

# Mediation

## Session 4 – The Mediated Settlement Agreement

# Contents

1. Drafting mediated settlement agreements (MSAs)
2. Enforcing and challenging MSAs

# 1. Drafting MSAs

## A. Example

- Parties A and B reach an agreement with the help of mediator C. How will the MSA be drafted? By whom? What provisions should (or may) the MSA contain?

# 1. Drafting MSAs

## B. Drafting

- In general, the parties' legal counsel draft the MSA
- Where the parties are not represented by legal counsel, the mediator may draft the MSA

# 1. Drafting MSAs

## B. Drafting

- See, e.g., CEDR Model Mediation Procedure Section 9 according to which “[t]he mediator will facilitate the drawing up of any settlement, though the drafting is normally done by the lawyers representing each of the parties”

# 1. Drafting MSAs

## B. Drafting

- Sometimes only an agreement in principle is reached and it may not be entirely clear whether and to what extent such an agreement is binding

# 1. Drafting MSAs

## C. Contents

- Most MSAs will contain the following clauses:
  - Identification of parties
  - Settlement terms
  - Effect on legal/arbitral proceedings
  - Enforcement
  - Confidentiality
  - Applicable law/dispute resolution

# 1. Drafting MSAs

## D. Identification of the parties

- Generally, only the parties to the dispute are parties to the MSA
  - See, e.g., CEDR Model Settlement Agreement note 3: *"the mediator should not be a party or even a witness to the settlement agreement"* (note, however, that under some laws (e.g. Hungary) an MSA is only valid if it has been signed by the mediator)



# 1. Drafting MSAs

## E. Terms of settlement

- The terms of settlement may include:
  - Obligations of the parties (*e.g.* pay amount X; deliver goods Y; etc.)
  - Contractual arrangements (*e.g.* termination/adaptation of existing contract; conclusion of a new contract or contracts)

# 1. Drafting MSAs

## F. Legal/arbitral proceedings

- Where proceedings are pending, the parties must provide for the termination of those proceedings, e.g.:
  - Withdrawal of the claim/case (unilateral, joint)
  - Court order adopting the MSA
  - Award by consent

# 1. Drafting MSAs

## F. Legal/arbitral proceedings

- Where no proceedings are pending, the parties must exclude the possibility for one of the parties to start proceedings
  - See, e.g., CEDR Model Settlement Agreement Art. 5 referring to the MSA as *"full and final settlement of any causes of action whatsoever which the Parties... have against each other"*

# 1. Drafting MSAs

## G. Enforcement of MSA (optional)

- This issue may be addressed
  - In connection with the termination of pending proceedings
  - In a separate clause (e.g. the parties agree to having the MSA subsequently adopted as a court order)

# 1. Drafting MSAs

## H. Confidentiality (optional)

- See, e.g., CEDR Model Settlement Agreement Art. 8
  - Note, however, that confidentiality obligations may also apply as a matter of law or as a result of a provision contained in the mediation agreement

# 1. Drafting MSAs

## I. Applicable law/dispute resolution

- What are the options for the parties? What considerations should they take into account?

## 2. Enforcing and challenging MSAs

### A. Example

- Parties A and B reach a mediated settlement agreement whereby B agrees to pay USD 1 million to A to settle A's breach of contract claim. The parties draft and sign a written MSA. If B fails to comply with its obligations, how can A enforce the MSA? How can B resist enforcement?

## 2. Enforcing and challenging MSAs

### B. Contract claims

- Where the MSA is not adopted in any other form, it will have the legal force of a contract



## 2. Enforcing and challenging MSAs

### B. Contract claims

- MSAs are thus enforced as contracts and their enforcement can be resisted on the basis of various contract law defenses such as, *e.g.*:
  - Mistake
  - Deceit
  - Duress
  - Lack of authority
  - Illegality

## 2. Enforcing and challenging MSAs

### B. Contract claims

- Where a party resists enforcement on contract law grounds, this frequently raises confidentiality issues, e.g.:
  - Can the mediator testify?
  - Can a particular mediation communication be produced as evidence?

## 2. Enforcing and challenging MSAs

### B. Contract claims

- The enforcement of the MSA, however, does not typically encounter any confidentiality-related obstacles
  - See, e.g., Model Law on International Commercial Conciliation Art. 10(3) which provides that mediation communications “*may be disclosed or admitted in evidence... for the purposes of implementation or enforcement of a settlement agreement*”

## 2. Enforcing and challenging MSAs

### c. Other legal forms

- MSAs may be adopted in other forms:
  - Court orders
  - Arbitral awards
  - Settlement deeds

## 2. Enforcing and challenging MSAs

### D. Court orders

- In court-annexed mediation, a court may adopt the MSA in the form of a court order or judgment. Two questions arise in this respect:
  - What review, if any, does the court perform of the MSA?
  - What means of recourse exist against the order or judgment?

## 2. Enforcing and challenging MSAs

### D. Court orders

- In France, for example:
  - Courts will only verify the existence of consent and the legality of the settlement
  - Means of recourse are extremely limited (revision for fraud)

## 2. Enforcing and challenging MSAs

### D. Court orders

- A number of mediation laws provide for specific (judicial) enforcement mechanisms for all MSAs
  - See, e.g., EU Directive Art. 6(1): *"Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable."*

## 2. Enforcing and challenging MSAs

### E. MSAs as arbitral awards

- Where arbitration proceedings are pending at the time when the parties reach an MSA, the MSA can be adopted as an award by consent by the arbitral tribunal



## 2. Enforcing and challenging MSAs

### E. MSAs as arbitral awards

- But what if no arbitration proceedings are pending? Or if there is no arbitration agreement?

## 2. Enforcing and challenging MSAs

### E. MSAs as arbitral awards

- Under some laws, the parties may establish an arbitration tribunal after the successful conclusion of the mediation in order to have the MSA adopted as a consent award (e.g. Hong Kong)

## 2. Enforcing and challenging MSAs

### F. MSAs as settlement deeds

- MSAs may be adopted in the form of “deeds”, i.e. documents that meet specific form requirements (witnesses, notarization, etc.) and whose validity cannot be legally challenged (or only upon limited grounds)