# Case Note

# AGREEMENTS TO MEDIATE

## The Impact of *Cable & Wireless plc v IBM United Kingdom Ltd* [2003] BLR 89

In the commercial world, mediation is now an accepted form of dispute resolution. Many commercial contracts today have dispute resolution clauses that require the parties to attempt mediation before resorting to arbitration or litigation. The law has lagged someway behind commercial practice, and the enforceability of such "mediation clauses" has always been in doubt. This note discusses recent developments in English law which suggest mediation clauses are now enforceable.

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## I. Introduction

1 Mediation has entered the commercial mainstream as a form of dispute resolution. Once seen as more suitable to family or *quasi* family type disputes, mediation is now routinely used even for pure commercial disputes between business entities.

2 Many commercial contracts today provide that in the event of a dispute, the parties attempt mediation before resorting to arbitration or litigation. This article discusses whether such mediation clauses are enforceable under English law. In particular, this article will discuss the impact of the recent case *Cable & Wireless plc v IBM United Kingdom Ltd*[1] ("*Cable & Wireless*") on this area of law.

3 Before delving into the law, it is helpful to define mediation, and to distinguish it from arbitration and litigation. In arbitration and in litigation, the disputing parties submit their dispute to a neutral third party. That third party is tasked with deciding the dispute, and the parties are bound by that decision. The hallmark of mediation is that the neutral third party cannot impose a decision on the parties. In mediation, the neutral third party (the mediator), has no power to

1 [2003] BLR 89.

decide the dispute, nor does the mediator normally offer his own views on the merits of each parties' case. Instead, the mediator acts as a facilitator to help the parties achieve an agreed settlement. No settlement can take place unless both disputing parties agree to it.

### *A. Tiered dispute resolution clauses*

4 An agreement to mediate often appears in commercial contracts as part of a tiered dispute resolution clause. Such a clause specifies that in the event of a dispute, the parties have to undergo sequential dispute resolution procedures. In commercial contracts, a three-tiered dispute resolution clause is often inserted.

5 The three main types of alternative dispute resolution ("ADR") procedures are negotiation, mediation and arbitration. A typical three-tiered dispute resolution clause requires that in case of a dispute, the parties first meet in an attempt to resolve the dispute (negotiation). If this fails, that the parties meet for structured negotiations with the assistance of a neutral third party to try to reach agreement (mediation) and only after that, to refer the dispute to arbitration.

### *B. Practical problems*

6 It sometimes happens that a party subject to a three-tiered dispute resolution clause begins arbitration without first attempting to settle the dispute via negotiation and mediation. This tends to happen if a time bar is looming and the party does not have the time to complete negotiation and mediation before the time bar sets in.

7 In such cases, two questions arise:

(a) First, whether an agreement to mediate is enforceable in law.

(b) Second, if an agreement to mediate is enforceable, whether an arbitration begun in breach of the requirement to first attempt mediation is void and thus ineffective for the purpose of preserving a time bar.

## II. Whether an agreement to mediate is enforceable in law

### *A. Position pre-Cable & Wireless*

8 Until recently, English courts have consistently refused to enforce agreements to mediate.[2] In 2002, a first instance decision was made in England which suggested agreements to mediate were enforceable. This was the case of *Cable & Wireless.*

9 Before examining *Cable & Wireless* in detail, it is instructive to examine the reasons for the historical reluctance of English courts to enforce agreements to mediate.

10 The root reason for this historical reluctance is that courts have viewed agreements to mediate as too uncertain to be enforced. Three main causes of uncertainty have been advanced by the English courts.

11 First, the agreement to mediate may be too uncertain to enforce because of a lack of provisions on practical matters. These include questions such as who is to bear the cost of the mediation, the length of the mediation, the location of the mediation proceedings, the language and procedure of the mediation and the procedure for appointing the mediator.[3]

12 Second, the agreement to mediate is a species of an agreement to negotiate, and amounts to an agreement to agree.[4] It is trite law that an agreement to agree is unenforceable for reasons of uncertainty of terms.[5]

13 Third, an agreement to mediate is in effect a commitment to attend mediation proceedings in a proper state of mind (for example, in good faith, with an intention to genuinely attempt a settlement *etc*).

2 See *Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels)Ltd* [1975] 1 WLR 297 at 301 *per* Lord Denning MR; *Paul Smith v H & S International Holding Inc* [1991] 2 Lloyd's Rep 127 at 131 *per* Steyn J. The position stems from the tendency to treat mediation as the same thing as negotiation, see *Halifax Financial Services Ltd v Intuitive Systems Ltd* [1999] 1 All ER (Comm) 303 at 310, where McKinnon J distinguished between determinative procedures which the courts would enforce such as arbitrations and expert valuations, and non-determinative procedures such as negotiation and mediation, which the courts would not enforce.

3 See *Cable & Wireless*, *supra* n 1, at 94 *per* Colman J.

4 See *Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd*, *supra* n 2, at 301 *per* Lord Denning MR:

> If the law does not recognise a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force.

5 See *Walford v Miles* [1992] 2 AC 128.

Since the court deems it impossible to read minds, the court deems it impossible to ascertain whether a party has complied with an obligation to mediate. Consequently, the court deems agreements to mediate as too uncertain to enforce.[6]

14 Notwithstanding these historical objections, there has been a recent change in the English legal attitude to mediation. Mediation was given a prominent role in the administration of justice when England radically overhauled its rules of civil procedure in April 1999. The new Civil Procedure Rules (which replaced the existing Rules of Court) provide for court-ordered mediation, and use cost measures to punish parties that unreasonably resist mediation.[7]

15 This conflict between the historical objections to enforcing an obligation to mediate and the recent recognition of the value of mediation in the administration of justice provides the context in which *Cable & Wireless* was decided.

### *B. Cable & Wireless*

16 The case was decided by Colman J in the Queen's Bench Division (Commercial Court) in October 2002. In a decision which

6 *Ibid* at 138 *per* Lord Ackner:

> The reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty … This uncertainty is demonstrated in the instant case by the provision which it is said has to be implied in the agreement for the determination of the negotiations. How can a court be expected to decide whether, subjectively, a proper reason existed for the termination of negotiations? The answer suggested depends upon whether the negotiations have been determined in "good faith". However, the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations … A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies.

7 CPR 1.4 states that the courts must actively manage cases, this includes "encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure"; CPR 1.3 puts a duty on the parties to a dispute to assist the court in achieving this objective; CPR 26.4 allows any party to seek, or the court to order, a stay of proceedings pending mediation; CPR 44.3 and 44.5 require the court, when making an order as to costs, to have regard to the conduct of the parties before, as well as during, the proceedings and efforts made, if any, before and during the proceedings in order to try and resolve the dispute. See also Practice Direction 26BPD.1, which sets up a pilot scheme in the Central London County Court that requires parties to certain types of claims to either attend mediation or to give reasons for objecting to doing so.

potentially changes English law, the court enforced an agreement to mediate.

17 In this case, a dispute over an agreement arose between the parties to a contract. The terms of the contract were that the parties would first attempt to resolve any dispute through negotiation, and then, "If the matter is not resolved through negotiation, the Parties shall attempt in good faith to resolve the dispute or claim through an Alternative Dispute Resolution (ADR) procedure as recommended to the Parties by the Centre for Dispute Resolution."[8] The ADR procedure recommended by the Centre for Dispute Resolution was mediation. The Centre of Dispute Resolution had detailed rules for the conduct of the mediation. The terms of the contract also stated that this procedure did not prevent parties from issuing proceedings.

18 One party refused to attend mediation and issued proceedings. The other sought to enforce the agreement to meditate and sought a stay of the court proceedings pending mediation.

19 The court found the agreement to mediate was sufficiently certain to be enforceable in law.[9] The court opined that judicial attitudes should change and be more supportive of mediation because there was value to the mediation process. This was in response to a submission by the party opposing the stay application that mediation would be futile. The court declined to grant a stay on the grounds that it was not the practice of the commercial court to issue a stay in these circumstances but rather to order an adjournment. The court then adjourned the proceedings pending mediation.

### *C. The law post-Cable & Wireless*

20 *Cable & Wireless* is a first instance decision. In so far as the case holds that agreements to mediate are enforceable in English law, it stands against a long line of English authority.[10] The case does not deal

8 *Cable & Wireless*, *supra* n 1, at 92.

9 *Cable & Wireless*, *supra* n 1, at 96 *per* Colman J:

> The reference to ADR is analogous to an agreement to arbitrate. As such, it represents a freestanding agreement ancillary to the main contract and capable of being enforced by a stay of the proceedings or by injunction absent any pending proceedings.

10 Subsequent to being decided in October 2002, *Cable & Wireless* has been mentioned in *Parker v Parker* [2003] EWHC 1846 (Ch), where the case was referred to briefly and distinguished with no criticism of its *ratio*; in February 2004, *Cable & Wireless* was cited with approval in *Flight Training International v International Fire Training Equipment Limited* [2004] EWHC 721 QBD (Comm Ct) by Cresswell J in a first instance decision of the commercial court. The writer is not aware of any subsequent case commenting on *Cable & Wireless.*

with all the bases of historical objections to enforcing mediation clauses in English law. In particular, it does not deal with the complications arising from the view that an obligation to mediate requires the parties to attend mediation in a certain state of mind.[11]

21 It may perhaps be premature to say this case represents a change in English law on the enforceability of agreements to mediate.[12] What seems clear is that it signals a change in judicial attitude to the value of mediation as a process.

22 Notwithstanding *Cable & Wireless*, careful drafting is required to maximise the chance of a mediation clause being found enforceable.

23 To have certainty of terms, a mediation clause must provide for the following practical matters:

> (a) the procedure of the mediation – this includes matters such as the language used, who will bear the costs and how long it will last;
>
> (b) the location of the mediation; and
>
> (c) the appointment procedure for the mediator.[13]

24 This problem of a lack of certainty as to the practical matters in a mediation clause is easily solved by proper drafting. One quick solution is to obligate the parties to mediate under the rules of an organisation (for example the mediation rules of the Hong Kong International Arbitration Centre, the Singapore Mediation Centre or similar organisations). Those rules would likely deal with matters such as who is to bear the cost of the mediation, the length of the mediation,

11 The words "good faith" appeared in the mediation clause in *Cable & Wireless*. Whilst the judge enforced the mediation clause, it does not appear to have been argued before him that the words "good faith" required a particular state of mind.

12 Note however, *Cable & Wireless* has been cited with approval in *Flight Training International v International Fire Training Equipment Limited* [2004] EWHC 721 QBD (Comm Ct) by Cresswell J. This is another first instance decision of the commercial court. The issue in this case was whether the clause in the contract amounted to an arbitration clause. One party disputed this and submitted the clause was in fact a mediation clause. The court found the clause did not amount to an agreement to arbitrate. It was not necessary for the court to decide if the clause was in fact an agreement to mediate. However, in *dicta*, the court seemed to accept a mediation clause was enforceable, and quoted with approval the relevant portions of the judgment in *Cable & Wireless*.

13 The requirement for certainty of procedure is discussed in the Australian cases of *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709; *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194 and *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996.

the location of the mediation proceedings, the language and procedure of the mediation and the procedure for appointing the mediator. In *Cable & Wireless*, it was important to the decision that the parties had chosen mediation under the procedure provided for by the Centre for Dispute Resolution, and that the Centre for Dispute Resolution had a detailed procedure which provided for these practical matters.[14]

25 The problem of the mediation clause being struck down as an agreement to agree is also easily solved by drafting. The wording of the mediation clause must not require that the parties settle their dispute in mediation, merely that the parties undergo the process of mediation in an *attempt* to settle their dispute.

26 The third problem is rather more difficult. This is the problem posed by English courts construing an obligation to mediate as an obligation to mediate with a certain state of mind. For example, in good faith, or with an open mind. The problem is compounded by the common form of words used in mediation clauses that the parties agree to mediate "in good faith". Whilst it is prudent to minimise the problem by avoiding using words like "good faith" in the mediation clause, it is not possible to ensure enforceability merely with careful drafting. The key is a change in the way English courts perceive the process of mediation.

27 Historically, the English courts have taken the view that the very nature of an obligation to mediate requires that a party attend the mediation proceedings in a certain state of mind. So long as this remains the view of the English courts, enforcement of agreements to mediate might be problematic.[15]

28 It is suggested *Cable & Wireless* signals a change in judicial attitude. The court in that case explicitly accorded value to mediation as a process, rather than an exercise in futility if one of the parties is unwilling to attend mediation, or unwilling to attend the mediation with an open mind.

29 In *Cable & Wireless*, Colman J noted:

14 Note however, that in *dicta* Colman J mooted the possibility that a mediation clause could be enforceable even if no set procedure was provided for (*supra* n 1, at 96):

> I would wish to add that contractual references to ADR which did not include provision for an identifiable procedure would not necessarily fail to be enforceable by reason of uncertainty. An important consideration would be whether the obligation to mediate was expressed in unqualified and mandatory terms …

15 *Supra* n 6.

> For the courts now to decline to enforce contractual references to ADR on grounds of intrinsic uncertainty would be to fly in the face of public policy as expressed in the CPR and as reflected in the judgment of the Court of Appeal in *Dunnet v Railtrack plc*.[16]

30 *Dunnet v Railtrack plc*,[17] is another case which demonstrates the change in English judicial attitude to the value of mediation. This is a decision of the English Court of Appeal. The case concerned the effect on costs of a party refusing to participate in mediation. It is therefore not directly relevant to the enforceability of a contractual obligation to mediate. However, the judgment contains a discussion by Brooke LJ on the value of mediation, and in which he opined:

> Mr Lord, when asked by the court why his clients were not willing to contemplate alternative dispute resolution, said this would necessarily involve the payment of money, which his clients were not willing to contemplate, over and above what they had already offered. This appears to be a misunderstanding of the purpose of alternative dispute resolution. Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve. This court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claims. But when parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live.[18]

It appears the English Court of Appeal recognised mediation as a process which changes mindsets, rather than a process that requires a particular mindset from the parties in order to work.

31 A similar judicial attitude towards the value of the mediation process has existed since the 1990's in New South Wales. An example is *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd*,[19] where in a decision of the Supreme Court of New South Wales, Giles J noted of agreements to mediate "what is enforced is not cooperation and consent, but participation in a process from which cooperation and consent might come".[20]

16 *Cable & Wireless*, *supra* n 1, at 95; for the attitude to mediation contained in the CPR, see *supra* n 7.
17 [2002] 1 WLR 2434.
18 *Ibid* at 2436–2437.
19 (1992) 28 NSWLR 194.
20 *Ibid* at 206.

32 In addition, there is persuasive authority from Australia that an agreement to mediate in "good faith" does not make this obligation impossible to enforce. To mediate in good faith does not require that a party place anyone else's interest above his own, nor is the term synonymous with "good behaviour". All that is required is attendance with an open mind, in the sense of a willingness to give consideration to giving and receiving options for resolution of the dispute.[21]

33 Whilst *Cable & Wireless* and *Dunnet v Railtrack plc* represent a change in English judicial attitude to the enforcement of mediation clauses, it is suggested that a mediation clause is more likely to be enforced if it does not expressly require the parties to have any particular state of mind when attending mediation. In particular, wording that requires the parties to attend a mediation in "good faith" is unhelpful.[22] Unfortunately many mediation clauses in use do expressly require the parties to undergo mediation in good faith.

## III. Whether an arbitration begun in breach of the obligation to first attempt mediation is void

34 Even assuming an agreement to mediate is enforceable in law, the manner in which a court enforces the agreement is of importance. If the remedy lies in damages, this is likely to be unsatisfactory to the party seeking to enforce the mediation agreement since the loss would be difficult to prove. The real reason a party seeks to enforce a mediation agreement is if time bar is an issue. In that situation, the party seeking to enforce a mediation agreement will want to have an arbitration begun in breach of the mediation agreement declared void and so ineffective for the purpose of preserving the time bar.

35 The writer is not aware of a precedent where a court has declared an arbitration proceeding void on the grounds of the non-fulfilment of an obligation to mediate as a pre-condition to arbitration. However, if a mediation clause is enforceable, and the dispute resolution clause is worded to make an attempt to resolve the dispute via mediation a pre-condition to the parties' agreement to arbitrate, then conceptually, an arbitration begun in breach of the obligation to first attempt mediation is void.

21 See *Aiton Australia Pty Ltd v Transfield Pty Ltd*, *supra* n 13.

22 The words "good faith" appear to be a red flag against enforceability, see *Walford v Miles* [1992] 2 AC 128 at 138 *per* Lord Ackner, see also the same position in Australia in *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd*, *supra* n 13; note however a different interpretation of the meaning of "good faith" in this context in *Aiton Australia Pty Ltd v Transfield Pty Ltd*, *supra* n 13.

36 The courts have held on past occasions that arbitrations begun in breach of pre-conditions to the agreement to arbitrate are void.[23] The theoretical basis for this is simple. The basis of an arbitrator's jurisdiction is the agreement between the parties to submit their dispute to arbitration. If a pre-condition to the agreement to arbitrate is not fulfilled, there is in effect no agreement to arbitrate. Any arbitration proceeding begun prior to the fulfilment of a pre-condition to an agreement to arbitrate is thus void.[24]

37 It is important to note that cases in which judicial proceedings are begun in breach of a mediation clause are not helpful to determine the status of arbitrations begun in breach of a mediation clause. The right to seek justice from the courts is a fundamental right, and English courts have rightly been hostile to any attempt by contract to restrict access to the courts. The right to go to arbitration is purely contractual.

38 Conceptually, an arbitration begun before fulfilment of a pre-condition to the arbitration agreement is a nullity. A suit begun in breach of a contractual obligation to first attempt mediation is valid, but may be stayed or adjourned pending mediation. As an example, in *Cable & Wireless*, the remedy sought by the party seeking to rely on the mediation clause was a stay of judicial proceedings begun by the other party. The court in that case granted an adjournment of the suit pending mediation, but did not order a stay.

39 It is suggested that conceptually, an arbitration begun in breach of a contractual obligation to first attempt mediation is void if:

(a) the agreement to mediate is enforceable in law; and

(b) the arbitration clause was drafted as to make performance of the agreement to mediate a pre-condition to the agreement to arbitrate.

40 It is suggested that in order to achieve the effect of making an attempt to settle the dispute via mediation a pre-condition to the parties agreement to arbitrate, clear words must be used. The word "pre-condition" must be used in the clause. It will not be sufficient merely to provide a sequence of steps where mediation is described as the step before arbitration.

23 See *Smith v Martin* [1925] 1 KB 745.
24 *Ibid*.

## IV. Conclusion

41 In the last two years, there has been a welcome and overdue empowerment of the mediation process in England. In light of *Cable & Wireless*,[25] it now appears that an agreement to mediate is enforceable under English law. In addition, the value of the mediation process has been expressly recognised by the English Court of Appeal in *Dunnet v Railtrack plc.*[26]

42 However, the manner in which a court will enforce an agreement to mediate is still unclear. In particular, it is unclear if the courts will hold that an arbitration is void if it was begun in breach of an agreement to first attempt mediation. The writer submits that provided the dispute resolution clause is drafted to make mediation a pre-condition to arbitration, the correct position is that an arbitration begun prior to mediation is void. This position will also be the most effective way of enforcing an agreement to mediate.

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25 See also *Flight Training International v International Fire Training Equipment Limited*, *supra* n 12.

26 *Supra* n 17.