

# Cross-Border Mediation: A New Solution for International Commercial Dispute Settlement?

By Thomas Gaultier

## I. Introduction

One of the greatest and most noble quests ever to be undertaken by humankind throughout history has been the pursuit of justice. Among other functions of justice, one is to provide a solution for disputes arising between individuals or entities. When conflicts arise, justice can be a means to bring an end to them, in a final and compulsory way. Two parties who are experiencing a dispute have often not had a choice about how to resolve their conflict, since social codes, customs, laws and even cultural heritage often designate the means of resolution. However, history has shown that there is no one way by which disputes can be resolved. Indeed, in Greek antiquity, parties could request private hearings, where the equivalent of a modern day arbitrator would decide the outcome of the dispute. In ancient China parties would sometimes use an intermediary to help them come to a solution that would settle the dispute. Finally, in most medieval European monarchies, the king would decide on the outcome of differences between two opposing subjects.

There is a correlation between the examples described above and today's most common methods for achieving a sense of justice when two parties are faced with a conflict: litigation; arbitration; and mediation. Although litigation is generally seen as the traditional method for resolving conflict, the other forms of dispute resolution are increasingly being used, since they are sometimes better suited to achieve the justice that the concerned parties desire.

Contrary to litigation, arbitration and mediation are considered to be methods of alternative dispute resolution, in the sense that the parties can elect to submit their dispute to one of these two procedures instead of going through the default procedure—litigation. They enter such alternative procedure either by providing for such a choice by contract (particularly for arbitration), or on their own volition (most commonly for mediation).

Today's society is witnessing an era of globalization, where state borders can generally no longer prevent communications, trade, or movement of goods and persons, thus leading inevitably to an internationalization of disputes. This is particularly true for commercial relations, since the current trend is to become increasingly international by targeting new foreign markets and feeling out the best affordable services, even if they are halfway around the globe. One of the results of this trend is that commercial disputes have taken on new dimensions, which include foreign counterparties and multi-national

entities. In dealing with the evolution of commercial conflicts, parties have increasingly found the national court systems inadequate for various reasons, ranging from cost, delay, inability to handle the technicalities of international disputes, and lack of qualification of national judges. Therefore, the actors on the global commercial scene have turned to alternative means to solve their disputes. They first looked to arbitration, which seemed to overcome the flaws that are found in litigation, as well as offering several advantages, such as confidentiality.

However, international commercial entities have been recently experiencing some drawbacks with arbitration, such as the increasing costs and delays, and are now starting to turn to another process of alternative dispute resolution, mediation. Mediation has been in use ever since conflicts have existed, but was generally, until recently, limited to local commercial disputes. However, the evolution of the global market and the demand for an even quicker, less expensive, and less adversarial dispute resolution procedure is leading to a new use of mediation, namely, in connection with cross-border commercial disputes.

The goal of this article is to analyze the implications of using mediation as a solution for reaching international commercial dispute settlements. In doing so, one must first define mediation, and then explore the current existing regulations pertaining to mediation, in order to set the legal framework applicable to the process. Consequently, an assessment of the value of cross-border mediation as applied to transnational disputes will be necessary, as well as an exploration of cultural issues involved in cross-border mediation, before concluding with a discussion of the future of international dispute resolution.

## II. What Is Mediation?

In order to define mediation accurately, one must first explore several definitions of the process, then explain what is the role of the mediator and the lawyer, and finally describe the main types of mediation that can be used when facing a dispute.

### A. Definition

Mediation is a process under which a neutral third party, or mediator, attempts to resolve a dispute between parties, in an amicable way. The mediator, unlike a judge or an arbitrator, assists the parties in reaching a settlement agreement on their own, without ever imposing a decision on them. The process is a voluntary one, which is there-

fore non-binding, even though the parties can agree to put the terms of their settlement agreement into a legally binding form,<sup>1</sup> a contract.

In addition to this definition of mediation, it is worth including the one given by the European Union Directive 2008/52 of 21 May 2008 on certain aspects of mediation in civil and commercial matters (“the Directive”), which defines the process as

...a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.

According to these two definitions, the most important element that stands out is the fact that the parties themselves are the ones who come to an agreement. Indeed, contrary to arbitration or litigation, the parties remain in control of the dispute resolution process at all times, and are free to leave the mediation if they wish to. In practice, mediation takes the form of a structured negotiation, where both parties share information, and exchange offers, with the assistance of a mediator, whose role is specifically to facilitate communication and collaboration between the parties so that they reach a settlement that is acceptable to them. Mediation is therefore a very informal process, which differs immensely from the formality of arbitration and litigation.

## **B. Role of the Lawyer**

The lawyer’s role in mediation is very different from the lawyer’s role in arbitration or litigation, since the ultimate goal of mediation is to reach an acceptable settlement, while in the other methods, the goal is to defeat the other party by means of legal arguments and evidence. Therefore, the traditional function of the lawyer as an aggressive litigator to crush the arguments of the opposing party is less welcome in mediation, where, instead, the lawyer will in turn become a negotiator and an advisor for the client. In order to be an effective lawyer in mediation, a lawyer must be trained in negotiation techniques and, most of all, should come to mediation with a spirit of conciliation, prepared to make concessions and give in to some claims, in return of course for concessions from the other party, so that all can walk out of the room with an agreement that each can live with.

In addition to being trained in negotiation and mediation, lawyers who wish to be effective in mediation should properly prepare for mediation. However, this preparation is very different from the preparation for trial or arbitration. Indeed, it will consist of separating

information into what can be disclosed and what should not, or should only be shared later on in the process, but also putting themselves in the opposing parties’ shoes, in order to predict and identify the interests and needs that they will have in order to feel satisfied with the agreement that is reached. Also, the lawyers should discuss beforehand with the client what concessions they are willing to make, and what proposals they would be willing to offer. Moreover, it will be the lawyers’ role to determine, with the client, the bottom line for the negotiation, as well as the best alternative to a negotiated settlement (BATNA), so that, at any phase of the mediation, the client will be able to assess what is on the table in relation to these elements.

Finally, since the main focus of this article is mediation of cross-border commercial disputes, the lawyers representing a client in mediation must also have sufficient knowledge of the economic dynamics affected by the dispute in order to help achieve a resolution that would place the client in the best business and economic situation.

## **C. Role of the Mediator**

The role of the mediator in international mediation will be significantly different than if the dispute were a local one. Indeed, in addition to being a neutral facilitator who provides a fresh approach on the situation, acts as a guide for the reality testing of the positions of the parties, and assists to establish effective communication between the parties in order for them to be able to negotiate,<sup>2</sup> the cross-border mediator must have sufficient technical economic knowledge to grasp fully the commercial issues at stake in the dispute, but must also be able to master the underlying cultural issues of international negotiation—issues which will be discussed further down in this analysis.

Since every mediator is different, due to his or her mediation training, culture, and personality, the influence he or she can have over the mediation structure will vary in accordance with his or her style.

## **D. Different Styles of Mediation**

There are many different styles of mediation which mediators can choose to adopt, or that the parties can require the mediator to adopt,<sup>3</sup> but for the purpose of this analysis, and in light of the area of commercial disputes, only the three most significant and most frequently used styles will be discussed: facilitative; evaluative; and directive.

### **1. Facilitative**

The facilitative style of mediation, also known as the self-determination approach,<sup>4</sup> focuses on letting the parties themselves reach an agreement. The mediator will be a facilitator of communication between the parties, acting

also as a vessel that carries information and proposals from one party to another, helping them understand the issues at stake, and offering creative problem-solving techniques to help the parties reach their own agreement. The parties are truly the ones in control of this type of mediation, and a lot of weight is given to the interests and needs of the parties, in order for them to be able to understand the other party's position, so that a balanced negotiation can take place.

This style is the preferred style for solving commercial disputes in the United States, since the increased neutrality of the mediator leaves a place for the direct and efficient business discussions between the parties, who, by exchanging information and ideas, can often come to a sound commercially viable settlement agreement. The popularity of this style in the United States is partly attributable to the principle of self-determination of the parties, which is a very highly regarded value, allowing the parties to reach an agreement on their own. In such a context, it would be perceived badly by the parties if a facilitative mediator were to evaluate the proposals, since it is the perception of the parties that the mediator does not have the authority to criticize the will of the parties.

## **2. Evaluative**

In the evaluative type of mediation, the role of the mediator will be different. Indeed, in such mediations the mediator can give recommendations and offer his or her views on the strengths and weaknesses of the legal aspects of a case, as well as criticize settlement proposals, and even suggest what might be a fair settlement.<sup>5</sup> It is important to stress, however, that, even if the mediator can "evaluate" proposals and situations, in no way is he or she authorized to force such an evaluation upon the parties, and cannot force the parties into agreeing to something that they would not be comfortable with.<sup>6</sup>

This type of evaluative mediation is often found in European countries, and the evaluations are generally highly welcome, especially in commercial disputes, where the mediator is probably someone with knowledge and know-how in terms of the business aspects of a dispute, in which case having such a person who can make suggestions can be beneficial for the settlement process.

## **3. Directive**

In a directive mediation, the mediator will play the role of a facilitator, but also the role of a guide, and will go beyond the roles described in the two previous styles of mediation, insofar as to influence and persuade parties to agree to a settlement which the mediator considers to be a fair solution of the dispute. Professor of Dispute Resolution Nadja Alexander explains that in Germany, for example, dispute resolution processes which take place

within government legal centers tend to follow a "directive, interventionist and right-based" method,<sup>7</sup> leading to a sacrifice of party self-determination for the benefit of an even more assisted mediation.

Moreover, in some Arab countries, the mediator is often viewed as a wise person in addition to being a facilitator, and his input is valued and respected. John Murray has commented that in Egypt it is even expected that the mediator will apply pressure to have the parties reach an agreement, since that is part of the function of the third party neutral.<sup>8</sup>

In a directive mediation, since the parties are expected to consider the suggestions of the mediator as the optimal solution, the process even draws close to an adjudication procedure, since the parties are pushed into agreeing with the settlement proposal of the neutral. Still, such is the will of the parties to select and accept a mediator who practices this type of mediation, which in some cultures will be highly efficient for resolving a dispute. Indeed, as was mentioned above, in mediation, the parties are the ones in control, and participate in the process voluntarily, according to their preferences and needs.

## **III. How Mediation Is Regulated**

### **A. Overview of Local Developments in Various Countries**

In order to understand the impact and effectiveness of cross-border mediation for commercial disputes, it is useful to provide a brief overview of local initiatives undertaken by various countries.

#### **1. In the United States**

The United States has always been known to be a litigious country, and as a consequence, the market for legal services has exploded, as has the caseload. This has inevitably created an increase in not only legal costs but also delays in court adjudications. Therefore, parties and organizations in the United States have always been pioneers in terms of developing innovative ways to keep parties away from the courts and arbitration.<sup>9</sup> A good illustration of this has been the Uniform Mediation Act ("UMA"), adopted in 2001 by the Dispute Resolution Section of the American Bar Association and the National Conference of Commissioners on Uniform State Laws.

This UMA offers the different states a model act setting forth provisions concerning mediation for them to adopt into their state legal systems, so that the rights and obligations related to mediation can be both simplified and harmonized across the entire country. Its purpose is also of course to promote mediation and to protect the rights of the parties involved in the process.<sup>10</sup> One of its main provisions is a legal privilege related to mediation communications, made either by the parties or the mediator, according to which these communications cannot

be used in a subsequent court procedure.<sup>11</sup> Another key provision of the UMA is the requirement for the mediator to report any situation in which he or she is faced with a conflict of interest, thus attempting to raise the minimum standards to guarantee a greater quality of the mediation process. Finally, the parties must use as a mediator a person who holds himself or herself out as a mediator.<sup>12</sup>

Virtually all states have either adopted the UMA directly, or in other cases have adopted local acts which provide the same minimum standard for mediation, including the right for communications to be privileged.

Mediation in the United States has existed for the past thirty years, and is now a method of choice for reaching settlement in commercial disputes (dispute resolution centers claim that the rate of cases which end up in trial varies between five and twenty percent, whereas the remaining eighty to ninety-five percent of cases are settled out of court, through mediation or negotiation<sup>13</sup>), and this is probably due to the fact that mediation is properly and efficiently regulated in this country.

## 2. In Europe

So far, each member state of the European Union has witnessed an increase in the use of mediation, as parties opt for using the method for its advantages compared to litigation and even arbitration. Therefore, member states have had to decide whether and how to regulate the use of mediation.

In Germany, commercial law has been driven by the principles of private autonomy and contractual freedom.<sup>14</sup> Therefore there is no legal framework making reference to how and when parties can negotiate. However, even though there is no statute regulating mediation, the German Civil Code (*Bürgerliches Gesetzbuch*, or BGB) still provides a certain level of protection for the mediation process. For example, Section 202 of the BGB states that the statute of limitations is suspended if the parties are engaged in negotiations. Thus, since mediation is a form of assisted negotiation, the parties are protected from the running of the statute of limitations, and can safely make all efforts to find an amicable solution through mediation. Also, the German Federal Supreme Court (*Bundesgerichtshof*) has decided that, if the parties have drafted a conciliation clause that clearly reflects their intention to refer to litigation as a last resort, the court will enforce the agreement to go to ADR upon objection of either party, thus rejecting the claim as temporarily inadmissible.<sup>15</sup>

In contrast to Germany, Italy has enacted various statutes and regulations regarding mediation. The most important one is Bill 5492, which provides a definition of mediation, as well as its scope within the Italian dispute resolution system.<sup>16</sup> This legislation provides that judges may refer cases to mediation, thus staying the proceedings; it also imposes upon lawyers a duty to inform cli-

ents about mediation, and defines pecuniary limits and time frames for mediation. In addition, the Italian legislation on mediation provides that, if the parties have not been able to reach an agreement, the mediator can make a final settlement proposal,<sup>17</sup> upon request from the parties.

Concerning England and Wales, a new unified civil procedural code was introduced in 1999, which encouraged the use of out-of-court resolution of disputes<sup>18</sup> and facilitated the settlement of disputes at the earliest stage possible. These new procedural rules in favor of mediation enabled the development of several state-sponsored mediation institutions, such as the Civil Mediation Council and the National Mediation Helpline. These institutions developed mediation in England and Wales through offering a forum where the process can take place, and by educating potential users to the mechanisms and advantages of mediation. In addition to these initiatives, the Commercial Court in England decided in *Cable & Wireless v. IBM United Kingdom*<sup>19</sup> that the proceedings would be stayed until the parties had referred their disputes to alternative dispute resolution. The English courts even went so far as to impose sanctions on parties who failed to give proper consideration to a mediation proposal, even when there was no obligation to mediate in the first place.<sup>20</sup>

Belgium enacted a Mediation Act in 2005, providing some key elements for the protection of the mediation process. Indeed, the Act requires a judge to stay proceedings at the request of either party if there is mediation clause in the contract. It also sets forth that the suspension will only apply to a mediation which is being conducted by an approved mediator who is certified by an institution guaranteeing the independence and quality of mediators. Finally, among other provisions, the Belgian Act also states that all documents and communications made in relation to or during the course of the mediation are confidential.<sup>21</sup>

In France, where mediation is a relatively new process, the legislature has nevertheless integrated a set of provisions into the French New Civil Procedure Code, through Decree n.° 96-652 of July 1996. Moreover, the French *Cour de Cassation*, which is the highest instance in France, had already been considering the issues of enforceability of mediation clauses in decisions which analyzed whether claims can be temporarily inadmissible if the parties had not fulfilled their contractual obligation to mediate.<sup>22</sup> These rulings of the French Supreme Court were harmonized by the Mixed Chamber of the same Court in the *Poiré v. Tripier* decision, which states that, if the language of the mediation clause is sufficiently clear, French courts will enforce it if either party invokes it as a bar to litigation.<sup>23</sup>

These selected European examples of how mediation is regulated clearly show that there is no uniformity in the

area of mediation across the European Union, and that each member state has decided to adopt its own individual rules and laws concerning the matter. Unfortunately, this does not favor the development of cross-border commercial mediation if the standards are different from one country to another within the Union and the rest of the world.

## **B. Firsts Attempts at Transnational Regulation**

In spite of the local particularities each country has decided to adopt in terms of mediation regulation, efforts have also been made on an international level to attempt to harmonize minimum standards for mediation, as well as develop and encourage the use of the process. The first multi-national text which set out the guidelines for out-of-court settlement with a third-party neutral was the UNCITRAL Conciliation Rules of 1980. Later, in 2002, a Model Law on International Commercial Conciliation was adopted by the UNCITRAL, and finally, more recently, the European Parliament and Council have issued the directive on certain aspects of mediation in civil and commercial matters in 2008.

### **1. The UNCITRAL Conciliation Rules of 1980**

With the rise of globalization and the increase of international trade, the international community felt the need to establish conciliation ground rules that would be acceptable in countries with different legal and economic systems,<sup>24</sup> as well as with different cultural perspectives on disputes. These conciliation rules provide a set of procedural regulations that are available to parties, and govern their mediation/conciliation process if they choose to be subject to them. Some of the elements covered by the rules relate to the method of appointment of the conciliator, his or her other role, the general conduct of the proceedings, but also the issues of confidentiality, admissibility of evidence and limitations on undertaking other adjudicatory procedures during the process of settlement discussions. In addition, the text suggests a model conciliation clause that can be used in contracts.<sup>25</sup>

These rules were the first international step taken to harmonize international dispute settlement without an adjudication process.

### **2. The UNCITRAL Model Law on International Commercial Conciliation of 2002**

The Model Law on International Commercial Conciliation, adopted in 2002 by the United Nations Commission on International Trade Law, is a testimony to the global recognition of the importance of mediation/conciliation.<sup>26</sup> These rules are designed to be default rules, meaning that they will apply if the parties do not provide for any body of procedural rules to govern their mediation.<sup>27</sup> When it comes to the specific difference between mediation and conciliation, the model law uses the terms interchangeably, and describes the process as one where

parties ask a third party to help them in their efforts to reach the amicable resolution of a dispute arising from a legal, contractual or other relations, or linked to such relations. The Model Law recommends that all states consider enacting legislation in light of these rules, with the view of creating a uniform legislative framework for the application of mediation procedures in cross-border commercial disputes.<sup>28</sup>

As to the content of the Model law, it includes many important legal issues that may arise in relation to mediation. Some of the provisions govern the number and selection of mediators, the conduct of the procedure, how communications between the neutral and the parties are to be regulated, the disclosure of information, confidentiality, matters of evidence, the possibility of having a hybrid system of mediation and arbitration, and finally the enforceability of settlement agreements arising from mediation. The Rules also make a recommendation for states to enact local legislation that would guarantee the suspension of the limitations period when mediation starts, and for it to restart in the event of a failure of settlement discussions.<sup>29</sup>

This model law marks a significant step forward in the area of cross-border mediation, which not only illustrates a trend toward the increased use of this means of dispute resolution, but also provides a solid international legal basis that can serve as a reference for countries that wish to adapt their current legislation to a global framework, while guaranteeing a harmonized use of mediation in situations of transnational commercial disputes. Parties from different countries can now subject their out-of-court dispute resolution process to a specific set of rules that is broad but detailed enough to permit the conduct of efficient cross-border settlement discussions.

### **3. The 2008 European Directive on Certain Aspects of Mediation in Civil and Commercial Matters**

In 2008, the European Parliament and the Council ended a ten-year preparation of the text of a European Directive that is meant to provide a minimum legislative framework to all twenty-seven members of the European Union.<sup>30</sup> The purpose of this directive is to regulate certain aspects of mediation in civil and commercial matters, to harmonize the legal status of mediation throughout the whole European Union, and to underline the increasing role mediation is playing in business relations. Finally, the Directive takes a position on the minimum requirements for the use of commercial mediation.<sup>31</sup>

Moreover, to quote the Directive itself in its Article 1, the purpose of the Directive is to “facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.”

The scope of the Directive is also defined, in its Article 2, which states, “This Directive shall apply, in cross-border disputes, to civil and commercial matters except as regards rights and obligations which are not at the parties’ disposal under the relevant applicable law.”

As briefly illustrated above, some states of the European Union have already adopted legislation related to mediation. However, there has been no uniformity across the EU as to the legal status of this process. Indeed, some countries, such as England, have embraced mediation very rapidly, but others still are not using its possibilities to the fullest, thus hindering the overall growth of commercial activities between member states.<sup>32</sup> Consequently, and in this context, the European Parliament and Council have adopted this directive, in order to enhance the development of cross-border commercial relations.

Before proceeding with a more detailed analysis of the content of the Directive, it is useful to mention how it is situated in the hierarchy of norms within member states. Since the European Union is not a sovereign state, the European Parliament does not have the same powers as a traditional state parliament would. Nevertheless, member states have granted the European Parliament the ability to issue “directives,” which are “statements of political or governmental objectives that each of the sovereign states constituting the Union must thereafter achieve by enacting laws that are consistent with those objectives.”<sup>33</sup> The Directive, in its Article 12, stated that the member states had to have transposed it into their national legal systems by 21 May of 2011, and could do so by enacting laws of their own, provided that they do not contradict the general principles set forth in the Directive. Hence, the Directive is not a uniform law applicable to all member states of the European Union, but rather a detailed set of principles related to mediation that was to be adopted in each member state and that would ultimately provide parties with a consistent and more harmonized legal framework to govern their cross-border commercial mediations.

In regard to the scope of the Directive, it was drafted in such a way as to apply to all cross-border disputes in civil and commercial matters, but clearly stated in its explanatory note 8 that nothing should prevent member states from applying the provisions to internal mediation processes as well. Additionally, it was drafted with the goal of encouraging the use of mediation, and thus did not prevent state legislatures from imposing the use of mediation, even though mediation is designed to be a voluntary procedure. Even though it is predictable that there would be variations in the domestic transpositions of the directive, it nevertheless serves as a minimum standard for mediation involving cross-border disputes.<sup>34</sup>

The main provisions of the Directive concerned the quality of the mediation,<sup>35</sup> the promotion of the use of

mediation,<sup>36</sup> the enforcement of mediation agreements,<sup>37</sup> the confidentiality of mediation,<sup>38</sup> and the expiry of limitation periods during the process of mediation.<sup>39</sup>

### (a) The Quality of Mediation

The Directive, in its Article 4, encourages mediators and organizations to develop voluntary codes of conduct in order to guarantee better control over the providing of mediation services. The goal of this aspect is to ensure that mediation is conducted in an impartial, effective and competent manner for the participating parties. In addition, member states are encouraged to develop the training of mediators, in order to guarantee that the competence and knowledge of mediators are sufficient to provide adequate and satisfactory mediation services.

### (b) Promoting the Use of Mediation

In its Article 5, the Directive invites the courts to refer cases to mediation in order to settle a dispute when it deems it appropriate, taking all the circumstances of the case into account. The Directive also invites parties to educate themselves as to how mediation works by attending information sessions if they are available. As mentioned above, the Directive does not prevent state courts from making mediation mandatory, either before or during judicial proceedings, so long as it does not prevent the parties from their right of access to the judicial system. It should be noted, however, that when the Directive opens the door to mandatory use of mediation, it does not aim at violating the voluntary aspect of this method, since the Directive never prevents the parties from staying in control of what happens during mediation, or leaving a mediation at any time.

### (c) Enforceability of Mediation Agreements

Article 6 of the Directive requires member states to provide for enforcement of mediated settlement agreements that result from mediation.<sup>40</sup> The reason behind this provision is that parties from different states, and which fall under different legal systems, will now be able to enforce a mediated agreement in their respective countries through a judgment or court order.<sup>41</sup>

However, the parties will need to bear in mind that states will not be required to enforce settlement agreements if these violate other aspects of national law. Since mediation can often result in finding creative alternatives for the resolution of a dispute, the parties must make sure that these alternatives, if any, can be legally enforceable in one country or another, and can, for example, be executed by a court order of judgment in the different countries of the parties.<sup>42</sup>

It is also useful to point out that, even though the Directive provides for enforceability of mediation agreements, it remains silent about the enforceability of agreements to mediate, which leaves up to each state the

decision on whether and how to regulate agreements to mediate.<sup>43</sup>

#### **(d) Confidentiality of Mediation**

One of the strongest aspects of mediation, which is crucial to the development of this means of dispute resolution, is the confidentiality of documents and communications arising out of or in connection with the process. Article 7 of the Directive provides that the mediator cannot be compelled to give evidence about what took place during mediation in subsequent proceedings between the parties. There are, however, two exceptions to this principle: (i) “where it is necessary for overriding considerations of public policy of each member state, particularly when required to ensure the protection of the best interest of children or to prevent harm to the physical or psychological integrity of a person”; and (ii) “where disclosure of the content of the agreement resulting from mediation is necessary to implement or enforce that agreement.” There is nothing in the Directive preventing member states from enacting stricter measures to protect the confidentiality of mediation.

This provision is the first step toward protecting the confidentiality of mediation, but it has one very important drawback: it only prevents the *mediator* from being compelled to share information, but not the parties. In sum, another way of reading this part of the Directive is that “any statement, offer, demand, or concession made by any party during mediated settlement discussions can be repeated, reproduced, compelled, broadcast or entered in evidence by anybody, except the mediator.”<sup>44</sup> Needless to say, the lack of privilege, when the information is transmitted by the parties, is a significant flaw in the Directive, which would technically enable parties subsequently to use such information in a court proceeding, in arbitration, or even to the press.<sup>45</sup> It will now be up to each member state to implement the respective provisions concerning confidentiality in a manner that takes this element into account.

#### **(e) Expiration of Limitation Periods**

In Article 8, the Directive covers the issue of the expiry of limitation and prescription periods during the mediation. As was mentioned above, many member states have already either enacted legislation on this issue, or issued court decisions on it. However, the Directive reinforces the fact that, if the parties choose to attempt to solve their dispute by the means of mediation, they cannot be prevented from subsequently initiating judicial or arbitral proceedings due to the expiration of the limitation or prescription period during the mediation proceedings.<sup>46</sup> This was motivated by the desire to protect the principle of fair access to justice should the mediation fail, hence encouraging parties to try to solve their dispute through mediation.<sup>47</sup> The limitation period

is not expressly suspended, it simply cannot expire. It will be up to each state to enact its specific legislation regulating how this provision is to be applied.

By creating a formal framework for mediation within the European Union, coupled with the pre-existing model laws and legislative acts of individual countries, including those who are not members of the EU, it becomes clear that in today’s world cross-border commercial mediation is definitely regulated enough to allow parties to be confident in trying to use the process.

After having explained what mediation is, and how it is regulated in various areas of the world, one must then evaluate if cross-border mediation could be an effective solution for international dispute settlement in today’s increasingly international business world.

### **IV. Mediation as a Method of Alternative Dispute Resolution for Cross-Border Disputes**

#### **A. Overview of the Already Available Dispute Resolution Methods**

To understand where mediation stands within the landscape of dispute resolution methods, it will be useful to make a summary of the main aspects of negotiation, arbitration and litigation.

##### **1. Negotiation**

Negotiation is the least formal method of solving commercial disputes, where the concerned parties communicate directly in order to try to reach a solution to their conflict. There is no formal structure for the process of negotiation, and very little legislation governing it.<sup>48</sup> The success of negotiation will depend solely on the will of the parties, which can be both an advantage but also a drawback. The advantages of negotiation are that the parties are free to choose the way the negotiation will be conducted, and that the information pertaining to the dispute at hand remains between the parties. However, such an informal process might in practice hinder the success of settlement, since parties who are facing a dispute are generally bitter, and sometimes even angry, making direct communication difficult, and thus minimizing the chances of reaching a negotiated solution. Moreover, they may not have a realistic perception of the respective strengths and weaknesses of their positions.

##### **2. Arbitration**

Arbitration is an adjudication method which is less formal than litigation, but more regulated than any other method of dispute resolution. Arbitration is generally initiated at the will of the parties, through an arbitration clause included in a contract. Pursuant to this clause, an arbitral tribunal will be constituted, which will contain one or more appointed or selected arbitrators, who will

serve as judges of the dispute. Arbitration is often associated with the concept of privatized justice, since the procedural rules and substantive rules that will apply to the arbitration are chosen by the parties. For example, arbitration allows commercial companies to turn to an arbitration organization which abides by certain procedural rules and which will appoint arbitrators who are experts in the commercial field at hand, who will themselves render an award according to the substantive law of a certain country. This gives the concerned parties some control over the process, even though the outcome of the procedure is entirely out of their hands. Arbitration also has the advantages of being confidential. The arbitration award is generally not subject to an appeal, and will be recognized and enforced in many countries.<sup>49</sup> However, the costs and delays associated with arbitration have become increasingly high, and the formality of the procedural rules of the process, in matters such as evidence and discovery, sometimes makes arbitration very strenuous for the parties.

Arbitration has been up to now the method of choice for solving cross-border commercial disputes, since multinational companies did not want their disputes publicized and wished to keep a certain degree of control over the process, while still wanting the outcome to be binding, final, and internationally enforceable.

### 3. Litigation

Litigation is the traditional method of dispute resolution, by which the parties submit their claim to a court, and where a judge will decide on the outcome of the conflict, usually by allocating fault to one party, and sentencing that party to some form of compensation for the damages incurred by the opposing party or mandating the defaulting party to specifically perform its obligations. Litigation is a public process; it is subject to very formal specific laws, both procedural and substantive, which the parties cannot choose from, since their application is determined by the conflict of laws rules in matters of international disputes. In addition to the publicity and mandatory application of state laws, litigation generally suffers from severe delays, and it can often take over five to ten years for the court to reach a final decision. Moreover, that decision is subject to an appeal, and the appellate court decision can also be appealed in some jurisdictions. This makes the certainty of a final and binding solution for the dispute only available many years after the dispute has arisen. Moreover, the decision, both in the court of first instance and on appeal, may be made by judges (or in the court of first instance, lay juries) who are not experienced in analyzing and resolving complex cross-border disputes.

It seems clear, with this very brief description of these three methods, that they each have their advantages and

disadvantages, making them more or less suitable for solving cross-border commercial disputes. Even though arbitration has taken the lead as the most used means of transnational dispute resolution, mediation definitely has some attractive elements, which could make it the new solution for reaching international dispute settlement in matters of transnational business.

### B. Advantages of Mediation

The main advantages of mediation which need to be mentioned are the cost and speed of the process, but also the rapport that is created between the parties during mediation, as well as the control they have over the process.

#### 1. Time and Cost

It is well known in commercial matters that costs and speed are crucial factors for conducting a business. Thus, it seems that the best possible method to solve commercial disputes would be a means that offered advantages both in terms of time frames and modest costs.

Generally, a commercial mediation will take about one day, and if the complexity of the international commercial dispute is above average, it will sometimes last a total of two days to reach a mediated settlement agreement.<sup>50</sup> In order to prepare for mediation (by conducting pre-mediation meetings between the mediator and the parties), to schedule the mediation session(s), and to proceed with the mediation itself, the estimated total time for cross-border mediation to take place will be about three months. Parties to an international dispute now have the chance to bring closure and settlement to their dispute within such a time frame, which is far more beneficial for both the parties and the business itself than the year or more that arbitration may take, or the three or more years it might take for a court to issue a ruling.

The short period of time it takes to conduct mediation influences the cost of the process significantly, since the time not spent in arbitration and litigation is time that could be used to conduct more business. But it also means that companies will have significantly less expense in court and lawyer fees. In addition, the cost of a mediator for one day of mediation generally ranges from \$5,000 to \$12,000, and considering that commercial mediation rarely takes more than two days, this expense is clearly more affordable than arbitration. Overall, companies that regularly use mediation benefit from greater savings in legal costs and less management time spent on dispute resolution.<sup>51</sup> The following chart is an illustration of comparative costs and time frames associated with arbitration and mediation, and is based on \$25 million disputes handled by the International Chamber of Commerce.<sup>52</sup>



Assumptions	Arbitration	Mediation
Facilitators	3 Arbitrators	1 Mediator
Internal Counsel per Party	1	1
External Counsel per Party	3 (1 Partner + 2 Assoc.)	1 Partner
Witnesses for both Parties	10 (6 fact + 4 expert)	0
Document Production	Moderate	None
Venue	London, UK	London, UK
Hearing Time	1 week	2 days
Cost Items		
Institution	72,500	8,000
Arbitrators/Mediator	408,500	25,000
Internal Counsel	100,000	10,000
External Counsel	2,000,000	50,000
Facilities	5,000	2,000
Document Production	50,000	0
Witnesses	100,000	0
Travel	100,000	25,000
<b>Total Costs</b>	<b>US\$ 2,836,000</b>	<b>US\$ 120,000</b>
Average Time		
Hearing	1-3 weeks	1-2 days
Preparation	12-18 months	3-5 days
Overall Resolution Time	18-24 months	2-3 months

The comparison of arbitration and mediation in this chart illustrates that the total cost of mediation would represent less than five percent of what arbitration would cost, and the time allocated to mediation represents between ten percent and fifteen percent of the time necessary for arbitration.<sup>53</sup>

The American Arbitration Association also conducted an international survey in 2006, in which it inquired about mediation by questioning one-hundred-one *Fortune 1000* Companies with mean revenues of \$9.09 billion.<sup>54</sup> The results show that the first reasons for using mediation include saving money and saving time. Indeed, ninety-one percent of questioned companies said saving money was a reason to use mediation, and eighty-four percent of them listed saving time as one of the reasons. In addition, the responding companies stated that in seventy-seven percent of cases mediation reduced the costs to resolve disputes (compared to litigation) and that in eighty percent of cases mediation decreased the time it took to solve disputes.

In addition to saving time and money, mediation also allows the parties to continue their business relations.

## 2. Rapport Between the Parties

Mediation permits the parties to come to an amicable solution that will settle their dispute. The result of a mediation can therefore be a “win-win” solution, since the parties need to both agree for there to be a settlement, and they will obviously only agree to an agreement that is acceptable for them. In mediation, the parties are not in a direct adversarial situation as they would be during arbitration or litigation, and they are rather in a collab-

orative situation, which requires them to understand, agree with, and give in to the opposing party. With the help of the mediator, parties are able to rebuild the trust that was broken, which might have led to the dispute, or might understand more thoroughly the reasons why one party defaulted on its obligation. Whereas in litigation or arbitration the search for a culprit is the main element of the procedure, mediation is really not about who is right or who is wrong, but rather about how the parties can make things better in the future. In relation to business relations, the public finding of wrongdoing in the business setting will surely have undesired repercussions on the losing party in arbitration or litigation, either for future business transactions or even reputation.<sup>55</sup>

The dynamics of mediation cause the parties to put themselves in the other’s shoes, and to view the dispute from a different perspective, without focusing on the fact that the opposing party is an adversary, but instead, considering them as a partner with whom they must collaborate in order to find an acceptable solution to the dispute. If parties mediate in good faith, often the commercial relations resulting from the mediation may even be better than before they entered into mediation, since they have had the possibility through the process to be creative and even develop new business perspectives which would satisfy them both.

The collaborative aspect of mediation is one of the main reasons why mediation is perfectly suited for cross-border mediation, since usually both parties have either been working together for some time, or are expected to be working again together in the future. By using mediation to prevent their business relationship from negatively spiraling out of control, business partners are able to put aside the conflicted aspect of their relation in favor of more opportunist aspects, have the chance of salvaging a business deal gone sour, and even have the opportunity of building on their pre-existing partnership.

Commercial players are now able to solve their disputes in a fast and less expensive manner, while maintaining ongoing business relations with other players of the commercial scene, therefore saving money, time, and the hassle of losing a business partner for good.

The elements clearly illustrate the main advantages of commercial mediation, which are emphasized in the situation of a cross-border dispute, but one last element needs to be explained, and that is the control the parties have over the process.

### 3. Control Over the Process

Mediation is one of the least formal alternative dispute resolution processes there is, since the parties (i) choose the mediator, (ii) choose which type of mediation they want, (iii) choose whether to engage in negotiation discussions during the mediation, (iv) choose whether to exchange information (v) choose to accept proposals as they please, and (vi) can even choose to leave the process whenever they want to. Mediation is designed to empower the parties, because parties who feel they can control the outcome of a dispute tend not to be able to resist trying to resolve their dispute according to their own terms. Therefore, with the help of the mediator, who will maintain the balance of power during the mediation, the parties are free to go as far as they wish to in order to put their conflict behind them.

In addition to empowering the parties into having almost absolute control over the procedure of mediation, the parties also are empowered as to the substance. Indeed, in contrast to litigation or arbitration, which can offer only a limited number of remedies to resolve the dispute, there is no limit as to what kind of remedy the parties can agree to in their mediated settlement agreement. For example, remedies that can be contemplated with mediation include (i) agreements to work together in the future, (ii) covenants not to compete, (iii) structured settlements, (iv) specific performance, (v) earn-outs and (vi) even apologies,<sup>56</sup> which are highly regarded in some cultures in matters of international transactions.<sup>57</sup>

This freedom to decide on the practical outcome of the dispute is a key factor which makes cross-border commercial mediation a very appropriate means to solve international business disputes.

After having assessed the advantages of mediation for international commercial disputes, it is also worth exploring how effective this process can be.

### C. Current Effectiveness of Mediation

In order to evaluate the effectiveness of mediation for cross-border disputes, three elements should be taken into consideration: the enforceability of mediation clauses; the enforceability of mediated settlement agreements; and, finally, the success rate of this settlement procedure.

#### 1. Enforceability of Mediation Clauses

In most international commercial contracts, the parties include a dispute resolution clause, which in many cases is only an arbitration clause, but often there is also a duty to try to resolve the dispute in good faith in an amicable way. The parties sometimes see this second part as a negotiation clause, but since negotiation is not regulated, such a duty is unlikely to be enforced in court. Mediation on the other hand is increasingly being regulated, both domestically and internationally, and in some countries,

courts refuse to hear a claim if mediation was not attempted beforehand.

Indeed, in countries such as Germany, England, Belgium and France, the legislature or the courts have already provided that in cases where the mediation clause is sufficiently clear, the courts will not hear a claim if one of the parties has invoked the duty to mediate and that duty has not been satisfied.

Even though the European Directive is silent on the issue of the enforcement of mediation clauses, it appears that an increasing number of states are already adopting some form of regulation in order for mediation clauses to be enforceable. This enforceability contributes greatly to the development and success of mediation in cross-border disputes, since the parties are now assured that they can benefit from trying to mediate their dispute before moving on to an adjudicative procedure.

#### 2. Enforceability of Mediated Settlement Agreement

Another important issue related to the effectiveness of cross-border mediation is whether the mediated settlement agreement can be enforced by state courts. There are two different ways that courts could be able to enforce mediation agreements: first, simply ratifying the settlement agreement and issuing a court order for its enforcement; second, recording the settlement agreement in the form of an arbitral award.

Generally a mediated settlement agreement will take the form of a legal contract that is signed by the concerned parties and that puts in writing their respective obligations. Since it has the legal status of a contract, the settlement agreement normally has a limited binding force, since parties are always free to breach a contract, even though they will have to face the consequences of such breach. Thus, the mere status of a contractual agreement might make the parties feel insecure about the outcome of mediation, even if during the process they actually manage to reach a consensus. The parties to an international commercial mediation will surely not want to take their chances in mediation if there is a risk that the other party then defaults in its obligations, thus forcing the non-defaulting party to bring a lawsuit for breach of contract.

It is to avoid this risk that the European Directive on mediation provided in its Article 6 that member states must legislate for the right of state courts to enforce mediation agreements, by having them become court orders, judgments, or decisions which can then be enforceable in all other member states in accordance with already existing European Union law or domestic law on the recognition and enforceability of foreign judgments of member states.<sup>58</sup> This measure will definitely, in Europe at least, ensure the effectiveness of international mediation, since

there will be a guarantee that the mediation settlement agreement can be enforced.

The other method for guaranteeing the enforceability of a mediated settlement agreement is by ratifying it in the form of an arbitral award. Indeed, whereas mediation agreements still do not benefit from the international recognition they deserve, arbitral awards on the other hand are recognized and enforced in all signatory countries of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. If a mediation agreement could enjoy the same regime as arbitral award, it would immensely benefit the development and use of mediation in commercial disputes.

So far, very few organizations are proposing to treat mediated settlements as arbitral awards for the sole purpose of their enforcement, one of them being the Singapore Mediation Centre and the Singapore International Arbitration Center, also designated as the SMC-SIAC Med-Arb Service.<sup>59</sup> The unique feature of this service is that, after having selected the mediator and having been through the mediation process itself, if mediation was a success and the parties have reached a settlement agreement, the parties can then appoint the mediator they used for mediation as an arbitrator for the sole purpose of recording any settlement reached in the form of an arbitral award containing the agreed terms.<sup>60</sup> This would then allow the mediated agreement to be enforceable extra-territorially in the countries and territories which have acceded to the New York Convention, while nevertheless still being subject to the prevailing laws of the relevant jurisdiction in which the award is sought to be enforced.<sup>61</sup>

Similar to the SMC-SIAC Med-Arb Service, the Mediation Institute of the Stockholm Chamber of Commerce has also adopted a rule providing a result that resembles the Singapore feature. Indeed, Article 12 of the rules of the Swedish Mediation Institute states that, upon reaching a settlement agreement, the parties may, "subject to the approval of the Mediator, agree to appoint the Mediator as an Arbitrator and request him to ratify the settlement agreement in the form of an arbitral award."<sup>62</sup>

In the context of international disputes, being able to use mediation and have its resulting agreement be able to be applied almost worldwide definitely is an attraction, and underlines the concrete effectiveness of cross-border mediation, even though the process is still at an early stage.

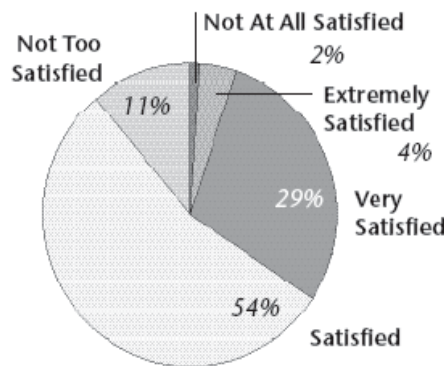
### 3. The Measure of Success

Many different factors could be taken into account to measure the success of mediation. However, for the purposes of this article, only the settlement rate and satisfaction of the parties will be considered.

Most mediation organizations report that the settlement rate is very high through mediation. Indeed, one study found that the combined average rate for four mediation service providers was seventy-eight percent,<sup>63</sup> but in matters of commercial mediation, the probability of settlement is usually in excess of eighty percent.<sup>64</sup>

This attractive success rate is understandable in countries like the United States or England, where mediation is already a widespread and generally accepted process, but, surprisingly, the rate is almost just as high in some European countries as well. The ABC mediation organization in the Netherlands, for example, stated that in 2006 the success rate for mediation of commercial disputes, where there was above € million in dispute, reached seventy-nine percent, and a survey conducted in France by the CMAP, the "Center for Mediation and Arbitration of Paris," revealed that for commercial disputes the settlement rate was above seventy percent. Some would argue that an average of eighty percent is not that high, considering that the overall settlement rate is apparently closer to ninety-two percent,<sup>65</sup> a difference which could lead one to think that mediation is not all that effective. However, such an argument cannot stand, because in an overwhelming majority of cases, the lawyers for the parties had previously attempted to reach a settlement through negotiation, but after the settlement discussions failed, they decided to bring their dispute to mediation. Bearing this in mind, many cases submitted to mediation are therefore disproportionately tough cases.<sup>66</sup> Consequently, an average settlement rate of eighty percent with mediation becomes much more impressive.

The other main element by which the success of mediation can be measured is the satisfaction of the parties with the process. Studies have indeed shown that the parties are in general very satisfied with the process, as the ninety-two percent rate of willingness to repeat mediation presented by the Dutch ABC mediation organization in 2006 suggests. The American Arbitration Association Survey also reported that a vast majority of companies—eighty-seven percent—were either satisfied, very satisfied, or extremely satisfied with their recent experiences with mediation, as shown in the chart below.<sup>67</sup>



Company Satisfaction with Mediation

The satisfaction parties have with mediation probably originates from the fact that mediated settlement agreements are reached by the parties themselves and not through a decision or ruling made by either a judge or an arbitrator. In addition, parties are probably more inclined to be satisfied with mediation because, however successful the outcome is, there is no “losing party” in mediation, since the ultimate goal is to agree to a “win-win” solution which is acceptable for the parties, and even if the process does not end in a settlement agreement, the parties will have at least believed they have been heard, will have understood the situation more clearly, and will have had the opportunity to do some reality testing as to the strengths and weaknesses of their case.

#### **D. Drawbacks of Mediation**

The main drawbacks of mediation come from the informal aspect of the process, and include the need for voluntariness, the need to assure confidentiality, and the need for cooperation of the parties. Another negative element that comes into play is the difficulty to ensure that the mediators are sufficiently qualified. Finally, mediation, especially cross-border mediation, can be hindered by cultural differences between the parties.

##### **1. Voluntariness**

As we have seen, recent legislation or court decisions in various countries provide for the enforceability of mediation clauses. However, this enforceability is limited by the fact that the parties must try to mediate their dispute in good faith. One of the main strengths of mediation is the fact that the parties are in control, but this also leaves open the option for either party to leave the mediation at any time. Voluntariness therefore can also be a drawback, because at any time a party can simply decide to abandon all efforts to reach a settlement, and the energy and expense that will have been invested will be lost. This is clearly a downside of mediation, and contrasts with the certainty of an outcome that the parties can find in adjudication procedures. Nevertheless, even though the risk of one party walking away from mediation exists, it may encourage parties to make the good faith effort to mediate, by never presenting outrageous proposals which could cause an opposing party simply to leave. With the risk of having one party abandon the mediation, it brings some sort of balance to the process, since both parties know how fragile it can be if one party acts out of line, or presents offers which are too extreme and can be seen as insulting.

##### **2. Confidentiality**

Confidentiality has always been a very dear issue to parties that are facing a dispute. This is especially so when the parties have had a previous business relationship, and each party does not want the other party to be aware of any vulnerabilities one party may have. This takes on even greater importance if the mediation fails,

since any information shared during mediation is then known to the other party. Despite the fact that it might not be admissible in court or arbitration, the simple fact of being aware of some information can be useful to one party in presenting legal arguments to a tribunal.

Mediation is a consensual process, and one factor necessary for its success is the communication of information to the other party. If one party refuses to communicate any information (which could be anything from the production of a document to the making of a settlement offer), there is a fair chance that the opposing party will not want to communicate information either. However, if parties decide to show some good faith and offer some information, then the mediation process will make progress, but will also expose the parties.

In addition to the parties themselves being aware of confidential information, the mediator will become privy to confidential information about the disputants, particularly during a “caucus,” which is a private session between one of the parties and the mediator during which the mediator assists the party in evaluating and formulating settlement proposals and understanding the issues that are being discussed. During one of these caucuses, one party can share information with the mediator which they do not want him to repeat to the opposing party, and for the sole purpose of helping the mediator understand the situation better. When the mediator will go into caucus with the other party, there is no concrete guarantee that he will keep the previously shared information confidential, and the professionalism of the mediator is the only assurance the parties will have.

Finally, concerning confidentiality, there is also a risk that if the parties fail to reach an agreement during mediation, they will try to invoke information that was shared during the mediation process to support their claims in court or arbitration. This was one of the major downsides of mediation before the process began to become regulated. However, the increasing regulation of mediation is putting an end to this threat, as most laws on mediation provide that any information arising from mediation is inadmissible in court or in arbitration.

##### **3. Cooperation of the Parties**

Mediation is a process that can only go as far as the parties wish to take it. In contrast to court proceedings or arbitration, where the judge or arbitrator will issue a ruling regardless of how the parties behave, for mediation to be successful there must be cooperation between the two opposing parties. This is one of the drawbacks of mediation, since it makes the process subject to the mood and feelings of such party, which unfortunately is often a barrier to settlement. If one party is not cooperative, the entire balance of mediation is lost, and it will be extremely difficult to reach a settlement. This is where the mediators have a critical role to play, since one of their roles is to

maintain this balance, and bring the two parties, who have every reason not to trust each other, to the table to discuss ways to resolve their problem. Unfortunately, sometimes the parties are simply unable or unwilling to put in the effort to cooperate, or do not succeed in getting past personal feelings, thus leading to an impasse in mediation. In these types of disputes, when parties are unwilling to cooperate, mediation reaches its limits, and another more adjudicative procedure will probably be best suited to resolve the dispute.

#### 4. Mediator Qualification

The issue of mediator qualification is especially important for cross-border commercial mediation, since the complexity of the issues that will be discussed will probably be greater than in a domestic civil matter. Indeed, an international dimension will be brought to the table, with both parties possibly not speaking the same language, or not being equally comfortable in a particular language. The mediator should therefore be very carefully chosen, and should be able to be proficient enough in the languages of both parties, so that if needed, they can talk to the mediator in their native tongue in order to make themselves perfectly clear when they negotiate. In addition, the mediators for a commercial dispute should be selected based partly on their business perspective, since the parties will need the mediator to understand the commercial implications of the dispute, as well as help the parties find creative but commercially feasible solutions to solve it. Regrettably, there is little uniformity in the training of international mediators. Mediators are often trained in a particular country, and then build experience, which may or may not be international in nature, meaning that there is no accurate way to evaluate the level of qualification of mediators. Usually parties select a mediator who has been recommended to them, either by a business partner or a trusted contact, but they can also turn to mediation service providers that require their mediators to meet certain professional standards. In order for mediation to be successful, the parties need to trust the mediator, and it is sometimes difficult for parties who face a highly complex transnational commercial dispute to find a mediator who is sufficiently qualified. Although the lack of uniformity in qualifications is one of the drawbacks of mediation, the parties can overcome that drawback by simply meeting different mediators before choosing the one who will mediate their dispute, allowing them to get to know how the mediators work, what type of mediation they are most comfortable with, what level of expertise they have and which languages they speak. Since mediation is a very personal process rather than a purely legal one, the parties can trust their personal judgment when they select a mediator in a manner that, in spite of the lack of uniformity of mediator qualification, allows them nevertheless to find a sufficiently competent mediator to mediate their specific dispute.

#### 5. Cultural Differences

When mediating cross-border commercial disputes, the parties as well as the mediator may find that this dispute resolution method is hard to apply when those involved in mediation come from different cultural backgrounds. Indeed, in addition to the language barrier, which is relatively easy to overcome in this age of globalization, the cultural background of individuals heavily influences the way they will conduct a negotiation. Even though the mediator's role is to maintain balance between the parties, this is not easily done when the parties, by their behavior, communicate in different terms, notwithstanding the fact that they may be speaking the same language. Cultural differences will not only influence how parties will behave during mediation, but will also affect their perception of what is being presented to them by the opposing party. The existence of cultural differences can therefore obstruct the mediation process, and, if not understood and taken into consideration, can even make the relationship that the parties had before trying mediation worse. For international commercial disputes involving parties from different cultures, mediation may not be the most appropriate dispute resolution process, since these differences often lead to negative outcomes. However, by taking these cultural differences into account, by understanding and explaining them during mediation, the parties can still manage to find grounds for an agreement, and reach a successful outcome, with the help of a cross-culturally trained mediator.

#### V. Cultural Issues for Cross-Border Mediation

Every individual or group of individuals has a different way of negotiating, which can be explained by many different factors. However, the predominant factor that explains these differences is the cultural background of each negotiator. Cultural differences will thus play a significant role in cross-border mediation, especially if the parties come from very different cultures. It is therefore important to explore cultural issues for cross-border mediation by first defining what culture is, then by analyzing the main elements of cultural divergences, and finally proposing solutions in order to get past the cultural barriers to settlement.

##### A. What Is Culture?

Unfortunately there is no one way to define culture, since the true meaning of this concept is not set in stone. There have been over years numerous definitions of culture. Some define culture as including all aspects of a person's values, beliefs, perceptions and behaviors; others suggest that culture "only includes a person's thought process;"<sup>68</sup> and, finally, culture has also been defined as "the integrated system of learned behavior patterns which are characteristic of the members of a society, and which are not the result of biological inheritance."<sup>69</sup>

These different definitions seem to open the possibility that no two individuals are alike, which adds another challenge when mediators enter into a “cross-cultural” mediation, because according to this idea, every mediation can be seen as “cross-cultural.”<sup>70</sup> Thus mediators must be able to identify the different particularities of each culture in order to deal with them in a constructive way when cultural differences arise as barriers to settlement.

## **B. Cultural Elements to Take into Consideration When Mediating Internationally**

In spite of the fact that there is no simple way to define culture, it is safe to say that a person’s culture may have an impact on that person’s attitudes toward and during a mediation.<sup>71</sup> Indeed, due to cultural differences, there is no guarantee that what one party is trying to communicate will be interpreted in the intended manner by the other party, if the other party is from a different culture. The major elements, which need to be explained in order to then propose solutions to go past cultural barriers, are those identified by Edward T. Hall, Geert Hofstede, and Jeswald Salacuse.

### **1. Edward T. Hall’s High/Low Context Communication**

High/low context communication was pioneered by Edward Hall, and is probably the most important cultural difference that one can encounter during cross-border mediation. According to Hall, in low context cultures, people communicate directly, explicitly and rely heavily on straightforward verbal communication. In this type of communication, important issues are discussed openly, no matter how sensitive the subject is.<sup>72</sup> Low context cultures are more present in the United States, Canada, Australia, and most of Northern and Western Europe, where direct and explicit communication is used.

High context cultures, however, communicate in a way that the information will lie in the context, and is not always verbal. In this type of culture, the talk tends to go around the point. High context cultures value tradition and the past; they also usually feel strong links to the community, and the common knowledge shared by the community is for the culture the key to deciphering high context communications that are not explicit. Asian countries, along with most of the rest of the world not listed above, use indirect, implicit, high context communication.<sup>73</sup>

Professor Raymond Cohen has described how high/low context difference can negatively impact on mediation, and he points out that American negotiators, for example, tend to be surprised by their interlocutor’s preoccupation with history and hierarchy, and preference for principle over detail. He also describes how Americans can get frustrated by opposing parties in mediation when they are reluctant to “put their cards on the table,”

or when they are evasive or dilatory. On the other hand, non-western parties can be surprised at the opposing party’s ignorance of history, preoccupation with individual rights, excessive bluntness, constant generation of proposals and the inability to leave a problem pending. They can be frustrated by the opposing parties’ occasional obtuseness and insensitivity, readiness for confrontation and inability to take no for an answer.<sup>74</sup> It becomes clear that during mediation, the high/low context issue arising from cultural differences can be a serious barrier to settlement, and will need to be addressed by the mediator in order to make the process a success.

### **2. Geert Hofstede’s Four Dimensions Related to Cultural Differences**

The first dimension identified by Hofstede is the power distance index (PDI). According to Hofstede, a lower power distance culture will value equalization of power and competence over seniority.<sup>75</sup> This PDI can also be assimilated to a measure of hierarchy. Indeed, status will be very important in a high power distance culture, and inequalities in society are expected and even desired.<sup>76</sup> In low PDI cultures, however, there is a stress on equality and opportunity for all. In such a culture, there is less dependence on superiors and more interdependence between people.<sup>77</sup> Hofstede’s studies have shown that wealthier countries and countries from northern latitudes tend to have a low PDI, whereas most Asian, Latin and South American and Arab countries tend to have a higher PDI. Needless to say, those from different cultures with different PDIs can easily develop conflicts regarding status, deference and respect, which can be significant barriers during mediation.

The second dimension is that of individualism versus collectivism. In an individualistic culture, individual needs and independence are valued over the community’s needs. In individualist cultures, individual interests prevail over those of the group,<sup>78</sup> whereas in collectivist cultures, individuals act as members of a group and put the interest of the group or organization before their own personal needs. Americans and Europeans are generally more individualistic, whereas Asians tend to be more collectivist. During mediation, these differences can be a barrier to settlement because opposing parties might be in a situation where they are seeking to satisfy very different interests. An illustration would be that individualists focus primarily on reaching a settlement agreement that the parties will sign, but collectivists will be more interested in maintaining a business relationship with the group that used to be their commercial partners.<sup>79</sup> In sum, in individualistic cultures, the negotiation task prevails over the relationship, and in collectivist cultures the relationship prevails over the task.<sup>80</sup>

Another dimension identified by Hofstede has to do with what he calls “gender.” This issue relates to whether the culture is more “masculine,” in that it values asser-

tiveness, competitiveness, and independence, or whether the culture is more “feminine,” in that it values nurturing, cooperation and relationship.<sup>81</sup> This distinction, which can be considered sexist, can equally be defined as assertiveness versus cooperativeness. A culture of assertiveness will value achievement, control, power, money, aggressiveness, dominance, challenge, ambition and competition, and can be summarized in the phrase “to win at all costs.”<sup>82</sup> Countries which have a tendency to be more assertive are Japan, Switzerland, Mexico and the Arab world, whereas the Scandinavian countries, as well as Thailand and South Korea, tend to be the most cooperative. The United States, as well as most European countries, seem to be in mid-scale, according to Hofstede’s research.<sup>83</sup> This cultural difference may have a great impact on mediation, since assertive negotiators will attempt to dominate the other through power tactics and will be reluctant to make concessions, in opposition to cooperative negotiators, who will prefer to discuss interests, offer concessions and be willing to consider the dispute in a more neutral way to maximize the chances of settlement.

The final dimension defined by Hofstede’s model is whether people in a culture are prone to avoid risks or to take risks. Risk avoiders tend to dislike risky and unclear situations, while risk takers will be more open to new ideas and to be creative in their problem solving approach.<sup>84</sup>

Negotiators from cultures that value risk aversion will prefer to keep the mediation structured, and will always follow the ground rules set forth by the mediator, since they are usually not comfortable in unconventional situations. They tend to value precision, and leave very little to chance. Countries which have a culture of high risk aversion are Greece, Portugal, Japan, Spain, Mexico and Belgium.<sup>85</sup> Cultures which tend to have a higher tendency to embrace risks, such as in the United States, England, Hong Kong, Sweden, Denmark and Singapore, usually tolerate uncertainty: they are less rule-oriented and are open to new situations.

This factor can be very important during a cross-border mediation, since there is the chance that the parties will find trouble cooperating if one is constantly proposing new options toward settlement and the other is unwilling to change its position, or to consider more creative solutions to the dispute. In addition, it is worth mentioning that, generally, risk avoiders are driven by fear of failure, whereas risk takers are motivated by the hope of success.<sup>86</sup>

### **3. Jeswald Salacuse’s Approach to Cultural Differences When Negotiating**

The last author who needs to be discussed in order to fully grasp the extent of the impact cultural differences

have over mediation in a context of cross-border commercial disputes is Jeswald Salacuse.

Salacuse identifies ten ways that culture could impede reaching an agreement.

The first element pertains to the negotiation goal, and whether the parties focus on the contractual aspect of the dispute, or on the relationship they have had with the other party. Americans tend to insist more on the contractual relation, while the Japanese, for example, focus more on the relationship. This can lead to barriers during the mediation, as one party might see it as a sign of lack of trust if one party is insisting on detailing all the provisions in a contract, while the other party may feel as if the opposition wants to escape its obligations by not putting every aspect of the agreement into a contract.<sup>87</sup>

The next issue concerns the negotiating attitude. Some parties will have a win-win approach to the settlement negotiations, while other parties will have more of a win-lose approach.<sup>88</sup> It will therefore be up to the mediator to make sure all parties are clear about what the process is about, so that the mediation can still be constructive.

Salacuse also mentions the formality aspect of the mediation. Indeed, some cultures, such as in the United States, find it normal to call each other by first names, or behave or dress in a casual manner. However, in other cultures, such as in France, Japan or Egypt, for example, this lack of formality will be seen as a sign of disrespect,<sup>89</sup> and will greatly hinder the mediation.

Another point is that of direct or indirect communication, as discussed above.

Depending on their culture, Salacuse also explains that parties might not have the same sensitivity to time. For example, Americans are usually perfectly on time: they reduce formalities to get down to business quickly,<sup>90</sup> and decide rapidly on the closing of an agreement, whereas in Japan, negotiations are taken slowly. Some parties will feel that spending time in mediation strengthens the relationship between the parties, which is an important factor when two business partners are in mediation to settle a dispute but still want to maintain some kind of commercial relation, while others will see the extra time spent in mediation as a waste.<sup>91</sup> These different perceptions, if not expressed and explained, can also be barriers to settlement.

Emotion is an additional factor that can come into play during mediation, and can be either a liberating element for a party which will permit it to mediate more openly, or it can be a hindrance. Some cultures, particularly in Latin America, tend to show their emotions during mediation, whereas others, such as in Japan, hide their emotions at the bargaining table.<sup>92</sup> Unfortunately, for

some more reserved cultures, showing emotion might be interpreted as a sign of aggression.

Also, Salacuse points out the element of the form of the agreements, whether it be a general one or a more specific one. Americans tend to desire a lot of detail in their agreements, providing for a legal remedy for any possible solution, whether predictable or not, while in China, for example, parties will prefer a more general contract, with the intent of maintaining a future business being the guarantee to the execution of the unwritten mutually accepted obligations. However, the American view is often seen by the Chinese as a sign of not wanting to maintain a long-term relationship, which can cause serious damage to the mediation process.

Another element put forth in the author's research is the way to build the agreement. Indeed, some cultures tend to build an agreement from the top down while others build it from bottom up. Americans, for example, like to build a settlement agreement from bottom up, discussing each and every issue step by step, one after the other, while in France, for example, negotiators tend to aim for a general framework agreement, and in a second phase will fill in the specific issues that need to be covered.<sup>93</sup>

Another aspect that can impede a settlement agreement is the way the parties are organized. Indeed, in some cultures, there is only one leader who will make the decisive decisions, while in other cultures, for a proposal to be accepted, it has to be agreed to by a group consensus.<sup>94</sup> The American style is that there is generally one person with the authority to negotiate, while in Japan, for example, there is often a delegation of negotiators who do not necessarily have full authority to negotiate, and must refer to a company hierarchy for final approval once the delegation itself has agreed to the proposal. These differences can be misinterpreted by parties, since Americans sometime believe the Japanese counterparty is not taking the negotiation seriously if they are not able to settle the dispute themselves.

Finally Salacuse describes the element of risk, which has already been discussed above.

With the study of all these different factors which can come into play during a cross-border mediation, it may seem that these differences cannot be overcome, and that mediation is maybe not the best solution to deal with these types of international commercial disputes that involve cross-cultural issues. However, where direct negotiations between very different parties have a significant chance of failure, mediation on the other hand can still be effective, since the parties are assisted by a mediator, who can use his knowledge in inter-cultural differences to get past these seemingly overwhelming barriers and facilitate the negotiations so that an acceptable settlement agreement is reached.

## C. Getting Past Cultural Barriers Toward Settlement

It should now be clear that cross-cultural mediation is more challenging than domestic mediation because of the numerous cultural differences the parties will face during the process. Nevertheless, with good preparation, by keeping an open mind, and by communicating these differences, the mediator can still help the parties reach a mediated settlement agreement.

### 1. Good Preparation

Cross-cultural mediation can only be successful if both parties and especially the mediator prepare for the process thoroughly. Part of this preparation will involve learning about the culture of the parties before entering into the mediation itself: that is, familiarizing oneself with the stereotypes about the culturally different parties who will be present.<sup>95</sup> Another element of the preparation will involve investigating the people who will be present, as well as the problem itself. The goal is to try to understand beforehand how each person feels about the problem, and how each person views the dispute. In addition, collecting all available information concerning the different cultural differences will help understand each person's behavior during the mediation, and ultimately smooth the process.

Mediator Julie Barker listed the top ten elements that she uses when dealing with inter-cultural mediation, and some of these include learning not only to recognize how culture affects bargaining tactics and positions, but also how to respond accordingly. Another very important element she points out is the need to do some research in order to understand the importance some cultures give to non-business factors such as family, religion, and historical influences. She also points out that, when preparing for mediation, the mediator should know some basics of the counterparts' languages, and if the mediator is not comfortable enough in that language, to choose a trusted interpreter who is very capable.

Raymond Cohen also made a top-ten list of elements that should be taken into consideration when dealing with a cross-cultural mediation, and he equally insists on learning each party's culture and history, in addition to understanding thoroughly the problem at hand. Moreover, he points out that the mediator should spend time before the mediation to create a warm and personal relationship with the parties he will be assisting during the mediation.

### 2. Keeping an Open Mind

The best quality a mediator can bring to a cross-cultural international commercial mediation is having an open mind. This is harder to apply than one might think, because the mediator will necessarily have been brought up in one particular culture, and the mediator must manage to detach himself or herself from that culture to be able to embrace all the cultures present during mediation



without being judgmental or acting solely based on cultural stereotypes. That is no easy task.

Keeping an open mind can refer to many things, one of which is to be conscious of one's own behaviors and predisposition, and what impact they can have on the parties.<sup>96</sup> It also can mean not to assume that what one has said is being understood, or that one understands what has just been said.<sup>97</sup>

An open mind will also be aware of the words and contexts surrounding the mediation, in addition to the indirect formulations and non-verbal gestures. This will require the mediator to read between the lines.

Mediators help parties come to an agreement with even greater success if the mediators learn to identify all the cultural elements listed in the previous section, and act in accordance with the approach each party has to them. For example, the mediator should not be surprised if the parties decide to continue the mediation even after an agreement has been reached, and should pay great attention to politeness, status, and deference.

Keeping an open mind before and during the mediation will allow the mediator to adapt to each party's cultural background, which will create a relationship of trust between the two, an essential element for the success of the process. Moreover, by being open, the mediator will be able to adapt instantly to one party or to another, and therefore facilitate communication between the parties.

### 3. The Importance of Communication

The mediator must be sufficiently knowledgeable and comfortable with the cultural differences present at the mediation, and be able to act as a cultural translator from one party to another, to avoid one of them being offended or frightened by what one would consider to be abnormal in their own culture.

What the mediator can do in order for the parties to communicate effectively, despite the cultural differences they might have, is to explain these cultural differences to both parties, preferably during a caucus. This will have the effect of warning the parties of what they should expect, and reassuring them that the other party is in fact not trying to bully, insult, or show them disrespect. If the mediator manages to "cushion the cultural blows" between the parties,<sup>98</sup> the mediator will increase the chances of success, since the parties may be able to get past these cultural differences that they will now understand in order to focus on solving the dispute at hand.

Communication is often the key to a successful mediation, because by communicating the parties and the mediator can create rapport, exchange information about one another, and, without even realizing it, develop their relationship. The mediator must be a catalyst of communication, who can intervene to explain, reframe or ques-

tion what has been said for the sake of clarity. The importance of communication has even more impact in a cross-cultural mediation, since there will be at least two levels of communication, the factual and the cultural, which the mediator must be able to understand and explain so that the parties are on the same page, and are going in the same direction toward a settlement. Moreover, the mediator must defuse any problem arising from a misinterpretation or misunderstanding due to cultural differences. The mediator must always reassure the parties that the "problem" is not personal, but rather simply a different approach to a situation that can often be rationalized and can be put aside, since it does not have anything to do with *what* is actually being negotiated, but rather concerns *how* it is being negotiated.

Cross-border commercial mediation is clearly more complex than any type of domestic mediation, particularly if the parties come from different cultures. However, it has also been shown that it is possible to overcome this complexity and find solutions to overcome barriers to settlement, and reach an agreement that the parties will be comfortable with.

## VI. The Future of International Conflict Settlement

After having discussed mediation, how it is regulated and how it can be used to solve cross-border commercial disputes effectively, it seems clear that this dispute resolution process can play a significant role on the stage of dispute resolution. Mediation definitely has its strengths, which parties are increasingly experiencing. As a result, new uses of mediation are emerging. In addition, in order to ensure that mediation continues to play such an important role in international conflict settlement, more guarantees are being given to the parties in relation to the process. And, finally, due to the obvious evolution of the way settlements are increasingly being reached, both lawyers and mediators must adapt to the future of dispute resolution.

### A. New Ways to Use Mediation in a Cross-Border Dispute

Parties are beginning to understand that mediation can effectively help them resolve their disputes, while saving them time and expense. Therefore, some parties are now using mediation as part of a larger dispute resolution process, particularly in international commercial disputes, and relaxing the formality of arbitration by mixing some elements of mediation into it.

#### 1. Negotiation-Mediation-Arbitration

This three-step method for solving international conflicts is being applied even more frequently, since it allows parties to take advantage of trying mediation if their direct negotiations fail, while still permitting them to go to arbitration afterwards if the mediation is unsuccessful.

Using mediation before arbitration has a dual advantage: it will offer the parties the possibility of reaching a settlement agreement before having spent the money and time they would spend in arbitration; and it also permits the parties to use mediation to filter the dispute, and settle certain issues that they do not want to leave in the hands of an arbitrator, but rather wish to settle themselves. Indeed, mediation can definitely be used as a filter,<sup>99</sup> so that part of the dispute is settled during mediation, whereas the fundamental issues of law, for example, are left for an arbitral tribunal to decide. As mentioned previously, mediation will go only as far as the parties are willing to take it, and if they want to decide to mediate only certain aspects of their dispute, they are perfectly free to do so, and can still be assured that some other elements will be decided by an arbitrator. Some might argue that, if the parties are planning on going to arbitration anyway, then what is the use of going to mediation, since in any case the arbitrator would have decided on all matters that the parties submit? The first reason is that settling on part of a dispute will save time and expenses for the arbitration, since those elements will not have to be heard during arbitration. In addition, parties may wish to settle the very intricate technical business aspects of the disputes between themselves, while leaving the more general legal implications to the consideration of the arbitral tribunal.

In addition to using mediation as a filter before arbitration, parties are increasingly using a mixed process of mediation and arbitration.

## 2. Med-Arb

Med-Arb is a process which is gaining a lot of popularity, since it is a process by which the arbitrator can in turn act either as an arbitrator or a mediator during the same procedure. The advantages of this are that often parties can come to an agreement on certain elements of a dispute, and the arbitrator can therefore easily function as a mediator, solve those specific elements, and incorporate the mediated outcome into the arbitral award that will be rendered at the end of the process. In this sense, the arbitrator can hear both sides of the case during an adversarial hearing with presentation of legal evidence, and when he has had sufficient information about the issues at hand he can change his role into that of a mediator, to help the parties reach a settlement, on either part of or the whole of the dispute if possible.<sup>100</sup> In China, this mechanism is even provided for in the China International Economic and Trade Arbitration Commission Arbitration Rules, which state that “where both parties have the desire for conciliation,[...]the arbitral tribunal may conciliate the case during the course of the arbitration proceedings,[...] where the conciliation fails, the arbitral tribunal shall proceed with the arbitration and render an award.”<sup>101</sup>

These new uses of mediation, such as the integration of mediation into more traditional methods of resolving conflicts, show how beneficial the mediation process can

be when the parties are faced with a dispute. Nevertheless, since cross-border commercial mediation, albeit growing at a rapid rate, is still in the early stages of its development compared to international commercial arbitration, certain guarantees need to be given to the parties for them to feel confident in using the process.

## B. Future Guarantees for the Parties

Two main guarantees can be given to parties in relation to mediation: the adoption by mediators of professional codes of conduct; and the existence of minimum legal standards which protect the rights of the parties.

### 1. Professional Codes of Conduct

In 2005, the European Union published a European Code of Conduct for Mediators, which sets out a number of principles to which individual mediators can voluntarily commit. Some of the principles covered by this code relate to competence, appointment and advertising of mediators’ services, independence, neutrality and impartiality, mediation agreements, fairness of the process, the end of the process and finally fees and the confidentiality of the process.<sup>102</sup> By a mediator adopting this code of conduct, even though it is not enforceable in the event of a violation by the mediator, parties should feel more confident in the mediation process. Indeed, from a business perspective, the mediator has all the reasons to abide by the Code if the underwriter still wants to practice mediation, since a mediator who violates the code of conduct will acquire a bad reputation and is risking his or her entire mediation career.

Another way to guarantee the competence of the mediators is by selecting the mediators from a recognized mediation institution. The International Mediation Institute,<sup>103</sup> for example, provides parties with a list of certified mediators whose competence has been verified, who must continue their mediation education to stay certified, and who commit to a professional code of conduct which is available online. By selecting mediators from an institution such as this one, the parties can be confident about the competence of the mediator.

### 2. Minimum Legal Standards

In addition to providing the parties with the guarantee that mediators will abide by a code of conduct, many countries, as we have seen above, are now legislating on matters of mediation. These usually new laws provide minimum legal standards that can be enforced by a court, and should reassure the parties of the fact that their essential rights are protected.<sup>104</sup> As was shown in the section on the regulation of mediation, even though the mediation process is still not harmonized, there have been some international attempts to regulate it, in order to guarantee that the parties are entitled to a minimum legal standard of protection when they are using mediation, which

should definitely contribute to the further development of this method of dispute resolution.

Although professional codes of conduct and minimum legal standards provide guarantees for the quality of the process, the effectiveness of mediation also requires both lawyers and mediators to adapt their respective role, particularly when faced with a cross-border commercial mediation.

### C. The Modern Lawyer

With the increasing use of alternative dispute resolution methods, including mediation, but also of settlement in general, the legal profession must adapt to the modern practices in order to best satisfy clients.

The traditional role of the lawyer was to be a legal expert on the technicalities of the law; he had to be adversarial and able to represent and defend adequately his client, even if that meant threatening the other party into giving in. The defense of the client was to be done at all costs, and costs were often unimaginably high.<sup>105</sup>

Lawyers tend still to have this mind frame that winning a case means crushing the other party, or at least having them lose. Lawyers of the past generation took pride in being sharks, aggressive to a point that even other lawyers who believed in their adversarial role feared to face them in court. However, such a lawyer can only be comfortable in an adjudication situation, and taking the recent average settlement rate of ninety-two percent into account, this would mean that these lawyers are really only effective in an average of eight percent of disputes.

In order to satisfy clients' needs, the modern lawyer must adopt a whole new perspective of conflict and of the opposing party. Indeed, the modern lawyer needs to be a legal entrepreneur, always in search of the best possible overall deal for his or her client; the modern lawyer must be open minded and welcome new ideas and alternative means of representing a client in a dispute, so that his or her role fits the current demands of the legal market. And the legal market today needs more cooperative lawyers and fewer aggressive lawyers: it needs lawyers who can focus on generating value instead of crushing an opponent.<sup>106</sup>

The 21st century lawyer must be able to represent his or her client while taking time, cost and energy into consideration, and must be a proficient negotiator in addition to being able to support his or her clients' legal claims before a court. The quest of a chance of winning in court must be replaced by the search for a solution that will be more beneficial for the client, even if this means making concessions in order to improve the odds of reaching an agreement which will satisfy the client, while avoiding spending incredible amounts of money and time in a legal proceeding.

In addition, in this era of globalization, disputes are increasingly international, and despite the often domestic legal education lawyers have, they must be knowledgeable in foreign legal systems, speak multiple languages, and understand cross-cultural differences, so that they can be the most effective when representing the interests of a client.

The face of the legal profession has changed with new methods such as mediation, and the lawyers will have no other choice but to adapt to this change.

### D. The Modern Mediator

In the same way that the role of the lawyers must adapt to the globalization of disputes, mediators must also be able to respond to the new needs of the international legal market. Particularly in the aspect of cross-border commercial disputes, mediators must be trained in business technicalities in order to understand the commercial issues at hand, but also need to be able to identify and deal with cultural differences if they intend to make mediation a success.

Moreover, in spite of the fact that mediation has not yet become completely harmonized like arbitration, modern mediators must commit to professional codes of conduct and always satisfy the constantly increasing legal requirements called for by both domestic and international regulations. In doing so, mediators are ensuring the sustainability of mediation, by constantly aiming for party satisfaction, so that they will keep trying mediation.

## VII. Conclusion

In conclusion, one can say that, even though mediation in cross-border matters is still in its infancy,<sup>107</sup> it has great potential. Indeed, mediation is now a process which is very well defined, both domestically and now internationally, and can be used to solve any type of commercial dispute, as long as the parties decide to turn to it, either consensually or by including a mediation clause in their contracts.

Mediation currently has many advantages to offer. The main advantages are that the process is faster and less costly, while empowering the parties with control over the process itself and the outcome. Indeed, the mediated settlement agreement can provide for a much wider variety of remedies than those available in court or arbitration.

The progressive regulation of mediation, both at state levels as well as on international levels, including the European Directive on certain aspects of mediation in civil and commercial matters and the UNCITRAL conciliation rules, will only make mediation a stronger and more reliable tool for the parties, by providing, for example, for settlement agreements to be recognized and enforced by state courts just as arbitral awards currently are.

It is true that mediation does have some disadvantages, which must not be overlooked. Nevertheless, the success rates of mediation as well as the satisfaction rates of the parties tend to prove that, despite these disadvantages, mediation is becoming the method of choice for solving disputes.

In regard to the cross-border aspect of mediation, the greatest challenge of this new solution is for it to find its place in the current international legal framework. This seems to be taking place, here again with the initiatives of international institutions and organizations.

One must not forget to mention the impact of cultural differences when dealing with cross-border commercial disputes, but even though it may seem as if some of these differences are unfathomable barriers to settlement, we have seen that it is still possible to overcome them and avoid an impasse. Cross-border mediation is reshaping the face of international dispute settlement, and this suggests that both lawyers and mediators need to adapt to this evolution, in order to provide the best possible services to clients or parties in terms of representation and facilitation.

For all the reasons presented in this analysis, cross-border mediation is now a dispute resolution method to be reckoned with, which has shown both its suitability and effectiveness in matters of international commercial disputes.

## Endnotes

1. Connerty, *Developments in cross-border mediation: The use of mediation as part of a "filter" process in cross-border disputes*, Address at First Asian Mediation Association Corporation, Singapore (June 2009).
2. Eidenmüller and Griffiths, *Mediation in Cross-Border Insolvency Procedures—The practitioner's resort of choice in disputes concerning insolvent undertakings*, GLOBAL FORENSICS 10-11 (November/December 2008).
3. Harold Abramson, in his article *Selecting Mediators and Representing Clients in Cross-Cultural Disputes*, 7 CARDOZO J. CONFLICT RESOLUTION 253 (2006), lists six different adjectives that can describe different mediation styles: the self-determination approach of mediation; transformative mediation; evaluative mediation; evaluatively directive mediation; wisely directive; and authoritatively directive mediation.
4. *Id.*
5. *Id.*
6. The power for mediators to give recommendations and make proposals of their own has been adopted in the American Arbitration Association International Dispute Resolution Procedures.
7. Alexander, *What's Law Got to Do with It? Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions*, 13 BOND LAW REVIEW Article 5 (Issue 2: 2001).
8. Murray, *The Cairo Stories: Some Reflections on Conflict Resolution in Egypt*, 13 NEGOT. J. 39 (1997).
9. Connerty, *The Role of ADR in the Resolution of International Disputes*, 12 ARB. INT'L 47 (1996).
10. Rosu, *International Regulations Dealing with Alternative Dispute Resolution for International Commercial Disputes*, 4 EIRP PROCEEDINGS 443 (2009), available at <http://www.journals.univ-danubius.ro/index.php/eirp/article/viewFile/471/441>.
11. There are, however, some exceptions to this privilege, such as: in case of threats of physical injury during the mediation session; abuse of negligence by persons needing protection; and the use of mediation for criminal purposes.
12. Heijmans and Plasschaert, *Effective Cross-Border Mediation in Europe*, Association of Corporate Council Docket, European Briefing (June 2006).
13. Brett, *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers*, 12 NEGOT. J. 259, 261 (1996), which found that the average settlement rate by mediation was seventy-eight percent.
14. Christian Duve, *Civil and Commercial Mediation in the European Union, The Settlement of Disputes from a German Lawyer's Perspective*, available at [http://www.google.pt/url?sa=t&source=web&cd=71&ved=0CBcQFjAAOEY&url=http%3A%2F%2Fwww.ajag.org%2FAJAG%2Flib%2Fexe%2Ffetch.php%2Fajag%2Fvortrag\\_dr\\_duve.pdf%3Fid%3Dajag%253A11\\_kongress%26cache%3Dcache&ct=j&q=christian%20duve%20mediation&ei=DnViTiGnM4iR4ga-juDgCg&usq=AFQjCNGeq\\_Go-zrBgZgGk\\_MsepnDuOTSIA](http://www.google.pt/url?sa=t&source=web&cd=71&ved=0CBcQFjAAOEY&url=http%3A%2F%2Fwww.ajag.org%2FAJAG%2Flib%2Fexe%2Ffetch.php%2Fajag%2Fvortrag_dr_duve.pdf%3Fid%3Dajag%253A11_kongress%26cache%3Dcache&ct=j&q=christian%20duve%20mediation&ei=DnViTiGnM4iR4ga-juDgCg&usq=AFQjCNGeq_Go-zrBgZgGk_MsepnDuOTSIA).
15. Tochtermann, *Agreements to Negotiate in the Transnational Context—Issues of Contract Law and Effective Dispute Resolution*, 3 UNIFORM L. REV. 658 (2008).
16. De Palo, *Cross-Border Commercial Mediation: How Legislation Affects Mediation Use*, presentation to the European Parliament (2007), available at [http://www.europarl.europa.eu/comparl/juri/hearings/20071004/depalo5\\_en.pdf](http://www.europarl.europa.eu/comparl/juri/hearings/20071004/depalo5_en.pdf).
17. *Id.*
18. Brady, *Mediation Developments in Civil and Commercial Matters within the European Union*, 75, No. 3, INT'L J. ARB., MEDIATION, AND DISPUTE MANAGEMENT 390 (2009).
19. *Halsey v. Milton Keynes General NHS Trust*, (2004) EWCA 3006 (Civ 576).
20. Heijmans and Plasschaert, note 12 *supra*.
21. *Id.*
22. *Cour de Cassation*, 23 January 2001 and 6 March 2001, commented by Jarrosson in the (2001) REVUE DE L'ARBITRAGE 749.
23. *Cour de Cassation, Chambre Mixte*, 14 February 2003, commented by Jarrosson in the (2003) REVUE DE L'ARBITRAGE 403.
24. Rosu, note 10 *supra*.
25. *Id.* In the author's opinion, there is no real distinction between conciliation and mediation.
26. Connerty, note 1 *supra*.
27. Duve, note 14 *supra*.
28. Rosu, note 10 *supra*.
29. *Id.*
30. With the exception of Denmark, which has not adopted the Directive.
31. Philips, *The European Directive on Commercial Mediation: What it Provides and What it Doesn't*, available at [http://www.businessconflictmanagement.com/pdf/BCMPress\\_EUDirective.pdf](http://www.businessconflictmanagement.com/pdf/BCMPress_EUDirective.pdf).
32. *Id.*
33. *Id.*
34. Brady, note 18 *supra*.
35. Directive 2008/52/EC of the European Parliament of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters (hereinafter "Directive") Article 4.

36. Articles 5, 9 and 10 of the Directive.
37. Article 6 of the Directive.
38. Article 7 of the Directive.
39. Article 8 of the Directive.
40. Philips, *The European Directive on Commercial Mediation: What it Provides and What it Doesn't*, available at [http://www.businessconflictmanagement.com/pdf/BCMpress\\_EUDirective.pdf](http://www.businessconflictmanagement.com/pdf/BCMpress_EUDirective.pdf).
41. *Id.*
42. Howell-Richardson, *Europe's changing mediation landscape*, S.J. Berwin LLP, THE IN-HOUSE LAWYER (July-August 2008).
43. Philips, note 40 *supra*.
44. *Id.*
45. Rosu, note 10 *supra*.
46. Brady, note 18, *supra*.
47. Blanke, *The Mediation Directive: What Will it Mean for Us?*, 74 ARBITRATION 441-443 (2008).
48. However, some countries have provided legal provisions which stay legal proceedings when settlement negotiations are taking place between parties.
49. An arbitration award can be recognized and enforced locally by state courts without being subject to review (except under certain specific and limited circumstances) through the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, which has been signed and ratified by 142 states.
50. Martin, *International Mediation: An Evolving Market*, in Arthur W. Ravine, ed., CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS (2010) at 404 (2011), available at [www.adrgovernance.com](http://www.adrgovernance.com) (June 2010).
51. Herbert Smith LLP, THE INSIDE TRACK: HOW BLUE CHIPS ARE USING ADR (November 2007).
52. Chart taken from Martin, note 50 *supra*, at 408.
53. *Id.*
54. The research report of this survey is available at <http://www.adr.org/si.asp?id=4124>.
55. Posin, *Mediating International Business Disputes*, 9 FORD. J. CORP. & FINAN. L. 449 (2004).
56. *Id.*
57. Wagatsuma & Roset, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOCIETY REV. 461 (1986).
58. Brady, note 18 *supra*.
59. [http://www.mediation.com.sg/Med-Arb\\_Service.htm](http://www.mediation.com.sg/Med-Arb_Service.htm).
60. Connerty, note 1 *supra*.
61. *Id.*, in reference to [http://www.mediation.com.sg/Med-Arb\\_Service.htm](http://www.mediation.com.sg/Med-Arb_Service.htm).
62. Connerty, note 1 *supra*.
63. Brett, note 13 *supra*, 12 NEGOT. J. at 261.
64. Eidenmüller and Griffiths, note 2 *supra*.
65. Brett, note 13 *supra*, 12 NEGOT. J. at 261.
66. Posin, note 55 *supra*, 9 FORD. J. CORP & FINAN. L. at 451.
67. <http://www.adr.org/si.asp?id=4124>.
68. Savage, *Culture and Mediation: A Red Herring*, 5 AMER. UNIV. J. GENDER SOC. POLICY & LAW 269 (1996).
69. E. Adamson Hoebel, ANTHROPOLOGY: THE STUDY OF MAN (4th ed. 1972).
70. Sim Khadijah Binte Mohammed, *Do You Hear Me Clearly From Over There? Communicating on Different Planes in Cross-Culture Mediation*, Address at First Asian Mediation Association Conference, Singapore (June 2009).
71. *Id.*
72. Barkai, *What's a Cross-Cultural Mediator to Do? A Low Context Solution for a High Context Problem*, 10 CARDOZO J. CONFLICT RESOLUTION 43 (2008).
73. *Id.*
74. Raymond Cohen, *Negotiating Across Cultures: International Communication in an Interdependent World* (1997).
75. Posin, note 55 *supra*, 9 FORD. J. CORP. & FINAN. L. at 466 (2004).
76. Barkai, note 72 *supra*, 10 CARDOZO J. CONFLICT RESOLUTION at 63.
77. *Id.*
78. *Id.*
79. *Id.*
80. Yoshihiro Sano & John Graham, *DOING BUSINESS IN THE NEW JAPAN* (2000).
81. Posin, note 55 *supra*, 9 FORD. J. CORP. & FINAN. L. at 466.
82. *Id.*
83. Geert Hofstede, *CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND* (2005).
84. Posin, note 55 *supra*, 9 FORD. J. CORP. & FINAN. L. at 466.
85. Hofstede, note 83 *supra*.
86. Geert Hofstede, *CULTURE'S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS AND ORGANIZATIONS ACROSS NATIONS* (2d ed. 2001).
87. Jeswald Salacuse, *MAKING GLOBAL DEALS: WHAT EVERY EXECUTIVE SHOULD KNOW ABOUT NEGOTIATING ABROAD* (1991).
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. Barkai, note 72 *supra*, 10 CARDOZO J. CONFLICT RESOLUTION at 55.
96. Laurence Boulle, *MEDIATION: PRINCIPLES, PROCESS, PRACTICE* (2d. ed. 2005).
97. Mark D. Bennett & Michele S. G. Herman, *THE ART OF MEDIATION* (1996).
98. Mohammed, note 70 *supra*.
99. Connerty, note 1 *supra*.
100. *Id.*
101. *Id.* Reference to the CIETQC rules can be found online at <http://www.cietac.org/index.cms>.
102. Brady, note 18 *supra*.
103. <http://www.imimediation.org/>.
104. The right to go to trial if the mediation fails, for example, is set forth in the European Directive on matters of civil and commercial mediation in its article 8, which must be transposed by member states before May 2011.
105. Richard Susskind, *THE END OF LAWYERS* (2008).
106. *Id.*
107. Eidenmüller and Griffiths, note 2 *supra*.