Mediation as Alternative Dispute Resolution in the European ICT-sector

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Abstract

Mediation is an alternative dispute resolution that is popular in the US. Today, it is less common in continental Europe but its use is likely to increase because of the forthcoming European directive on certain aspects of mediation in civil and commercial matters. Mediation can be an important cost and time saving tool for solving ICT disputes.

1. What is mediation ?

Mediation is an alternative dispute resolution. Alternative Dispute Resolution ("ADR") refers to any means of settling disputes outside of the courtroom. Mediation is a process in which the parties to a dispute, with the assistance of a mediator (a neutral third party), identify the disputed issues, consider alternatives and try to reach an agreement. In principle, the mediator has no advisory or determinative role regarding the content of the dispute or the outcome, but he may advise on or determine the process of mediation whereby resolution is attempted.

2. Advantages of mediation. Obstacles.

Compared to the traditional modes of conflict resolution (the courts), mediation has several advantages. The parties themselves play an active role in finding the solution best suited to both of them. Once the dispute is settled, it is more likely that 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 an arbiter or a judge. In many cases it permits a fast and cost-

effective resolution of the dispute.

However, mediation is not a magic solution for all kinds of conflicts. When a legal precedent is needed or when one party wants to crush the other party, mediation probably isn't the best way forward.

Also, there still remain a number of obstacles, specially when dealing with cross-border disputes(1) (pdf). Particular attention should be given to the drafting of the dispute resolution clauses in international contracts(2) between parties from different jurisdictions where different rules or concepts about mediation may apply.

3. Mediation in the ICT sector

3.1. A specific approach

Dispute resolution in the ICT sector requires a specific approach because of the following reasons:

- ICT processes are more and more business critical. This implies that ICT conflicts have an impact on the continuity of the business processes. Therefore parties want a fast solution.

- Conflicts in the ICT sector often arise regarding technical issues. A good understanding of these technical characteristics is often a first step towards a feasible solution.

- The ICT technology changes rapidly and is characterised by an increased complexity. There is a constantly increasing convergence between different technologies. Some examples are: convergence between telecom, speech and (TV) data transfer (offered on the market as "triple play"), convergence between content and infrastructure (e.g. online exchange of music and video in peer to peer networks).

- Once a company has chosen an ICT-supplier or a technology, it is not that easy to reverse that choice, because it often has an impact throughout the whole business process of the company.

- The ICT sector, just as other sectors and professions, uses its own terminology. Also, ICT contracts often include mechanisms that are designed to create a balance in the contractual relationship such as service credits and benchmarking clauses for pricing. A thorough knowledge of these mechanisms and the terminology are often vital to understand the solutions the parties propose themselves and also to help define solutions that are realistic.

- Finally, it is helpful that a mediator understands how an ICT company (or any company for that matter) works in real life: e.g. what is the decision making process within a company? What is the impact of a proposed solution on the budget? What is the impact of a proposed solution on the personal situation of the representative of the company that participates in the mediation (e.g. the ICT-manager, project manager)? Who are the stakeholders and what is their involvement in the conflict?

3.2. The traditional dispute resolution method (the courts) is not always efficient

The traditional method to deal with ICT disputes is to go to court. Unfortunately, this isn't always efficient if one wants to get a fast and feasible solution to the real issues that are the core problem.

- A court often deals only with legal issues and the case before the court is limited to the legal issues and what parties can actually prove. The business and financial issues are not always considered in a way they should be.

- A case before a court often takes too long. By the time (e.g. after appeal) there is a final legal outcome, the ICT-project is already out of date and the know-how to finish a project isn't available anymore, or at a very high cost. The courts aren't always to blame for this. There are judges who have acquired a competence in ICT-matters over the years, but it is just inherent to a judicial dispute resolution procedure.

- Judges are not trained to deal with highly complex ICT-matters. They are not familiar with the ICT-terminology and mechanisms, and have to deal with a lot of various cases in a lot of legal areas. One can't reasonably expect them to be specialists in every kind of conflict.

- The types of solution that the courts (at least under the civil law system) can offer are limited. They can come to the conclusion that a contractual obligation has not been fulfilled, and can dissolve an agreement or order its execution and also order the payment of damages. However, they cannot adjust the balance in a contractual relationship, nor can they redefine the rights and obligations of the parties, e.g. supplier and customer.

3.3. The specific advantages of mediation for ICT conflicts

Mediation has a lot of advantages for the resolution of ICT conflicts.

- Supplier and customer (and possibly also the subcontractors of the supplier and customer) retain control over the dispute resolution process and are able to keep control over the outcome.

- The parties involved in the mediation can select the mediators and make sure the mediators have the required background regarding legal and/or specific technical matters.

- A mediator can go beyond the mere legal approach and explore the underlying business interests.

- Mediation is much faster than a procedure before the courts.

- Mediation is confidential whereas proceedings before a court are public.

- Parties can choose not only choose the mediator, but also the language of the mediation, which is not the case in classical court proceedings. This is especially relevant in international disputes or in conflicts where for example the contract is drafted in English but both parties speak another language and their written and oral communication is in several different languages.

4. Brief overview of some initiatives in the European Union.

Today, mediation is still less common in continental Europe because the mediation-market was mainly supply-driven (by mediators) instead of demand-driven (by companies having disputes). The cost of litigation is usually higher in the US than in the EU. There also used to be a lack of promotion. Companies will accept only what they see will work. They also need to know why and how mediation works, and how they can use it effectively in their own situation. However, the use of mediation is likely to increase because of the forthcoming European directive on certain aspects of mediation in civil and commercial matters, and also because the promotional efforts by private mediation organisations have increased.

In several EU countries there are initiatives regarding mediation in business (and ICT) conflicts.

CEPINA, located in Brussels, is a well-known Belgian Centre for Arbitration and Mediation. CEPINA was on the initiative of the Belgian National Committee of the International Chamber of Commerce (ICC) and the Federation of Belgian Enterprises (VBO/FEB). It offers a neutral forum for mediation and appoints mediators who have experience in ICT-conflicts.

In the Netherlands, the SGOA (Stichting Geschillenoplossing Organisatie en Automatisering) offers a forum for mediation and arbitration of ICT disputes. ACB is active in general business mediation.

In France, there is e.g. Unam, an organisation of mediators that also provide mediators in commercial disputes.

In Germany, there are a lot of organisations involved in mediation. One of them is the German bar association (DAV). One of the largest business mediation providers in Germany is the Centrale f? Mediation.

CEDR is probably the largest mediation provider in Europe. CEDR is a London-based independent non-profit organisation, which was launched in 1990 with the support of The Confederation of British Industry. It encourages and develops mediation and other cost-effective dispute resolution in commercial and public-sector disputes and civil litigation.

There are of course many more initiatives then I have mentioned here.

5. The European Directive and the European code of conduct for mediators

5.1. European Directive on certain aspects of mediation in civil and commercial matters

On 22 October 2004 the European Commission adopted a proposal for a directive of the European Parliament and of the Council, on certain aspects of mediation in civil and commercial matters (3) (pdf). The Commission?s proposal was sent to the European Parliament and the Council. The Council reached common understanding on the text, subject to the definition of cross-border crisis and the application of the principle of subsidiarity. At the moment of writing this article the European Parliament has not yet delivered its opinion. This is expected in November 2006.

The directive contains two types of provisions. Firstly, the objective is to establish some common rules throughout the European Union for mediation and its relationship with judicial proceedings (art. 1). Secondly, by providing the necessary rules for the national courts of the European Union?s Member States to actively promote the use of mediation, without making mediation compulsory or subject to sanctions. These rules will cover the areas of confidentiality of the mediation process and of mediators as witnesses (art. 6), enforcement of agreements for settling disputes as a result of a mediation (art. 5), the suspension of the running of periods of prescription (art. 7) and limitation of actions while a mediation is in process. The directive obliges Member States to allow courts to suggest mediation to the parties (art. 3).

5.2. European code of conduct on mediation

In 2004 a European Code of Conduct for Mediators (pdf) has been developed by a group of stakeholders with the assistance of the European Commission. It sets out a number of principles to which individual mediators can voluntarily decide to commit. It is intended to be applicable to mediation in civil and commercial matters. Organisations providing mediation services can also make such a commitment, by asking mediators acting under the auspices of their organisation to respect this code. Adherence to the code is without prejudice to national legislation or rules regulating individual professions, such as the rules of bar associations or associations of company lawyers, accountants etc.

6. WIPO

An example of a well functioning mediation process is the ?Dispute Avoidance and Resolution Best Practices for the Application Service Provider Industry? of the World Intellectual Property Organisation (WIPO), located in Geneva, Switzerland. The WIPO Arbitration and Mediation Centre was established in 1994 to offer Alternative Dispute Resolution (ADR) options, in particular arbitration and mediation, for the resolution of international commercial disputes between private parties. The procedures of the WIPO Arbitration and Mediation Centre are particularly appropriate for technology, entertainment and other disputes involving intellectual property.

7. .eu domain names

On a EU-level, another recent example is the alternative dispute resolution method used to solve conflicts about .eu domain names. The ADR-method offered in this case is arbitration. It is provided by the Prague-based Arbitration Court attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic.

8. Conclusion

Mediation is a cost and time saving tool for solving commercial conflicts. Mediation is especially interesting for disputes in the ICT sector. At this moment the state of development of mediation in continental Europe is not yet as far as in the United States, but there are a lot of private organisations that provide mediation in commercial and civil matters, including in ICT disputes. The forthcoming European directive is likely to increase the use of mediation.

Footnotes

(1) Y. HEIJMANS and E. PLASSCHAERT, "Effective Cross-border Mediation in Europe", ACC Docket, June 2006.

(2) D.J.A. CAIRNS, "Mediating International Commercial Disputes: Differences in U.S. and European Approaches", Dispute Resolution Journal, Aug-Oct 2005

(3) Proposal for a directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, COM(2004) 718 final - COD 2004/0251