

With 30 years of experience, Allen Green has engaged in extensive litigation and counseling on a wide range of international matters. He represents clients in international arbitration and court litigation, involving governmental as well as private sector parties, and counsels and represents clients before federal agencies concerning the U.S. government's regulation of exports. He also works closely with clients on international government contracting, international transactions and financing. Mr. Green currently heads McKenna Long & Aldridge LLP's International Practice Group.

Mr. Green served as the Chairman of the American Bar Association's International Procurement Committee, Public Contract Law Section for three terms (1991-1994).

Mr. Green received his BA from the University of Virginia and is a graduate of the University of Virginia School of Law.

Overview of International Institutions' Cross Border Mediation Rules

Allen B. Green
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Growth of Mediation in International Commercial Disputes

- Differences in the U.S. and Europe
 - Historical development
 - U.S., England, Central, Eastern, and Western Europe
 - Conciliation v. Mediation
 - Common v. Civil Law

Virtually all International Arbitral Institutions Offer Mediation

- International dispute resolution institutions have grown with the mediation trend
- They have developed and revised rules to include the option of mediation

Promotion of Mediation by International Dispute Resolution Institutions

- International Chamber of Commerce (ICC)
 - “Amicable Dispute Resolution”
 - Mediation is a neutral facilitation of negotiated settlement; default ADR technique
 - Private and Confidential with 2 exceptions
 - Selection of Neutral
 - Conduct of ADR Procedure

Promotion of Mediation by International Dispute Resolution Institutions

- American Arbitration Association's (AAA)
International Centre for Dispute Resolution
(ICDR)
 - Mediation and Mediator's Role Defined
 - Appointment of Mediator
 - Identifying matters in dispute
 - Confidentiality
 - Sample Clauses

Promotion of Mediation by International Dispute Resolution Institutions

- International Institute for Conflict Prevention and Resolution (CPR Institute)
 - CPR European Mediation Procedure (1996)
 - Selecting Mediator
 - Ground Rules
 - Negotiation of Terms
 - Confidentiality

Promotion of Mediation by International Dispute Resolution Institutions

- **London Court of International Arbitration
(LCIA)**
 - LCIA only publishes ADR rules for mediation
 - Commencing Mediation
 - Appointment of Mediator
 - Statements by Parties; Conduct of Mediation
 - Confidentiality and Privacy

Promotion of Mediation by International Dispute Resolution Institutions

- Commercial Arbitration and Mediation Center of the Americas (CAMCA)
 - For commercial parties involved in free trade
 - Joint creation by leading national institutions
 - In that respect, rules are similar to AAA
 - Commencing mediation; Panel of mediators;
 - Privacy and confidentiality

Promotion of Mediation by International Dispute Resolution Institutions

- United Nations Commission on International Trade Law Conciliation Rules (UNCITRAL)
 - Model Law: International Commercial Conciliation
 - Broad definition of “conciliation”
 - Appointment of conciliators; Confidentiality
 - Option of conciliator acting as arbitrator – shall not unless otherwise agreed
 - Legislation based on UNCITRAL Rules enacted in Canada, Croatia, Hungary, Nicaragua

Promotion of Mediation by International Dispute Resolution Institutions

- **Cairo Regional Centre for International Commercial Arbitration (CRCICA)**
 - Operating in Egypt since 1979
 - Administers cases on basis of UNCITRAL Arbitration Rules
 - CRCICA's Mediation Rules

International Mediation Practices: Mediator Selection

- Nationality and background
- Common v. civil law
- Occupation
 - Jurist v. industry expert

International Mediation Practices: Techniques

- Define mediation and mediator's role
- Three varieties of mediation
- Co-mediation – alert to cultural and legal differences
- Joint Sessions v. Private Caucuses
- Options

International Mediation Practices: Structural Options

- Mediation part of broader dispute resolution plan
- Multi-tiered dispute resolution clauses
 - Negotiation, mediation, arbitration

International Mediation Practices: Sample Clause

- The parties shall endeavor to resolve any controversy or claim arising out of or in connection with this agreement or the breach, termination or validity thereof, by mediation under the [Insert Institution] in effect on the date of this Agreement. Unless otherwise agreed, the parties will select a mediator from the list of [Insert Institution] neutral third-parties.

International Mediation Practices: Sample Clause

- All negotiations and proceedings pursuant to paragraph 1 are confidential and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence and any additional confidentiality protections provided by applicable law.

International Mediation Practices: Sample Clause

- If the dispute has not been resolved by mediation as provided herein within [60] days of the initiation of such procedure, either party may initiate arbitration in accordance with [Provision 2].

PHILIP RAY

Philip Ray is Senior Counsel for Siemens AG, Legal Services Department, in Erlangen, Germany. His responsibilities include providing legal counsel to Siemens' Corporate Information Office (CIO) and to its Power, Transmission and Distribution Group and its Transportation Systems Group. One of his areas of focus is dispute resolution.

Before joining Siemens in Atlanta, Georgia, USA, in 1989, Mr. Ray served as an attorney-advisor in Washington, DC with the US Commerce Department's Office of General Counsel, as associate with Atlanta's Troutman, Saunders law firm, and as in-house counsel with an Atlanta-based hardware-software company, Digital Communications Associates.

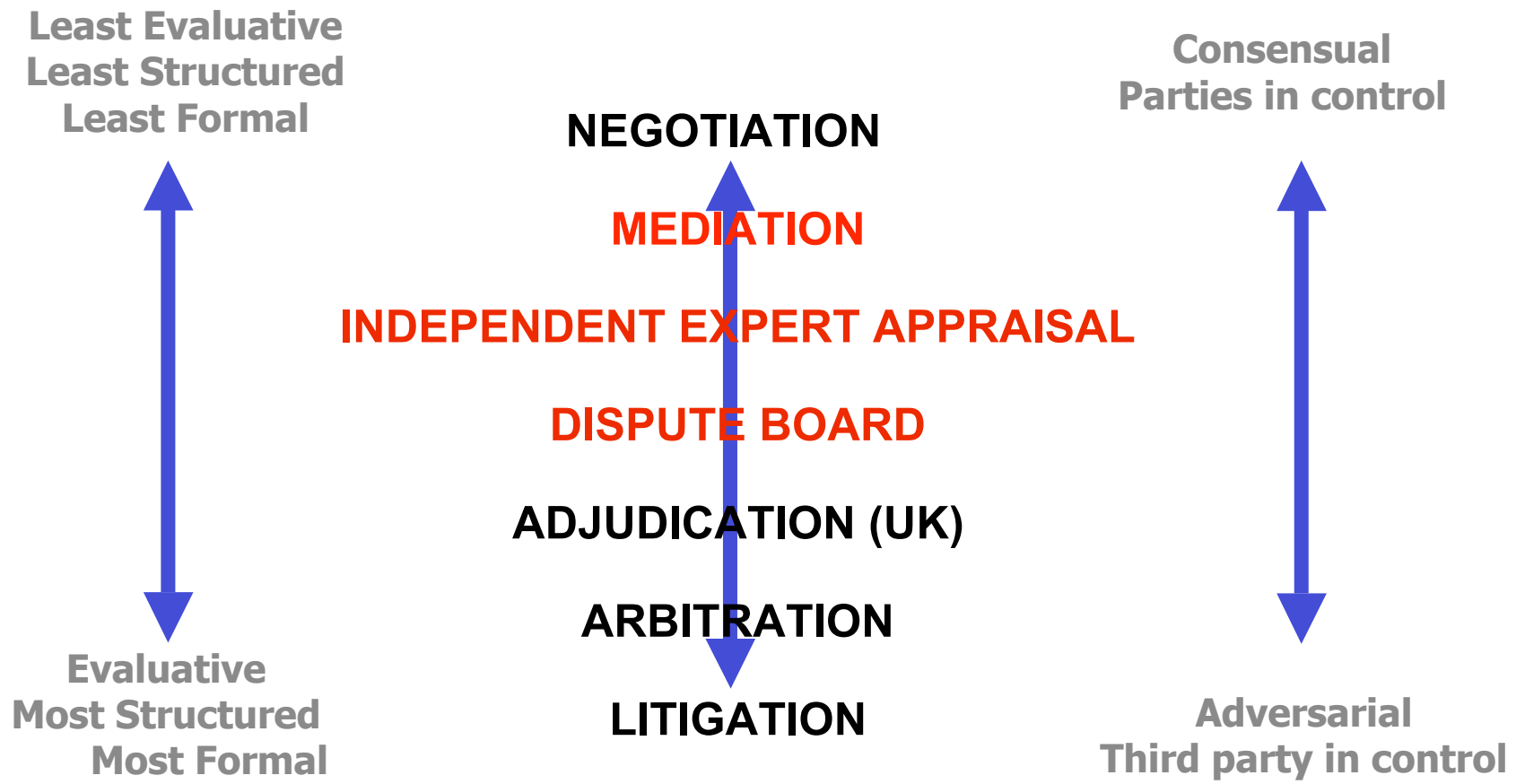
In 1988, Mr. Ray chaired the State Bar of Georgia's Drafting Committee resulting in enactment of Georgia International Transactions Arbitration Code. He has published in the areas of export controls and international dispute resolution, is on the Board of Advisers of *Corporate Counsel's International Adviser* (Thomson/West), and has taught, as an adjunct professor, international business transactions law courses at Georgia State University Law School in Atlanta and at the Erlangen University Jura Fakultät.

Mr. Ray received an A.B. from Davidson College, Davidson, North Carolina and is a graduate of the University of Georgia Law School, Athens, Georgia, where he was editor-in-chief of the *Georgia Journal of International & Comparative Law* in 1978.

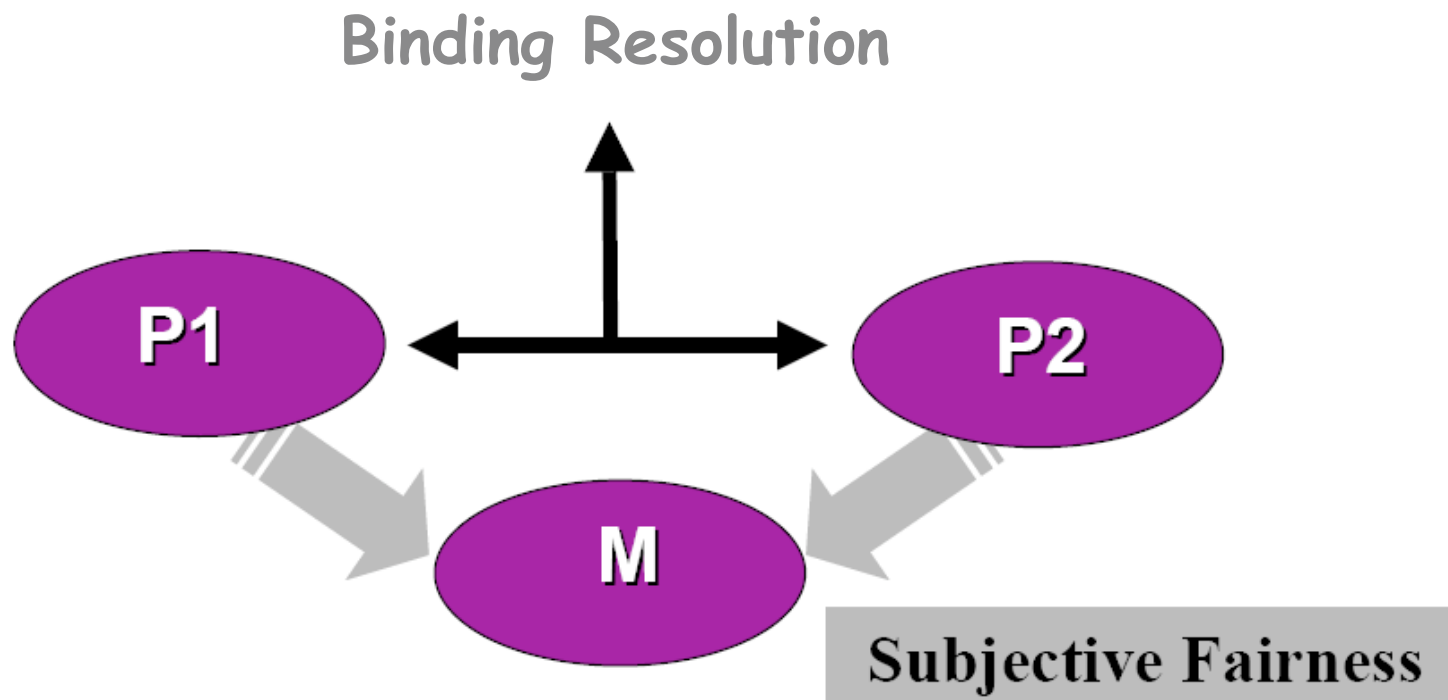
**203 Mediation: A Third Way?
Pros & Cons**

**Philip Ray
Senior Counsel
Siemens AG
Legal Services**

Mediation v. "ADR" (Source: Joanne Kalowski)



... **Mediation** (Source: Joanna Kalowski)

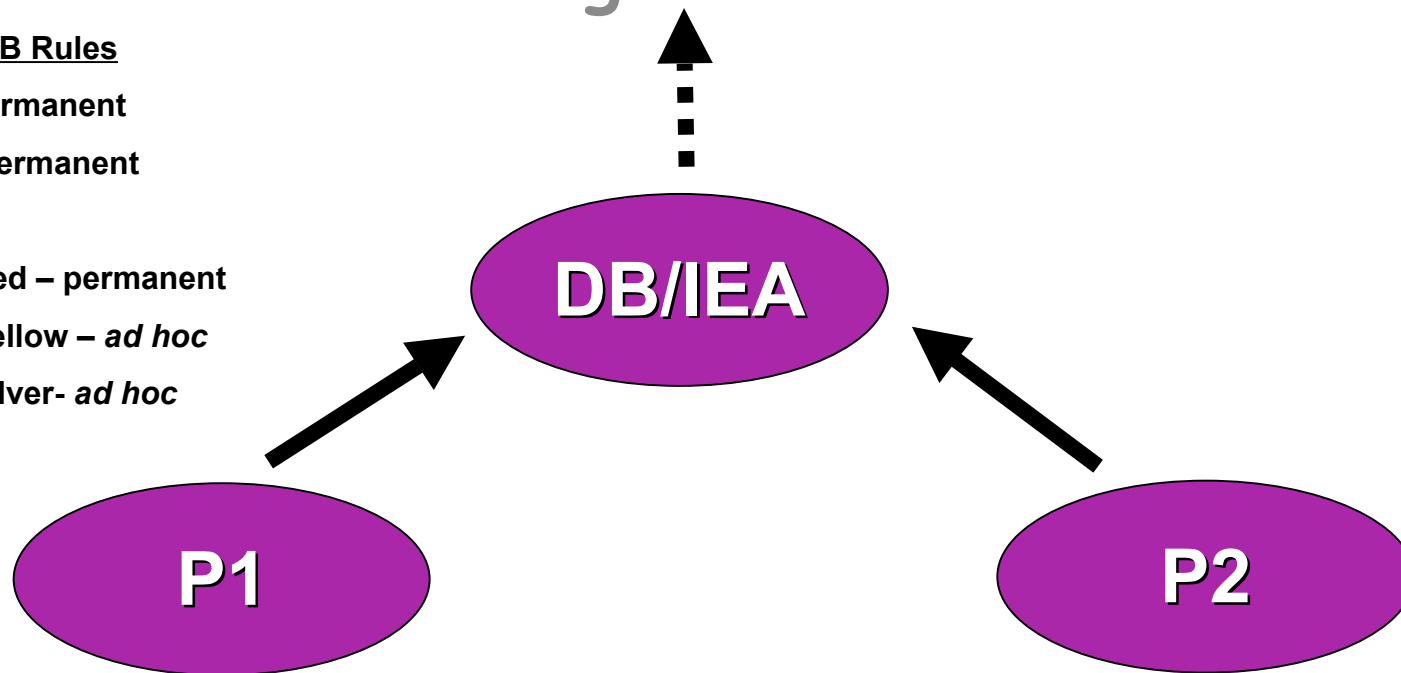


Dispute Board („DB)/Independent Expert Appraisal (IEP“)

Binding Resolution

DB Rules

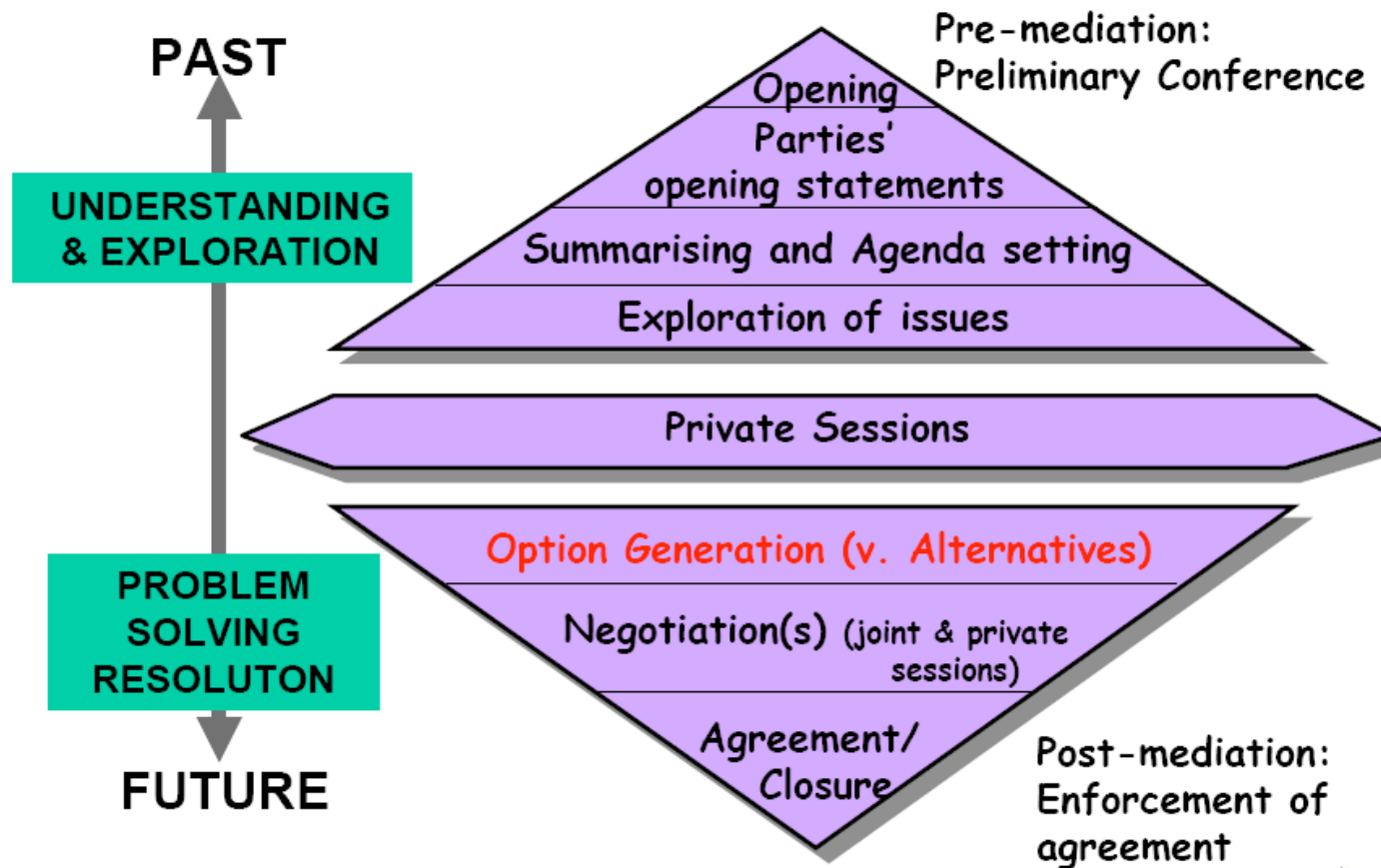
- ICC – permanent
- AAA – permanent
- FIDIC
 - Red – permanent
 - Yellow – *ad hoc*
 - Silver- *ad hoc*



Mahnken, *Why International Dispute Settlement Institutions Should Offer Ad Hoc Dispute Board Rules*, [2006 Pt 4] Int'l Construction L. Rev 433

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Mediation Can Create New Options



Mediation – A Third Way?



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**ACC Europe 2007 Annual Conference: The Growing Role of In-house
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**3-5 June 2007 Bayerischer Hof Hotel
Munich, Germany**

Resources

- ACC, *Leading Practice Profile: The Use of Mediation in the United States and Western Europe to Add Value to Transactions and Effectively Resolve Commercial Disputes* (2006)
<http://www.acca.com/resource/v7474>
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- Butterworths Mediators on Mediation: Leading Mediator Perspectives on the Practice of Commercial Mediation (C. Newmark, A. Monaghan, eds. 2005)
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- LexisNexis/CMS/CEDR, The EU Mediation Atlas: Practice and Regulation (J. Singer, author; K. Mackie, Hardy, G Massie, eds. 2004)
- McIlwrath, Villarreal & Crafts, *Finishing Before You Start: International Mediation*, ABA, International Litigation Strategies (B. Legum, ed. 2005)
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- J. Risse, Wirtschafts-mediation (2003)

Yves Heijmans is responsible for managing the legal support for the commercial operations of Chevron Phillips Chemical in Europe and Asia. Chevron Phillips Chemical is a joint venture between Chevron and ConocoPhillips and is one of the world's leading manufacturers of petrochemicals and plastics. It has 31 production facilities located in the United States, Puerto Rico, Singapore, China, South Korea, Saudi Arabia, Qatar, Mexico and Belgium.

Prior to joining Chevron Phillips Chemical in 2000, Yves Heijmans served five years as international legal counsel at Alcatel.

Yves Heijmans is a graduate of the University of Leuven (Belgium) and the University of Barcelona (Spain) and obtained an LL.M degree from Cornell University (US). He is a member of the New York Bar.

Mediation of cross-border disputes in Europe

Yves Heijmans
Chevron Phillips Chemical Company

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

Curriculum Vitae

Prof. Dr. Stephan Breidenbach

Prof. Dr. Stephan Breidenbach is a dispute resolution consultant, practitioner, trainer and researcher. He teaches Civil Law, Civil Procedure and International Economic Law at the European University Viadrina Frankfurt (Oder) and is Co-director of the Mediation Masters Program and the Forum for Negotiation and Mediation at the Europa-University Viadrina. In addition he is Honorary professor for Mediation and Business Mediation at the University of Vienna, Austria and has held Visiting Professorships at the Renmin University of Beijing (China), the University of Klagenfurt (Austria) and at the University St. Gallen (Switzerland).

His two major books are „Mediation. Structure, Chances and Risks of Mediation in Conflict Situations“ and “Mediation for Lawyers“. In addition to his university-based research, Professor Breidenbach research expertise lies in the areas of computer-based methods of visualisation for legal knowledge and the integration of intra- and extrajudicial dispute resolution.

In 2002 he was awarded the National Sokrates Prize for Mediation for his outstanding services to the development of the theory and practice of mediation in Germany.

In terms of private practice, Professor Breidenbach is an active dispute resolution practitioner. Since more than ten years he has mediated a large number of both national and international business cases and has been one of the first business mediators in Germany. Furthermore he is offering arbitration and hybrid processes.

He acts as an international arbitrator for the ICC and as expert appraiser primarily in the areas of large scale industry, family businesses, money market and combination of businesses. Upon request he designs individual dispute management processes for clients. In suitable cases Professor Breidenbach’s computer-based visualisation technique is applied to reduce legal complexity and aid in transparency, analysis and decision-making.