Commercial Mediation: The United States and Europe
The view through practitioners’ eyes

By Claire Mulder

All across the United States and Europe, parties engaged in commerce are increasingly sophisticated in their understanding and use of mediation. But how does commercial mediation compare across boundaries? To help answer this question, I interviewed experienced mediators who work in the United States and Europe.

I contacted 10 individuals, each of whom has worked in ADR for decades, and talked with them by telephone, e-mail, and Skype. Their experience and range make them impressive commentators.

Cultural and Legal Backgrounds

Any international assessment of mediation requires an appreciation of countries’ different social and legal norms. Compare, for example, the United States and the Netherlands. When Frank Sander first introduced the idea of the “multi-door courthouse” at the Pound Conference in St. Paul, Minnesota, in 1976, suggesting that people in conflict would benefit from choosing among various options for resolving their dispute, there was a strong and unmet need for alternative dispute resolution in the United States. America had a relatively litigious culture, generating a high volume of disputes, many of them potentially suited to other means of resolution, but few well-established extra-judicial dispute resolution mechanisms were available. In the Netherlands, however, the polder-model of consensus-based decision-making, which was identified by that name after unions, employers, and the government agreed on a comprehensive plan to revitalize the economy in the early 1980s, sprang from the everyday culture of the time; only a small proportion of disputes ever made it to the civil courts. The Netherlands also had — and still has — a wide range of extra-judicial dispute resolution mechanisms that are technically strong and well regarded, and today mediation is just one of a range of available ADR tools.

Conciliation is a good example of this diversification. Whereas many in the United States may see conciliation as equivalent to mediation (and often use the phrase to describe mediation, if in a slightly more evaluative form), in many European countries people see conciliation as a distinct concept, with deep roots in their civil-law countries’ legal systems. Switzerland’s Code of Civil Procedure, for example, considers conciliation procedurally distinct from mediation: conciliation is a magistrate-led form of non-binding adjudication, whereas mediation is a non-evaluative process that involves not magistrates but accredited professionals from a wider range of disciplines. The two processes may have similar goals (i.e., settling disputes), but the neutral has different roles.

Jeremy Lack, who has worked throughout Europe and is based in Geneva, explains. “When you litigate in a commercial case in Switzerland, you often have to do a conciliation before a judge will hear the matter in a final audience.” This works well in certain Swiss courts; settlement rates in Zurich commercial courts are over 70 percent. As a result, mediation is used less often to resolve commercial disputes in Switzerland. Its use depends on whether the parties seek a settlement proposal from a magistrate or an interest-based outcome with the help of a mediator, who is not evaluative. Similarly, in Germany judges are held in high esteem and are able to broker settlements between parties as conciliators. Decisions in the courts are reached quickly and at relatively low cost. Conversely, Italy has a current backlog of 4.5 million pending legal cases, and enforcing a legal contract through the courts takes an average of 1,185 days — or more than three years. With this kind of
Axel Boesch represents German and overseas clients in cross-border commercial dealings with an emphasis on corporate and distribution law. He also teaches commercial law and mediation.

Michael E. Dickstein has helped resolve complex disputes across North America for more than two decades, and teaches negotiation, mediation and ADR at Stanford University as well as in Canada, China France, Australia, and many other countries.

Thierry Garby, who practiced law in Paris for 30 years, now teaches, mediates, and arbitrates full time. He has worked on cases from simple commercial disputes to those involving intellectual property and post-merger and acquisition matters.

Maša Kociper is a Slovenian lawyer and politician who led the Public Relations and Alternative Dispute Resolution Service at the District Court in Ljubljana from 2000 to 2007. She is now a city councilor of Ljubljana and a member of the National Assembly of the Republic of Slovenia.

Jeremy Lack specializes in commercial dispute prevention and resolution, especially in international or cross-cultural settings. He is an international technology and IP lawyer, admitted in New York, London and Geneva, and works with start-ups and multinationals.

Benjamin Lundström, is a lawyer and mediator in Denmark who has worked with commercial mediation for 17 years. He chaired the Association of Danish Mediation Lawyers for six years, trains mediators, and has been appointed by the Danish Courts as court mediator since 2008.

Judith Meyer, who has worked as a mediator and arbitrator for more than 25 years, resolves commercial mediations and arbitrations involving a wide range of issues. She has taught at Cornell Law School and is a contributor to this magazine’s regular feature “On Professional Practice.”

Eva Schutte is a lawyer based in the Netherlands who practiced law for 25 years before joining colleagues to launch an independent commercial mediation firm. A trainer for the Dutch Bar Association and other organizations, she specializes in mediating conflicts within collaborative relationships.

Leonardo D’Urso is the CEO and Cofounder of ADR Center, a Rome-based consulting firm that focuses on international business disputes. With almost two decades of experience in ADR, he manages the center’s activities, has opened nearly 30 resolution centers in Italy, and has created a cloud platform to manage the mediation process.

Tony Willis, who was a partner in a London law firm for more than 25 years, now works full-time as a mediator, negotiator, and dispute resolution process designer. He has worked on or served as an advisor for cases in the United Kingdom, the United States, Belgium, Romania, The United Arab Emirates, Ireland, and elsewhere.
backlog, it is hardly surprising that the Italian government has been an enthusiastic recent supporter of mediation and conciliation.

**Mediation Referral**

In private commercial mediations in both the United States and Europe, it is relatively rare for parties to approach a mediator directly. Lawyers typically act as gatekeepers for their clients, making referrals to mediators.

Michael E. Dickstein, who has worked on disputes throughout North America and has taught in many countries, explains the usual referral process in US commercial mediations: “Lawyers don’t look on websites or do Google searches,” he says. “They basically choose mediators they have either worked with before or who are within one link of someone who has worked with them.” Eva Schutte, a principle in an independent commercial mediation firm in the Netherlands, agrees that the process is similar in her practice: “Lawyers are repeat players,” she notes. “If they have a good experience at your mediation table, then they will come back.” A smaller number of mediators gain referrals through organizations such as the International Mediation Institute or JAMS.

Court-annexed and court-referred mediations are an important part of the overall mediation landscape in the United States and Europe. In some jurisdictions, courts can either refer cases for mandatory mediation or conciliation or actively encourage disputing parties to settle. Legislators have taken a wide range of approaches to referring civil disputes to mediation and/or conciliation as part of judicial proceedings, pursuing full mandatory processes, opt-out processes, and voluntary processes with incentives and penalties as well as leaving extra-judicial mediation as an entirely voluntary alternative outside the court system.5

Some US states and district courts were quick to use incentives to relieve court burdens and promote mediation/ADR. In 1988, Florida enacted comprehensive state legislation allowing judges to refer civil cases to mediation, stimulating the growth of what has become a highly developed mediation market there. More recently, several European countries have chosen to overhaul their legislation on domestic mediation, prompted by the European Parliament’s 2008 EU cross-border Mediation Directive.6 Italy is one example: In 2013, Italian legislators made it mandatory for both parties and their lawyers to attend an initial mediation session with a court-appointed mediator in 8 percent of all civil and commercial cases.7 The meeting is inexpensive (about €40), there are material penalties for non-attendance, and there is no obligation to pursue mediation after this initial meeting. Should the parties go ahead with mediation, the government provides tax credits for the first €500 of fees.

Leonardo D’Urso, whose organization has opened dispute resolution centers throughout Italy, explains. “This simple meeting allows us to bring all the decision makers into one room, together with professional mediators. Sixty percent of the time the parties voluntarily choose to go ahead with a full mediation.” Today Italy conducts more than 200,000 mediations a year,8 and legislators are evaluating whether to expand the proportion of all cases that are referred to an initial mediation meeting. “This legislation is successfully changing the conversation in Italy,” D’Urso says. “For example, companies are starting to adopt mediation clauses into their standard contracts.”

England and Wales have opted for softer incentives to promote mediation. The 1999 Civil Procedure Rules established a stable and supportive framework for judicial referral to mediation with a high degree of institutional buy-in. Courts can “encourage but not compel” parties to mediate, with powerful potential penalties for parties that have not attempted to settle prior to going to court.9

Tony Willis, based in England, says, “This has proved very successful. Major commercial law firms now espouse mediation, use it regularly, and use it very well.” Slovenia has followed a similar path. As Maša Kociper, a Slovenian lawyer and politician, explains, “Slovenian courts are obligated to offer mediation unless the judge thinks it is really not suitable. This referral system works well in a country with a high degree of trust in public institutions.” Other countries, however, have opted for fewer incentives for ADR. In France, judges can suggest mediation, but the parties are not obligated to pursue it. Thierry Garby, who has practiced law in Paris and now works full time in ADR, says, “Although the
first legislation on mediation in France came out in 1995, it has been slow progress. Mediation is still pretty new. More and more companies are starting to use it now.”

**The Mediator**

The background and training of commercial mediators is relatively uniform internationally; approximately 70 percent to 80 percent of commercial mediators initially trained as lawyers, but many are architects, notaries, business executives, consultants, or psychologists. Many mediators are solo practitioners (in countries where there is enough business to support an independent practice) or they combine their mediation work with other activities, such as working as a lawyer at a law firm. With the exception of some court-annexed mediation programs, commercial mediators are lightly regulated, if at all. One common dissatisfaction across the mediators I spoke with was how challenging it is to set and maintain high standards for mediators.

As Judith Meyer, a US-based arbitrator and mediator, puts it, “You don’t need a law degree, you certainly don’t need a license, and with few exceptions there is no minimum competency testing.” Training ranges from a basic, practical 40-hour course to yearlong graduate programs. Most countries have shied away from government certification and instead use public or private bodies to manage, guide, and promote the mediation industry. Organizations such as the International Institute for Conflict Prevention & Resolution (CPR), the Centre for Effective Dispute Resolution (CEDR), or the Mediators Federation Netherlands (MfN) have all played significant roles in providing training and setting standards. Several people I spoke with observed that mediation training is becoming a cottage industry in its own right.

As one puts it, “There are almost as many people training mediators as there are doing mediations right now.” Each country seems to be teaching and training mediation differently, although the International Mediation Institute (IMI), a nonprofit...
global public service initiative to increase transparency and raise competency standards in mediation practice across all fields worldwide, is trying to establish universal standards, a code of conduct, and regular obligations to seek feedback from mediation participants.

The Mediation

The legal requirements for court-recognized mediation to function effectively are largely in place across Europe and the United States. Some countries have formally legislated for mediation confidentiality, mediator privilege, and the suspension of statutes of limitation periods while mediations are taking place. While others have been less explicit, they have been extremely reluctant to “pierce the veil” of mediation. Mediated settlement agreements are automatically enforceable in a minority of jurisdictions; in most others, these agreements must be ratified by the courts or transformed into legally binding acts by lawyers or notaries.

Mediation’s procedural flexibility is one of its greatest strengths. Its versatility is especially valuable in the commercial world, where cases are diverse and can be highly complex. Mediators develop personal styles, which are the product of experience as much as training or regional bias and are tailored to their specific field (such as class action or intellectual property disputes). Most experienced commercial mediators know how to be evaluative and non-evaluative and are free to shape their styles to the needs of each case. One should, therefore, be extremely cautious about comparing and contrasting how mediators work in different regions. There is no clear national model of mediation. That being said, however, some high-level observations may be interesting and accurate, especially when considering extra-judicial or private mediations (since court-annexed mediations can be tightly prescribed).

It is natural that the parties who are attending a mediation will influence the path that it takes. In the United States, lawyers are key decision-makers and typically attend mediations with their clients. Lawyers frequently start the mediation by making opening statements and can also be the primary negotiators. In the United Kingdom, lawyers normally also attend and make statements, so that parties can receive guidance on legal issues. Across Continental Europe, however, lawyers often play a smaller role: they can attend the mediation, but the parties themselves are the key players. Some French mediators actually forbid the presence of lawyers in mediations. Technical experts and expert witnesses are commonly used across geographies. Thierry Garby, however, explains that in his experience, “Technical expertise is rarely an issue — if it were, they would have resolved the dispute long ago.”

The format of a mediation also matters. In the United States and the United Kingdom, mediators may schedule one initial day for a mediation. Then, depending on the case, the mediation can continue over consecutive days. In mainland Europe, however, parties may have a series of shorter meetings, operating with less time pressure and a greater focus on process, taking on average six to 30 hours in all. Irrespective of geography, most experienced mediators are extremely persistent. “I’m hired until I’m fired” is the mentality several mediators describe.

In the United States and the United Kingdom, most mediations start with a joint session, moving to private caucus as the mediation enters the exploration phase, although many in the United States have noted a trend for commercial mediations to skip the joint session completely and use private meetings as the structure for the entire mediation, with a directive mediator operating as a “bridge.”

This trend is most evident in areas with the most experience with commercial mediation, such as California and Florida.

Michael E. Dickstein suggests that this move may be motivated by clients’ negative experience of opening statements, which he notes can descend into “opening litigation arguments.” In this private-meeting model, with the help of a mediator, parties and lawyers can focus more on the negotiation of a deal than on what will happen if they cannot find agreement. In Continental Europe, however, an initial opening statement from both parties is followed by a mediated joint session that continues until it is no longer productive. Private meetings or caucuses are used sparingly in these jurisdictions, as mediators prefer to keep all the decision makers together and focus on mediation as a social process — helping parties share information.
regarding their future needs and interests more directly with each another. In parts of mainland Europe, mediators tend to frown on caucusing, and people generally expect everything to happen in joint session.

There is a strong facilitative philosophy in Continental Europe. Benjamin Lundström, who is based in Denmark, sums this up by saying, “The DNA of mediation in Denmark is very grounded in the facilitative approach and rules out the use of evaluative measures.” Lundström emphasizes the value of exploring personal and emotional factors that underlie a dispute and the importance of the parties’ self-determination.12

In France, mediators operate within a strong conceptual framework, often asking “What? Why? How? How practically?” Dutch mediations are seen to be pragmatic, although the basic philosophy remains facilitative. Mediations in the United States and the United Kingdom appear to be somewhat more evaluative and outcome-oriented.

While significant differences persist across borders, there are enduring similarities in mediation, wherever it is practiced. Michael E. Dickstein speaks for many of those I talked with. “There may be differences between Europe and North America in how people are negotiating and mediating,” he says, “but at an individual level, it is more enlightening and more valuable to look at what is in front of you in each and every mediation.” Tony Willis makes another observation that crosses international borders. “One hour you’re being facilitative,” he says, “another you’re being evaluative. And an hour later, you may be tearing your hair out, wondering what on earth to do next.”

Despite such occasional frustration, however, the work often brings enormous satisfaction. Echoing many practitioners, Axel Boesch, who works with German and overseas clients in cross-border commercial dealings, says his greatest satisfaction comes from helping people move toward an agreement that once seemed unimaginable. “My biggest reward is my ability to provide solutions for clients,” he says. “Clients want to find a solution, and I am proud to have helped solve cases which were simply not possible to resolve with classic lawyering. Seeing happy faces at the end of a mediation is extremely rewarding.”

Endnotes
1 Machteld Pel, Regulation of Dispute Resolution in the Netherlands, Does Regulation Support or Hinder the Use of ADR?, in Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads Felix. (Felix Steffek & Hannes Unberath eds., 2013).
2 This distinction between mediation and conciliation is still blurred in many other parts of the world.
4 Judicial System Reform in Italy: A Key to Growth (International Monetary Fund working paper, 2014).
5 Giuseppe De Palo et al., Rebooting the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU (European Parliament Think Tank, 2014). See also, Klaus J. Hopt & Felix Steffek, Mediation: Comparison of Laws, Regulatory Models, Fundamental Issues, in Mediation: Principles and Regulation in Comparative Perspective (Klaus J. Hopt & Felix Steffek eds., 2012).
8 Not all of these are commercial mediations.
9 Even if successful, a party who has rejected ADR can be obligated to pay the cost of litigation.
10 In Italy, the presence of lawyers is mandatory.
12 I adopt Manon Schonewille & Jeremy Lack’s “modified Riskin Grid” for comparing mediation styles. For a full discussion, see Manon Schonewille & Jeremy Lack, Mediation in the European Union and Abroad: 60 States Divided by a Common Word?, in The Variegated Landscape of Mediation, Manon Schonewille & Fred Schonewille eds., 2014.)