

Publications

EU: The impact of the EU Mediation Directive 2008/52/EC

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The Reasons for Mediation and the Directive

The European Parliament adopted in 2008 Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (“the Directive”). Its purpose is to build trust in the process of mediation within the EU. The Directive notes there are a number of advantages of mediation over litigation, including that it is cost effective, flexible and that agreements reached through mediation are more likely to be adhered to voluntarily without further recourse to the courts.

According to a recent EU funded study, the time wasted by not using mediation (based on a claim of €200,000) is estimated at an average of between 331 and 446 extra days in the EU, with extra legal costs ranging from €12,471 to €13,738 per case. In England and Wales, the position is similar. In March 2011 the English Ministry of Justice noted in its consultation paper that:

“Last year, more than three quarters of claims in the civil system were settled after allocation but before trial. That’s 87,000 more cases that could potentially have been resolved earlier if mediation had been use more widely and committedly.”

Implementation of the Directive

The Directive provided that Member States (apart from Denmark, which has opted out) were to ensure by 21st November 2010 that its terms were implemented into national law. So far, only Austria, Estonia, France, Greece, Italy and Portugal have notified the Commission that they have implemented the Directive, while Lithuania and Slovakia have provided notification of the competent courts for enforcing cross-border mediation settlements. It is expected that most countries will avail themselves of the mechanism already in place pursuant to the Brussels Regulation for recognising and enforcing judicial awards and apply it to mediated settlement agreements.

The United Kingdom has partially implemented the Mediation Directive by enacting the Civil Procedure (Amendment) Rules 2011, which came in to force on 6th April 2011 and The Cross-Border Mediation (EU Directive) Regulations 2011 (SI 2011 No 1133) that came into force on 20 May 2011. Both of these pieces of legislation apply only to the mediation of cross-border disputes, not purely domestic ones. However the Ministry of Justice in England and Wales is now considering extending the national legislation to govern domestic mediations. The other countries that have implemented the Directive into their national laws have also done so only in relation to cross-border mediations.

Cross-border Recognition and Enforcement

One of the main aims of the Directive is that mediated settlement agreements will be recognised and enforced in one Member State if made in another Member State as if they were court judgments. This is an important step in enhancing the efficacy of cross border mediation with in the EU. It provides that mediation settlements will be made enforceable by a new type of order called a “mediation settlement enforcement order”. Article 6 of the Directive requires the “explicit consent” of all parties for enforceability to be recognised by a court. The practical way to deal with this in cross border settlement agreements is for an enforceability clause to be drafted in the mediation settlement agreement. A model clause for inclusion in a mediation settlement agreement under English law is annexed to this paper.

So far there are no international conventions that deal with recognition and enforcement of mediations between parties outside the EU, or with one or more party outside the EU. In these cases the mediation settlement agreement will be enforceable in contract.

Generally the question of legal and other costs are resolved at a mediation if the liability and quantum issues are settled. The costs element of the mediation settlement agreement would then be recognised and enforced in the same way as the substantive settlement. If the costs issues remain unresolved, that part of the dispute would be referred back to the court where the proceedings were being heard and costs would be assessed in accordance with the rules of the jurisdiction seised.

Voluntary or Compulsory Submission to Mediation?

The Directive envisaged that parties in dispute would seek recourse to mediation voluntarily. Article 5 provides that the court may invite the parties to use mediation to settle a dispute. However, it provided that Member States could elect for mediation to be compulsory before recourse to the courts. England has chosen for mediation to be voluntary. However, in order to obtain legal aid in England for a family law case, it is necessary to seek to resolve the dispute by mediation first. Italy, briefly elected to make it mandatory to mediate many civil and commercial disputes before initiating proceedings, but this rule has now been abolished in favour of voluntary mediation.

The question of whether mediation should ever be mandatory has been the subject of significant discussion by jurists and judges. Generally mediation is considered to be a voluntary process, and its consensual nature a fundamental contributor to the success of the process. Many, especially mediators, fear that if parties are compelled to mediate the goodwill essential for a successful outcome will not be present. Further, Dyson LJ in *Halsey v Milton Keynes* (2004) EWCA Civ 576 considered that “compulsion of ADR would be regarded as an unacceptable constraint on the right of access to court and, therefore, a violation of Article 6 (of the European Convention on Human Rights).” Some, such as Sir Anthony Clarke (former master of the Rolls) believe that compulsory mediation does not prevent a party’s right to a fair trial; it merely at worst delays that access.

In the ECJ case of *Rosalba Alassini and Others* Joined Cases C-317/08 to C320/08 19th November 2009, it was considered that a requirement to use ADR before instituting proceedings in an Italian consumer complaint situation was permissible on the basis that although a fundamental right might thereby be restricted, ADR was quicker, less expensive and more likely to produce a satisfactory long term solution.

The United Kingdom has notified the European Commission that it has already complied with Article 5 of the Directive by virtue of the current Civil Procedure Rules. CPR 1.4(2) requires the courts to engage in active case management, which includes if appropriate encouraging the parties to use ADR.

Limitation Periods

A further step in favour of mediation is Article 8 of the Directive, which provides that member states shall ensure that the limitation or prescription period for any litigation or arbitration shall be extended during the period of the mediation process. The general domestic position is that mediation does not of itself suspend the limitation period. For example, in England and Wales, the rule before 20th May 2011 was that if a party wished to mediate, they had to either (i) obtain the agreement of the other party to suspend the limitation period or (ii) issue a protective claim and then seek a stay of that claim by the court while the mediation takes place. Following the implementation of the Cross-Border Mediation (EU Directive) Regulations 2011 in the UK if a mediation in respect of a cross-border dispute begins on or after 20th May 2011, the limitation period is extended accordingly.

Quality of Mediation

Member States were by 21st May 2011 to provide systems for quality control of mediation services, judicial powers to invite parties to mediate, confidentiality of mediations and encourage Codes of Conduct and training of mediators. The United Kingdom Government considers that it has already complied with these requirements.

Confidentiality

Article 7 of the Directive provides that confidentiality of the mediation process will be preserved, unless (i) there are overriding policy considerations; or (ii) where disclosure of a mediation settlement agreement is necessary to enforce that agreement; or (iii) the parties agree. The first two exceptions alone would mean that mediators and mediator providers could not be compelled to give evidence save in very limited circumstances. However the addition of the third exception, namely the agreement of the parties, is seen by many to be too wide and to go against the grain of one of the fundamental factors of mediation: confidentiality.

In the UK, an application for disclosure of mediation evidence will only succeed if the parties agree and one of the first two limbs of Article 7 of the Directive are met-i.e. the parties' agreement alone will not justify disclosure and confidentiality not being preserved.

Conclusion

The implementation of the Directive in the EU is a welcome advent for mediation. It puts mediation at the forefront of ADR, and gives a clear message that it is an effective and highly satisfactory method of resolving many types of disputes. It is hoped that its terms will be implemented in England and Wales and other jurisdictions in relation to domestic as well as cross-border mediations, since its provisions are equally valid and desirable in the domestic context as the international context. How long will it be before, as is already the case in Australia, Primary Dispute Resolution is arbitration and mediation, and Alternative Dispute Resolution is litigation before the courts? That, I believe, will be an important turning point for parties locked in contention.

ESSENTIAL SKILLS OF MEDIATION FOR LAWYERS

1.1 Why mediate?

“Mediation is a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.” (CEDR definition)

1.2 What are the advantages of mediation?

Negotiation	Mediation	Ligitation
Informal, private	Informal, private	Formal, public
Enforceable in contract	Enforceable in contract	Binding, subject to appeal
No 3rd party	Facilitative	Decision Maker
Result Mutually acceptable	Mutually acceptable	Imposed decision
Flexible process	Flexible process	Rules based

Negotiation	Mediation	Litigation
Focus on past	Focus on future	Focus on past

Mediation is a confidential, goodwill procedure. It can help people save face. It can also achieve a win-win solution, that is acceptable to both or all the parties.

1.3 Selecting the Mediation Procedure and the Mediator

The Mediation Procedure

A mediation can arise in one of the following circumstances:

- The voluntary referral by all parties;
- The referral by one party to a mediation body who is asked to secure the involvement of the other parties;
- A response to a Pre-action Protocol, the Civil Procedure Rules, a Court Order or recommendation by a judge before trial or appeal. 9291192v1/023290.000003 - LAYTONS

Employment law issues:

The ACAS Code of Practice on discipline and grievance procedures introduced on 6 April 2009 recommends workplace issues be resolved informally and encourages the use of Mediation. Technically the Code does not apply to redundancy dismissals or non-renewal of fixed term contracts.

Selecting the Mediator

The Mediator needs to be agreed between the parties. The parties should select an Accredited Mediator with relevant experience. Expertise in the subject matter is less important than mediation and communication skills.

1.4 Referral by a Court to Mediation

Judicial Studies Board Referral Indicators

Indicators	Counter Indicators
A result other than that possible through a court ruling is desired Speedy solution desired “Legal Proceedings fatigue” Long term relationship Common future interest(s) More litigations or conflicts Confidentiality important Other parties involved Long standing solution	Both parties are unwilling Earlier mediation attempt failed Precedent desired Too great a power imbalance Cultural background no place for mediation\ Legal procedure in which only a court ruling can bring about a solution

1.5 Submission to Mediation Clauses

Increasingly, references to negotiation and mediation are included in commercial contracts. For example, the parties may agree to negotiate:

“If any dispute arises out of this agreement the parties will attempt to settle it by negotiation.”

It is also worth considering including a mediation clause in agreements. See for example the model mediation clauses of CEDR and LCIA. 9291192v1/023290.000003 - LAYTONS

1.6 The Mediation Agreement

The Mediation Agreement is an agreement between the parties and the mediator setting out the terms upon which the parties agree to mediate. It is signed before the mediation.

1.7 Consider the effect of Mediation (or not mediating) on any pending Litigation

Consider whether you need to apply for a stay of any pending proceedings. A refusal to mediate may result in a costs award against a party, even if they are successful at trial.

1.8 The roles of Lawyers, Parties and Mediator

Solicitor:

Remember it is the client’s problem and a dispute will only be resolved when the client is ready to resolve it.

Help the client to analyse the source of conflict, identify their needs, and explore settlement options.

Believe in the mediation and convince the other parties to believe in the mediation.

Mediator:

Facilitate, probe, reality test, and communicate when requested with the other side.

Look for overlap between the parties' interests.

Party:

Take responsibility for the dispute and actively seek to achieve a settlement by considering the matter from the other side's point of view

Barrister:

Work with the solicitor, research points of law, advise on Settlement Agreement

1.9 Barriers to a Successful Mediation

There are many barriers to achieving a settlement at a mediation. These include:

People like to feel they are right.

Shame and guilt - money may be used as a weapon.

Lawyers are trained to fight.

People like to feel "important".

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1.10 Mediation "Rules"

It is a goodwill process

All discussions are on a "Without Prejudice" basis

All discussions are confidential, unless the party expressly agrees otherwise.

The party attending the mediation must have authority to settle

The mediation will consist of a mix of plenary and caucus sessions.

2. PREPARING YOURSELF AND YOUR CLIENT FOR A MEDIATION

2.1. Choosing mediation/being told to attend a mediation:

- It is important that you and your client have faith in the process.
- Choose a mediator- do you want a lawyer? Layperson? Same field of law?
- Sell it sensibly but positively to your client; explain court (and costs) versus mediation (and costs) also best-case and worst-case results from both
- Explain it is a goodwill process/ confidential/ without prejudice (explain what this means)

2.2 Pre mediation contact:

- Your mediator will contact you before the mediation. Run any concerns you have by them briefly (your client may have certain stipulations / geographical concerns about distance of venue/. Do not try to get the mediator on your side.
- Consider whether the mediator should be asked to read all, or parts of the file.
- Fill in and return the mediation agreement
- Find (or agree) a mutually acceptable venue and date
- Agree mediator fees/ how they will be split/ when you will pay (on the day? Post invoice?)
- Consider instructing Counsel

2.3 Preparing your client:

- Remind your client this is a voluntary process
- The day will be a mixture of plenary and confidential caucus sessions with the mediator
- Consider with your client their best alternative to a negotiated agreement (BATNA) and worst alternative to a negotiated agreement (WATNA)
- Consider with your client strategies, settlement options and ranges
- Discuss what your client wants from the day; what would be 'good enough' for them?
- Will they be bringing anyone with them? 9291192v1/023290.000003 - LAYTONS
- Do they have authority to settle?
- How much time can they give to the day?
- Go through a case analysis with your client. What are the factual and legal strengths and weaknesses.
- Tell your client it is wise to refrain from standing on their principles.
- Advise your client if they get to a good resolution it is more likely they can do business together again in the future.
- Remind your client of the consequences of not settling.
- Consider confidentiality

2.4 Preparing yourself and your client for a mediation Position statement:

- Prepare your opening statement together with your client. It should be no more than 1-2 pages describing how you see things and setting out any progress that has been made thus far. Avoid legal arguments (this is not the arena); try to simplify the case to its basic components. Try to include something new or not previously discussed with the other party. Say if you have tried facilitating negotiation or mediation in the past.

2.5 On the day:

- Your mediator will arrive ahead of time, and will ensure a good room set up for a plenary session, plus break-out rooms.
- The mediator will greet the parties and "set the tone".
- The mediator will set out the rules of the day.
- Your mediator will ask all parties to make their opening statements; traditionally she/he will ask the claimant to make their opening statement first.
- Decide whether you or your client delivers your opening statement.
- Prepare your client that things might go slowly.
- Advise them to refrain from insults, infighting - the purpose of the mediation is that it will give them space to have their say.

- Your mediator will then split the parties and start 'caucus sessions', with each in separate rooms. He/she will go back and forth in this series of confidential private meetings until he/she considers they can (or cannot) bring you back together if an agreement looks likely (or does not). This is a very flexible system depending on the level of emotions etc.
- If you get stuck it might be worth reminding your client that it is the dispute that is the common enemy, not the other side.
- Be collaborative.
- You may want to mediate on just one small part of the whole. Reaching agreement on just one clause can be seen as a success.
- If you reach agreement, it is best if you or your barrister draft a heads of agreement or a settlement agreement on site at the end of the mediation for signature by the parties before they leave. 9291192v1/023290.000003 - LAYTONS

2.6. Settlement Agreement

Consider preparing in advance a draft Settlement Agreement or Heads of Agreement, or clauses for insertion in them.

2.7 The Mediation Process

- Usually consists of an opening joint session, private sessions, and a closing joint session.
- The parties start in a contentious position, then hopefully move to a problem solving mode before ideally achieving a settlement.
- During this process, the Mediator will help the parties to:
 - gather information
 - identify issues and/or problems
 - generate and evaluate options
 - select options
 - reach an agreement

2.8 If at first you do not succeed...

The average success rate of mediations is 70 - 80%. However if a mediation does not settle on the day, do not give up attempts to settle it. Many mediations that do not settle on the day settle shortly thereafter. This is because the mediation process has enabled the parties better to understand each others' point of view and a little more time is needed.

RECOMMENDED READING LIST

ADR and Commercial Disputes
 General Editor - Russell Caller (2002) Sweet & Maxwell
 (ISBN 0421763000)

ADR, Practice and Principles
 Brown, Henry & Marriott, Arthur (1999) Sweet & Maxwell

(ISBN 0421579609) (726 pages)

The ADR Practice Guide: Commercial Dispute Resolution

Mackie, K, Miles, D, Marsh, W & Allen, T (3rd

Ed, 2007) Tottel

ISBN 987-1-84592-314-3) (364 pages)

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ANNEX

MODEL CLAUSE FOR INCLUSION IN CROSS-BORDER SETTLEMENT AGREEMENTS TO ENSURE CROSS-BORDER ENFORCEMENT IN THE UNITED KINGDOM

The parties agree that:

This confirms that the settlement has resulted from mediation. This may be particularly important where the settlement has not been put into writing at the mediation. It obviates the need to obtain the parties' consent at a later stage.

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