] Furthermore, there is an ongoing duty for parties and solicitors to consider mediation/settlement throughout the case. Failure to comply can result in adverse costs orders against parties either for non-consideration, or for unreasonable refusal to engage in ADR. Practically, courts can also order a stay of proceedings[11] until ADR steps have been taken.

A 2021 audit undertaken by the Centre for Effective Dispute Resolution ("CEDR") shows that over the last two decades there has been an acceleration of growth in cases going to mediation.[12] On the basis of mediators' reported caseloads, CEDR estimated that the size of the civil and commercial mediation market in England & Wales up to 31 March 2020 totalled 16,500 cases per annum.[13] By way of comparison, the London Court International Arbitration Annual Casework Report[14] states 333 referrals were received for its services in 2022. Other data for arbitration and ADR cases received at arbitral centres across the world in 2022 include ICC (515), ICSID (41), HKIAC (344), SIAC (357) and SCC (143). This shows the use of mediation in the UK is changing.

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9 Lord Neuberger, *supra* note 1.

10 The Chancery Guide, ch. 10 para 5, Courts and Tribunals Judiciary.

11 Civil Procedure Rules, 26.4.

12 Graham Massie, *A Survey of Commercial Mediator Attitudes and Experience in the United Kingdom*, CEDR.

13 Increase of 38% (from 12,000 mediations in the 2018 CEDR report, to 16,500 mediations in the 2020 report).

14 LCIA, LCIA Annual Casework Report 2022.

The latest question in the use of mediation and ADR by parties, is to what extent courts can compel parties to mediate. In 2004, the case of *Halsey v Milton Keynes General NHS Trust*[15] ("*Halsey*") considered it a breach of the Article 6 European Convention on Human Rights[16], right (to a fair trial) to compel parties to mediate.

UK - Costs Consequences

The current landscape is that a successful party at trial can be denied part or all of its costs if it has unreasonably refused to agree to mediate. This can include by simply not replying to an invitation to mediate (PGF II SA OMS Company 1 Ltd[17]). Factors the court will consider can include:

- Whether the **nature of the dispute** meant ADR was suitable for the subject-matter.
- Whether the **merits of the case** are strong enough that a party is reasonable in refusing ADR (for example, the claim would have succeeded on an application for summary judgment).
- Whether **other settlement attempts** have been made, with the consideration that mediation can succeed where other attempts have failed.
- Whether the **costs of mediation** would be disproportionate to the amounts in the case.
- Whether a mediation would cause delay/**endanger the trial date**.
- Whether mediation has a **reasonable prospect of success**. The burden is on the unsuccessful party to show the successful party unreasonably refused to agree to mediation. This is not an onerous burden as the unsuccessful party does not have to show mediation would in fact have succeeded.
- What level of **judicial encouragement** there was. Although courts cannot currently compel parties to undertake mediation, if it has strongly encouraged the parties to mediate, and there is a refusal, there may be a higher risk of costs consequences.
- Whether further **expert evidence** is/was required in the case.
- Whether any **Part 36 offers** were made.

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[15] *Halsey v Milton Keynes General NHS Trust*, (2004) 1 WLR 3002: 2004 EWCA Civ 576.

[16] Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Nov. 4, 1950.

[17] PGF II SA v OMFS Co. 1 Ltd., (2014) 1 WLR 1386: 2013 EWCA Civ 1288.

CONCLUSION

The robustness of a court to deal with claims, and ensure effective dispute resolution is non-negotiable. The use of ADR and, in particular mediation, is a key part of many court systems. The courts of England & Wales handle a vast variety of claims, which include not only domestic, but international parties with varying levels of sophistication. There will always be parties, for whose case mediation is appropriate, but who are reluctant to mediate or whose legal representatives do not prioritise it. Using a court system where ADR and mediation are an active part of case management is therefore important. The possibility of sanctions in the English courts, for non-compliance with an order to mediate could be a more effective stick than the power to impose an adverse costs order against parties, which can feel intangible.

The English courts' encouragement of out-of-court settlements remain an attractive reason for use of the jurisdiction for adjudicating parties' disputes. The caselaw is clear that parties will require sound arguments for refusing to mediate, if they wish to avoid costs consequences. Parties should carefully consider any rejection of an invitation or suggestion from the court to mediate.