

Effective Cross-border Mediation in Europe

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Compared to the traditional modes of conflict resolution, mediation has one main advantage: The parties do not engage in a process of confrontation, but rather in a process of rapprochement. The parties choose

The Legal Background

Definitions

Arbitration is the form of ADR most like traditional court proceedings. A third party (either a single arbitrator or panel of arbitrators) seeks to facilitate a resolution of the dispute and, absent agreement of the parties, imposes a resolution. Typically, the parties make written submissions, provide evidence, and present their position at a hearing. Arbitration is more formal than other types of ADR and often involves application of court rules of procedure. The decision of the arbitrator(s) is usually binding.

Mediation involves a neutral third party (the mediator) who seeks to facilitate the parties' efforts to resolve their dispute by agreement. Resolution of the dispute depends on the parties reaching agreement; if the parties fail to reach agreement, the mediator does not impose a resolution. The mediator, unlike the arbitrator, does not propose any solution to the parties' disputes, but simply facilitates the parties' amicable discussion, helping them to reach a settlement agreement. The degree of formality can vary widely, but often involves some form of written submission to the mediator (which may or may not be exchanged with the other party), followed by face-to-face meetings with the parties and mediator.

Some useful acronyms

ACAS—Advisory, Conciliation and Arbitration Service

ADR—Alternative Dispute Resolution

CEDR—Centre for Effective Dispute Resolution

CPR—International Institute for Conflict Prevention and Resolution

the means of resolving the dispute and then play an active role in finding the solution best suited to them. This consensual approach increases the likelihood that, once the dispute is settled, the parties will be able to maintain their commercial relations. Even if the mediation does not lead to a full resolution of the dispute, it often serves to narrow the issues that need to be submitted to formal dispute resolution. In many cases it permits a quick, simple, cost-effective resolution of the dispute.

There have been many initiatives in recent years, both at EU level and by the EU member states, to encourage mediation as a way to resolve disputes. However, there still remain a number of obstacles, specifically when dealing with cross-border disputes. These obstacles could explain why mediation has not yet become the preferred method of dispute resolution in commercial settings. Mediation is still a bit like climate change: Everybody talks about it, but nobody seems willing to do something about it.

Three Key Questions

When confronted with a request for mediation, a company will want to answer the following three questions:

1. Is there an obligation to comply with the request?
2. Will the mediation process suspend the limitation periods for initiating procedures in the courts?
3. Will the information exchanged during the mediation process remain confidential?

Obligation to mediate

The first question might seem the easiest. Since the mediation process is by definition consensual, it will serve no purpose to oblige someone to participate against his/her will. However, if the parties include in their contract a clause that obliges them to mediate procedure, it can be debated what the sanction should be in the event of noncompliance. The French Supreme Court, for example, decided in a recent decision that the claimant's action should be regarded as inadmissible on the basis of the contract unless and until mediation proceedings were implemented. The Commercial Court in England (*Cable & Wireless v. IBM United Kingdom*) took a similar approach, deciding to stay the proceedings until the parties had referred all their disputes to ADR. The English

court has also imposed sanctions in costs for parties' failure to give proper consideration to a mediation proposal, even where there was no obligation to enter into mediation (*Halsey v. Milton Keynes General NHS Trust*). In Belgium, the new Mediation Act enacted in 2005 requires the judge to stay the proceedings at the request of either party if there is a mediation clause in the contract. These examples show that parties should always make a good-faith attempt to comply with an ADR clause if they do not want to run the risk of having their claim rejected by the courts.

Mediation and limitations

An effective mediation mechanism also requires certainty that the recourse to mediation suspends the limitation periods for initiating procedures in the courts. If that were not the case, the parties' action could be extinguished by the time it becomes clear that the mediation does not resolve the dispute. For example, Belgian law requires that an action relating to the delivery of defective goods must be initiated within a "short time." This "short time" can under certain circumstances be as short as three months, which in most cases will not be sufficient to complete the mediation process. Certain EU member states have therefore stipulated in their legislation that recourse to mediation suspends limitation periods. This right is usually limited to mediation conducted by approved or certified mediators or ADR bodies. For example, the Belgian Mediation Act provides that the suspension applies only to mediation procedures conforming to the requirements of the law and using an "approved mediator," i.e., a mediator who has been certified by a newly set-up organization entrusted with guaranteeing the independence and quality of the mediators.

The requirement that the mediation procedure comply with specific requirements or use the services of an approved mediator might be problematic in a cross-border context. What will happen, for example, if the parties attempt a mediation procedure conforming to the requirements of one member state and subsequently initiate court procedures in another? Will the courts of the second member state recognize the mediation procedure as sufficient to suspend the limitation periods? Parties could attempt to solve this in the mediation agreement by providing for a suspension of the limitation period, but here again it is not certain that all jurisdictions will recognize such an agreement

as valid in all jurisdictions.

The draft EU directive on mediation adopted by the European Commission attempts to respond to these problems. Article 7 of the directive provides that the running of any period of prescription shall be suspended as of the date the parties agree to use mediation. The directive does not require any specific formalities or certification for the mediation process; this ensures that a mediation process conducted in one member state will be recognized by the courts of the other member states.

Confidentiality

The third question, confidentiality, is certainly the most important concern of the parties in a mediation process and a key element of its success. Confidentiality helps to guarantee the parties' frankness and sincerity in the procedure. The confidentiality obligation should first be binding on the parties. Any information that may be exchanged between the parties should not be admissible as evidence in any subsequent court or arbitration procedure, except in a limited number of exceptions. The confidentiality obligation should also be binding on the mediator. The mediator should not be able to be called as a witness or to act as an arbitrator with respect to the same dispute if the mediation procedure fails.

Confidentiality could be protected through a contractual arrangement between the parties and the mediator, but this is not always an adequate solution. If confidential material is presented as evidence in judicial proceedings, the nonbreaching party will often only have an uncertain action in breach of contract without necessarily having the ability to oppose the admission of the evidence. Some member states have enacted legislation to address this issue. The Belgian Mediation Bill, for example, provides that all documents prepared for the purpose of the mediation and all communications made within the framework of a mediation are confidential. Any violation of this rule exposes the violating party to pay damages to the other, and any information submitted to the judge or arbitrator in violation of the confidentiality rule will automatically be disregarded. Other countries, such as the Netherlands, decided that it was not necessary to grant any specific confidentiality protection to mediation proceedings (nor to regulate mediation more generally).

Different rules on confidentiality could create problems when parties mediate in one Member State under the expectation of the confidentiality protection and are confronted with a disclosure in subsequent court proceedings in a member state that does not afford such protection. The Mediation Directive attempts to resolve this issue. Article 6 of the directive provides for the inadmissibility of any information exchanged during the mediation, except for overriding considerations of public policy and for the purpose of implementing a settlement agreement. It also provides that evidence otherwise admissible in judicial proceedings does not become inadmissible because it was used in a mediation. Indeed it would be too easy to submit prior existing documents in a mediation as a way to avoid disclosure in subsequent court proceedings.

However, the proposal of the EU Commission raises one major question: What will be considered to be a mediation process? Unlike other professionals, mediators are not licensed and the process they conduct is informal. If the intent to mediate is not clear, even a casual discussion over a backyard fence might later be deemed to have been a mediation, unfairly surprising those involved and frustrating the reasonable expectations of the parties. When legal consequences are attached to a mediation process, it must be very clear when their application is triggered. At the very least, the agreement of the parties should be in writing and should be explicit as to their intent to mediate. In the United States, the Uniform Mediation Act requires that the agreement to mediate be in a record that demonstrates an expectation that mediation communication will be privileged. In addition, the parties must use as a mediator a person who holds him/herself out as a mediator. It can be expected that this aspect of the directive will be heavily debated. It can also be expected that member states that have a mechanism to approve ADR bodies and mediators will resist a system which does not guarantee the quality and independence of the process.

Recommendations

Even if the Mediation Directive is adopted quickly, it will still take a number of years before it is implemented in the national legislation of the various member states. In the meantime, companies should pay particular attention to the following issues when considering mediation in the context of

cross-border disputes:

Companies should not start a mediation process without signing a proper mediation agreement that fully addresses (among other issues) the possibility of terminating the mediation at any time, the suspension of limitation periods, and the confidentiality obligations of the parties and the mediator. Companies should check whether any limitation periods apply and whether the provisions of the mediation agreement relating to suspension of limitation periods will be recognized in the relevant jurisdiction(s). If there is any risk that a limitation period might restrict the company's right to file a claim at a later stage, the company should initiate judicial action as a precaution. This will not stop the company from participating in a mediation, although it may require some diplomatic skills to explain the course of action to the other party.

Although open communication is important to increase the likelihood of the mediation's success, companies should never forget that the protection of confidentiality under the mediation agreement is not foolproof. Companies should avoid making any admissions of guilt or disclosing existing documents harming the company's position, and focus instead on finding a solution to the dispute. 