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International Mediation

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International Mediation

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I. The Refusal to Mediate in the United Kingdom Could Lead to the Imposition of Costs

In *Northrop Grumman Mission Systems Europe Ltd v. BAE Systems*,[1] the High Court of Justice in the United Kingdom, held that "[w]here a party to a dispute, which there are reasonable prospects of successfully resolving by mediation, rejects mediation on grounds which are not strong enough to justify not mediating, then that conduct will generally be unreasonable."[2] In such circumstances, the party refusing to mediate is at risk of being financially penalized by the court for its refusal.[3]

BAE Systems ("BAE") and Northrop Grumman Mission Systems Europe Ltd ("NGM") are two major defense industry contractors that had a longstanding commercial relationship. That relationship was memorialized in two contracts, the Licence Agreement and the Enabling Agreement. BAE terminated the relationship, arguing that it had the right to do so under the Enabling Agreement, an interpretation disputed by NGM.[4] Prior to the commencement of the court action, the parties exchanged their views about the two contracts and how they should resolve the dispute through a series of letters, some of which were called "without prejudice" letters. In essence, the without prejudice letters provided that the parties were setting forth their positions "without prejudice save as to costs."[5]

In these letters, NGM invited BAE to mediate their dispute. NGM believed mediation "would be the best forum to explore a sensible resolution to this matter."[6] BAE rejected NGM's invitation to mediate. BAE believed that the dispute was not amenable to mediation because it was "about contractual interpretation so that the outcome was 'all or nothing.'"[7] That is, if NGM's interpretation were correct, it would recover "in excess of £3 million," but if NGM were wrong, "it would receive nothing."[8] BAE was very confident

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1. Northrop Grumman Mission Systems Europe Ltd. v. BAE Systems Ltd., [2014] EWHC 3148 (U.K.).
2. *Id.* at para. 72.
3. *Id.* at paras. 73-75.
4. *See id.* paras. 1-37.
5. *Id.* at para. 37.
6. *Id.* (quotation omitted).
7. *Id.* at para. 12.
8. *Id.*

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in its legal position and saw NGM's mediation offer as an attempt to "pressure [BAE] to make a settlement payment with respect to a claim which BAE considered had no real prospect of success . . . even in the abstract."[9]

The court proceedings began on October 22, 2013. On January 20, 2014, BAE sent a without prejudice letter to NGM ("January 20 Letter"). The Letter stated:

> This letter sets out the basis on which our client would be prepared to settle.
> Our client will agree to a full and final settlement of the claim above and any other claims your client may have arising out of or in connection with the Agreement for Deployment Licences and Associated Software Support dated 15 December 2010 and associated agreements, on the basis that no payment is made by our client to your client, but that each party bears its own costs associated with the on-going claim. Please note that this offer is not subject to negotiation.[10]

NGM rejected BAE's settlement offer two days later.[11]

The court held that BAE was not justified in refusing to mediate. To reach this conclusion, the court weighed its assessment of BAE's view of the merits of the underlying contract dispute against the likelihood that mediation would have successfully resolved the dispute. This weighing is necessary because a party's "reasonabl[e] belie[f] that it has a watertight case may well be sufficient justification for a refusal to mediate."[12] Though the court concluded "that this was a strong case by BAE,"[13] it found that BAE's refusal to mediate was outweighed by the fact that the case "was a classic case where [the] mediator could have brought the parties together."[14] The court explained:

> In this case there were two parties who had a commercial relationship. One party, NGM, clearly felt aggrieved that BAE had terminated a contract [ ] when NGM had negotiated the Licence Agreement on the basis of the early commitment to buying licences at a lower price. The other party, BAE, clearly felt that it had the right to terminate in circumstances where it no longer needed any licences. I consider that this is just the situation where a mediator could assist the parties in resolving the dispute and avoid wasted management time and soured relationships even if as large commercial entities, the effect will not be serious or long lasting.[15]

BAE's refusal to mediate "ignore[d] the ability of the mediator to find middle ground by analyzing with each party its expressed position and making it reflect on that and the other parties' position." Further, BAE failed to consider the mediator's "skills of evaluation and facilitation to find solutions" to what appeared to disputants to be intractable problems.[16]

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9. *Id.* at para. 17.
10. *Id.* at para. 35.
11. *Id.* at para. 36.
12. *Id.* at para. 58.
13. *Id.*
14. *Id.* at para. 69.
15. *Id.* at para. 68.
16. *Id.* at para. 69. In reaching its conclusion, the court also considered the fact that total cost of mediation—approximately £500,000—could not "be said to be disproportionately high" when compared to the approximate total value of the claim, £3 million. *Id.* at para. 66.

Though the court found that NGM properly requested mediation and that BAE was not justified in refusing this request, the court rejected NGM's argument that BAE's fee request should be reduced because of its conduct. NGM contended that BAE's application for trial costs "should be reduced by 50% by reason of BAE's unreasonable refusal to mediate the dispute."[17] However, the court found that the January 20 Letter was an "offer to settle," and that "NGM's conduct in not accepting that offer is similarly a matter to be taken into account" when making an award of costs.[18] After considering all of the parties' conduct, the court came "to the conclusion that the fair and just outcome should be that neither party's conduct should be taken into account to modify what would otherwise be the general rule on costs."

II. The Global Growth of Mediation

Over the past year, a number of countries and international organizations have taken various steps to make different forms of alternative dispute resolution—including mediation—easier to access. In particular, there are increased opportunities for parties to use mediation in a number of Asian states to resolve their disputes. For example, the Financial Mediation Bureau, an independent body set up in Malaysia, offers a way for consumers to resolve their disputes with financial service providers without having to go to court, engage a lawyer, or pay any fees. The Bureau mostly hears bank card related disputes, a category which includes bank card loss, compromised passwords, unauthorized online transactions, and cash advances.[19] Similarly, the Indian Department of Consumer Affairs has been debating proposing amendments to the Consumer Protection Act of 1986 that would facilitate mediation and arbitration. The amendments would create a mediation and arbitration "structure" at the "point of grievance," i.e., the place where the consumer is located. To achieve this goal, the Department of Consumer Affairs wants to empower local bodies such as the panchayats and gram sabhas to mediate disputes. It is only after this local mediation has been exhausted that a party may bring his or her dispute to court. According to the Department, the mediators will be trained to facilitate discussion between the parties, assist in identifying key issues, clarifying priorities, exploring areas of compromise, reducing misunderstandings, and emphasizing to the parties their role in causing the dispute.[20]

Mediation is also becoming increasingly popular in the Indian city of Bangalore. In 2006, the High Court of Karnataka, the Indian state in which Bangalore is located, issued a series of rules governing mediation. The following year, the High Court established the Bangalore Mediation Center. In the ensuing seven years, mediation has become an increasingly popular form of alternative dispute resolution. In 2014, the Center handled on average, 110 cases every day and, by August 2014, over sixty percent of all of the cases

17. *Id.* at para. 2.

18. *Id.* at para. 7.

19. M. Mageswari, *FMB Way to End Disputes*, THE STAR ONLINE (Aug. 3, 2014), http://www.thestar.com.my/News/Nation/2014/08/03/FMB-way-to-end-disputes-Channel-set-up-to-resolve-complaints-against-service-providers/.

20. Sanjeeb Mukherjee, *Consumer Protection Act to be Amended to Ease Mediation*, BUSINESS STANDARD (July 30, 2014), http://www.business-standard.com/article/economy-policy/consumer-protection-act-to-be-amended-to-ease-mediation-114073000042_1.html.

referred to the Center were resolved. To incentivize parties to mediate their disputes, all of the fees associated with the mediation are returned if the parties arrive at a settlement.[21]

Additionally, African countries have an increased number of mediation opportunities available to disputants. For example, in Kenya, a bank industry group set up a pilot mediation program in July 2014 for individuals who have grievances pertaining to loans that banks sold them. The program is housed at Strathmore Law School and, at least for the pilot period, involves Barclays, Equity, Family, Gulf, and Housing Finance Banks.[22] Similarly, on December 1, 2014, court-annexed mediation will begin in several magisterial districts across South Africa. If a party is interested in having his or her case heard by a mediator, the party must, either before or after the issuance of a summons, request that the court clerk invite the other party to a free conference where the possibility of mediation is discussed. If both parties agree, then they may begin formal mediation. If the mediation process is unsuccessful, the parties may resume their court case. Mediation does not compromise the parties' rights or the merits of their positions.[23]

Sovereign states were not the only entities that increased opportunities for mediation in 2014. The World Trade Organization's ("WTO") Sanitary and Phytosanitary Committee also added a mediation mechanism. This new mediation scheme—which hears disputes pertaining to food safety and animal and plant health—is designed to alleviate the perceived flaws with the prior dispute resolution process. Previously, WTO members with a disagreement had to raise it with the Committee before they could initiate the WTO's more formal dispute resolution mechanisms. However, disagreements brought before the Committee became politicized where the recommended resolution was based more on peer pressure than the merits. By putting the dispute before a mediator, the Committee's members hoped to address this problem. The mediation is voluntary, not legally binding, and it can be either confidential or public.[24]

21. Shyama Krishna Kumar, *Mediation: A Big Success*, NEW INDIA EXPRESS (Aug. 4, 2014) http://www.newindianexpress.com/cities/bangalore/Mediation-a-big-success/2014/08/04/article2364109.ece.

22. Lola Okulo, *Banks Eye Mediation to Settle Loan Cases*, THE STAR ONLINE (July 11, 2014), http://www.the-star.co.ke/news/article-176184/banks-eye-mediation-settle-loan-cases.

23. Jacques Joubert, *Mediation Will Get Its Foot In A South African Door*, MEDIATE.COM (October 2014), http://www.mediate.com/articles/JoubertJ9.cfm.

24. Official Press Release, World Trade Organization, Steps Officially Agreed for Mediating Food Safety, Animal-Plant Health Friction, *available at* http://www.wto.org/english/news_e/news14_e/sps_10sep14_e.htm.