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The International Challenge

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The need for more streamlined court procedures and more flexible and cost-effective dispute resolution is a global concern. As ADR providers have begun expanding worldwide, a global shift towards ADR has gained momentum. Change at this pace generates interesting challenges and worthwhile debate as new entrants bring fresh ideas and new methodologies to the market.

Europe is an interesting case in point. Most of the 27 EU Member States implemented the European Union Directive legislation in 2011, which provided a harmonised approach to matters like confidentiality and the recognition and enforcement of mediation agreements. Nevertheless, different states, for different reasons, chose to implement the Directive differently. Italy took the most radical approach, with the result that mediation is now a mandatory precursor to the use of the courts for a wide range of civil disputes.

The Italian model raises taxing questions for mediation globally, being born of a broken civil justice system rather than the more familiar need to save time and legal costs. By 2011, the civil courts in Italy had a backlog of 5.4 million cases and an average processing time of eight years. Mediation was touted as the best available solution to these problems. By contrast, ADR in the United States has risen in prominence precisely because it is complimentary to the courts: a credible threat of judicial determination is the elephant in many of mediation rooms.

Given such different starting points, different mediation styles inevitably follow, which raises some practical challenges in managing cross-border and cross-continental disputes.

Fortunately mediation can respond and including a mediation clause in business contracts is becoming a more attractive and popular option. Among mediation's advantages are total procedural flexibility and the ability to evolve as the market requires. At a practical level therefore, in cross-continental matters mediators are encouraged to develop a "mid-Atlantic" style. At its most basic, this involves throwing away the rule book, and adapting an approach to suit either side. It means being tough enough on the legal merits to engage U.S. clients, but leaving scope for parties to determine the outcome themselves.

As business becomes more "glocal" and jurisdictions become blurred, charting out ahead of time what is important to you or client can prevent a lot of wasted time and money. Additionally, mediation has proven effective at not only resolving all types of conflicts, but more importantly, leaving the business relationship intact so future business can still occur. Therefore, inserting a mediation clause, indicating both the name of the mediation service provider and the city where the procedure will take place, can aid in the process of an effective and efficient resolution.

With more than 20 official languages and radically different legal traditions, the EU can still look like a daunting place to resolve business disputes quickly and cost-effectively. With some creative thinking and appropriate infrastructure, most challenges can be overcome. Traditional barriers of language and culture have been successfully managed using co-mediation; process and style are on-going and fascinating challenges, but mediation is adept at evolving to meet market demands.

Cross-border and cross-continental mediation is still in its infancy. How experiments like those in Italy impact the theory and practice of mediation over the next decade make these exciting times for global ADR.

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