# Kluwer Mediation Blog

## Brexit and EU mediation

Nadja Alexander (Editor) (Singapore International Dispute Resolution Academy) · Monday, July 18th, 2016

In the aftermath of the Brexit vote and the appointment of Theresa May as England's Prime Minister, there are many things to think about and there will be much to negotiate. While some commentators anticipate a U-turn on Brexit, Theresa May has made it clear that "Brexit means Brexit" – whatever that means.

In this post, I want to pay attention to cross-border mediation within the EU and, in particular, the impact Brexit may have on how London is perceived as a venue for cross-border mediation within the EU.

Currently within the EU, there are a number of mechanisms available to support cross-border mediation and the recognition and enforcement of cross-border mediated settlement agreements. These include mechanisms related to the EU Directive on Mediation in Civil and Commercial Matters , the Rome I Regulation and the Brussels 1 Regulation.

Like other member states, England has complied with the EU Directive (see the The Cross-Border Mediation (EU Directive) Regulations 2011, SI 2011/1133). It is unlikely that it would repeal these Regulations in the event of a Brexit. This is good thing in terms of certainty and clarity in relation to English cross-border mediation law. However, the Regulations deal only with enforceability, protection of mediators from giving "mediation" evidence in court, and the impact of mediation on litigation limitation periods. Other aspects of cross-border mediation law such as parties' rights and obligations in relation to confidentiality and privilege remain in the general principles of the common law. And, of course, common law principles can sometimes operate quite differently from civil law principles. This is where choice of court and choice of law become really important. Given the potentially significant difference among civil law codes and the common law, disputing parties want to be sure:

– that they have expressly identified the laws and jurisdictions applicable to any dispute between them; and that
– in the event that they have not been clear in relation to the above, that they know which rules will be used to determine the applicable law and jurisdiction for their case.

In short therefore, where parties clearly state in writing the law (or laws) they want to govern their dispute and identify their jurisdiction of choice, then all is well. However where the choice of jurisdiction and law are not clear, there are rules to determine the relevant court and the governing laws. Within the EU there are two main Regulations that aim to achieve a harmonised set of rules for EU member states in this regard: the Rome I and Brussels I Regulations.

And so I now turn to the operation of these two Regulations and the possible implications for English mediation in a post Brexit world.

The Rome I Regulation aims to create a harmonised, if not a unified, choice of law system in contracts within the EU. In the context of cross-border mediation, there are three types of contract in mediation settings:
– An agreement between the parties to engage in mediation: this may take the form of a mediation clause in a commercial contract or a separate agreement between the parties.
– An agreement between the mediator(s) and the conflicting parties referred to as a mediation agreement, which regulates the rights and obligations of the signatories in relation to the mediation process.
– A mediated settlement agreement between the parties, which contains the terms of settlement of their dispute.

In absence of the parties making a clear selection of law to govern their dispute and the mediation process itself, Rome I establishes various rules to determine the applicable law. In this way it aims to provide a degree of certainty for those embarking on cross-border mediation within the EU. This is particularly important with respect to the English common law system, which can contain quite different legal constructs from civil law jurisdictions. For example, the legal construct of “without prejudice” privilege is not found in civil law EU jurisdictions. If England really does leave the EU, it will fall outside the unifying reach of Rome I. Unless it negotiates its way in again through new arrangements, this situation will create significant uncertainty in relation to how the applicable law will be determined. England will go back to its own general choice-of-law rules (rather than Rome I) to determine which laws will apply in relation to the dispute including rights and obligations associated with mediating the dispute.

Then there is the Brussels I Regulation. The Brussels I Regulation deals with court jurisdiction and judgment recognition issues in virtually all civil and commercial matters within the EU. In other words it is about choice of court, whereas Rome I is about choice of law. It aims to harmonise the rules on jurisdiction and prevent parallel litigation. Generally this Regulation is likely to play an increasing role in the development of European mediation law to the extent that:
– Courts make decisions about the recognition and enforcement of mediation clauses, agreements to mediate and mediated settlement agreements in their various contractual forms;
– Mediated settlement agreements take the form of a court order, court consent award or judgment; and
– Courts make decisions about other aspects of mediation such as confidentiality and admissibility of mediation evidence.

In addition, there are specific provisions in relation to cross-border mediated settlement agreements involving a pecuniary claims. This type of mediated settlement agreement can be made enforceable in the State of origin and subsequently enforced in another Member State by virtue of Article 24 or 25 of the Regulation No 805/2004. If it involves the delivery of specific assets it can be declared enforceable in another Member State according to Article 58 of the Brussels I Regulation.

At the same time, all eyes are now looking beyond the EU at UNCITRAL as its Working Group II (Arbitration and Conciliation) focuses its efforts on enforceability of cross-border mediated settlement agreements and a potential multi-lateral convention along the lines of the highly successful New York Convention in relation to foreign arbitral awards. However until such a convention is finalised and implemented (which could take a while), Brussels I remains relevant to Europe and its benefits will not extend to a brexited Britain.

If and when Brexit occurs these mechanisms will be not be available in relation to enforcement in the UK. This means lack of uniformity and more uncertainty for disputing parties and their lawyers. Given that mediation clauses written today focus on managing disputes in the future, a quiet nervousness has already set in.

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