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Enforcement of International Commercial Mediation Settlement Agreements

By Christopher Miers

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Commercial mediation relies on the consensual participation of the parties. However, underpinning the voluntary nature of engaging in mediation is the opportunity to settle the dispute in a way which leads to a binding settlement agreement which can be enforced if necessary.

Introduction

The progressive globalisation of trade, including electronic commerce where business is frequently conducted across national boundaries, creates an increasing need for effective dispute resolution mechanisms which work across different legal jurisdictions.

Most international trade and investment agreements incorporate arbitration clauses which are supported by international provisions for enforcement of an arbitration award. Such provisions include the New York [1] and ICSID [2] Conventions.

Mediation and/or conciliation [3] frequently form part of the dispute resolution process. However, underpinning the voluntary nature of engaging in mediation is the opportunity to settle the dispute in a way which leads to a binding settlement agreement which can be enforced if necessary.

Without the possibility of such enforcement, parties may consider there is limited benefit in entering into a mediation. Whilst a settlement agreement will always be consensual at the time of the settlement, a settlement agreement which relies purely on the voluntary implementation of it by the parties will be vulnerable to matters such as:

- Change: a change of opinion, or change of circumstance, by one or more of the parties, leading to a reluctance to follow through with the agreed settlement terms;
- Outside Influence: a party being influenced by a third party prior to the implementation of the settlement agreement, to seek different terms;
- Tactical Delay: a party mis-using the mediation process to delay proceedings, by reaching a settlement and then failing to implement it thus bringing the dispute back to a continuation of negotiations, proceedings and potentially a further mediation.

In most jurisdictions mediation is a voluntary process. Even where mediation is compulsory, however, such as for disputes in Italy regarding disposable civil and commercial rights [4], an effective enforcement process is essential to support the mandated mediation.

In the international context, currently there is no uniform standard for the enforcement of mediated settlement agreements. The European Directive [5] and the UNCITRAL Model Law on International Commercial Mediation [6] do not achieve this. Procedures which may seem appropriate in civil law jurisdictions may be unworkable in common law jurisdictions; and vice versa.

Accordingly UNCITRAL's Working Group II is currently considering whether an equivalent of the New York Convention for arbitration awards might offer a solution in mediation.

Background

In 2002 the UNCITRAL Model Law on International Commercial Conciliation ("the Conciliation Model Law") was adopted by resolution of the UN General Assembly with a recommendation that

> *"… all States give due consideration to the enactment of the Model Law, in view of the desirability of uniformity of the law of dispute settlement procedures and the specific needs of international commercial conciliation practice."*

By way of support to this *"non-adjudicative dispute settlement method"* the necessity to provide for an enforceable settlement agreement is set out at Article 14 of the Conciliation Model Law ('Enforceability of settlement agreement') which reads:

> *"If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable … [the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement]."*

In the 'Guide to Enactment' of the Conciliation Model Law, the drafters recognised the wide variation within different legal systems for possible enforcement mechanisms, stating:

> *"In the preparation of the Model Law, the Commission was generally in agreement with the general policy that easy and fast enforcement of settlement agreements should be*

promoted…[7]

The ICSID Convention, Regulation and Rules include a conciliation procedure [8]. The procedure provides for the appointment of a Conciliation Commission of one, three or more [9] conciliators. The Commission may make oral or written recommendations to the parties at any stage of the proceedings, in order to bring about agreement. Amongst other matters it may recommend that the parties accept specific terms of settlement or that they refrain from specific acts that might aggravate the dispute.

The World Intellectual Property Organisation (WIPO) includes an Arbitration and Mediation Center which promotes the resolution of international commercial disputes between private parties through ADR mechanisms. Just over half of the cases administered by the Center are mediations [10]; and 68% of their cases involve parties based in different jurisdictions. Cross-border enforcement of mediated settlement agreements is therefore a critical issue. WIPO provides its own WIPO mediation rules [11], and offers an escalation clause providing for WIPO mediation followed by WIPO expedited arbitration if required.

Also of note is the Hague Conference on Private International Law (the Convention on the Choice of Court Agreements (2005) and the Judgements Project, where a Working Group is addressing the recognition and enforcement of judgments to facilitate cross-border trade. It is expecting to be able to submit a finalised text during 2016 for a convention to apply to the recognition and enforcement in one contracting state of a judgement given in another contracting state, relating to civil or commercial matters.

In the European Community, cross border enforcement is supported by EC Directive 2008/52/EC. In particular, the European Directive advises in its introductory guidance that:

> *"Mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the goodwill of the parties. Member States should therefore ensure that the parties to a written agreement resulting from mediation can have the content of their agreement made enforceable. It should only be possible for a Member State to refuse to make an agreement enforceable if the content is contrary to its law, including its private international law, or its law does not provide for the enforceability of the content of the specific agreement…" [12] And*
>
> *"The content of an agreement resulting from mediation which has been made enforceable in a Member State should be recognised and declared enforceable in the other Member States in accordance with applicable community or national law…." [13]*

Within the five broad areas covered by the EU Directive, member states were obliged to ensure mediation settlement agreements were enforceable as if they were Court judgments. EU Member States [14] were required to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive before 21 May 2011.

By way of general overview, the options for enforcement of a settlement agreement typically will be:

- enforcement as a contract, via a further court procedure.
- enforcement via specific statutory provisions recognising the settlement agreement as equivalent to an arbitration award, where such legislation exists; or
- enforcement via an arbitration award.

Considering briefly a sample of countries from around the world:

Italy [15]: The enforceability of an agreement reached as a result of a mediation proceedings as governed by Decree No. 28 can be reached by presentation of the settlement agreement to the Court, or if certified by the lawyers, the settlement agreement becomes directly enforceable on the Italian territory. All other settlement agreements, including international, are treated as contracts.

Korea: The Korean Commercial Arbitration Bureau includes in their arbitration rules provisions on conciliation procedures and the legal effect of settlement agreements resulting. See also the WIPO paper on IP ADR in the Republic of Korea [16]. In respect of Intellectual Property disputes a settlement agreement reached in an IPRMDC mediation is binding under Rule 46 of the Invention Promotion Act which provides the same effect as a Court's conciliation order.

Saudi Arabia [17]: There is no Law that regulates commercial mediation / conciliation judgments in the Kingdom of Saudi Arabia. The judicial system in the Kingdom does not reject local or international commercial settlement agreements, but encourages them in fulfilment of the Holy Koran verse ("And reconciliation is better"). It does, however, highlight the need for the procedural validity — as

stipulated in the Saudi laws — of the functioning of these agreements to ensure their enforcement. [18]

UK: Mediation is well established in the UK and has been for many years. Accordingly case law has built up concerning the enforcement of domestic mediated settlement agreements. In respect of European cross-border settlement agreements, in response to the EU Directive 2008/52/EC the Ministry of Justice for England and Wales introduced CPR Part 78 – European Procedures, Section III, for disputes that are subject to EU Directive 2008/52/EC.

UNCITRAL Developments

UNCITRAL is probably best known in dispute resolution circles for its Model Law on International Commercial Arbitration [19] and its Arbitration Rules [20]. However it also has a significant role in conciliation, since its publication in 1980 of its Conciliation Rules and in 2002 of its UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use [21].

UNCITRAL document 'Modern Law for Global Commerce' 2007 [22] addressed, inter alia, the issues of enforcement as a contract or as an arbitral award. It was in this context that in 2014 the US Government proposed [23] that the UNCITRAL Working Group II should consider the issue of enforcement of international settlement agreements resulting from conciliation [24] proceedings. It was recognised that *"the lack of a harmonised enforcement mechanism was a disincentive for businesses to proceed with conciliation"* [25].

The UNCITRAL Working Group II has met since at the 64th session on arbitration and conciliation 1-5 February 2016 in New York City. Pertinent points arising from the meeting, inter alia are:

> Providing guidance to create a legal instrument for direct enforcement of an "international commercial settlement agreement resulting from conciliation".
>
> Considering the notions of "international" and of "commercial".
>
> Consumer, family and employment law matters will be explicitly excluded.
>
> Settlement agreements reached during judicial or arbitral proceedings but not recorded in a judicial decision or an arbitral award will fall within the scope of the instrument.
>
> Regarding defences to enforcement and applicable law, the Working Group has considered: incapacity, coercion and fraud; subject matter of the settlement agreement not capable of settlement; subject matter of the settlement agreement contrary to public policy; contrary to the terms and conditions of the settlement agreement; validity of the settlement agreement; the settlement agreement is not binding, is not final, has been subsequently modified or the obligations therein have been performed; enforcement of the settlement agreement would be contrary to a decision of another court or competent authority.
>
> The Working Group also considered whether the conduct of a conciliator could have an impact on the validity of the settlement agreement and its enforceability.

Edited from a paper written by Christopher Miers, Heather Douglas and Jeffry S. Abrams *for the Union Internationale des Avocats, World Forum of Mediation Centres, as presented in Luxembourg, April 2016. The full paper considers the issues more widely and also compares enforcement provisions in China and the United States.*

[1] The New York Convention

[2] The Convention on the Settlement of Investment Disputes between States and Nationals of Other States. See Article 53(1) of the ICSID Convention, Regulation and Rules as Amended and Effective April 10, 2006 - https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partA-chap04.htm#s06

[3] See UNCITRAL Model Law on International Commercial Conciliation.

[4] Italian Decree No. 28/2010 on Mediation in Civil and Commercial disputes as amended with Law No. 98 of 2013

[5] EU Parliament and Council Directive 2008/52/CE dated 21 May 2008

[6] See Article 14

[7] Para 88

[8] Rule 22 et seq

[9] An uneven number

[10] At the end of 2013, of over 350 cases, 57% were mediations. See http://www.wipo.int/amc/en/center/caseload.html

[11] See January 1, 2016 version at http://www.wipo.int/amc/en/mediation/rules/

[12] Para 19

[13] Para 20, see also Article 6

[14] Except Denmark which opted out

[15] See UNCITRAL A/CN.9/WG.II/WP.196/Add.1

[16] http://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ace_9/wipo_ace_9_7.pdf

[17] See UNCITRAL A/CN.9/WG.II/WP.196/Add.1

[18] The laws in the Kingdom specify all criteria to be applied to ensure that local or international commercial agreement resulting from mediation/conciliation procedures are enforceable. This is done by virtue of the Arbitration Law established by Royal Decree No. m/34 dated 24/5/1433 H [15 April 2012] and the Enforcement Law established by Royal Decree No. m/53 dated 13/8/1433 H [2 July 2012].

[19] 1985 with amendments as adopted in 2006

[20] As revised 2010, see http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf

[21] http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf

[22] The proceedings of the Congress of UNCITRAL on the 40th session of the Commission, July 2007, see http://www.uncitral.org/pdf/english/congress/09-83930_Ebook.pdf

[23] In respect of a proposal from the US Government, Future Work for Working Group II, A/CN.9/822

[24] Where a third person assisted the parties to reach an amicable settlement of their dispute. Thus it includes mediation.

[25] See UNCITRAL Working Group II A/CN.9/WG.II/WP.195

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There's Many a Slip - But Do They All Need Expert Help?

By Bart Kavanagh

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The use of expert opinion evidence has become commonplace in construction disputes. The recent Scottish case of Kennedy v Cordia [1], however, required the Supreme Court to consider whether it should be always admissible.

Miss Kennedy, a carer visiting a client in the course of her work, slipped and fell on an icy path and sustained an injury. At issue was the question of whether the risk assessment carried out by her employers had been adequate and whether, on a proper assessment of the risks, they ought to have provided her with anti-slip attachments for her footwear. Expert evidence was admitted, which covered both the adequacy of the risk assessment made by the employer and the availability and effectiveness of anti-slip attachments.

At first instance, the Lord Ordinary found in Miss Kennedy's favour. On appeal, an Extra Division of the Inner House reversed that decision stating that the Lord Ordinary had erred in five respects, the first of which was by admitting and relying upon the expert evidence.

> *"[The expert] should not have been allowed to give the evidence (…). It is one thing to say that a precaution could have been taken; that is simply a matter of fact and is accordingly, in the context of litigation, within the province of a witness. It is another thing to say that a precaution should have been taken; that is a matter of judgement to be exercised by reference to the applicable rules of law and, in the context of litigation, generally within the exclusive province of the judge."* [2]

and

> *"[The dispute] was something that the Lord Ordinary was fully equipped to [resolve] without any instruction or advice; it was squarely within his province as judicial decision-maker. No additional expertise was required. (…) It is the job of a judge to hear evidence about matters with which he may previously have been totally unfamiliar and, on the basis of that evidence, come to conclusions of fact and then apply the relevant law to these facts."* [3]

CPR Part 35 prescribes neither rules regarding the admissibility of expert evidence nor criteria for establishing appropriate credentials or qualifications for those who hold themselves out as experts in any field. However, as long ago as 1984 in the South Australian case of R v Bonython [4] King CJ dealt with both of these issues, stating that before allowing expert opinion to be adduced as evidence, two questions must be considered:

The first is; *"whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible"*. King CJdivided this into two parts:

1. *"whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgement on the matter without the assistance of witnesses possessing special knowledge or experience in the area; and*
2. *whether the subject matter of the opinion forms part of a body of knowledge and experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which of the witness would render his opinion of assistance to the court."*

The second is:

> *"whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issue before the court."*

This provides a working test, which has been applied subsequently in the English courts. [5]

The Supreme Court referred to Bonython and stated that:

"There are in our view four considerations which govern the admissibility of skilled evidence:

1. *whether the proposed skilled evidence will assist the court in its task;*
2. *whether the witness has the necessary knowledge and experience;*
3. *whether the witness is impartial in his or her presentation and assessment of the evidence; and*
4. *whether there is a reliable body of knowledge or experience to underpin the expert's evidence.*

All four considerations apply to opinion evidence, although, … when the first consideration is applied to opinion evidence the threshold is the necessity of such evidence." [6] (Emphasis added)

In the majority of construction cases that come to court, the technical matters at issue are almost certain to fall outside the knowledge and experience of the judge. Similarly where professional competence is being questioned, a judge is unlikely to have sufficient knowledge of current practise in a particular profession to decide whether or not the performance complained of was that of a competent professional acting with reasonable skill and care, without the assistance of expert opinion. In both cases the existence of an underlying 'reliable body of knowledge or experience' is unlikely to be in doubt.

In the case of arbitration or adjudication, however, the situation may be different. Here the parties are able to select the tribunal on the basis of having skills and experience that are relevant to the matters in issue and there are many practicing arbitrators and adjudicators who have both legal and technical or professional expertise. In both of these forums, where the parties have some control over the process, its cost and the time it takes, it may be quicker and more cost effective to rely on the technical and/or professional expertise of a tribunal selected precisely because of that expertise, than to marshal the efforts of two separate experts.

In these forums, therefore, the question of whether expert evidence will assist the tribunal should be properly considered, preferably in conjunction with the tribunal, rather than assuming that it should be assembled and presented simply as the default option.

This is not to say that expert opinion cannot be beneficial outside the courts. Even in those cases where it may not be necessary in order to assist the tribunal, an independent expert view is likely to be of considerable assistance to the parties. It will help them to assess the strengths and weaknesses of their case and to develop an effective strategy for structuring that case. Who knows, it may even encourage them to reach a realistic settlement long before the tribunal needs to sit.

[1] Kennedy (Appellant) v Cordia (Services) LLP (Respondent) (Scotland) [2016] UKSC 6 on appeal from [2014] CSIH 76
[2] Tracey Kennedy against Cordia (Services) LLP [2014] CSIH 76, Lord Brodie – Paragraph 14
[3] Tracey Kennedy against Cordia (Services) LLP [2014] CSIH 76, Lord Brodie – Paragraph 15
[4] R v Bonython (1984) 38 SASR 45, 46 – 47 (Sth Australia Supreme Ct)
[5] For example JP Morgan Chase Bank v Springwell Navigation Corp [2006] EWHC 2755 (Comm)
[6] Kennedy (Appellant) v Cordia (Services) LLP (Respondent) (Scotland) [2016] UKSC 6 on appeal from [2014] CSIH 76. Para 44

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