

# **Mediation of cross-border disputes in Europe**

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# Mediation = climate change

Everybody talks about it but nobody seems to  
be willing to do something about it

## Critical legal issues

- 2 critical legal issues in any mediation:
  - suspension of limitations periods
  - confidentiality
- For pure national disputes: refer to local laws
- For cross-border disputes: ???

## Legal situation in Europe

Legal situation in Europe with respect to mediation is diverse:

- Some have specific mediation laws; some not
- Some mediation laws requires mediator to be approved under local law; some not

## Suspension of limitation periods

What if mediation is conducted in one EU member state (with mediation law providing for suspension of limitation periods) and thereafter litigation starts in another EU member state (without a specific mediation law or requiring that mediation is conducted by a mediator approved under local law)?

## Suspension of limitation periods

- Solution: include specific provision in mediation agreement  
BUT will this be recognized by local courts as valid?
- Draft EU directive on mediation (2004) attempts to address the issue:
  - Mediation process suspends limitation periods
  - No requirement of certification/approval of the mediator

## Confidentiality

What if the mediation process starts in Belgium (under expectation of confidentiality granted under the Mediation Act) and is then followed by a claim in the Netherlands (no specific provisions on mediation)?

## Confidentiality

- Solution: add specific provision in the mediation agreement

What if breach of the agreement? Will the evidence be inadmissible in the Netherlands?

- Draft EU Directive on Mediation provides for inadmissibility of statements made or documents prepared for a mediation



## What is a mediation procedure?

- Draft EU mediation directive does not require any certification or approval of the mediator or the mediation process
- Defines mediation as any process where 2 or more parties to a dispute are assisted by a third party to reach an agreement on the settlement of the dispute

## What is a mediation procedure?

You live in a nice neighborhood in the area of Munich. Your neighbor on the left side is a division director of a German engineering company; on the right side lives the director of a US supplier to this German company.

The atmosphere in the neighborhood has always been very good but at the latest barbecue there was a strong exchange of words between your two neighbors with respect to some dispute between their respective companies.

You want peace to return in your nice neighborhood and start talking to both to understand the issues at stake and find some common ground. By the end of the week a compromise is found and they both shake hands. However the following week the legal department of the US company decides to bring the case to court and plans to have its director testify as to the content of the discussions the week before.

IS THIS A MEDIATION PROCESS  
PROTECTED BY CONFIDENTIALITY ?

## What is a mediation procedure?

- US Uniform Mediation Act:
  - Intent to mediate must be in a record that demonstrates an expectation that communications will be privileged
  - Mediator should be a person who holds him/herself out as a mediator

## Recommendations for mediation in cross-border disputes

- Mediation agreement should address (among others)
  - suspension of limitation periods
  - confidentiality of parties and mediator
- If any strict limitation periods apply, consider initiate legal proceedings as a precaution
- Be careful with information exchanged
  - Confidentiality is not foolproof
  - Prior existing documents will always be admissible