

Mediation: A Tool for European Business People

By Fabienne van der Vleugel

As a matter of fact, mediation in Europe is not yet used in complex commercial and company-related disputes as much as it is in the U.S. or in the UK.

Why is it so? Does commercial mediation have a future in Europe? What should be done to ensure development of mediation?

Unfortunately there seems to be a basic confusion. Among many European economic actors—managers, clients, customers, directors, lawyers and experts—mediation's value is perceived as limited to personal and family disputes such as disputes between opposing neighbours or members of a family. In addition, a sizable group is simply confused about the process and believe that mediation is identical to arbitration. In many contexts business people indiscriminately use the words "arbitration award" for "decision," "arbitrators" for "mediators," "arbitration procedure" for "mediation process."

To the extent that misinformation or incomplete information contributes to the confusion and to the low acceptance of mediation in business disputes, the ADR community must find better ways to educate the public about the process, and about its use in business disputes of all kinds from the most basic to the most complex. When educating business people one can rely on ordinary business processes and preparations to bridge the information gap—the more concrete the explanation, the better.

The typical business executive will be able to understand the degree of preparation necessary to negotiate an important business transaction, such as restructure or negotiating contracts. The investigation of alternatives, the listing of options, the weighing of costs and benefits will all be within the known realm of business preparation. Indeed to successfully negotiate any new deal, the business person must be willing and able to understand the negotiating partner's state of mind, objectives, and interests. Even issues of confidentiality are routinely considered in business discussions. He or she is deeply and personally involved in the process. These preparations and approaches are also required in mediation and the mediator assists the parties in making an orderly examination of the same types of questions that have blossomed into a dispute.

Mediation is a tool well-designed for complex commercial and company-related disputes because it builds on the accepted business practices, leaves ultimate authority with the parties and permits the business people (being accompanied by their respective lawyers) to remain in control of the solution, through a process organized and directed by the mediator. The mediator

facilitates a resumption of the communication that may have been impaired by the dispute.

Another important tool for convincing European business people is the acceptance of mediation in the US. Getting explanations from U.S. users of mediation services before their European counterparts may jump-start the process that is beginning to move in the right direction.

Article 1 of the European Union directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters (the "Directive") expressly states that "the objective of this 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." All European countries (with the exception of Denmark) had to implement the Directive into their national law by 20 May 2011.

Multiple associations have been set up in various countries to develop mediation. Local initiatives create a real dynamic in some major capitals and cities, giving concrete support and efficiency to mediation.

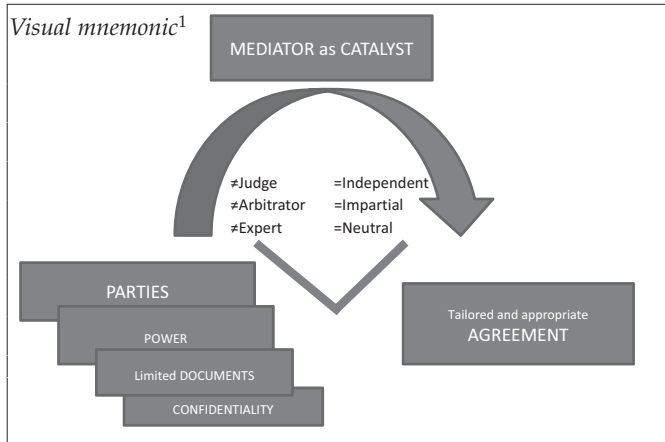
Various mediation centres ensure professional education, seminars and conferences, ensuring continuous training and guaranteeing professionalism of mediators.

Students are invited to participate in various mediation competitions such as the very well known international commercial mediation competition organized by the International Chamber of Commerce in Paris. This competition has educated a growing cadre of young lawyers on the potential benefits of mediation and many of them will bring their commitment into their practice.

Although an increase in mediation among all European countries is not in doubt, now is the time to assure that mediation is clearly explained to the business community on a broad scale: European ADR professionals should encourage the teaching of mediation in law schools and business schools. Mediation should be systematically explained by lawyers to their clients; each time they are engaged in a new transaction, there is an opportunity to discuss dispute resolution and to incorporate dispute resolution provisions in any agreement. As in the U.S. and UK, mediation should be suggested by judges to litigants in the course of the judicial procedure. Mediators themselves can continue to remind the parties in public discussions and in introducing mediation sessions.

Now, let's imagine you have a few minutes to explain what mediation is all about. You must convince a European business manager that this tool may be useful for the

dispute he is facing. In case you have a visual memory, the visual mnemonic reproduced below may be helpful to make sure you do not forget essential characteristics. This visual mnemonic may also be helpful for any teaching venue or discussion on mediation. You may draw it before your audience, so that it may visualize your presentation.



(a) **Voluntary** process: the « V » forming the base of the mediation process. It is the parties that opt for mediation, and they may end it at any time.

(b) Throughout the **process**: the arrow above the «V» hence demonstrating the flexible character of the mediation process which offers business advantages: speed, low costs, creativity of the solution, relationship improvement, parties' empowerment.

(c) The mediator facilitates as an **independent, impartial** and **neutral professional (=)**

Professional, because s/he must be skilled in mediation and provides documentation of on-going training. S/he must be able to handle specific techniques and master the mediation process. Independent, because s/he cannot have conflicts of interest with either party in the dispute. Impartial, because s/he cannot take the side of either party. Neutral, because the mediator has no interest whatsoever (either professional or personal) that the dispute be resolved in a particular manner that excludes other possibilities.

(d) Throughout the process, the parties retain power—the mediator facilitates their resolution and the mediator does not act as a **judge, arbitrator or expert (≠)**.

European businessmen, who often confuse arbitration and mediation, should be reminded that the mediator does not render any decision to be unilaterally imposed on the parties.

(e) Mediation is **confidential**: an essential aspect of mediation which certainly is an advantage for business.

“Mediation has a bright future in Europe but first it must be explained and understood.”

(f) The parties retain the **authority (power) to resolve their own matter**. This is clearly an advantage for parties who are ready to spend time and energy to solve disputes. However, some businessmen do not want to handle their disputes themselves. They prefer entrusting any and all disputes to lawyers while they focus on business development. It seems essential to explain the fact that mediation is also a part of business development: solving disputes quicker, spending appropriate time on a shorter and well-designed calendar, tailoring the best practical solution serves the best interest of the business.

(g) Mediation consists of a process that must be simple to administer, i.e., only a few **documents** to assemble (list of those present, confidentiality agreement, mediation agreement, fee agreement, documents specific to the case notably the disputed contract).

(h) The mediation process ends with an **agreement** stated in a contract not an order.

Mediation has a bright future in Europe but first it must be explained and understood.

Endnote

1. Technical sheets regarding mediation, VDV Médiation®, Fabienne van der Vleugel.

Fabienne van der Vleugel who concentrates in company law, is an attorney admitted to practice in New York, Brussels, and Meaux—Mediator—Arbitrator.

DISPUTE RESOLUTION SECTION

Visit us on the Web at WWW.NYSBA.ORG/DRS