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# WHY THE DRAFTSMAN MUST TAKE PARTICULAR CARE WHEN DRAFTING THE PARTIES' COMMITMENT TO REFER THEIR DISPUTES TO MEDIATION: AN APPRAISAL OF ENGLISH CASE LAW'S.

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***"Discourage litigation. Persuade your neighbours to compromise where you can. Point out to them how the nominal winner is often the real loser – in fees, expenses and waste of time''. -Abraham Lincoln***

**Abstract**

*The paper sought to consider why mediation as an Alternative Dispute Resolution Mechanism is employed between business parties. Why it is imperative for the draftsman to capture the intention of parties to use mediation while drafting the parties' commitment to the contract. We shall be using English case law's, requirements, and recommended approach, when exploring or looking at the parties' position and multiple interests as considered before, at the outset, during, or the end of mediation, as the importance of having the Agreement in writing cannot be overemphasised, as the powers exercised by the Mediators are generally subject to the wordings of the Arbitration Agreement.*

**What is Mediation**

Mediation is a process of Dispute Resolution between Parties who chose to settle amongst themselves with the help of a neutral third party known as a mediator who only facilitates the process of settlement. He helps them maintain communication and help them shift to interest-base to ensure an amicable resolution[1].

**Why Would One Take Care When Drafting Parties Commitment to Refer Disputes Between Them to Mediation in the UK.**

A draftsman must be careful when drafting parties commitments to refer disputes to mediation in the UK due to the Legal regimes in force and how it will affect his client's interest, whenever dispute arise involving his client. The Legal Regime in place and reasons for caution in the drafting of client's commitment are as follows;

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[1] B.G.Picker,Mediation Practice Guide A Handbook For Resolving Business Disputes(2nd end, American Bar Association Section on Dispute Resolution,2003)ISBN 1-59031-169-8 Page 3

Mediation became more formalised in the UK with the adoption of the recommendations of Lord Woolf's Report **''Access to Justice''**[2]. The report gave rise to the 1998 Civil Procedure Rules, which came into force in 1999. The sweeping reforms brought about by the CPR 1998 made the consideration of Mediation compulsory at the outset and during disputes between parties.

The Law gave Courts sweeping powers to stay proceedings as parties explore ADR[3], the courts order parties that refuse mediation to pay some or all the cost of their opponent's litigation[4]. As was decided in **Thakkar v Patel** were the court penalised the defendant who frustrated the mediation process by ordering the defendant to pay cost to the claimants for delaying the mediation process[5].

The new Legal regime made the use of mediation by parties more common in the UK as buttressed by the Court of Appeal in **PGF II SA v OMFS Co 1 Ltd** were Briggs J in the lead Judgement held "***… that the defendant's silence in the face of two offers to mediate amounted to an unreasonable refusal to mediate meriting a costs sanction…'' [6]***

The UK Courts are empowered to make parties consider ADR[7]. With Courts imposing penalties for parties that fail to engage in ADR, as was decided in **Ohpen Operations UK Limited v. Invesco Fund Managers Limited** were the court held *'' that mediation was a condition precedent to the commencement of litigation and, accordingly, stayed the proceedings to enable mediation to take place'' [8]*. Consequently, the decision buttresses the principle that ADR provisions in parties' commitment can be enforceable in Court.

Furthermore there is the very fundamental issue of parties being unable to recover legal costs, when a party insist on litigation without going through mediation, even if they would otherwise be entitled to cost, as was held in *Holloway v. Chancery Mead Ltd***[9]** . Thus, clauses in Agreements between parties to refer disputes between them to mediation should state clearly; where they want it to take place, who the mediator is and other issues that they want to resolve among themselves all of which

[2] https://www.judiciary.uk/wp-content/uploads/2013/03/lj-jackson-cjreform-adr.pdf Accessed on the 5th of April 2020.
[3] Civil Procedure Rules 1998,Section 24.6
[4] Ibid Note 2 Section 44.2
[5] [2017] EWCA Civ 117
[6][2013]EWCA Civ 1288;[2014 ]1 WLR 1386
[7] Ibid Note 3 ,section 1.4 (2) e. Applicable to England and Wales
https://www.legislation.gov.uk/uksi/1998/3132/article/1.4/made Accessed on the 3rd of April 2020.
[8] [2019]EWHC 2246

[9] [2008]EWHC 2495

must be clearly stated to be a binding obligation stating the resolve of the parties to use mediation and to be bound by it as an ADR mechanism between them.[10]

**Parties Requirements**

Parties written commitment to mediate in recent times have paid greater attention to the wordings of the clauses contained in the contract. As the mediation process allows them to choose the way and manner they want the dispute resolution to take place[11]. A new trend in recent times is the incorporation into ADR Clauses a ‘’Multi –step contract clauses ‘’[12], which requires negotiation between key decision makers on the side of the two parties involved before embarking on mediation.

The clauses gives parties the blank check to determine the entire process of the exercise with the sole aim of saving time, business relationship, defining the limits of issues to mediate upon, the application of general rules which parties could be waved, were such waivers are within the realm of the parties, taking cognisance of the socio-cultural background of the people involved and the tenents of the business venture that they engage in[13]

**English Case Law Requirements to Mediation by Parties**

The English Case Law requirements were set out in **the *Emirates Trading Agency LLC v. Prime Mineral Exports Pte*[14]**

‘The parties’ agreement must create an enforceable obligation that requires them to engage in alternative dispute resolution’’.[15]

1. “The relevant obligation must be expressed clearly as a condition precedent to court proceedings or arbitration’’.[16]

2. “The relevant alternative dispute resolution process does not have to be formal, but must be sufficiently certain by reference to objective criteria (including clear machinery to appoint a mediator or determine any other necessary step without the requirement for further agreement between the parties)’’.[17]

3. “The court has discretion to stay proceedings that have been commenced in breach of an enforceable dispute resolution agreement: the court will have

[10] English High Court Confirms Mediation Can Be Condition Precedent to Litigation | Latham.London | Latham & Watkins
https://www.latham.london/2019/09/english-high-court-confirms-mediation-can-be-condition-precedent-to-litigation/ Accessed on the 3rd of April 2020.
[11] Ibid Note 1 page 9 Paragraph 1.7
[12] Ibid Note 1 Page 9 Paragraph 2
[13] Ibid Note 1 Page 9 Paragraph 2.2
[14] *[2014]EWHC 2014,* Ibid note 5

[15] Ibid Note 5
[16] Ibid Note 5

[17] Ibid Note 5

regard to the public policy interest in upholding the parties' agreement and furthering the overriding objective in encouraging parties to resolve their disputes''.[18]

4. "The decision serves as a useful reminder that parties wishing to commence formal dispute resolution proceedings through litigation or arbitration should take care to comply with any enforceable conditions precedent before commencing proceedings. Failure to comply can have serious consequences, including challenges to the court/tribunal's jurisdiction and a stay of the proceedings (both of which increase the time and costs involved in resolving the dispute). To reduce these risks, parties should engage counsel as soon as dispute arises so that compliance is ensured and carefully documented''[19].

5. "The decision also provides useful and practical guidance to practitioners drafting multi-tier dispute resolution clauses. While in principle parties can create a condition precedent to the commencement of court or arbitration proceedings, in order to be enforceable, the relevant provisions need to be sufficiently certain by reference to objective criteria''.[20]

**Recommendations of Approaches When Exploring /Looking At Parties Position and Interests as Considered; Before, at the Outset, During and At the End of Mediation.**

The informal nature of Mediation allows parties to choose the approach that suite them in resolving disputes. It is the most widely used ADR mechanism due to the following:

i. Mediation is an informal tool for finding solutions to conflicts between parties.
ii. It is cheaper for parties' dispute resolution.
iii. It enables parties to maintain the relationship between them without animosity.
iv. It is confidential.

Mediation remains a method of listening to parties by the Mediator who must do his duties with utmost good faith without fear or favour in such a way that will assist parties to come up with an agreed panacea for the disputes between them.[21]

[18] Ibid Note 5
[19] Ibid Note 5
[20] Ibid Note 5
[21] M.Meadow , L. Schneider, Mediation Practice, Policy and Ethics. Aspen Publishers, New York, (2006). Page 89

**Key Factors to be Considered by a Mediator Before the Commencement of Mediation**

Before any further step is taken in the preparation stage, the mediator must ensure the settlement of issues relating to[22]:

A. Agreement of the parties to mediate
B. Representation of the parties
C. Experience of mediation previously by the parties
D. Authority of the person appearing
E. Arrangement for the reception of parties
F. Nature of the dispute
G. Sitting room arrangement
H. Particular/special mediator requirement

**Stages at the Out Set of a Mediation Process**

Considering that the mediation process is an important process that is very fundamental to socio-economic development, some preparations have to be made that will facilitate the quick resolution of the disputes, as most often jobs and livelihoods rely on the resolution of the process. Some steps that need to be taken include but not limited to the following[23]:

1. Preparation stage (venue of the mediation session is considered here)
2. Opening stage (introduction of the mediator and all the parties present;
3. Non-disclosure agreement; opening statements; privilege)
4. Agenda setting/Issue identification/Exploration stage (real issues are found out by the mediator)
5. Bargaining stage
6. Agreement stage (concluding agreement and enforcement

**Qualities Expected of a Mediator during Mediation**

In most instances, mediators are appointed by the parties. In situations where the parties fail to agree on who the mediator will be, they can approach a Mediation Centre or service provider to fill in the gap.

A Mediator is expected to have the composure, knowledge and ability to be that dependable captain that will disclose any possible conflict of interest. He is expected to navigate parties away from the storm. Such qualities include but not limited to the following[24]**:**

[22] mediation-information-assessment-meetings.pdf https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/300260/mediation-information-assessment-meetings.pdf Accessed on the 5th of April 2020.

[23]Stages of the mediation | Legal Guidance | LexisNexis https://www.lexisnexis.co.uk/legal/guidance/stages-of-the-mediation Accessed on the 5th of April 2020.

[24]Mediation in United Kingdom - Lexology

a. Patience and persistence
b. Effective communication skills c. Rapport building ability
d. Flexible and creative
e. Empathetic (sensitive to the parties' needs)
f. Conflict handling ability g. Tolerant
h. Trust worthy
i. Impartial and neutral j. Non-judgmental
k. Good listening skills

**Qualities Expected from Parties during Mediation**

Parties have a critical role to play as the facts in issue is a dispute between them which they want to be resolved, thus they must have some level of decorum and expectations to enable the mediator do his duty and achieve the purpose that they set out for. Some of these qualities expected are as follows[25]:

- Respecting the ground rules set and agreed upon.
- Willingness to cooperate in the resolution of the dispute.
- Not misrepresenting facts intentionally to the mediator.
- Duty to act with integrity. Mediation or any ADR should not be used purposely to delay eventual litigation; or only to obtain information of the opposite party's case
- Parties must at all times during or after the mediation maintain the confidentiality of the information shared by the parties.

**Features of Mediation**

Mediation has been embraced all over the world as one of the most efficient dispute resolution process, especially within the commercial realm. Some of its key Features are as follows[26]:

- Voluntary (most outstanding feature)
- Confidential
- Accessible
- Facilitative (keeping the interest and options of the parties alive for them to reach an agreement

**A Summation of the Mediation Process**

The Mediator usually commences the herculean task of being a neutral, by making an opening statement in a Joint meeting that will set the tone for peace and harmony, by making the parties comfortable with him and also to voice out the grey areas of

https://www.lexology.com/library/detail.aspx?g=02ee5416-79ba-484b-bd62-eb26318d330b Accessed on the 5th ofApril2020

[25] Ibid Note 23

[26] Ibid Note 23

the disagreement between them , these usually happens by way of an Introduction; He/she then explain the rules that will help maintain some orderliness : He may then ask the parties to tell their respective situations by meeting with the parties differently say in separate meeting rooms[27]. Then meeting them jointly, separately again, jointly again. Then we can have an Agreement in writing haven resolved the issues or part of the issues, as multiple interests might require multiple agreements, then implementation of the signed agreements reached between parties.[28] All in an atmosphere of strict privacy and confidentiality: As a mediator must uphold the confidentiality of the information that parties share with him, and will only share the information with permission of parties in such a way that will facilitate the amicable settlement of the dispute at hand. He will also hold a session with both parties, were positions will be restated and he advices them in such a way that will enable them arrive at a decision with parties shifting positions here and there looking at each other face to face. Though parties are in control of the mediation process as agreed between them some meetings take place online.[29]

Not withstanding the issues involved between Parties or multiple parties with varying interests that have agreed to partake in mediation the process accommodates the interest of all and sundry who are committed voluntarily to the process.[30] It is expected that the Neutrals will exercise a duty of good faith to the parties. In an unbiased manner, as parties agreed and signed the agreement because they are satisfied with the resolutions reached between them under the assistance of the Neutral[31].

Enforcement of the agreement takes place after the parties agree to the terms; they sign and date the outcome as witnessed by their lawyers. The agreement becomes binding as parties are bound by it. Thus, the right of a party to walk out of mediation ends as soon as the settlement agreement is signed by the parties. Except in instances when the terms agreed upon are not certain.

There is a likelihood that a lot of Mediations are in the offing as a result of the disruptions caused to the world economy due to the COVID 19 Pandemic[32] and the

[27] Ibid Note 16 Page 114
[28] Ibid Note 16 Page 115
[29] J.W Cooley, Mediation Advocacy(2nd edn NITA,2002)Page 263 Paragraph 8.6.1
[30] https://www.mdrs.com/mediating-complex-multi-party-cases Accessed on the 4th of April 2020

[31]Alternative Dispute Resolution for Consumers Act 2015 https://www.gov.uk/government/publications/alternative-dispute-resolution-for-consumers/alternative-dispute-resolution-for-consumers Accessed on the 4th of April 2020.
[32] Coronavirus COVID-19 and force majeure: How are your contracts being affected? (Europe) | Insights | DLA Piper Global Law Firm https://www.dlapiper.com/en/uk/insights/publications/2020/02/novel-coronavirus-and-force-majeure-how-are-your-

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fact that the UK has left the EU. The cross-border trade between the UK, EU and the entire world must take cognisance of the current trends, as well as regional and international Legal regimes.

*'Settlement agreements arising out of cross-border mediations subject to the EU Mediation Directive (2008/52/EC)*[33] *must be in writing. Civil Procedure Rule (CPR) Part 78 (which implements the Mediation Directive, including enforcement provisions, into English law) defines a 'mediation settlement agreement' as 'a written agreement resulting from mediation of a relevant dispute', and stipulates that the written agreement must be annexed to any application to court for a mediation settlement enforcement order''*[34].

**Findings**

- The use of Mediation as an ADR mechanism has been embraced globally.
- Mediation is now part of the learning curriculum for law students at both the undergraduate and post graduate level.
- The ethical standards for Lawyers in the ADR process is now entrenched in the Rules of Professional conduct in all jurisdictions around the world.
- Companies are embracing the trend of training of management staff on ADR as part of capacity building.
- The Mediation Clauses in contracts between parties are becoming more detailed and specific.

**CONCLUSION**

As global commerce gets more dynamic in the 21st century due to globalisation, regional economic agreements, global cartels and economic blocks. Contracting parties are relying more on Mediation and other ADR Mechanisms in resolving disputes between parties which include Individuals, Firms, Companies, State and Non-State actors. As the world becomes a global village, so is the need for a hitch free commercial activity. The crash in the global oil prices which is mainly due to the COVID 19 Pandemic and the dispute between Saudi Arabia and Russia is a case study. The Day the President of the United States mediated between the two countries; there was an increase in the global Oil prices[35]. The US/ China trade disputes, the US/China trade row over Huawea 5G technology are all examples of

[33] Directive 2008/52/EC of The European Parliament and Council of 21st May 2008 on certain aspects of Mediation in Civil and Commercial Matters.
[34] Ibid Note 23
[35] **Trump: Will intervene in Russian-Saudi oil dispute 'at the appropriate time' | Fox News https://www.foxnews.com/politics/trump-russian-saudi-oil-dispute-intervention Accessed on 6th of April**

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trade disputes which have been resolved through Mediation and negotiations between parties[36].

The role of the Draftsman in the future of disputes resolution, is crucial because parties are bound by their commitments as agreed in the commercial agreements and contracts that they are party to. Different jurisdictions around the world now have Legal regimes in place nationally[37] and internationally[38] to make parties explore ADR before litigation.

The Mediation process is now largely tied to parties' commitment agreed upon at the beginning of the contract in most instances. As the Mediation is non -adversarial, it is also not bound by strict rules which are found in litigation. Parties drive it, choose how they want it and where they want it; all in an effort to resolve issues with the aim of mutual gain and legitimate interests of the parties, by identifying solutions to disputes between them so that business will continue.

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