

MEDIATING INTERNATIONAL COMMERCIAL DISPUTES: DIFFERENCES IN U.S. AND EUROPEAN APPROACHES

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Mediation is an accepted item on the menu of commercial dispute resolution in the United States and many other common law jurisdictions. In contrast, the state of development of ADR and mediation in continental Europe is uneven and many years behind the United States. In these circumstances, how useful is it for the English or US legal adviser to draft a multi-tiered dispute resolution clause, committing their client to a period of mediation with a party from a jurisdiction where mediation might barely be known? To what extent is mediation better avoided where the parties do not share the same cultural perceptions of mediation? This article offers some guidelines for drafting multi-tiered dispute resolution clauses in international contracts between parties from different legal traditions.

Over the last two decades, alternative forms of dispute resolution (ADR), particularly mediation, have become an established feature of the landscape of commercial dispute resolution in the United States. Practitioners might hold different views as to the types of disputes best suited to mediation and the style of mediator they prefer. They may also differ in the amount of enthusiasm they have for the process generally. But all practitioners of commercial dispute resolution must not only be able to advise their clients about mediation (and other ADR processes), they must also know how mediation works and be able to participate in mediation on behalf of their clients.

In the United States, the acceptance of mediation can be seen in the many state mediation statutes, the existence of the Uniform Mediation Law (a model law prepared for enactment by U.S. states), and the numerous court-annexed mediation programs. There are codes of ethics for mediators that the many full- and part-time mediators must follow. Also, a great deal of literature on mediation and numerous seminars and courses exist on the techniques of mediation. In short, mediation is a thoroughly established part of ADR in the United States. While mediation is a more recent development in England (and other common law jurisdictions such as Australia and New Zealand), it has been well received there and is better known there than in continental Europe.

In common law jurisdictions it is common practice to include in commercial contracts a reference to mediation prior to initiating arbitration. Only after the failure of mediation are the parties able to move on to litigation or arbitration in a designated forum. Some sophisticated clauses call first for negotiations at the chief executive level before mediation can take place. The intention is to create a dispute resolution process that explores in a structured manner the possibility of a negotiated solution before a formal adjudicatory process, like arbitration or litigation, can begin. These are called multi-tiered or multi-step clauses.

However, lawyers from civil law jurisdictions tend not to be as familiar as their common law brethren are with mediation. In some cases, they are many years behind in their understanding of mediation and how to use it.

In these circumstances, should U.S. corporations doing business in continental Europe include a multi-tiered ADR clause in the transaction documents? Or should mediation be avoided where the parties do not share the same cultural perceptions of the process?

These issues recently acquired a new dimension through the European Commission's (EC) endorsement and promotion of mediation in civil and commercial disputes. In July 2004, the EC issued the *European Code of Conduct for Mediators*, for adoption on a voluntary basis by institutions and individual mediators. Then, in October 2004, the EC released the *Proposal for a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters* (Proposed European Directive). The EC's objective is to establish some common rules throughout the European Union (EU) for mediation and its relationship with judicial proceedings.

The Proposed European Directive sets a deadline for Member States to make their domestic laws comply with its terms. That date is September 2007. This is likely to increase the profile of mediation in Continental Europe. Therefore, it is an appropriate time to address possible cultural limitations on the use of mediation of international commercial disputes.¹

While considering these issues, this article provides a brief overview of the current status of mediation in continental Europe, and then discusses the extent to which mediation, depending as it does on the good faith and cooperation of the parties, is more vulnerable than international commercial arbitration to difficulties arising from cultural clashes. The final section offers some guidelines for drafting mediation and step clauses in order to make the best use of ADR.

Mediation in Continental Europe

The term "mediation" does not have the same significance in continental Europe as it does in the United States and the United Kingdom. This can now be expected to change given the EC's Proposed European Directive.

Some European jurisdictions have longstanding procedures intended to facilitate the settlement of civil and commercial disputes, which are often called "conciliation" procedures. Many lawyers consider this term more or less interchangeable with mediation,² but in fact conciliation has a history in Europe that differs substantially from the modern U.S. concept of mediation.

The experience of conciliation at the International Chamber of Commerce (ICC) in Paris is illustrative of the different attitudes. The ICC is an international arbitral institution, although since its inception in 1923, it has also provided conciliation services. Prior to World War II, 80% of the cases submitted to the ICC were settled by conciliation. However, in more recent decades, conciliation has fallen into disuse. In November 1994, ICC Secretary-General Eric Schwartz reported that since the ICC Rules of Optional Conciliation entered into force on January 1, 1988, fewer "than 60 requests for conciliation (as opposed to more than 2,000 requests for arbitration) [were] received by the ICC."³ The Secretary-General went on to describe some features of the few cases that actually proceeded to conciliation:

In practice ... ICC conciliation proceedings have until now tended to take the form of mini-arbitrations, the main differences being that relatively short deadlines have been fixed for submissions, and the "hearing" has been conducted as a discussion culminating in a settlement proposal, as opposed to an award.... Written submissions—in some cases, quite voluminous—have been exchanged together with "evidence." Meetings—often referred to as "hearings"—have usually been organised in the presence of both parties, and occasionally witnesses have appeared to testify....

In some cases, the settlement proposals of the conciliator have been submitted to the parties in writing with an analysis of the relevant facts and law, much in the manner of an arbitration award. In fact, one such proposal so closely resembled an award that the parties were identified as "claimant" and "defendant,...."

ICC conciliators have also been notably reluctant to meet (or "caucus") separately with the parties during the conciliation process....⁴

These features—formality, legality, an adversarial mentality, evidence and hearings—differ fundamentally from the U.S. conception of mediation as a consensual process in which the mediator assists the parties in exploring their wider interests (rather than just their rights) in search of opportunities to create value and reach a collaborative “win-win” outcome that is not dictated by rules of law or precedents. In his 1994 report, Mr. Schwartz cautiously concluded that parties in ICC conciliation proceedings were ignorant of the potentials of the process and that conciliators “need to learn more” about possible methodologies. This reveals a significant gulf between mediation in the United States and the experience of conciliation of a leading continental European ADR institution.⁵

Spain provides a good European example of established experience with conciliation and lack of experience with mediation. For a long time in Spain there was a requirement to attend a compulsory conciliation hearing prior to continuing with litigation. Many Spanish commentators complained that the conciliation process was useless. Parties to a dispute went through it as a mere formality in order to be able to continue with their litigation. The major overhaul of Spanish civil procedure in 2000 retained a weak obligation to make an effort at conciliation at the parties’ first appearance before the judge, but made no mention of “mediation.” Few arbitration institutions in Spain offer mediation services, and of those that do, the practice is to select mediators from the list of arbitrators. The result is that Spain has a moribund practice of conciliation. Since it has taken virtually no steps towards developing a mediation culture in the modern sense, there is little understanding there of the techniques of mediation.⁶

Therefore, one could view conciliation in one of the following ways: (i) as well established in continental Europe; (ii) as representing a hopelessly outdated set of ideas by U.S. standards, or (iii) often regarded as synonymous with mediation in the modern U.S. sense. Thus, there is an immediate potential for a serious cultural misunderstanding if a U.S. party and its continental European counterpart enters into a discussion about the possibility of using mediation or conciliation. These parties probably believe they are discussing the same thing but actually have quite a different set of assumptions and procedures in mind.

Over the past decade, European conceptions of mediation have advanced and, in certain respects, closed the gap with U.S. practice. Europeans have moved away from the antiquated concept of conciliation as either a mere formality or a mini-arbitration. They have begun to understand that mediation involves a new set of ideas and techniques and requires practical training and experience. The Proposed European Directive, if adopted through legislation by Member States, should accelerate this understanding. The Proposed European Directive will require Member States to create a uniform, predictable legal framework for recourse to mediation.

This framework will require effective quality control mechanisms for providers of mediation services and training programs for mediators. In addition, courts will be authorized to refer cases to mediation, and standards will be developed for the confidentiality of communications made in the course of a mediation, the suspension of limitation periods, and the recognition and enforcement of mediation settlement agreements.

The Proposed European Directive should introduce some much-needed uniformity to the piecemeal legislative initiatives to promote mediation, such as recent initiatives in France,⁷ Austria and Italy.⁸

Since the mid-1990s, there have also been some private initiatives to encourage mediation in continental Europe. The Centre de Mediation et d’Arbitrage de Paris (CMAP) and the Netherlands Mediation Institute were both established in 1995. In 1996 the CPR Institute for Dispute Resolution, which recently changed its name to the International Institute for Conflict Resolution and Prevention, published Model European Mediation Procedures, and in 2004 initiated a European Business Mediation Congress. The ICC replaced its 1988 Rules of Optional Conciliation with the ADR Rules effective July 1, 2001, which cover a range of dispute resolution techniques, including mediation, neutral evaluation,

mini-trial, and other settlement techniques or combination of techniques agreed by the parties. The American Arbitration Association has opened an office of the International Centre for Dispute Resolution in Dublin, Ireland, which offers international arbitration and mediation services. In addition, the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center in Geneva has been actively promoting mediation for international dispute resolution, and regularly offers workshops for mediators with distinguished U.S. teachers. WIPO's mediation caseload is larger than its arbitration caseload, mediation predominating due to its success in eliminating the need for arbitration.⁹

Notwithstanding these positive developments, problems and uncertainties remain about international mediation. An important consideration not addressed in the Proposed European Directive is the enforceability of obligations to mediate, whether in a mediation clause or a multi-tier clause. The novelty of mediation in continental Europe makes it difficult to predict whether a contract provision calling for mediation prior to arbitration will be enforceable. The principle of *competence/competence* is well established in Europe, so the question of whether a mediation clause creates a mandatory condition precedent to the commencement of arbitration will be a question for the arbitral tribunal to decide. However, there is little case law (and therefore uncertainty) in most European jurisdictions as to whether this is a question of substantive or procedural law. Moreover, there is also no law as to whether a failure to mediate, if not a bar to arbitration, might have consequences on the amount of damages or costs assessed against the party who failed to mediate, or entitle the party who desires to mediate some form of interim relief.¹⁰

Cultural Aspects of International Mediation with European Parties

From the above discussion, it is clear that an important consideration for U.S. corporations doing business with continental Europeans is that the European understanding and experience with mediation is limited. Mediation is a consensual process and consent requires understanding, which is spread very unevenly in Europe.

Another complication is that the fundamental differences between trial processes in common law and civil law jurisdictions have shaped lawyers' perceptions of their role in dispute resolution. Common law judges have historically refrained from actively encouraging settlement in order to preserve their neutrality. So any settlement initiative has to come from one of the parties. In contrast, the Swiss and the German legal systems have strong traditions of judge-led settlement initiatives.¹¹

Another difference between U.S. and European practice is that in litigation in the United States, attorneys are accustomed to having contact with the other party's legal advisers during discovery and depositions. There is also sustained interpersonal contact with both the adversary's counsel and witnesses. In contrast, continental European practice has substantially more written than oral (sometimes exclusively written) communications and it lacks the disclosure and exchange mechanisms of discovery and depositions in the United States. Thus, European lawyers prepare and present their clients' cases to the court in written form within fixed time frames. This means that there is substantially less lawyer-to-lawyer contact.

Continental European lawyers are also less accustomed to watching their clients speak at length, as either witnesses in court or as participants in mediation. Moreover, in some jurisdictions, to prepare them for such appearances might violate professional ethics rules. So continental lawyers from Europe might not be comfortable with clients playing an active role in mediation.

Another difference between common law and civil law jurisdictions is that the mechanisms to protect the confidentiality of statements and offers made in negotiations are more developed in common law jurisdictions. These protections enable parties to engage in the kind of full and frank exchanges that often bring disputes to an end.

Finally, Anglo-American litigation generally is much more costly and disruptive than civil law adjudication. These very defects in Anglo-American litigation encourage disputants to negotiate and mediate. Some European commentators have pointed to the reasonable costs of European justice as a major reason for the slow development of ADR in Europe.¹²

Accordingly, many structural factors that facilitated the enthusiasm and acceptance of mediation in the United States are lacking in Europe.

An important cultural obstacle to international mediation with a continental European party is likely to be the language difference. Mediation is primarily an oral process. It requires oral communications not only between lawyers, but also between the senior representatives of the parties involved. The techniques of mediation rely heavily on language and the search for mutual understanding. Mediation often involves expressions of anger and other emotions (venting), and its success requires good listening skills. If there are language obstacles, it will be difficult for the parties to reach an understanding of each other's needs and interests.

The formality of arbitration proceedings provides an established framework for the use of interpreters. This framework does not exist in mediation. There are many bilingual international arbitrators who can hear evidence in different languages. However, conducting a mediation in two languages is a different and substantially more difficult story. The problem of language differences in international mediation should not be underestimated.¹³

Drafting International ADR Clauses

The following common sense guidelines for drafting ADR clauses with a continental European country recognize that there are language barriers and that Europe lags in its understanding of mediation.

1. *Avoid boilerplate clauses.* Do not mechanically copy a boilerplate ADR clause from a contract used in a U.S. transaction. Consider the specific circumstances of the parties and the contract, such as whether there are international industry practices relating to dispute resolution with which both parties are familiar. You can also make inquiries as to the other party's understanding of mediation, or the level of use of mediation in the country where the other party resides. In the construction industry, there are international standards for dispute resolution that already exist and are familiar to both parties. Thus, in an international construction contract, it might be appropriate to use the standard form clause. However, if mediation is not well established or understood by the other party or in the jurisdiction where the contract will be performed, and direct recourse to arbitration is not satisfactory there, it makes sense to consider a more structured form of ADR (such as dispute boards) or to require good faith negotiation by relatively high-level executives to take place over a defined period (say 15 or 30 days), rather than mediation. Good faith in contractual dealings is a well-developed and understood concept in Europe. If the principle of negotiation prior to arbitration is established in the contract, it is always possible at the time the dispute arises to propose that negotiations take place with the assistance of a mediator.

2. *Consider using co-mediators.* Particularly when the parties do not share a common language, the appointment of co-mediators could be considered. Having a co-mediator fluent in the language of the other party can provide a level of comfort that can make mediation successful.

3. *Propose using a mediation institution.* The involvement of a reputable international institution has obvious advantages. Because the institution is involved in the selection of the mediator, a party who is less knowledgeable about mediation may obtain comfort as to the neutrality and qualifications of the mediator. Having an institutional provider also provides a place to direct inquiries and requests for further information. It also means that there are well-tested rules around which to structure the mediation.

4. *Provide for confidentiality.* To protect both parties, the attorneys should ensure that communications made during mediation will be kept confidential and treated as inadmissible in subsequent judicial or administrative proceedings. Confidentiality can be provided through a confidentiality agreement or by incorporating by reference institutional mediation rules that protect confidentiality.

5. *Avoid ambiguity and over-refinement.* The intention should be to simplify and expedite dispute resolution. Accordingly, the ADR clause should be clear and straightforward so as not to become a potential source of difference. One way to do this is to clearly distinguish the non-binding processes in a multi-tiered clause from the adjudicatory processes.

6. *Obtain local legal advice.* It is relatively simple to run a proposed dispute resolution clause past experienced legal advisers in the overseas jurisdiction. This can ensure that there are no special problems under the contractual choice of law relating to the terminology or process proposed.

Conclusion

Knowledge of mediation in continental Europe is growing—unevenly but steadily. The Proposed European Directive can be expected to promote further use of mediation and raise expectations that within a few years there will be a shared legal framework for mediation across the European Union.

In the meantime, there is no reason why Anglo-American companies should not propose multi-tier ADR clauses in contracts with continental European parties. However, when they do, they must not assume that the European party will share the same understanding of mediation. Until mediation becomes an integral part of European ADR, Anglo-American companies will have to be prepared to consider the appropriateness of mediation on a case-by-case basis. Mediation seeks to resolve disputes in a consensual process through mutual understanding. I suggest that the objective of mutual understanding should begin with the drafting of the dispute resolution clause.

¹ For the terms of the European Code of Conduct for Mediators and the Proposal for a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, see the European Commission (EC) Web site for the European Judicial Network in civil and commercial matters at http://europa.eu.int/comm/justice_home/ejn/.

² Some Anglo-Saxon writers consider “conciliation” as a simply less fashionable synonym for mediation; others limit the term to certain styles of mediation: see Arthur Marriott Q.C. & Henry Brown, *ADR Principles and Practice* ¶ 7-002 (2nd ed., London, 1999) (stating: “The term ‘mediation’ has tended to be used interchangeably with ‘conciliation’ although ‘mediation’ has become the preferred term. Sometimes mediation is understood to involve a process in which the mediation is more pro-active and evaluative than in conciliation; but sometimes the reverse usage is employed.”).

³ Eric A. Schwartz, “International Conciliation and the ICC,” 5 *ICC Bull.* 5-6 (Dec. 1994); on the early history of ICC conciliation, see also Stuart Hamilton, “ICC Conciliation: A Glimpse into History in Special Supplement,” *ICC Int’l Court of Arb. Bull.* 23-30 (ADR—International Applications, Paris, ICC Publishing, 2001).

⁴ Schwartz, *supra* n.3, at 13.

⁵ Schwartz, *supra* n.3, at 17 (stating: “While going through the ICC’s conciliation files, I have developed the sense that one of the reasons why there is not more international conciliation today is simply that parties have little idea what it may entail and do not appreciate its extraordinary flexibility. Conciliators, in turn, need to learn more about the methodology of conducting conciliation proceedings, as distinct from arbitrators or other adversarial proceedings.”).

⁶ On the history and use of conciliation under La Ley de Enjuiciamiento Civil of 1881 (Articles 460-480), see Ignacio Diez-Picazo Giménez, “Civil Justice in Spain: Present and Future. Access, Cost, and Duration,” in *Civil Justice in Crisis* 401-2 (A.A.S. Zuckerman (ed.) OUP 1999). For conciliation in civil procedure today see Article 415 of the Ley de Enjuiciamiento Civil 2000.

⁷ The Code of Civil Procedure in France was amended in 1995 to provide for court-annexed mediation; see Alexis Mourre, “Mediation and French Law: Recent Landmarks in Legislation and Case Law,” in *Special Supplement—ICC Int’l Court of Arb. Bull.* 63-73 (ADR-International Applications, Paris, ICC Publishing 2001).

⁸ A comprehensive new civil Mediation Act came into force in Austria on May 1, 2004; see Marianne Roth & Klaus Markowetz, *The Austrian Law on Mediation in Civil Matters: An Overview of the New Provisions ADR & the Law* 222-34 (2003); see also 9 (No. 2) *Current Developments Arbitration and ADR* 19-20 (Austria) and 64-66 (Italy) (Oct. 2004).

⁹ For the WIPO caseload summary see <http://arbitrator.wipo.int/center/caseload.html>

¹⁰ For a discussion of these issues over a range of European jurisdictions, see the feature on Enforcement of Multi-Tiered Dispute Resolution Clauses in *Arbitration and ADR* 7-26 (October 2001); see also Tanya Melnyk, "The Enforceability of Multi-Tiered Dispute Resolution Clauses: The English Law Position," 5 *Int'l Arb. L. Rev.* 113-118 (2002); and for the ICC ADR Rules, see Peter M. Wolrich, "Multi-Tiered Clauses: ICC Perspectives in Light of the New ICC ADR Rules," in *Special Supplement—ICC Int'l Court Arb. Bull.* 7-22 (ADR-International Applications, Paris, ICC Publishing, 2001).

¹¹ See Benjamin Kaplan, Arthur T. Von Mehren & Rudolf Schaefer, "Phases Of German Civil Procedure I," 71 *Harvard L. Rev.* 1193, and especially 1223-24 (May, 1958) ("The intensity and candor of the [German] court's drive toward settlement will astonish an American observer.... Lawyers do not complain of this strong official impulsion nor does there appear to be concern over subversion of legal norms in compromises reached under pressure from the bench." (footnotes omitted)). See also John H. Langbein, "The German Advantage in Civil Procedure," 52 *Univ. Chi. L. Rev.* 823, n.25 (Fall 1985).

¹² For example, see Sergio Ciarloni, "Civil Justice and Its Paradoxes: An Italian Perspective," and Peter Gottwald, "Civil Justice Reform: Access, Cost and Expedition. The German Perspective," in *Civil Justice in Crisis*, *supra* n. 6, at 230, 232 & 288-90.

¹³ See Ileana Dominguez-Urban, "The Messenger as the Medium of Communication: The Use of Interpreters in Mediation," *J. Disp. Resol.* 1-52 (1997).

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