# ReSolution: In Brief


## Global Pound Conference – Shaping the future of dispute resolution & improving access to justice

The international Global Pound Conference (**GPC**) is coming to Auckland, New Zealand on **31 May 2017** bringing together the country's leading business and dispute resolution stakeholders to discuss the future of commercial and civil dispute resolution.

Launched in Singapore in March 2016, and finishing in London later this year, the GPC Series is a not-for-profit global project initiated by the International Mediation Institute (IMI). It is convening commercial and civil dispute resolution stakeholders at a series of conferences around the world in order to discuss how to improve access to and quality of all forms of dispute resolution, including litigation, arbitration, and mediation. These stakeholders include parties, lawyers, judges, arbitrators, mediators, academics, policy makers, government officials, and others.

The Series is based on the original 'Pound Conference' that was held in the United States in 1976, and which was a seminal event in the development of modern dispute resolution. The GPC Series is currently scheduled to take place in 40 cities across 31 countries. This event will bring together the country's leading business and dispute resolution stakeholders to discuss the future of commercial and civil dispute resolution.

Be part of the Global Pound Conference Series in Auckland and help shape the future of dispute resolution. Register now at auckland2017.globalpoundconference.org or contact Resolution Institute on **0800 453 237**.

## Singapore passes new Mediation Act

The Singapore Parliament recently passed the Mediation Act as part of the government's initiative to grow Singapore as a destination for international dispute resolution, by strengthening the legislative framework for international commercial mediation.

The Act does not apply to all mediations in Singapore. It only applies to mediations either conducted wholly or in part in Singapore, or conducted elsewhere provided that the mediation agreement provides that the Mediation Act or Singapore law applies to the mediation.

The Act has four key features:

- **Enforceability of Mediated Settlement Agreements:** The Act provides an expedited process for parties to enforce their mediated settlement agreements, by allowing such agreements to be recorded as court orders. To take advantage of this process, all parties must agree to apply to court to have the settlement agreement recorded as a consent order, the settlement agreement must be in writing, and the mediation must have been administered by an approved mediation service provider or a certified mediator;

- **Confidentiality of Mediation Communications:** Subject to certain narrow exceptions, discussions during the course of mediation are confidential and cannot be disclosed to third parties or in court or arbitral proceedings. This protection extends to any communications, documents, or information provided in the course or for the purpose of mediation;

- **Stay of Legal Proceedings Pending Mediation:** The Act allows parties to a mediation agreement to apply for a stay of court proceedings pending the outcome of the mediation; and

**- Foreign Counsel and Mediators:** The Act removes the restrictions on the practice of Singapore law for mediation counsel and mediators in mediations administered by an approved mediation service provider or a certified mediator.

## New Mediation Bill for Ireland

The Mediation Bill 2017 was published on 13 February 2017 and contains proposals for a statutory framework to promote the resolution of disputes through mediation as an alternative to litigation or as an option where court proceedings are ongoing. Arbitration Act proceedings, disputes subject to statutory employment dispute resolution processes, matters under tax and customs legislation and proceedings under the Child Care Act and the Domestic Violence Act are excluded.

Practising solicitors will be required to advise clients to consider mediation as an alternative to court proceedings. For this purpose, they must provide clients with information on mediation services, including details of mediators, information about the advantages and benefits of mediation and where court proceedings are instituted on behalf of a client, the application must be accompanied by a statutory declaration made by the solicitor confirming that these obligations have been discharged in relation to the client and the proceedings to which the declaration relates. If the declaration is not submitted, the court will adjourn the proceedings until the solicitor complies with the requirements.

When awarding costs in such proceedings, a court may, where it considers it just to do so, take into account any unreasonable refusal or failure by a party to consider using mediation, or to attend mediation.

## The effect of an arbitration agreement on liquidation proceedings

The New Zealand and UK Arbitration Acts generally require court proceedings to be stayed if the parties have agreed to resolve disputes through arbitration.

In a recent address to the Insolvency Lawyers Association, the new Chancellor of the UK High Court, Sir Geoffrey Vos, discussed briefly the effect of that statutory stay upon winding-up petitions. He observed that there are many cases where a creditor might think that it can show that the debt under the contract is not disputed in good faith, but that creditor is still obliged to go ahead with a lengthy arbitration process because, if it fails to do so, it will be restrained from proceeding with his petition to wind up

Vos J explained that contrary to the views of some following his judgment in *Changtel Solutions UK Ltd (formerly Enta Technologies Ltd) v Revenue and Customs Commissioners* [2015] EWCA Civ 2, he agreed with the leading judgment of his predecessor in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2014] EWCA Civ 1575, in which the Court of Appeal concluded that the mandatory stay when there is an agreement to arbitrate does not apply to winding-up petitions. However, the Court considered that (except in exceptional circumstances) when there is a dispute in relation to the existence of a particular debt, the Court should exercise its discretion to stay the winding-up application and compel the parties to resolve the dispute through arbitration.

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## Contractual interpretation – striking a balance between the language used and business common sense

In *Wood (Respondent) v Capita Insurance Services Limited (Appellant)* [2017] UKSC 24, the UK Supreme Court earlier this year unanimously dismissed an appeal relating to the construction of an indemnity clause.

The Court emphasised that it was not appropriate in this case to reformulate the guidance on contractual interpretation given to the legal profession in *Arnold v Britton* [2015] AC 1619 and *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900.

Lord Hodge gave the lead judgment, with which Justices Neuberger, Mance, Clarke and Sumption agreed. His Honour stated that the court's task is to ascertain the objective meaning of the language the parties have chosen to express their agreement. It must consider the contract as a whole and, depending on the nature, formality and quality of its drafting, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. Where there are rival meanings, the court can reach a view as to which construction is more consistent with business common sense. However, in striking a balance between the indications given by the language and the practical implications of competing constructions, the court must consider the quality of the drafting of the clause. It must be alive to the possibility that one side may have agreed something which in hindsight did not serve its interest, or that a provision may be a negotiated compromise. It does not matter whether the detailed analysis commences with the factual background and the practical implications of rival constructions or with an examination of the contractual language, so long as the court balances the indications given by each.

The court observed that textualism and contextualism are not conflicting paradigms in a battle for the exclusive occupation of the field of contractual interpretation and, on the approach to contractual interpretation, *Rainey Sky* and *Arnold* were saying the same thing, namely that interpretation is a unitary exercise involving an iterative process by which a balance must be struck between the indications given by the language used (in both the clause under scrutiny and the remainder of the contract) and the implications of rival constructions (which is usually thought of as the business common sense approach). Interestingly, Lord Hodge said that in striking a balance between these two tools to construction it does not matter which way round they are used, so long as the court balances the indications given by each, although the weight to be given to each tool will depend on the circumstances. Some agreements may be successfully interpreted by textual analysis because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals, whereas others may require a greater emphasis on the factual matrix and commercial background and implications to interpret a disputed provision because of their informality, brevity, lack of clarity, or the absence of skilled professional assistance.

## Not all documents or evidence produced for the purposes of mediation will be privileged

Generally, documents produced for the purposes of mediation are, subject to certain limited exceptions, covered by without prejudice privilege ie, they cannot be referred to or used as evidence outside the mediation process unless the parties (who own the without prejudice privilege jointly) all agree to waive the privilege.

The reasoning behind this is to enable parties to speak freely and frankly and to make admissions and/or concessions in an attempt to achieve settlement of a dispute in the knowledge that such admissions or concessions cannot be used against them subsequently if settlement is not achieved.

However, during a costs assessment in the recent case of *Savings Advice Ltd and Anor v EDF Energy Customers Plc* [2017] EWHC B1 (Costs) an issue arose as to the admissibility of information provided during a mediation and the court held that information about the level of the defendant's costs, produced for the purposes of the mediation, could subsequently be used as evidence of those costs.

The use of this information was contrary to the express terms of the Mediation Agreement which provided that *all documents or other material produced for or brought into existence for the mediation will be subject to without prejudice or negotiation privilege ... [and] not be disclosable in any litigation or arbitration connected with the dispute so long as and to the extent that such privilege applies.*

A settlement had been achieved some months after the unsuccessful mediation, resulting in a detailed assessment of the claimant's costs. The claimant attempted to use the defendant's costs information in the detailed assessment to calculate an after-the-event insurance policy premium based on them and which the defendant was liable to pay. The defendant objected.

Master Haworth found as a fact that the information relied on consisted of documents produced for or brought into existence in relation to the proposed mediation. However, he took the view that, despite the without prejudice nature of the mediation and the confidentiality provisions contained in the mediation agreement, the information on costs was admissible evidence in the costs proceedings because the statement as to the level of costs was a statement of pure fact, not an admission or concession, and not therefore covered by without prejudice privilege, in any event the relevant communications were marked "without prejudice save as to costs", and "*[T]he whole purpose of the mediation was to achieve a settlement. In those circumstances, any costs information given in mediation is and must be admissible in order to work out the consequence of any subsequent settlement.*"

Parties have typically tended to regard without prejudice privilege as covering the entirety of documents and communications made or produced for the purposes of attempting to settle a dispute. The judgment does seem to be an anomaly based as it was on the "pure fact" point, but it does serve as a reminder that limitations can be placed on privilege and the common-place carve-out "without prejudice save as to costs" clearly didn't help. Future cases will no doubt seek to argue that the case was dependent on its own facts, namely that the claimant's funding agreement relied on the level of the actual amount of the defendant's costs.