

## UNITED STATES

## A brief survey of US case law on enforcing mediation settlement agreements over objections to the existence or validity of such agreements and implications for mediation confidentiality and mediator testimony

Edna Sussman\*

*Hoguet Newman & Regal LLP, New York*

esussman@hnrlaw.com

The mediation is over. The case is settled. But is it really over? What happens if one of the parties announces that there is no deal after all or that the agreement is not enforceable for some reason? With the exponential growth of both court-ordered and private mediation, the conflicts that can arise after mediation have given rise to a substantial body of case law in the United States. The cases highlight the aspects of a mediation that can lead to its undoing. They also bring into focus the importance of the debate over the central issue of confidentiality in the mediation setting, what exceptions to confidentiality should be applicable, and what the role of the mediator should be in giving evidence when problems arise after the mediation.

With 50 state jurisdictions and federal jurisdiction, there is no single body of law governing mediation or the enforcement of settlement agreements achieved through a mediation process in the United States. Many jurisdictions have enacted legislation establishing rules for mediation; many courts have developed their own mediation procedures. Some states:

- require a signed written agreement;
- require that a specific understanding of the significance of the agreement be confirmed in the agreement;
- provide for a 'cooling off' period during which consent to a settlement can be withdrawn;
- provide for more confidentiality; and
- provide for less confidentiality for the mediation proceeding.

The specific state laws or court procedures applicable can be determinative of the result achieved in enforcement actions.

While summary procedures are beginning to be developed in some jurisdictions in the United States for the enforcement of mediation settlement agreements, the courts generally view mediation settlement agreements as contracts and apply traditional contract law principles to disputes arising out of efforts to enforce them. Contract law is applied by the courts with little regard to the special nature of the negotiations in the mediation context. The courts often recite the general

rule in 'the law favours the settlement of disputes by agreement of the parties' and that the courts 'will enforce the agreement which the parties have made absent any fraud, mistake or overreaching'.<sup>1</sup> While the courts repeatedly state that they heavily favour the enforcement of agreements that settle disputes, where contract law claims and defences are raised as to a settlement agreement, the courts (or a jury) will consider evidence to determine whether a binding contract was entered into and review any defences raised as they would in any other contract dispute.<sup>2</sup>

We will review the legal theories typically employed to attack settlement agreements achieved through mediation in the United States – lack of agreement, duress, coercion, fraud, misrepresentation and mistake – and offer a few recent illustrative decisions on each theory. Many of the potential pitfalls spelled out in these cases can be avoided by the parties and the mediator. It is suggested that the reader consider what to do in his or her own practice, as a mediator or as a litigant, to avoid such problems altogether as delays and litigation over enforcement of a settlement agreement defeat primary goals of mediation – speed, economy and the maintenance of relationships. We will also discuss recently adopted standards on confidentiality in mediation which directly effect what facts the courts will have available to them in exploring whether a settlement agreement should be enforced.<sup>3</sup>

### Is there a binding contract?

The question of whether the facts support mutual consent to all material terms as necessary to form an enforceable contract is the area of potential attack that has been most successful in defeating efforts to enforce mediation agreements. It is also the claim most likely to arise in an international dispute context as in such cases the parties are generally sophisticated, represented by counsel and, accordingly, less likely to find applicable other commonly raised issues such as duress, lack of competence, and lack of authority.

Abbreviated settlement agreements or memoranda of understanding, often prepared at the mediation session

as a shorthand recording of the terms agreed to, are frequently argued to be only agreements to make an agreement, and are not binding.<sup>4</sup> The courts recognise the difficulty of generating a final settlement document in complex cases at the mediation conference. Thus the courts have enforced settlement agreements where all of the material terms had been the subject of mutual consent,<sup>5</sup> and the mere fact that a later more complete document is contemplated will not defeat enforcement.<sup>6</sup> The language used in the agreement can be critical in this determination. Where the parties made the settlement 'subject to' a formal agreement, as opposed to 'be followed' by a formal agreement implementing the terms agreed to, enforcement was denied.<sup>7</sup> Where the courts find that material terms in an agreement are not sufficiently definite to constitute a basis for finding mutual consent they have, of course, refused to enforce a settlement agreement.<sup>8</sup> But the fact that a few ancillary issues remain to be resolved will not defeat enforcement of a settlement agreement.

The court found that all material terms had been addressed in the written agreement and refused to credit a party's contention that a material term was left unresolved by a provision in the agreement that a certain aspect of the arrangement would be resolved in the future by certain employees, where the agreement was negotiated by top executives who the court felt would not have left a material term open for resolution by junior employees.<sup>9</sup> Applying general contract principles, even if there is no writing, the courts will not allow mere 'second thoughts' to undo a 'done deal' even in mediation.<sup>10</sup>

Of special interest are the many cases concerning the typical end-of-mediation settlement term sheet provision that states that a release will be provided. Subsequent problems with the exact nature of the release to be provided has caused many settlement agreements to founder in court. Where the parties provided that the release to be delivered was to be 'mutually agreeable to both parties', the court held that there was no enforceable contract because there was no meeting of the minds on a material term;<sup>11</sup> courts have refused to enforce where there was no agreement on the release language.<sup>12</sup> However, in one case where the parties had entered into a written settlement agreement signed by attorneys for both sides which provided for the execution of a 'general release' but did not make the agreement effective upon delivery of a signed release, and the parties were unable to subsequently agree on the language of the release, the court found that there was a binding definite offer and unconditional acceptance as required for contract formation.<sup>13</sup> The courts have, on occasion, saved agreements and enforced them by deleting terms added in the final documentation that were not expressly included in the original written settlement agreement – rather than abrogate the entire agreement, including expanded release language.<sup>14</sup>

### Oral agreements

Consistent with the standard contract law principle which recognises the validity of oral contracts (with the exception of contracts governed by the statute of frauds which requires a writing in limited circumstances eg contracts concerning transfers of land, or where performance is not to be completed within one year), courts enforce a mediation settlement agreement in the absence of an executed written agreement if persuaded that there was a meeting of the minds as to all material terms and the parties intended to be so bound.<sup>15</sup>

However, when the parties intended not to be bound until there was an executed written document, an oral settlement agreement will not be enforced.<sup>16</sup> Factors considered in determining whether the parties intended to be bound in the absence of a fully executed document include whether:

- (1) there was an express reservation not to be bound in the absence of a writing;
- (2) there has been partial performance of the contract;
- (3) all of the terms of the contract had been agreed on; and
- (4) the agreement in issue was the type of contract usually committed to writing.<sup>17</sup>

An exception to the enforcement of oral settlement agreements achieved in mediation is found when governing law or applicable court rules governing the mediation require a writing. In a recent decision the federal Third Circuit Court of Appeals reviewed the implications of its own court mediation rules which are based on protecting the confidentiality of mediation and refused to allow evidence as to the existence and terms of a claimed oral settlement agreement. The court rejected the contention that precluding such testimony would enable parties that entered into settlement agreements to back out on a whim and thus deter the federal policy of encouraging settlements; the court pointed out that if parties know beforehand that only a written settlement agreement is binding they will memorialise the agreement. The court stated that:

'if counsel know beforehand that the proceedings may be laid bare on the claim that an oral settlement occurred at the conference, they will of necessity feel constrained to conduct themselves in a cautious and tight-lipped non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute.'<sup>18</sup>

Similarly, the Supreme Court of Indiana concluded that the goal of producing clear understandings that the parties are less likely to dispute or challenge is more important than enforcing agreements resulting from mediation, and refused to construe a local evidence rule to permit proof of an oral agreement.<sup>19</sup>

These decisions barring proof of oral agreements presage what will ultimately be the rule throughout the United States. The recently-adopted Uniform Mediation

Act (UMA), discussed later in this article, is in the process of being passed by the legislatures of states across the country. The UMA exempts written settlement agreements from the privilege which protects mediation communications but does not exempt oral settlement agreements making oral agreements inadmissible in court. This approach is consistent with the current trend in mediation policy and is likely to be passed in most if not all jurisdictions.

### **Duress and coercion**

The courts adopt the basic contract tenet that a contract obtained through duress or coercion will not be enforced. Notwithstanding that some of the facts alleged in the cases are quite egregious, only in rare cases have the courts believed the claims and found them to be persuasive in establishing such duress or coercion as to defeat enforcement of a settlement agreement. After reviewing the facts before them, the courts have enforced settlement agreements reached in mediation in the face of a party's testimony that he was not permitted to leave the room throughout a lengthy mediation and had been sapped of his free will,<sup>20</sup> that he was threatened with prosecution in bankruptcy court,<sup>21</sup> a 65-year-old woman claiming duress at a mediation which started at 1000 and was concluded at 0100 the next morning, while she suffered from high blood pressure, intestinal pain, and headaches, and was told by both the mediator and her lawyer that if she went to trial she would lose her house.<sup>22</sup>

Factors illustrative of excessive pressure have been stated to include:

- (1) discussion of the transaction at an unusual or inappropriate time;
- (2) consummation of the transaction in an unusual place;
- (3) insistent demand that the business be finished at once;
- (4) extreme emphasis on the untoward consequences of delay;
- (5) use of multiple persuaders by the dominant side against a servient party;
- (6) absence of third-party advisers to the servient party; and
- (7) statements that there is no time to consult financial advisers or attorneys.<sup>23</sup>

Where the party seeking to back out is represented by counsel at the mediation and had an opportunity to reflect, an attack on the mediation settlement agreement based on duress and coercion will not succeed.<sup>24</sup>

An increasing number of cases are directed at contentions that the mediator himself or herself was the cause of duress and coercion. These cases are troubling and perhaps suggest a need for more training and oversight over mediator methodologies. However, the courts have for the most part rejected such attempts to

defeat settlement agreements. Where a party contended that she was warned by the mediator of claims of insurance fraud against her, that the mediator bullied her, that she cried for an hour and no consideration was given to her distress, the agreement was enforced.<sup>25</sup> Statements by the mediator as to the substantial legal fees that would be incurred that were claimed to make the party feel financially threatened and under duress were held not to be a basis to set aside a settlement agreement.<sup>26</sup> Where the mediator was alleged to have said 'you have no case' because the case belongs to the bankruptcy trustee and the only way the plaintiff 'would ever see a dime' would be if he 'agreed to the mediated settlement then and there', the court upheld enforcement of the settlement agreement stating that a mediator's statement as to the value of a claim where the value is based on fact that can be verified, cannot be relied on by a counselled litigant whose counsel was present when the statement was made.<sup>27</sup>

However, the courts will require an evidentiary hearing if persuaded that sufficient facts are presented to raise a question of fact on duress or coercion. Thus where it was alleged that the mediator imposed extreme time pressure and told the party that the court would have the embryos in issue destroyed rather than give them to her; that the property value in issue was grossly disproportionate to the cost of litigating further; and that she would have a chance to protest any provisions of the agreement at a final hearing even if she signed the mediation settlement agreement, the court held that if the mediator in fact engaged in such conduct the agreement would not be enforceable and set it down for a hearing.<sup>28</sup>

### **Incompetence or incapacity**

The law presumes adult persons to be mentally competent and places the burden of proving incompetence on the person claiming it. In the face of this burden, claims of incompetence, even based on facts that sound quite striking, have not met with much success in court where they have been raised to defeat enforcement of a settlement agreement. The courts have rejected claims that a party was incompetent when suffering from side effects of medication that included severe depression, memory loss, brain fog, that she was crying during the mediation, and continually stated that she was confused and did not understand,<sup>29</sup> where a party claimed that she suffered physical pain during the mediation from recent surgery, had taken higher than prescribed narcotic pain and anti-depressant medication and developed a migraine headache that required her to administer a medicinal injection during the mediation.<sup>30</sup> The court rejected a claim of mental incapacity where the party claimed to be disassociating and had no understanding of the nature and terms of the contract, finding that expert testimony was required to support such a claim.<sup>31</sup>

### Lack of authority

Claims by a party that it had not signed the settlement agreement and that the signature by its attorney was not authorised have also not been viewed with favour. A party's counsel is presumed to have authority when counsel is present at a mediation session intended to settle a lawsuit, a presumption that has to be overcome by affirmative proof that the attorney had no right to consent.<sup>32</sup> A settlement agreement signed by counsel can also be upheld on the basis that apparent authority existed where the opposing counsel had no reason to doubt that authority.<sup>33</sup> Even where the governing state statute required the party's own signature, the courts have upheld a settlement agreement in the absence of such a signature where the party's absence from the mediation was unexcused.<sup>34</sup>

### Fraud

The courts have applied contract rules quite strictly and required a knowing and material misrepresentation with the intention of causing reliance on which a party justifiably relied even in the mediation context with its unique negotiating framework and relationships.<sup>35</sup>

Absent a duty to disclose, mere failure to disclose a fact that might be material to the opposing party is not a basis for defeating a settlement agreement. Where a plaintiff thought the defendant's insurance limit was US\$100,000 rather than US\$1.1 million, the court held that the defendant was in an adversarial position and not in a position of special trust or confidence that would create a duty to disclose to plaintiff; however an evidentiary hearing was required to determine if the defendant had made an affirmative misrepresentation which could be a basis for defeating the settlement.<sup>36</sup>

In jurisdictions in which strict confidentiality of mediation communications applies, the courts have refused to accept any evidence of a claimed fraud based on what transpired at the mediation session holding that such evidence is blocked by the confidentiality of the proceeding.<sup>37</sup> The Delaware Chancery Court suggested that if parties to a mediation know that they are basing their decision to settle on a representation of fact they must extract that representation in a form that is not confidential, eg as a representation in the settlement agreement itself.<sup>38</sup>

### Mistake

While mistake is frequently raised as a defence to enforcement of a settlement agreement it, too, is a ground that is rarely accepted by the court. Courts have rejected claims of mutual mistake and the more difficult claim of unilateral mistake where a party claimed that the amount to be paid was to be offset by an amount previously paid;<sup>39</sup> where a plaintiff had failed to read the agreement to understand its terms;<sup>40</sup> but remanded for

a hearing where a claim of mutual mistake leading to a clerical error of US\$600,000 was asserted.<sup>41</sup>

### Tension between fact finding for enforcement analysis, mediation confidentiality and mediator testimony

As is apparent from the cases discussed above, the court's inquiry in determining whether a settlement agreement should be enforced is intensely fact-based and often delves into what happened at the mediation itself. While an unambiguous contract is construed by the courts without looking to evidence outside the contract, contract law interpretation is based on the intention of the parties. A factual exploration is frequently required of the negotiation process, not only to ascertain if an oral contract was reached in cases where there is no writing, but often to review claimed ambiguities and to clarify their meaning. Moreover the various contract law legal theories discussed above with respect to mediation settlement agreements – duress, lack of capacity, lack of authority, mistake, fraud – all turn largely on what happened at the mediation.

The courts and the policy-makers have struggled with the tension between the need to develop the facts as to what transpired at the mediation in order to be in a position to analyse claims made under contract law, and the need to preserve the confidentiality of the mediation proceedings. Concern centres on both an identification of the circumstances and the nature of the evidence that should be allowed as to the mediation proceedings, and on the permissible scope of testimony by the mediator.

Courts have explained the reasoning behind the need for mediation confidentiality by stating that confidentiality 'permits and encourages counsel to discuss matters in an uninhibited fashion often leading to settlement'.<sup>42</sup> 'Public confidence in and the voluntary use of mediation can be expected to expand if people have confidence that the mediator will not take sides or disclose their statements, particularly in the context of other investigations or judicial processes.'<sup>43</sup> Lack of trust may not only discourage participation in mediation but may doom the process as 'agreement may be impossible if the mediator cannot overcome the parties' wariness about confiding in each other during these sessions'.<sup>44</sup>

While the importance of confidentiality in mediation is not disputed, court decisions run the gamut in their treatment of such confidentiality. Some decisions:

- have permitted limited disclosure of mediation communications based on a need for the evidence;
- find waivers of confidentiality by virtue of the claims raised;
- bar all evidence of mediation communications;
- completely ignore the question of confidentiality and simply treated the matter as they would any other contract with relevant evidence from any and every source, sometimes even in the face of a statute protecting mediation confidentiality.<sup>45</sup>

As discussed below, the UMA adopts a middle path by promulgating a process that protects mediation confidentiality but allows evidence about the mediation to be admitted in specified limited circumstances.

### Testimony by the mediator

The issue of testimony by the mediator has drawn particular attention, and the particular importance of mediators maintaining confidentiality has been reviewed in vivid language by the courts. One court in refusing to allow mediator testimony to be received in evidence stated that:

‘It is a challenge to posit a more poisonous means to weaken the promise of confidentiality our public policy regards as critical to the effectiveness of mediation than authorising the use of a mediator as an opinion witness against a mediating party.’<sup>46</sup>

Another court summed up the need for mediators maintaining confidentiality by saying:

‘[I]f mediation confidentiality is important, the appearance of mediator impartiality is imperative. A mediator, although neutral, often takes an active role in promoting candid dialogue by identifying issues and encouraging parties to accommodate each others interests . . . To perform that function, a mediator must be able to instill the trust and confidence of the participants in the mediation process. That confidence is ensured if the participants trust that information conveyed to the mediator will remain in confidence. Neutrality is the essence of the mediation process. Thus courts should be especially wary of mediator testimony because no matter how carefully presented, it will inevitably be characterised so as to favour one side or the other.’<sup>47</sup>

In these recent decisions, based on governing rules and statutes, the courts have refused to admit mediator testimony. However, many courts have admitted such evidence, relied heavily upon mediator testimony,<sup>48</sup> and used the mediator as a tie-breaker between the conflicting testimony of two parties.<sup>49</sup> This result is not surprising as the mediator is often the person in the best position to give the court precisely what it is looking for – an unbiased view of what happened at the mediation. For example, the mediator can attest as to whether:

- the parties intended to be bound by the settlement agreement or whether they anticipated further negotiation to refine terms in the agreement;
- terms that may be ambiguous on the face of a hastily drafted memorandum of understanding prepared at a mediation session were actually the subject of discussion and agreement between the parties;
- anything truly coercive transpired with respect to any party;
- the misrepresentations alleged were in fact made; and
- a party was really so sick as to make it impossible for him or her to make a competent decision on settlement.

The admission of mediator testimony will undoubtedly become less prevalent as the UMA. While the mediator’s testimony may be helpful, when it is balanced against the importance of confidentiality and measured in light of the availability of evidence from other sources, the balance will often tip in favour of confidentiality.

### Uniform Mediation Act

With the growth of mediation and the focus on the issues raised, new standards for mediation have been developed in recent years in the United States and internationally. The Uniform Mediation Act, adopted in 2001 in the United States by the National Conference of Commissioners on Uniform State Laws, was drafted to deal with the multiplicity of differing provisions relating to mediation in the United States. In 2001 there were over 2,500 separate state statutes or rules affecting mediation proceedings in some manner. The principal purpose of the UMA was to assure confidentiality and foster uniformity. At the time of writing the UMA has been adopted in six states, and is progressing through the legislative process in several others.<sup>50</sup> In time, the adoption of the UMA should help make the mediation confidentiality rules more consistent across the United States, although it must be noted that the UMA is intended to create a baseline minimum confidentiality standard and is not expected to necessarily supplant the rules applicable in jurisdictions with more stringent confidentiality requirements. The UMA provides a mechanism for protecting the confidentiality of mediation, and specifies the limited exceptions where other policy interests have greater weight.

Section 4 UMA protects mediation confidentiality by providing that a mediation communication is privileged and is not subject to discovery or admissible in evidence in a proceeding unless confidentiality is waived. Section 6 UMA provides the exceptions to the privilege: these include a written agreement signed by all parties. This exception enables litigants to bring a written signed agreement to the court for enforcement even though it was derived from a confidential mediation proceeding.

Oral settlement agreements, generally enforceable under contract law principles, were deliberately omitted and evidence of oral-settlement agreements achieved in mediation will not be admissible in states which adopt the UMA or which otherwise bar the admission of such agreements. The drafters of the UMA reasoned that many statutes already require that a mediation settlement agreement be in writing, and as lawyers and mediators become familiar with the requirement they will prepare a writing to evidence their agreement. The drafters feared that since everything that happened at a mediation could bear on whether an agreement was reached, allowing testimony as to oral agreements would be an exception to confidentiality that swallowed the rule.

The UMA also provides for an exception to the privilege that would operate to cover claims for rescission or defences with respect to settlement agreements such as the ones discussed above, including fraud, mistake, duress, coercion, and incompetence. Section 6(b) (2) UMA provides an exception if it is found by a court, administrative agency, or an arbitrator, after a hearing in camera, that the need for the evidence substantially outweighs the interest in protecting confidentiality, it is not otherwise available, and is offered in a proceeding to prove a claim to rescind or reform or to prove a defence to avoid liability on a contract arising out of the mediation. The UMA thus allows evidence of the mediation proceeding to be introduced where it is necessary to resolve contract law claims that put in issue whether the settlement should be enforced but only after a careful in-camera analysis. The UMA balances the interests by providing protections against unnecessary breach of mediation confidentiality but stops short of totally precluding a party from introducing evidence from the mediation. By virtue of Section 6(c) a mediator cannot be compelled to give evidence pursuant to this provision. Thus, while evidence by others can be obtained pursuant to this exception, the mediator cannot be forced to testify.<sup>51</sup>

### Reactions to the Uniform Mediation Act

A great deal of scholarly discussion has addressed whether the right balance was struck by the UMA in allowing evidence of the mediation in connection with enforcement of settlement agreements.<sup>52</sup> There is a general consensus that the UMA requirement of a written agreement, which makes evidence of oral agreements inadmissible, is correct and will eliminate many disputes and many situations in which mediation confidentiality would be breached. While there may be some quibbles on the specific language used in the UMA, there is also general consensus that it is important to have an exception to mediation confidentiality so that parties can offer the evidence they need from the mediation in connection with claims for rescission or reform and defences asserted and that the careful balancing of the interests required by the UMA before such evidence is admitted is well advised.

Some commentators have, however, questioned the wisdom of the limitation on mediator testimony on the ground that it limits a party's ability to introduce probative evidence that would be available in a different contractual setting.<sup>53</sup> The UMA ultimately leaves whether or not the mediator will testify to the discretion of the mediator. It is submitted that the provision allowing the mediator to refrain from testifying is appropriate and strikes the right balance between the need for the evidence and the role of the mediator as confidant. Mediators often develop a truly trusting relationship with the litigants based on the fundamentally confidential nature of the relationship. If

mediators could be required to testify in connection with the enforcement of the agreement, the breach of that confidential relationship would lead to feelings of betrayal by the parties. The mediator will no longer appear to be impartial as the testimony given will inevitably favour one side over the other.

More and more litigants are employing a mediation process in an effort to resolve their disputes. This growing mediation case-load makes inevitable a burgeoning number of disputes that arise after the mediation. If mediators can be required to testify in such situations, even if they believe that their testimony would be inappropriate, there will be an increasing number of cases in which mediators testify and divulge confidential matters. As a consequence the very bedrock underpinning of confidentiality which makes mediation a successful mechanism for resolving disputes will be shaken and the usefulness of mediation as an alternative dispute resolution mechanism will be reduced.

Moreover, with a requirement that only written and executed mediation agreements can be introduced in evidence, the importance of the mediator's role as a witness is much diminished. The written document will generally be determinative as to whether an agreement was entered into and what the terms are. Properly-worded settlement agreements can also dispose of issues relating to misrepresentation and fraud by specifically including any material representations in the agreement itself. Mediator testimony as to competence, coercion, and duress, would almost invariably support the party seeking to enforce the agreement as no mediator doing his job would allow undue coercion or duress or permit an incompetent person to proceed. Thus the limitation on mediator testimony will rarely injure the parties attempting to defeat the agreement, the very people some commentators contend would be disadvantaged by the mediator rule. Mistakes are precisely the kinds of matters a mediator may well decide to attest to under the right circumstances. The UMA does not foreclose mediator testimony in appropriate cases and leaves the decision where it should be, with the mediator who knows best what his relationship with the parties was and what effect his testimony could have. If there are continuing concerns about lack of adequate process for those attempting to set aside settlement agreements achieved in mediation, it is submitted such concerns are better addressed by legislation such as that in Minnesota that affords a three-day period for withdrawing consent to a settlement agreement. Such an approach protects the parties without sacrificing confidentiality.

### Model Standards of Conduct for Mediators

The Model Standards of Conduct for Mediators (Model Standards) adopted in August 2005 by the American Bar Association, the American Arbitration Association, and the Association for Conflict Resolution, appears to cut back on the mediator's role as a witness. Standard V of

the Model Standards directs that a mediator 'shall maintain the confidentiality of information obtained by the mediator in mediation...unless otherwise agreed by the parties or required by applicable law'. The use of the word 'shall' means that such action is mandatory. The Model Standards further provide that a mediator 'may report, if required, whether parties appeared at a scheduled mediation and whether the parties reached resolution'. Thus under the Model Standards the mediator may testify under these provisions if the parties waive confidentiality or if the mediator is 'required' to do so.

Since the UMA specifically provides that a mediator cannot be 'compelled' to give testimony relating to enforcement of a settlement agreement, in states that adopt Section 6(b) and (c) UMA, it would appear that the mediator cannot be said to be 'required' to give such evidence as the Model Standards provides. It is not yet clear how the apparent discrepancy between these two new standards will be dealt with by mediators as the Model Standards were adopted only a few months ago and the passage of the UMA by state legislatures is progressing across the country.

With the exponential growth of mediation as a form of alternative dispute resolution in the United States it was inevitable that the number of post-mediation contract-law based disputes spawned on enforcement issues would grow as well. The maturation of mediation has led to the development of model laws in the United States that will serve to preclude broad categories of post-mediation enforcement disputes and narrow the scope of others. As these models become accepted and known, both mediators and those who practise before them will develop practices that further reduce areas of potential post-mediation settlement agreement conflict. For the settlement agreement disputes that persist, a careful balance between the need for evidence to assess the claims made *versus* the need for confidentiality in mediation is being developed that will serve to protect both interests.

#### **Practical steps to avoid problems in enforcing the settlement agreement**

The mediation practitioner whether a mediator or representing a party, with this body of case law in mind, can take steps to forestall subsequent problems. Listed here are some of the steps that can be taken to assure that a mediation agreement will hold up in court. A word of caution though, is required: as with all checklists, judgment must be exercised in each instance to determine whether to take any recommended step.

Mediation is often a delicate process and in some instances taking a step recommended here might kill the mediation effort. It is sometimes better to leave the mediation with a deal that may not stand up in court than to walk out with no deal at all. Furthermore, some of these steps, derived from a body of case law that

covers disputes of all kinds, may be wholly inappropriate in the context of an international or large commercial dispute.

#### *Record the agreement*

This may seem an obvious step, but many mediations end with only an oral agreement and a promise by one of the parties to prepare the necessary papers. Upholding an oral agreement is much trickier than enforcing a recorded agreement, so taking the time to record the agreement, even if it is late at night when the mediation is finally concluded, is definitely worthwhile. If the mediation takes place over a period of time and involves issues of some complexity, the mediator (or one of the parties) should record agreements achieved and circulate them to the parties for confirmation so that by the end of the mediation the recording of the agreement in a form acceptable to all is greatly facilitated. The memorandum of understanding prepared at the close of the mediation need not be the final settlement agreement, but it should:

- cover all of the material terms,
- use language definite enough to be understood and to dictate performance,
- state, if it is the case, that the parties intend the agreement to be binding and enforceable,
- take care in the use of language as to follow-up documents; reference can be made to follow-up documents to implement the agreed terms but do not make the agreement 'subject to' follow-up documents or 'effective only upon' the execution of further documents, unless that is the result you want,
- be signed by the parties or authorised representatives,
- provide that the agreement shall be admissible in evidence in any proceeding to enforce its terms,
- consider including a provision that mediation confidentiality is waived if any issue arises as to enforcement of the agreement.

The agreement can be recorded in writing and signed by the parties (or authorised party representatives) physically. Stenographic recording with parties or representatives indicating their consent on the record may suffice and may be useful if the mediation session is conducted by phone.

#### *List material representations*

If there are material representations on which a party has relied in making a decision on settlement, consider including them in the settlement agreement itself with a statement that the listed representations constitute all the material representations on which the parties relied. This would obviate the need for any testimony as to what representation was made at the mediation, as all material representations would be in the text of the agreement itself and render almost impossible any claim of additional alleged material misrepresentations.

*Prepare ancillary documents at the mediation*

If there are ancillary documents that it is known will be material, a draft should be brought to the mediation session by the party interested in the document so that differences can be resolved with the mediator on the spot. If there is time in advance of a session to work out the language of these documents, do it. Don't wait on the assumption that these are details that can be worked out after the major items, like the amount of money to change hands, is resolved. Proper preparation can serve to prevent a later dispute over such a document that might otherwise be brought to court as a legally acceptable basis for what is in fact a change of heart. A release, a confidentiality agreement, or an apology, often fall into this category.

*Confirmation by parties of competence, independence of judgment, etc*

The mediator should consider asking the parties to confirm certain facts. Consideration can be given to the preparation of a side document to be signed by the parties or if a court reporter is called in to record the agreement these confirmations can be recorded stenographically. The parties would confirm that:

- they have read or heard the terms of the agreement and understand them,
- they agree to the terms,
- they understand and agree that the terms are binding and can be enforced in court,
- there were no material representations made to them in the course of the mediation that were not included in the text of the mediation agreement,
- they understood that the mediator and the opposing party and counsel were not under any affirmative obligation to provide them with information,
- they were suffering from no physical impairment that interfered with their ability to exercise their judgment in deciding to approve the settlement,
- they had had an opportunity to consult with their attorney about the settlement terms,
- they are acting voluntarily and exercising their independent judgment in making the decision to settle the dispute,
- they have authority to legally bind the party that they represent.

If the matter is in litigation, consider having the terms of the settlement incorporated into the judge's final order in the case or providing for the court to retain jurisdiction over the matter for the purposes of enforcement of the settlement agreement.

If the matter is not in litigation, consider asking the mediator to serve as an arbitrator after the settlement is fully resolved to render an arbitration award based on the settlement agreement. Some jurisdictions around the world and in the United States expressly provide for such a procedure, or deem the resulting agreement to have the same force and effect as an arbitral award. It

should be noted that questions have been raised as to whether such an award would be recognised under the New York Convention.

**Notes**

- \* Edna Sussman is a court-certified mediator and a member of various mediation panels including those of the federal, bankruptcy and state courts in New York, as well as serving as an arbitrator on the commercial panel of the American Arbitration Association, and the panels of the NASD and the NYSE.
- 1 *Chantey Music Publishing Inc v Malaco, Inc*, 915 So 2d 1052, 1055 (Miss 2005); *Snyder-Falkinham v Stockburger*, 457 SE 2d 36 (Va 1995).
- 2 *M Martin v Senn Dunn LLC*, 2005 WL 2994424 (MDNC 2005).
- 3 For a comprehensive review of the earlier cases, a description of the underlying contract principles, a discussion of mediation confidentiality, and citations to relevant state statutes, see Peter Robinson, 'Centuries of Contract Common Law Can't be All Wrong: Why the UMA's Exception to the Mediation Confidentiality in Enforcement Proceedings should be Embraced and Broadened' (2003) J Disp Resol 135; Peter Thompson, 'Enforcing Rights Generated in Court Connected Mediation – Tension Between the Aspirations of a Private Facilitative Process and the Reality of the Public Adversarial Justice' (2004) 19 Ohio St J on Disp Resol 509; Ellen Deason, 'Enforcing Mediated Settlement Agreements: Contract Law Collides With Confidentiality' (2001) 35 UC Davis L Rev 33.
- 4 *Certainfeed Corp v Celotex*, 2005 WL 217032 at 14 (Del Ch 2005).
- 5 *Harkader v Farrar Oil Co*, 2005 WL 1252379 (Ky App 2005).
- 6 *Claridge House One Condominium Ass'n v Beach Plum Properties*, 2006 WL 290439 (NJ Super AD 2006); *Snyder-Falkinham*, *supra* n 1.
- 7 *Golding v Floyd*, 539 SE 2d 735 (Va 2001).
- 8 *M Martin*, *supra* n 2; *Weddington Productions Inc v Flic*, 71 Cal Rptr 2d 265 (Cal App 2 Dist 1998).
- 9 *Heaven & Earth Inc v Wyman Properties Ltd*, 2004 WL 2931347 (D Minn 2004).
- 10 *Snyder-Falkinham v. Stockburger*, *supra* n 1; *Ford v Ford* 68 P 3d 1258 (Alaska 2003); *Ammons v Cordova Floors Inc*, 904 So 2d 185 (Miss App 2005).
- 11 *Chappell v Roth*, 548 SE 2d 499 (NC 2001).
- 12 *Krebs v United Refining Co of Pa*, 2006 WL 348709 (Pa Super 2006); *Calderon v JB Nurseries Inc*, 2006 WL 263644 (Fla App 1 Dist 2006).
- 13 *Strategic Staff Management v Roseland*, 619 NW 2d 230 (Neb 2000).
- 14 *A El-Fadly v Northridge Park Townhome Owners Association*, 2005 WL 1503857 (Cal App 2 Dist 2005); *Union Pacific R Co v Larkin*, 2005 WL 3664428 (DNM 2005).
- 15 *White v Fleet Bank of Maine*, 875 A 2d 680 (Me 680); *Standard Steel LLC v Buckeye Energy Inc*, 2005 WL 2403636 (WD Pa 2005); *Harkader*, *supra* n 5; *Ford*, *supra* n 10.
- 16 *Catamount Slate Products Inc v Sheldon*, 845 A 2d 324 (Vt 2003); *Gildea v Design Distributors Inc*, 378 F Supp 2d 158 (EDNY 2005).
- 17 *Winston v Mediafare Entertainment Corporation*, 777 F 2d 78 (2d Cir 1985).
- 18 *Beazer East Inc v Mead Corporation*, 412 F 3d 429 (3d Cir 2005); *Thayer v Wells Fargo Bank NA*, 2005 WL 1847174 (Cal App 1 Dist 2005).
- 19 *Vernon v Acton*, 732 NE 2d 805 (Ind 2000).
- 20 *DeVillie v United States of America*, 2006 WL 373491 (WD La 2006).
- 21 *Chantey Music Publishing Inc*, *supra* n 1.
- 22 *Olam v Congress Mortgage Co*, 68 F Supp 2d 1110 (ND Ca 1999).
- 23 *Ibid* at 1142.
- 24 *Advantage Properties Inc v Commerce Bank NA*, 242 F 3d 387 (10th Cir 2000).
- 25 *Vela v Hope Lumber & Supply Company*, 966 P 2d 1196 (Okla Civ App Div 1 1998).
- 26 *Marriage of Banks*, 887 SW 2d 160 (Tex App – Texarkana 1994).
- 27 *Chitkara v New York Telephone Company*, 45 Fed Appx 53 (2d Cir 2002).
- 28 *Vitakes-Valchine v Valchine*, 793 So 2d 1094 (Dist Ct App Fla 2001).
- 29 *Domangue v Domangue*, 2005 WL 1828553 (Tex App – Tyler 2005).
- 30 *Mc Mahon v Mc Mahon*, 2005 WL 3287475 (Tenn Ct App 2005).
- 31 *Alexander v Naden*, 2005 WL 3150323 (Wa App Div 1 2005).
- 32 *Inwood International Co v Wal-Mart Stores*, 243 F 3d 567 (CA Fed 2000).
- 33 *Little v Greyhound Lines Inc*, 2005 WL 2429437 (SDNY 2005).
- 34 *Georgos v Jackson*, 790 NE 2d 448 (Ind 2003).
- 35 *JMJ Inc v Whitmore's BBQ Restaurant*, 2005 WL 1792817 (Ohio App 8 Dist 2005).



## GLOBAL ROUND-UP

- 36 *Brinkerhoff v Campbell*, 994 P 2d 911 (Wa App Div 1 2000).
- 37 *Princeton Insurance Co v Vergano*, 883 A 2d 44 (Del Ch 2005).
- 38 *Ibid*.
- 39 *Feldman v Kritch*, 824 So 2d 274 (Fla App 4 Dist 2002).
- 40 *Stewart v Preston Pipeline*, 36 Cal Rptr 3d 901 (Cal App 6 Dist 2005).
- 41 *DR Lakes Inc v Brandsmart USA*, 819 So 2d 971, 974-75 (Fla Dist Ct App 2002).
- 42 *Beazer*, *supra* n 18 at 435.
- 43 *Princeton Insurance Company*, *supra* n 37 at 63.
- 44 *Foxgate Homeowners Association v Bramalea California Inc*, 25 P 3d 1117, 1126 (Ca 2001).
- 45 For a review of the cases on confidentiality, see Deason, *supra* n 3.
- 46 *Princeton Insurance*, *supra* n 37 at 66.
- 47 *Lehr v Afflito*, 889 A 2d 462, 474-5 (NJ Super .D 2006) (internal citations omitted).
- 48 *Claridge House One Condominium Ass'n*, *supra* n 6; *White*, *supra* n 15; *Barnebei v St Paul Fire & Marine Ins Co*, 2005 WL 351754 (Ohio App 5 Dist 2005); *Chantey*, *supra* n 1.
- 49 *Standard Steel LLC*, *supra* n 15.
- 50 The UMA has been adopted in Iowa, Illinois, Nebraska, Ohio, New Jersey and Washington. It has been introduced in Massachusetts, New York, and Vermont, and is awaiting the Governor's signature in Utah. The District of Columbia is the first to adopt the UMA with its international amendment.
- 51 United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation (Model Law) adopted in 2002 provides in Article 9 that unless otherwise agreed by the parties, 'all information relating to the conciliation proceedings shall be kept confidential except where disclosure is required by law or for the purposes of implementation or enforcement of a settlement agreement'. Thus the Model Law provides an exception to confidentiality similar to that in the UMA. A 2003 amendment to the UMA incorporated the Model Law into the UMA and provides that unless there is an agreement otherwise, the Model Act applies to any mediation that is 'international commercial mediation'.
- 52 See *supra* n 3.
- 53 *Robinson*, *supra* n 3 at 161-62; *Deason*, *supra* n 3 at 91.