MEDIATION IN THE EUROPEAN UNION AND ABROAD: 60 STATES DIVIDED BY A COMMON WORD?

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1. Implementing a flexible and predictable framework in Europe

'Good management is the art of making problems so interesting and their solutions so constructive, that everyone wants to get to work and deal with them.' (Paul Hawken)[3]

Directive No. 2008/52/EC entitled 'Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters' (the 'Directive'), had an implementation deadline of 21 May 2011. Although it created challenges for several Member States, all countries of the European Union ('EU') have since adopted this Directive. The purpose of the Directive was to create minimum common rules on mediation for all Member States of the EU in cross-border civil and commercial mediations with the exception of Denmark, which is exempt in certain areas like civil judicial matters from the Maastricht treaty. Although the Directive was initially intended to have a broader domestic remit, its scope was narrowed down to cross-border commercial and civil disputes as a political compromise, due to resistance to mediation legislation in certain countries.

The stated aim of the Directive[4] in its final form was to facilitate access to mediation where a party from at least one Member State of the EU is involved in a civil or commercial dispute with another party located in another country.[5] This meant ensuring a predictable legal framework and, through this, promoting the use of amicable dispute settlement methods across the EU in general. In addition to introducing a predictable legal framework and common principles for

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4 Article 1 **Objective and scope**: '1. The objective of this Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.
2. This Directive shall apply, in cross-border disputes, to civil and commercial matters except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii).
3. In this Directive, the term 'Member State' shall mean Member States with the exception of Denmark.'

5 Article 2 **Cross-border disputes**: '1. For the purposes of this Directive a cross-border dispute shall be one in which at least one of the parties is domiciled or habitually resident in a Member State ...'

particular aspects of civil procedure in cross-border civil and commercial cases, the Directive also aimed at establishing a framework to preserve flexibility, which was perceived by the drafters as being a main advantage of mediation. Adopting the Directive was also seen as an important and much needed initiative in order to harmonise mediation practices for cross-border disputes between 27 Member States, having 23 different official and working languages (not including Denmark/Danish),[6] over 500 million people and diverse judicial systems including 3 common-law jurisdictions (England and Wales, Northern Ireland, Ireland) 2 mixed common and civil-law jurisdictions (Scotland and Malta), and a wide variety of civil-law countries.

Although the Directive sought to set certain minimal standards (e.g., of confidentiality and to interrupt statute of limitations periods), it did not seek to regulate or affect the practice of mediation within any EU Member State. Nor did the authors of the Directive suggest what courts should actually do in civil or commercial cases when parties come from different countries. This lack of practical provisions on how mediation should be put into practice, or how the judicial system in each Member State should support or promote the use of mediation is a universal theme in many countries around the world, and the EU is not an exception. According to a report that was published in June 2010 as part of a EU Commission-sponsored mediation project,[7] the use of mediation in Europe could be summarised as a paradox comprised of two numbers: an average use in 0.5% of cases (based on the ratio of the number of mediations/the number of litigated cases in Europe) and an average settlement rate of 75% for those cases where mediation was used.[8] So mediation was understood to be a high quality product that was rarely used.

While drawing up the Directive, the EU Commission and Parliament were guided by two principles: flexibility and predictability.[9] The result was a document with a very 'light touch', which essentially left every Member State to its own devices. Although the Directive was ostensibly intended to set standards for cross-border cases, it also considered the possibility that it may be applied to domestic cases as well,[10] where the parties would be from the same Member State. This light touch approach did not address whether mediation was a clearly understood process, or whether it may have varied in practice from country to country and if so, how.

'How well has the intended purpose of the Directive been achieved?' Based on our practical experience as mediators and mediation advocates, and after analysing the 28 chapters for all EU Member States in this book, our answer could be summed up as follows: 'The Directive's intended purpose to stimulate cross-border mediation has been impeded by the way it has been conceived, implemented and regulated'. Although flexibility and diversity have been maintained to accommodate local circumstances and cultures, there are no predictable legal frameworks or guidelines for parties coming from different countries as to how mediation should be initiated, conducted or overseen. There are no clear EU guidelines or provisions regarding mediator quality standards, or clear explanations of what different forms of mediation may mean. Each Member State has been left free to develop a culturally-shaped and nationally-biased view of

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6 At that time 26 countries and 22 official languages (excluding Danish/Denmark). In 2013 Croatia became a new Member State, bringing the total to 28 EU Member States.

7 'The Cost of Non ADR: Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation', June 2010.

8 80% for voluntary mediation and 70% for mandatory mediation.

9 European Parliament resolution of 13 September 2011 on the implementation of the directive on mediation in the Member States, its impact on mediation and its take-up by the courts (2011/2026(INI)).

10 'Whereas: ... (8) The provisions of this Directive should apply only to mediation in cross-border disputes, but nothing should prevent Member States from applying such provisions also to internal mediation processes. ...'

what the word 'mediation' means, without creating any bridges between these different interpretations and customs, and there are a dizzying number of different practices and definitions existing today, not only within the EU but across the world as a whole. This could be seen as positive, encouraging diversity, but it can also be viewed as disruptive if the goal is to provide greater certainty and address possible cultural, national or linguistic barriers to amicable dispute resolution. The solution is not to impose one definition or to prescribe one approach to mediation, but to facilitate the use of commercial and civil mediation across borders by enabling parties and their counsel to understand the different options that exist so they can make an informed choice.

The majority of the 60 states surveyed in this book have recently passed new legislation, or are planning to do so. No two countries, however, seem to have implemented the exact same legislation or to have agreed on the practicalities of how the Directive would be put into practice in the EU to facilitate mediation across borders. Local variety is important and inherent in a flexible process like mediation, and it usually works well within national borders. When regulatory frameworks or practices vary greatly from country to country, however, and if litigants or their counsel are unaware of this, difficulties can arise that could easily be addressed by providing clear guidelines and definitions on mutually identified parameters where countries differ. These would at least inform disputants of differences and how they may have an impact on the process or the outcome to their dispute. If parties and/or their counsel have different procedural expectations and have not consciously agreed to what type of mediation process or approach they and the other party wish to use (which can depend on their view of what mediation is about) this can lead to even more disputes on matters of process. The authors suggest that some form of guidance is needed to ensure that the parties and their counsel have agreed on common parameters on a case-by-case basis, to ensure there is informed consent. In the absence of informed consent, the parties' self-determination and autonomy may be compromised. The purpose of this chapter is to explore how it may be possible to create a balance between, on the one hand, the need for local flexibility and, on the other hand, the need for a more predictable framework in cross-border cases. The answer seems to lie in guiding the parties more specifically towards reaching informed consent regarding their procedural choices, and to ensure that they have designed a process that is best suited to the needs of their particular cross-border case.

2. Mediation in the EU and abroad: The absence of clear definitions or common principles

> *'Between what I think, what I want to say, what I believe I say, what I say, what you want to hear, what you believe to hear, what you hear, what you want to understand, what you believe you understand, what you understand… there are ten possibilities that we might have some difficulties in communicating. But let's try anyway…'* (Bernard Werber)[11]

a. The absence of clear definitions

George Bernard Shaw is known to have joked that the United Kingdom and the US are two nations divided by a common language. Something similar can be said about the word 'mediation'. In our view, the EU (as well as the rest of the world) is equally separated by this common word. As concluded in the first chapter, mediation offers a kaleidoscopic landscape with huge varieties, and there are no `common cores' or practices that are universally applied in each and every country. It is difficult to extract any clear standards or processes for mediation when two parties

11 French author. Extract from *'L' Encyclopédie du savoir relatif et absolu'*.

come from different jurisdictions, especially when the expectations, styles and approaches to mediation vary greatly from country to country. To add to the confusion, the words used to describe mediation styles and approaches, like 'directive', 'facilitative', 'transformative', 'evaluative' or 'non-evaluative', appear to have different meanings in different countries. Even the word 'mediation' is interpreted differently in different states or depending on an individual's profession. Yet for cross-border cases the word mediation, just like the terms to describe the approach to the process, is commonly used and agreed to, without people understanding the key differences that exist behind it, or the consequences of these different understandings. A common and more precise vocabulary would help to avoid the risks of misunderstandings that are highly likely to arise in the current cross-border environment.

Ostensibly, the Directive appears to provide a sufficiently broad definition to accommodate all types of mediation. On closer examination, it appears to be a tautology of limited practical value:[12] 'Mediation' is defined as 'a structured process, however named ... whereby two or more parties to a dispute ... reach an agreement on the settlement of their dispute with the assistance of a mediator'. 'Mediator' is defined as 'any third person who is asked to conduct a mediation'. Thus the definition of 'mediation' refers to a 'mediator', and the definition of 'mediator' refers back to 'mediation'. On the face of it, mediation could be taken to mean any sort of process in which a neutral person helps the parties to settle. It includes 'any third person', which means, *inter alia*, a negotiator, facilitator, manager, sage, guru, therapist, lawyer, religious leader, elder, ombudsperson, early neutral evaluator, mediator, chairperson, norms-educator, independent expert, neutral, conciliator, adjudicator or even an arbitrator or magistrate. This provides the advantage of freedom and flexibility to cover all dispute resolution processes and approaches, provided the parties agree to and have the same understanding of the process that they are entering into and what type of 'third person' (or persons) they are seeking.

The Directive does not offer practical guidance to a person seeking to initiate mediation in a cross-border situation where these invisible potential traps for miscommunication and misunderstandings are prevalent given this broad definition. Even if parties and their counsel agree that they want a professionally accredited mediator as opposed to any of the other types of 'third person' mentioned above, there are many different schools and types of professional mediation that exist, including facilitative, transformative, evaluative, narrative, solution-focused, etc. Some countries apparently favour one type over the other, which is even entrenched in the law, whereas others seem to wish to capture the same diversity as contained in the EU definition.

Nor does the Directive provide any guidance regarding typical cross-border issues. For the purposes of the Directive, a cross-border dispute means any dispute where a party residing in one EU Member State has a dispute with a party residing in another EU Member State.[13]

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12 Article 3 **Definitions**: 'For the purposes of this Directive the following definitions shall apply:
(a) 'Mediation' means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State. It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seised to settle a dispute in the course of judicial proceedings concerning the dispute in question.
(b) 'Mediator' means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.'

13 Article 2 **Cross-border disputes**: '1. For the purposes of this Directive a cross-border dispute shall be one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which:
(a) the parties agree to use mediation after the dispute has arisen;

Although it provides that mediation should be suggested by the court in such instances (and can even be ordered by the court in some countries), there are no provisions regarding due process, informed consent of the parties, language issues, venue, applicable laws, or how to verify the appointment of mediators who are culturally appropriate or neutral for the case in question. Should the mediator be proposed or appointed by the court, or should the parties appoint one themselves? Should a naming authority be used, and if so, should it be a national or an international body? How and where will the mediators be found? How can they be selected based on relevant skills and experience? Is word-of-mouth reliable? Can mediators be neutral or impartial if they come from the Member State of one of the parties? Should it be considered a 'good practice' for the mediator to come from a third Member State? If so, which one? Should the parties appoint two co-mediators, one from the Member State of each of the parties? If so, how should issues of language and venue be dealt with? What happens if the parties cannot agree on any of the above points? These are overwhelming questions that the Directive could not have been expected to regulate (and probably cannot, or should not, today), however, providing a checklist describing possible choices for some of these issues or offering some guidelines – which parties would be free to deviate from – would have been helpful.

According to the Directive's definition, a mediator is also any third person who is asked to conduct mediation in 'an effective, impartial and competent way'. What do these words actually mean? If parties do not have informed consent about what mediation process, style or approach each of them prefers, and the mediator does something very different from what both or one of the parties expects, can a mediator still be seen as conducting the mediation in an effective, impartial and competent way? If not, can it still be called 'mediation'?

It appears from this book that a cross-border mediation, whether within the EU, between EU and non-EU states, or outside of the EU, will suffer from at least three problems:

1) a lack of clear and shared definitions or a precise vocabulary of what mediation and different styles of mediation or mediation approaches actually mean (which can become an issue if parties do not address this or have a different understanding of what they think they agreed to);
2) a lack of generally-accepted and clear quality standards for those professionals calling themselves mediators to determine their competency or suitability to handle cross-border disputes as opposed to those of any other 'third person' profession (e.g., their intercultural competencies and knowledge of various mediation practices, approaches and techniques)[14]; and

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(b) mediation is ordered by a court;
(c) an obligation to use mediation arises under national law; or
(d) for the purposes of Article 5 an invitation is made to the parties.

2. Notwithstanding paragraph 1, for the purposes of Articles 7 and 8 a cross-border dispute shall also be one in which judicial proceedings or arbitration following mediation between the *parties are* initiated in a Member State other than that in which the parties were domiciled or habitually resident on the date referred to in paragraph 1(a), (b) or (c).

14 A task force of the International Mediation Institute, IMI, developed criteria for inter-cultural mediator training and IMI certification. Besides general requirements and substantive criteria (knowledge and skills) the task force also proposed six cultural focus areas (CFAs) that mediators may want to give particular attention to during inter-cultural mediation. Each of these behavioural categories is offered as an example and may be relevant when preparing for mediation, interacting with participants, bridging differences, and establishing common grounds between participants:
1. relatedness and communication styles;
2. mindset towards conflict;
3. mediation process;
4. orientation toward exchanging information;
5. time orientation;
6. decision making approaches.
See: https:/imimediation.org/intercultural-certification-criteria.

3) the absence of basic practical guidelines or a checklist suggesting how to set up an appropriate, culturally-balanced mediation process, when parties and their counsel who come from different countries may have different understandings or expectations of what the process to which they agreed actually entails.

This book reveals that preparing for mediation around the world is a bit like travelling and having to prepare ahead for different electric plugs and phone sockets. If you travel to another country you are likely to need an adapter to make a connection. As part of their survey, the editors and the co-authors of this chapter initiated limited sub-research on whether there was a common statutory definition of mediation in each of the 60 countries surveyed, especially within the EU. Despite the common definition suggested by the EU Directive, the following definitions emerged from within the EU:

- Hardly any EU country uses the EU Directive's definition exactly (only Greece does so).
- Most countries have developed their own national definitions. Some are very different from the EU definition (for example, Romania and Austria); some are a variant of the EU definition (for example Luxemburg, Cyprus and Spain, but in Spain a different definition is used, in Catalonia).
- Some countries use different definitions for national and cross-border cases (for example, Austria, which still deviated slightly from the language of the EU Directive when defining mediation for cross-border disputes as separate from domestic disputes).
- Some countries like Poland, Sweden, the Netherlands, Belgium, England and Wales, and Scotland have no official national definition. Some do not have a definition but do have a description of the scope of applicability, for example, Finland.

Many civil-law countries, such as Switzerland and France, distinguish between 'mediation' and 'conciliation', whereas others use the terms interchangeably (for example, Estonia and Lithuania), and in Belgium, mediation legislation refers to '*bemiddeling*', which is the term used in Dutch to describe conciliation, whereas in Italy the term '*mediazione*' used to be understood to relate primarily to a commercial contract for a middle-man who will receive a commission on sale, '*conciliazione*' being the preferred definition prior to the implementation of the EU Directive in Italy).

b. Common principles that are not common

The Directive also sought to introduce certain common principles that it turns out are not, in fact, common in all countries of the EU or beyond its borders: Article 5 creates the possibility for courts to suggest (or even mandate) mediation; Article 6 regulates the enforceability of agreements resulting from mediations; Article 7 seeks to guarantee confidentiality using standards that do not meet the standards of several jurisdictions (e.g., focusing only on the mediator's ability to testify and not on communications between the parties during the course of mediation); and Article 8 regulates the effect of mediation on statutes of limitations and prescription periods. Few countries have implemented these common principles in the same way. Even seemingly uncontroversial words, such as 'on a voluntary basis' or 'confidentiality' turn out to contain certain invisible biases of mediation as a process, and what the word can entail. Can a mandatory pre-mediation information session for litigants be seen as part of a voluntary mediation process (as is required in countries like France and Romania)? Can a mandatory mediation session prior to a court hearing be voluntary (as in Italy)? Is mediation voluntary even if the parties are compelled to sit in a room with a mediator for a minimal period of time before the dispute goes before a court or if refusal to do so may have consequences?[15]

15 Some mediators will answer 'yes' to these questions. It is possible to compel a party **into** mediation, they will say, but not to **stay** in mediation. Once the process is started, they submit, the parties are free

Can mediation be non-confidential (as in Finland for joint sessions during *in-court* mediation, where a judge acts as the mediator and there is a presumption that all documents filed with the court should be publicly accessible)? Can mediation have no impact on the statute of limitations period within which a cause of action must be filed (as in the Netherlands and Latvia)? Can mediators or parties in certain circumstances be compelled to give evidence in court if professional secrecy is not regulated by law (as is the case in Finland, France, Latvia, Luxembourg, the Netherlands and the UK)?

Could it be for these reasons that several EU jurisdictions (e.g., England and Wales, Scotland, Portugal, Austria, the Netherlands and Ireland) implemented the Directive as narrowly as possible – e.g., for cross-border commercial and civil cases only? Whatever the reasons, be they to enhance diversity as much as possible or for domestic political or cultural reasons, the Directive's implementation has led to the confusing situation (in our eyes) that different regimes and standards now appear to apply not only between countries, but even within the same Member State, distinguishing domestic from international disputes, and applying nationalist thinking to the latter as well. This is difficult to reconcile with the EU's general purpose of enabling the free movement of goods, services and professionals.

It can only be concluded from this analysis that, insofar as facilitating international or cross-border commercial or civil mediations are concerned, there is still much room for improvement. This book highlights the need for trying to formulate common definitions, guidelines and frameworks, at least for cross-border situations. In the remainder of this chapter we will focus on how to proceed in the current environment. We will then offer some suggestions to take into account when the impact of the Directive is reviewed by the EU authorities in 2016.

3. The two separate axes to consider when designing mediation: process and substance

> *'We have to consider the process itself as part of the problem.'*
> (David Plant)[16]

a. Classifying mediation approaches in 4 quadrants

It appears from the language of the Directive and the surveys contained in this book that there is a broad range of processes around the world, and particularly in the EU, which are all called mediation but are quite different from one another. Mediation can be a positional negotiation that is managed by an evaluative neutral, or an interest-based negotiation that is facilitated by a non-evaluative neutral as part of a social process. It can be a 'numbers only' discussion, orchestrated in separate one-on-one meetings with the mediator ('caucuses'), or a process by which emphasis is placed on relationship building, by keeping the parties together in joint sessions at all times. It is important that parties discuss the details of the process and not assume anything, remembering that to 'assume' makes an 'ass' out of 'u' and 'me'!

In a series of articles, Professor Len Riskin designed a simple grid to illustrate the range and complexity of different types of mediations (and mediators) that can exist, and to assist parties in selecting the type of mediator and mediation process they seek.[17] We have adapted his grid as

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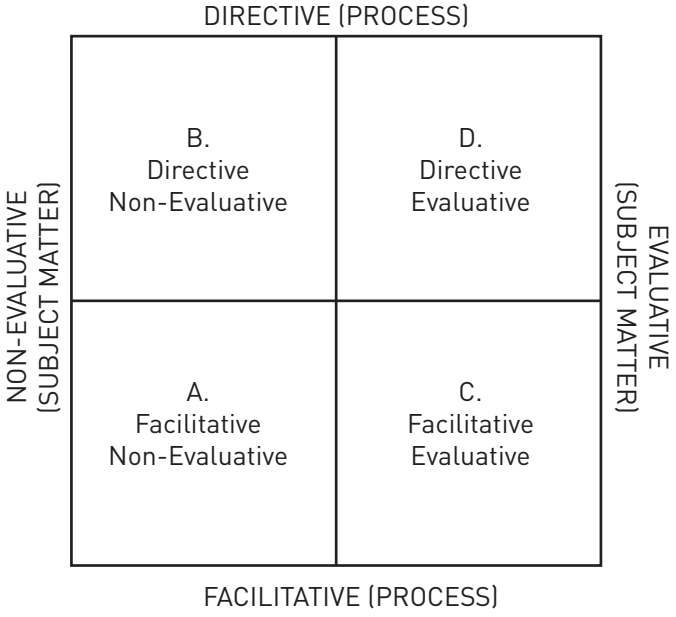
to leave and mediation is now voluntary. Mediators handling mandatory mediation claim to have similar settlement rates (presumably 70%) for contractual mediations. Once people talk in the presence of a skilled mediator, who knows how to orient their attention constructively, they start listening and things change.

16 US litigator, arbitrator and mediator, author of *We must talk because we can – Mediating international intellectual property disputes*', ICC Publication No. 695, 2008 Edition.

17 Leonard L. Riskin, '*Decisionmaking in mediation: the new old grid and the new new grid system*', Notre Dame Law Review 79, No. 1 (2003): 1–53. Professor Riskin is the Chesterfield Smith Professor of Law

follows, and find it to be very helpful as a basis for discussion with the parties and their counsel in all mediations, especially cross-border situations.



According to this modified Riskin grid, the type and style of mediation can be analysed by focusing on two basic axes:

a) how directive or facilitative the neutral will be on matters of process (e.g., time management, whether to caucus or not, written submissions if any, opening presentations, etc.); and
b) how evaluative or non-evaluative ('facilitative' as defined in the standardised questions in other chapters of this book)[18] the neutral will be on matters of substance (e.g., ranging from refusing to express any views, to doing tough reality-testing and preparing to give a mediator's proposal if the parties do not reach an agreement).

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18 This book was primarily conceptualised and drafted by a Dutch team. In doing so, the word 'facilitative' was used in accordance with the Dutch concept of facilitative mediation, which essentially means that the mediator should not be evaluative regarding subject matter. The use of the word 'facilitative' as synonymous with 'non-evaluative', however, reflects a cultural bias, which is a good example of what permeates the field of international mediation. Whereas 'facilitative mediation' equates to 'non-evaluative mediation' in the Netherlands, the term can be used in relation to process (as opposed to substance) in other countries, as is the case with this Riskin Grid. It is thus possible in other countries for people to describe themselves as 'facilitative' and 'evaluative', which would not be understandable in the Netherlands. Working on this chapter, the authors reflected on a mix of Swiss/British/US/Israeli/Dutch approaches, which brought this Dutch cultural bias to light. The questions formulated by the editors for questions 3.e. to i. in the survey were thus meant to address issues of substance (as opposed to process). The two axes, facilitative or directive on process, and evaluative or non-evaluative on substance shown in the above graph, could therefore be confusing to a Dutch mediator. In this chapter (as opposed to the rest of this book) we use an international approach, in which the term 'facilitative' relates to process only, and 'non-evaluative' relates to substance. In the other chapters of this book, 'facilitative' means 'non-evaluative', relating to substance.

Considering process and substance to be two separate axes distinguishing different types of mediations and mediators, we can see that there are at least four different types of approaches to a mediation process, which can vary greatly within the same quadrant, depending on the degree of emphasis on process and/or substance. These processes can reflect different values or cultures, and allow a visualisation of the mixed forms that can exist between countries or within the same country.[19]

Quadrant A *(Facilitative on Process & Non-Evaluative on Substance):*
This can be described as a form of ***facilitative, interests-based mediation***, where the role of the mediator is to generate choices, both on issues of process and of substance. The neutral in this quadrant helps the parties to generate procedural options that will help them to find solutions themselves (e.g., focusing on subjective interests and facilitating joint brainstorming sessions to seek possible options for mutual gain, based on the parties' subjective interests and looking towards the future). In this type of mediation, the neutral acts as a convenor and helps the parties to discuss their procedural options and preferences. Issues such as time, venue, whether or not to caucus, and preparations for the mediation will all be left to the parties to decide, and the mediator will try to refrain from making any recommendations. The mediator in this quadrant helps the parties to brainstorm and to find solutions that may best meet both parties' subjective interests. The primary focus of the mediator operating in quadrant A can be described as treating the mediation as a social process, in which the parties are given the opportunity to explore their relationship, recognise and express emotions, and discuss their fears and hopes, misunderstandings, intentions and motivations. The neutral avoids expressing views, or using any substantive knowledge that they have in making any proposals to the parties as to possible outcomes, and considers the journey in itself to be the destination.

19 It should be pointed out that this modified Riskin Grid is not the only (or indeed necessarily an all-encompassing) way of explaining some of the differences that can be observed between countries. Other techniques, such as use of caucuses or joint sessions, use of systemic theory, appreciation-based enquiry, brainstorming techniques, or the primary purposes of the mediations, may be better. Professor Stephan Breidenbach of the Humboldt-Viadrina School of Governance in Berlin, the Europa-Universität Viadrina in Frankfurt and the University of Vienna, for example, has identified four basic models of mediation: (i) a service-driven model; (ii) an individual-autonomy model; (iii) a reconciliation model; and (iv) a social transformation model. It could be argued that the Riskin Grid captures all of these models. Frankly, however, the mere fact of trying to stereotype country styles is in itself dangerous and over-simplistic, and none of these systems of categorisation (or caricaturisation) should be relied on. Breidenbach emphasises the need to look at mediators individually, in a given context, and not as a group or as a national profile. For the purposes of this chapter, however, and notwithstanding the dangers of doing so, the Riskin Grid is a practical and accessible way of visualising some of the differences that exist and their possible consequences, but its implications should not be taken to their logical extremes. It is provided purely as a basis for discussion for the purposes of this chapter, or for discussions with parties when preparing for a cross-border mediation.

Possible pros and cons of this type of mediation:

PROS	CONS
Generates more choices and party autonomy, and may be perceived as providing better procedural quality.	The process may be viewed as inefficient, 'wishy-washy' or too unclear in some cultures or professional communities.
Empowers the parties: provides an unlimited scope for the parties' discussions, including emotions, beliefs, fears and concerns.	The process and outcome are purely subjective and there are no clear norms to help frame a structured process or a zone of possible agreement (ZOPA).
Decelerates the discussions and gives more time for introspection as well as possibly deeper discussions with the other party.	Can take more time and possibly be more expensive.
Builds relationships, trust and affiliation between the participants attending the mediation.	Parties can get stuck if no guidance is offered, emotions may dominate, or parties may feel they have too many choices.
Embeds a possibly higher compliance factor, since all outcomes are generated by personal choices.	Weaker parties may have less leverage and need a person to help them level the playing field (e.g., by giving each party the same opportunity to participate in the process).
The fact that the mediator is non-evaluative means the parties are less likely to try to convince the mediator of the merits of their case or become positional.	Added value of mediator may be unclear if this person is not seen to be taking an active leadership role or providing any substantive expertise.
Makes the parties solely responsible for their behaviour and all decisions regarding process and outcome.	May provide an illusion of harmony and enable the parties to avoid facing difficult topics needing in-depth discussions.

Quadrant B *(Directive on process and non-evaluative on substance):*
This can be described as a form of ***directive, interests-based mediation***, where the role of the mediator is similar to that of the mediator in Quadrant A, but where the mediator is expected to take more of a leadership role and direct the process itself. The mediator's role in this quadrant is to guide the parties by structuring the process according to what he or she thinks will help the parties reach an outcome based on their subjective interests looking towards the future. The neutral in this sort of mediation may limit the nature of the discussions (e.g., guide the conversations and discourage positions from being argued) and take on a more directive role on procedural matters, such as setting the time (e.g., several short working sessions or one mediation day), whether and when to caucus, choice of venue (e.g., a place that is more likely to help the parties to reconnect – such as an off-site retreat or an office building in a central business district), what sorts of prior written documents will be exchanged (such as written 'interest papers' as opposed to 'position papers', legal documents or expert reports), and any preparations to be done prior to attending mediation (e.g., perspective-taking and setting the agenda on what to discuss in an opening session). The mediator will often decide if and how long to caucus for with each party, or on the other hand, whether, when and how long to meet in joint sessions. The neutral operating in quadrant B, as in quadrant A above, refrains from making assessments or proposals on substantive issues, and is not meant to express any views or opinions as to where he/she thinks the matter should settle.

Possible pros and cons of this type of mediation:

PROS	CONS
Possible greater efficiencies in terms of time and costs compared to Quadrants A and possibly C.	The mediator may have procedural preferences or biases that may not be (culturally) appropriate or optimal under the circumstances.
Neutral is given a greater leadership role, without influencing the parties empowerment regarding substantive outcomes.	The outcome is purely subjective and there are no clear norms to help frame a possible zone of possible agreement. (ZOPA)
Catalyses the discussions but leaves time for introspection.	Can take more time and possibly be more expensive than Quadrants C and D.
Builds relationships, trust and affiliation between the parties.	Parties can become too dependent on the presence of the mediator to direct communication.
Mediator can direct attention to difficult topics needing discussion.	Weaker parties may have less leverage on substantive issues.
Mediator can be more directive in focusing parties to discuss useful and constructive topics.	Mediator may make wrong assumptions when directing the parties' attention and miss opportunities for deeper exchanges.
The fact that the mediator is non-evaluative means the parties are less likely to try to convince the mediator of the substantive merits of their case or become positional.	May leave the parties with the perception that the mediator cannot help them handle substantive topics that they believe need evaluative input.

Quadrant C *(Facilitative on Process and Evaluative on Substance):*
This can be described as a form of ***facilitative, norms-based mediation*** where mediators are chosen for their substantive knowledge of the norms that would normally apply to this sort of dispute (e.g., the applicable laws, case law or industry standards that would apply if a tribunal were to decide the matter). The neutral in this case should still take into account the parties' subjective interests and help generate procedural choices, but is also expected to help the parties identify certain objective parameters and norms regarding possible outcomes, such as what the law would provide for, which may be dispositive of the outcome of the case (e.g., what are the relevant facts that the parties would need to present, what type of evidence would suffice, and the relative merits of their cases as a matter of law, or applying whatever other norms might apply to these facts). The mediator in this quadrant invites the parties to discuss their procedural preferences (e.g., as to time, venue, caucuses, written submissions and preparations) but is also expected to discuss and possibly provide input in discussions regarding the parties' best alternatives to a negotiated agreement (BATNA), worst alternatives to a negotiated agreement (WATNA) and possible, probable or realistic alternatives to a negotiated agreement (PATNA/RATNA). Mediators may be expected to use their substantive knowledge to do some reality testing with the parties (normally in caucus) and to help identify key parameters and benchmarks that may create a framework for a zone of possible agreement (ZOPA), based on these objective norms, as well as the parties' interests to generate subjective norms. It is also possible for the mediator operating in quadrant C to make proposals to the parties as to possible solutions if so requested, or to make final determinations on substantive issues.

Possible pros and cons of this type of mediation:

PROS	CONS
Possibly greater efficiencies in terms of time and costs in that norms can be used to focus discussions, and at the same time parties are fully in control of the process.	The mediator may have substantive preferences or biases that may influence the outcome or prevent the parties from exploring the whole breadth of possible outcomes.
Neutral is given higher status regarding their substantive expertise, without influencing the parties' empowerment regarding their procedural options.	The outcome may become too focused on norms and past events, so subjective needs and interests, looking to the future may be overlooked.
Neutral can propose important substantive topics for discussion and can help the parties generate subjective (as well as objective) norms with which to resolve the conflict, while leaving the parties in control of the agenda.	Attention may get too focused on substantive issues as opposed to relationship building, and mediator may confuse parties by being facilitative on process, but also doing reality testing, discussing the merits of the case or offering a proposal.
The mediator can help parties define the parameters of a ZOPA based on a discussion of their respective BATNAs, WATNAs, PATNAs/RATNAs are and possibly a reality test, or make a proposal.	May lead to more positional posturing behaviour, as the parties try and build coalitions with the mediator, treating the mediator as a non-binding arbitrator when it comes to outcomes, and seeking to use the mediator to influence the other party's perceptions of their BATNAs, WATNAs and PATNAs/RATNAs).
Mediator can direct attention to substantive topics needing discussion and provide evaluative feedback if so required.	Parties may abdicate too many responsibilities to the mediator and stop working on relationship issues.

Quadrant D *(Directive on Process and Evaluative on Substance):*
This can be described as a form of ***directive, norms-based mediation*** where the role of the mediator is to be efficient in generating outcomes, and to set and control the process. The mediator is expected to be able to form a view as to what would settle the dispute and to possibly propose it to the parties if they do not reach an agreement within a set period of time (e.g., one or two days). Although a skilled mediator operating in this quadrant will initially seek solutions that take into account the parties' subjective interests, the process may be influenced by the premise that the mediator can direct the process and provide an opinion regarding substance, to help the parties reach cost-effective outcomes within a pre-defined time frame. The parties' interests should be used to generate subjective norms, however, the mediator is likely to be an expert who will also focus on legal or industrial norms, such as what the law or the applicable rules of the industry in question would provide for. The goal is to catalyse an outcome that is within the range of what a court or tribunal might propose, or that benchmarks well with what could happen in court. The mediator in this sort of process normally has much experience, substantive knowledge, limited time, and is a person of high status. This person is expected to set social protocols, direct the process in accordance with their procedural preferences (e.g., as to time, venue, caucuses, written submissions and preparations) and to be willing to do some robust reality testing regarding BATNAs, WATNAs and PATNAs/RATNAs. This person is expected to be able to apply her/his substantive knowledge to help the parties identify key parameters and benchmarks, and to shape a settlement within a defined ZOPA. The neutral operating in quadrant D is likely to be under time pressures and to use this pressure to focus on specific dispositive issues (e.g., risk assessments and probabilities of outcomes). Although these mediations may be handled in joint sessions, they tend in practice to be done in caucuses, so that the mediator may gain as much relevant information as possible, test assumptions,

or suggest solutions. Although emotions may be recognised as important, they may also be seen as best handled in caucuses, either to help the mediator build a greater sense of trust and relationship with the party or to keep the process 'on target' in the eyes of the other party. Bracketing techniques (narrowing down financial ranges all parties might agree to) and shuttle diplomacy (e.g., carrying messages and offers) are techniques sometimes used in this quadrant to combine efficiencies of time and process with outcomes. Some mediators in this quadrant inform the parties upfront that they will put forward a mediator's proposal if they deem it useful to do so. Mediators operating in this quadrant often require the submission of position papers and key documents in advance of the mediation, which the mediator is expected to have read and formed a preliminary view of before the mediation proceedings begin. Co-mediations are rarely used in this quadrant, save for large multi-party disputes, where it may be efficient to conduct several caucuses in parallel. The mediator(s) in these sorts of cases are often judges, experienced lawyers, senior managers, consultants or engineers, with complementary expertise, who can suggest where in the ZOPA the parties may agree to settle. In its extreme form, mediations in this quadrant amount to a sort of non-binding arbitration process, with the difference being that the neutral(s) can meet separately with the parties in caucus before giving their recommendations or making a settlement proposal.

These four quadrants are only symbolic and should not be taken as more than one method by which to try to visualise what sort of approach can be required or applied in different kinds of mediations.[20] Like all attempts to stereotype, it is dangerous to use this as a way to define or characterise a country or its mediation styles. Some countries with sophisticated mediation services and highly skilled neutrals offer combinations of processes in one or more of these quadrants. Although some countries may appear to have adopted one of these quadrants in their national approaches to mediation, mediation is still in its infancy, and increased cross-pollination across countries may lead to more diversity within each country. Some countries with a long history of mediation (e.g., the Netherlands) are also offering innovative hybrids, combining some of these quadrants.[21] Most experienced international mediators are also sufficiently versatile to adapt their style according to the procedural needs of the parties and their counsel. It is possible for a mediator to start in one quadrant at the beginning of mediation and to end up in another quadrant over the course of the same mediation (sometimes even in the same day!). The authors to this section favour, in fact, a flexible and eclectic approach.

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20 These four quadrants describe only a very limited number of types of mediation. In addition to facilitative, directive, evaluative and non-evaluative styles, there are transformative, narrative, religious, appreciative, solutions-oriented, conciliative, transcendent, spiritual, constellation–based, compassionate, systemic and eclectic styles. See e.g., Ken Cloke *'Let a thousand flowers bloom: a holistic, pluralistic and eclectic approach to mediation'* (2007).

21 In the Netherlands, a country with a traditionally non-evaluative approach to mediation, the editors of this book have introduced the concept of 'legal mediation' an eclectic or varied approach where several evaluative elements regarding substance are introduced in the closing stages of a mediation process or using co-mediators with different approaches. It would be impossible to characterise this process as belonging to any one of these quadrants. A legal mediator has a solution focused, facilitative and evaluative approach. Legal mediation means that the mediator pro-actively supports parties on a substantive and procedural level. On request the mediator also addresses applicable legal norms or how similar issues were successfully solved in comparable mediations. The communication, substantive- and legal aspects of the case as well as the personal and commercial interests of the parties play an equally important role in the mediation process.

Possible pros and cons of this type of mediation:

PROS	CONS
Probably greater efficiencies in terms of time and costs in that norms can be used to focus discussions and the mediator can be more directive in focusing parties' discussions on useful and constructive topics.	The mediator may have substantive or procedural preferences that may unduly influence the outcome, or that may not be culturally appropriate, or prevent the parties from exploring the whole breadth of possible outcomes.
Neutral is given a greater leadership role and can assert him/herself as needed, use his/her status as leverage and set protocol standards.	Less party empowerment. The outcome may become too focused on norms and past events (e.g., issue of facts and law), and future subjective needs and interests may be overlooked.
The mediator can help focus the parties by defining the parameters of a ZOPA, based on an analysis of the BATNAs, WATNAs, and PATNAs/RATNAs and by putting forward a binding or non-binding proposal.	Focusing too much on the ZOPA and a mutually acceptable PATNA or RATNA may lead to unhappy compromises or equally unsatisfactory outcomes, instead of focusing on interests to try to 'expand the pie' and think of possible outcomes for mutual gain that go beyond both parties' BATNAs.
The mediator can use caucuses to do robust reality testing, work on confirmation bias, overconfidence bias, and to help the parties overcome issues of reactive devaluation and positional anchoring.	Over-reliance on caucuses may lead to too much emphasis on the mediator's relationship with the parties as opposed to the relationship between them. May lead to more positional posturing as the parties try and build coalitions with the mediator thinking in terms of 'us' vs. 'them'.
The mediator can educate and assess the parties on norms that may be dispositive of the outcome or direct attention to substantive topics needing discussion.	Mediator may become too much of a problem-solver, thinking they have the solution rather than that the parties do. Participants may work less hard on relationship issues and substantive issues, leaving this to a great extent to the opinion of the mediator.
Pressures of efficiency, or the parties perceived need for an outcome (e.g., to avoid costs of trial or unpleasant relationships) may provide additional incentives for the parties to compromise and settle.	Pressures of efficiency may lead to greater adversarial behaviour and positional negotiation, less room for working through relationship difficulties or emotional issues, and may possibly lead to lower compliance rates, cognitive depletion, or decision fatigue.

For example, a mediator may start mediation in quadrant A, leaving all choices regarding procedural options up to the parties and not acting evaluatively, but find that they are in quadrant C or D by the time the mediation has ended by becoming increasingly directive and evaluative due to the parties external constraints (e.g., time and budgets). The opposite can also happen: the parties may ask the mediator to conduct the mediation in quadrant D, but during the mediation it becomes clear that there are many underlying emotional, cultural, social or relational issues that are blocking arriving at optimal solutions between the parties or there may be changes in the parties' circumstances (e.g., in company strategy or objectives, external pressures, or a renewed interest on rebuilding on the relationships between the participants to mediation) which require an increasingly facilitative or non-evaluative approach. It can also be considered a good practice to consider by appointing two neutrals operating simultaneously in one or different quadrants (e.g., in co-mediations or hybrid mediation models).

There is no 'right' or 'wrong' quadrant, and both of the authors have found themselves operating in different quadrants, in different types of cases and at different times (sometimes in co-mediations or hybrid processes). Although quadrant D may lead to greater efficiencies, there may be a price to be paid for it, leading to fewer 'mutual gain' outcomes. Alternatively, quadrant A may appear to be an ideal starting point, but given power imbalances, cultural

differences, or external pressures that neither party can control, it can lead to disappointment and frustration if the parties do not have a mediator who is also willing to work in another quadrant, or to bring in a co-mediator who knows how to do so.

b. Mediation approaches in a cross-border mediation

It is important to ensure at the beginning of a cross-border mediation that the mediator(s), the parties and their representatives all have a common understanding of the quadrant(s) they are operating in. An experienced international mediator should have the flexibility and skills to operate in and understand all four quadrants if so required, or to know when to bring in a colleague with complementary skills. They should be able to discuss various procedural choices and options with the parties, just as skilled mediation advocates should be trained to do.

National training or their source profession may make a mediator initially more comfortable working in one quadrant than another. Thus some jurists, who have built up skills, mental models, and considerable experience working in quadrant D, or some psychologists who are used to work in quadrant A, may find it difficult to work in another quadrant. There is also a danger that if only one type of profession may be accredited as a mediator in a given country (e.g., only lawyers), the national style of mediation may tend to gravitate around quadrants C and D, as lawyers tend to be trained to focus on legal syllogism, whereby 'facts + laws = outcomes'. If mediator lawyers are under time pressure and do not receive additional training on how to specifically deal with this, they are likely to act as problem-solvers, seeking to analyse the facts and the law as the basis for a ZOPA within which a settlement can be found, rather than probe the parties' subjective interests and seek options for mutual gain.

Having explained above the dangers of national stereotyping, the Riskin Grid may nevertheless be borne in mind when reading the various national chapters that are contained in this book. The regulatory frameworks of some countries suggest that not as much thinking has gone into promoting or sustaining diversity of mediation practices as has been done in other countries, or that the legislators may, prefer one quadrant over the others. Although mediation is not everywhere clearly defined and regulations are not in all countries set in a way that can be clearly identified with any given quadrant, these distinctions, or a conscious strategy to embrace all of them, can be found to exist (to varying extremes) when reading the 60 descriptions contained in this book closely.

The country that a mediation process or mediator is chosen from may have a very big impact on the way mediation is initiated, conducted and concluded. Its outcome and the impact it may have on the parties themselves or their relationships with others may be greatly affected by what may at first appear to be an insignificant choice of venue. The process itself can contribute to conflict escalation or de-escalation. If the parties are placed in an evaluative quadrant, they may place greater emphasis on coalition-building with the mediator, seeking to influence them and working more in caucuses, whereas in non-evaluative quadrants the process may lead the parties to focus more on their communications, and how to work in joint session.[22] Many civil-law countries do distinguish precisely between these two types of processes (i.e., evaluative and non-evaluative), which both fall within the EU Directive's definition of mediation. They are often treated quite differently in the rules of civil procedure of these countries, often called '**conciliation**' (a norms-based and evaluative process, corresponding to quadrants C and D) – which the authors find confusing – and '**mediation**' (an interests-based and non-evaluative

22 For further discussions on the distinction between mediation and conciliation, and the possible impact of the process itself on the outcome of an ADR process, see J. Lack *'Appropriate dispute resolution (ADR): the spectrum of hybrid techniques available to the parties,'* Chapter 17, in *ADR in business, practice and issues across countries and cultures* (Kluwer Law International, edited by A. Ingen-Housz, 2011), pp. 339-79, and J. Lack & F. Bogacz, *'The neurophysiology of ADR and process design: a new approach to conflict prevention and resolution?'*, 34 Cardozo J. of Conflict Resolution (Vol. 14:33] 2012, pp. 33-80.

process, corresponding to quadrants A and B). In Switzerland, for example (which is not an EU Member State, but to all intents and purposes is part of the EU due to its bilateral agreements with the EU), the Code of Civil Procedure (CPC) makes a clear distinction between 'mediation' and 'conciliation', which are covered by different sections of the CPC.[23]

As the authors of this section see the current situation, a clearer awareness of the different types of mediation processes and their pros and cons, together with clearer definitions of mediation, principles that represent a variety of generally accepted standards or the types of mediation that can exist, could help disputants in different Member States of the EU and around the world to avoid the invisible trap of agreeing to a process that they actually do not understand in the same way and to give them opportunities for informed choice and authonomy. Of course a large variety in styles and approaches can be reframed as providing more flexibility. Some countries objected at the time to the EU Directive because they were afraid that it would take away one of the cornerstones of the mediation process: flexibility. This was the position, for example, of the Netherlands.

One question we had, seeing the feedback from all the countries, was whether cross-border mediation was more predictable in the past, when there were fewer legislative rules, meaning that parties may have had more informed consent regarding the processes they were entering into. Given the possible misconception that the EU Directive was seeking to harmonise one type of process when it was in fact combining variants of conciliation with variants of mediation, is the Directive creating more choice or more confusion?

It can be useful to use the Riskin Grid to discuss approaches and expectations together with the parties and/or their legal counsel. This can be a good preparation exercise before any mediation to ensure everyone is working within the same quadrant at the same time, in domestic cases as well. A lack of clarity when setting up a cross-border mediation process may impede confidence in or greater use of mediation in cross-border disputes if lawyers and the parties are not aware of these issues, and there is a disagreement either between them or with the mediator about what mediation is about, or what type of mediation should be used after the mediation has commenced.

As with everything in this world it would be wrong to look at the glass as only being half empty, and to reach the conclusion that mediation in the EU and abroad is '60 countries divided by a common word'. Although there are indeed wildly differing mediation practices and regulatory frameworks within Europe and elsewhere, with little predictability in certain cross-border cases, more courts and lawyers are beginning to discover the use of this process. It is thus possible to also look at the glass as being half full, given the high levels of efficiency and satisfaction ratings achieved by most countries where mediation is now being used, in whatever quadrant(s) happens to be the case.[24]

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23 Conciliation is more commonly used in Swiss courts and is considered to be part of judicial proceedings, covered by sixteen sections in Title 1 of Part 2 CPC (Sections 197-212 CPC), whereas mediation is seen to be an extra-judicial procedure that is covered by only six sections in Title 2 of Part 2 CPC (Sections 213-18 CPC). The Swiss CPC does not provide a clear definition, however, to distinguish mediation from conciliation. Nor does it highlight the differences between them. The differences are to be inferred from the contexts they relate to ('conciliation' is usually conducted by a sole magistrate sitting in the court; 'mediation' is usually conducted by one or more professionally trained mediators, whose style will are often be influenced by training they have had in other countries). For more information, see Section 16 'Country specific remarks' in the chapter on Switzerland.

24 ACB foundation, for example, at the time reported 77% settlement rates and 94% satisfaction ratings. Data compiled by the ACB Foundation in 2004 over a period covering 1998-2004. Source: http:/www.acbmediation.nl/upload/Sections/files/kwantitatief%20verslag%20St%20ACB%201998-2004.pdf.

Cross-border mediation, however, can be a complex and confusing process for the moment, and it may inhibit the expansion of mediation or its ability to reach its full potential use. The %ages of 0.05% for usage and 75% as a success rate suggest that there is still huge growth potential for mediation in the EU and abroad. For this to really take off in the EU, however, the Commission will need to promote the free movement of mediation services, parties and mediators across the EU by recognising the national prejudices that are beginning to emerge and the lack of precision or understanding about the differences which each Member State has adopted it. The answer does not necessarily lie in more legislation or harmonisation, but greater precision in vocabulary, support in making informed choices and creating incentives for ADR professionals and users from across the EU to discuss and learn more about the pros and cons of different styles of mediation and how to provide parties with more informed choice. Mediating internationally or cross-culturally requires (even more than in domestic mediations) specific knowledge and skills, including mediators being aware of their preferred style(s) of mediation, their ability to diagnose and help the parties adapt the process to suit their procedural preferences and needs. Mediators should also allow the parties to re-contract from time to time, should they wish to move to a different style of mediation if their first choice regarding the process turns out not to have been optimal in the circumstances. It is a good idea, for example, for the parties to have a first mediation session with a mediator or an independent and experienced mediation advocate that will work for both parties and lawyers to facilitate a discussion on procedural choices before the actual mediation begins, which could be with one or more other mediators.[25]

4. What does this all mean in practice?[26]

How would civil or commercial cross-border mediation work in practice today?

Let's imagine a hypothetical dispute between a family-owned business based in Country A (where mediators and lawyers are trained, and the government has regulated mediation in accordance with quadrant A of the Riskin Grid) ('Company A'), and a mid-sized company based in Country D (where mediators and lawyers are trained, in accordance with quadrant D of the Riskin Grid) ('Company D'). The dispute arises over whether payment for certain invoices is due, and whether certain goods conformed to specifications. Both companies have local lawyers, who are knowledgeable about mediation in their respective jurisdictions and have been trained to handle mediations in quadrants A and D respectively. They advise their clients to agree to mediation, not realising the expectations and approaches between Country A and Country D are different. Depending on where the 'defendant' is domiciled, it is possible that external lawyers would be appointed in that country, and that the external lawyers would agree on a mediator in that country, without providing an informed choice to the parties regarding the process to be used in this cross-border setting. This could create an advantage for one party, to the possible disadvantage of the other. Let's assume that Company A is expecting a process to take place

25 In order to avoid this risk, the International Mediation Institute has provided a decision tree on its website at http://www.imimediation.org/decision-tree to assist parties in different countries in jointly selecting a mediator in international cases. The idea behind this decision tree is to help the parties to understand these issues by using the decision tree itself, and jointly identify and select mediators who are not only competent, but also more suited to their combined procedural preferences.

26 The authors would like to warmly thank our colleagues and country contributors who challenged us to rethink and review substantial parts of this chapter. We realise that there are many different views regarding some of the ideas that are expressed in this section, and that many experienced practitioners will not agree with these views. This debate is helpful in itself, and the authors welcome comments from all readers, to help us to develop our thinking on the topics of how to initiate, conduct and oversee cross-border mediation. Please contact: jlack@lawtech.ch and manon@schonewille-schonewille.com.

in accordance with quadrant A, and that Company D is expecting the process to take place in accordance with quadrant D. How and when will they realise that the processes they are expecting may not be appropriate for the other company?

As noted earlier, the words used to describe mediation styles and approaches, such as 'directive', 'facilitative', 'evaluative' or 'non-evaluative' may have a very different meaning in different countries. A mediator from Country D may describe him/herself as 'facilitative', in the same way that his or her colleague from Country A would, without knowing that they may mean different things. 'Facilitative' in Country D may mean that parties may instruct the mediator on certain preferences they have, but the mediator is clearly in control as the manager of the mediation process and will assume that the mediation will take place in his/her office in the course of one day, and expect prior submissions (mediation briefs or position statements and documents), opening statements and most work to be done in caucuses during the day, working in several rooms. In contrast, 'facilitative' in Country A may mean that the mediator will ask and expect the parties to discuss every detail regarding the process (e.g., location, venue, meals, social events, time to be allocated per meetings, who should attend, whether or not any documents will be provided, options for initial joint meetings) and may assume that everything will happen in joint sessions, leaving all decisions, both procedural and regarding substance, to the parties (e.g., whether or when to ask for a caucus or joint meeting, and if so, when and how long each session will take, who should attend, what preparatory work should be done in advance, etc.).

A 'facilitative' approach for a Country D mediator may also mean that he or she believes the parties expect mediators to use their substantive knowledge and to be willing to do reality testing in caucuses, to walk the parties through the strengths and weaknesses of their cases, and help them to assess their BATNAs, WATNAs or PATNAs/RATNAs and any underlying assumptions. Because this mediator is not expecting to put forward a mediator's proposal, and may indeed refuse to do so when first asked, this person may perceive themselves to be as 'facilitative' in a way that is not at all what Company A or its lawyer may expect. For a Country A mediator, however, 'facilitative' may mean refraining from using any substantive knowledge altogether and will not consider any rigorous reality testing (PATNAs/RATNAs) to be part of their remit (unless expressly requested to facilitate such a discussion by the parties). The mediator from Country A may not understand that Company D or its lawyer expect him/her to do reality testing in caucus or to provide any views at all on anything. It is very possible, in view of the foregoing, that Company A and its lawyer would be very disappointed by a mediator working in Country D style, and that Company D and its lawyer would be very disappointed in a mediator working in Country A style (and may interpret the proposal of hiring a co-mediator as a lack of confidence rather than as a way to improve the quality of the process). Parties or their lawyers may even end up having a dispute about the mediation process itself. What type of mediator should be appointed in such a case (e.g., a 'facilitative', 'evaluative', 'transformative', 'solution-focused', etc. mediator)? How many mediators should be appointed? Where from? What should their role and status be? How much time should be allocated to the mediation? Who should attend? Who will decide whether or not to caucus or have a joint session? If Company A's lawyer raises all of these questions with Company D's lawyer, the latter may think that the former is wasting time and is unnecessarily trying to drag things out. Likewise, Company A's lawyer may think Company D's lawyer is being far too positional or aggressive if he or she starts to assume they are working in the same Quadrant D, and that all the lawyers need to do at that point is work out the date of the mediation and to propose names of mediator(s) they have worked with in the past and in whom they have confidence. One company may even suspect that the other is not acting in good faith if they appear to be too insistent on working only within their view of what 'mediation' is about.

Without even going into the substantive details of our hypothetical case between Companies A and D, it is possible to foresee that their lawyers may face a number of immediate hurdles when discussing the type of mediator they wish to appoint. For example:

Company A's lawyer may seek two co-mediators:
(i) who do not use caucuses and work almost exclusively in joint sessions, helping the parties to rebuild direct communication and affiliation with one another and to recognise emotions as expressions of unmet needs and interests;
(ii) who never make recommendations or provide any evaluative feedback;
(iii) who will take all the time that is needed to ensure the parties design an optimal process and outcome, working over many short sessions to ensure that everyone is fresh and alert, and so that they can prepare between meetings for the next meeting (i.e., a process that can be spread out over several days or weeks);
(iv) who will ensure the parties reach their own co-created outcomes, based solely on their subjective interests; and
(v) who work as a team (preferably a man and a woman, from different professions – e.g., a lawyer and a psychologist, who had 150 hours of mediation training), given that, in Company A's view, the value or complexity of the dispute will justify doing so.

Company D's lawyer may seek a sole mediator:
(i) to work primarily in caucus to build trust with each of the parties separately;
(ii) who can do robust reality-testing, and will be prepared to provide views on the merits of certain positions or evidence that the parties may argue, as well as to give a final mediator's proposal if asked to do so by the parties;
(iii) who can complete the mediation in one or two consecutive days without any breaks;
(iv) who is usually a retired judge, a senior lawyer, or an engineer with a great deal of substantive expertise and procedural experience, having handled many such cases before (regardless of their international or cross-cultural experience) and who had 40 hours of training as a mediator.

Appendix I at the end of this chapter provides a more detailed chart outlining the expectations of Company A and Company D and important considerations to take into account when planning for such a cross-border dispute. In view of the disparate preferences and national approaches to mediation, where, how, when and with whom should the mediation be set up? These questions appear simple at first, but can be harder to answer in practice.

The selection of mediator(s) and the design of the process itself may have a profound influence on the parties and possible outcomes. Should two mediators be hired (e.g., one from country A and another from country D who know how to operate in quadrants A and D respectively)? Or should one mediator be hired, from a neutral third jurisdiction, who knows how to operate in quadrants B or C? If co-mediators are chosen, will they know how to work together? Will one mediator take the lead and, if so, which one? Should one mediator focus on process issues and another on substantive issues? If a sole mediator is appointed, should this person be familiar with all four quadrants and the substantive or mediation laws of both countries?

One possibility is indeed to appoint two mediators, one from each jurisdiction, or from two similar jurisdictions. This may result in a form of hybrid, with the one neutral acting more as an evaluative conciliator, and the other neutral acting more as a non-evaluative mediator. Although this may sound unnecessarily cumbersome and more expensive, such co-mediations

are reported to be widely preferred by mediators, parties and especially counsel, whenever they have tried it, and to be particularly effective.[27]

As discussed in section 3, there are pros and cons to each of the four quadrants. Yet some sort of a starting place is needed. If the parties in the dispute between Company A and Company D choose to conduct the mediation in a primarily facilitative (process) and non-evaluative (substance) way, the downside may be that just discussing the process options may already take too much time and frustrate Company D. The mediator may leave everything up to the parties to decide, leaving Company D feeling insecure because it does not know what to expect (or what would be a good process choice), or irritated because it wants to move on instead of discussing procedural options with the other party. The managers of Company D may have no interest in sitting down and meeting the members of the family that own Company A, and may not be willing to sit for long periods of time to discuss how the employees of Company A felt when certain things occurred, nor what emotions they could have expected. Company D may have come to the mediation with a settlement price and a clear walk-away price in mind, and may be in a hurry to move on to a positional negotiation strategy based on numbers. In this model the process may also become part of the problem. The mediator may not be comfortable discussing numbers early on, and if Company A does not wish to do so, the mediator may try and mediate the issue of when and how numbers should be raised. Too much time may thus be spent on things that appear to be trivial to one (or both) of the participants, who may ask early on for caucuses and a discussion on numbers because this would be perceived as a much faster way to settle the dispute, with a similar degree of satisfaction. Company D's lawyer may insist that the mediator move to caucuses and start to do reality testing with both sides, two proposals that the mediator in this case is likely to resist given his facilitative and non-evaluative mandate. Caucuses may, however, help the mediator to uncover solutions that the parties cannot see themselves. The positive side of this approach is that if Company A and Company D are to have close future working relations, treating the mediation as a social process may help them to focus on how to build a sustainable relationship despite their different corporate cultures and styles of management, allowing natural affiliation, respect and empathy to build between the participants. Such a process, ostensibly not only about issues of money, could also be a transformative and empowering opportunity for both parties, teaching them how to prevent and handle any future disagreements that may arise between them as well. Such a social process is more difficult to achieve in a day or when the parties are sitting in separate rooms. The question may be: when is which approach more desirable or useful for the parties? The answer, we submit, lies in informed choice, discussing all of these points. Which can be done before the mediation begins, by telephone or videoconferencing, e.g., using Skype, GotoMeeting or some other online meeting platform using online dispute resolution technology.

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27 Not only does this observation match the authors' own experiences in practice, the findings from a Dutch court-connected mediation project (*mediation naast rechtspraak*) indicate that:
(i) compared to a solo-mediator, co-mediators generate higher settlement rates: 67% for judicial co-mediations as compared to 59% for judicial solo-mediations; and
(ii) lawyers report higher satisfaction ratings with the outcomes of co-mediations, although the parties themselves were typically indifferent.
A possible explanation for these findings may be that co-mediation actually does generate better outcomes. Lawyers frequently deal with disputes, and are more able to compare the resolution of one case with outcomes in similar cases. Although a co-mediation team may not necessarily be cheaper or more efficient in terms of time, a team is generally more effective and mediators used to working with other mediators in this way will tend to recommend it whenever possible and even offer discounts to their clients as an incentive to do so.

The Directive ignores or sidesteps these fundamental issues and does not give any direction as to what to expect in such cross-border cases as the one between Company A or D, or how to initiate it. Its definition of 'mediation' and 'mediator' includes all four quadrants in the Riskin Grid, deliberately including conciliation as one of the mediation processes covered (by including 'however named'). Additional EU guidelines with more precise definitions would help, thus converting possible traps (e.g., fragmented national processes) into an opportunity (e.g., more informed choice and diversity).

5. Dealing with the variety and looking ahead

> *'There is nothing so useless as doing efficiently that which should not be done at all.'*
> (Peter F. Drucker)[28]

The trend towards national definitions, and national ADR institutions, who may teach their own (often culturally-biased) concepts of mediation to their nationally-certified mediators, is likely to be one of the greatest obstacles to the growth of mediation across the EU in the next few years, and to the free movement of mediators and mediation services across the EU, which would bring greater diversity and more informed choices. Even if different national approaches reflect different cultures that need to be taken into account, cross-border mediation guidelines should be set to help courts, companies, advisors and ADR institutions to have a common vocabulary and set of standards when initiating mediation between companies such as Company A and Company D. The EU framework should guide and assist them in making their own choices, depending on the definition, type of process, type(s) of mediator(s), of the process, including certain key parameters (e.g., time, value of dispute, budgets, value placed in future business relations, social, emotional, cultural and other factors, such as the likelihood of the dispute escalating further).

The European commission will prepare in 2016 a report on 'the development of mediation throughout the European Union and the impact of the Directive in the Member States.' And '...if necessary, the report shall be accompanied by proposals to adapt the Directive.'[29] In anticipation of that report, it is important to analyse and discuss not only what the generally accepted standards of mediation are or what a 'common core' for mediation and best or good practices should be in Europe or around the world, but also to discuss the question of how to help disputants build their own interests-based justice systems using mediation or conciliation, with the assistance of the executive, the legislator and the judicial arms of the state, to initiate, manage and resolve their disputes optimally. This would help parties reach an informed choice when designing processes and reaching optimal solutions that comply with the law, but more importantly, address their needs. Based on this book, the authors suggest that the following 3 issues be given particular consideration in the context of cross-border civil and commercial mediations:

1) The development of an EU glossary providing clear and shared definitions or a precise vocabulary of what mediation, conciliation and different styles of mediation or mediation approaches actually mean.
2) Organising regular opportunities for professional cross-border mediators to meet, exchange good practices, and provide user feedback or descriptions of their competency or suitability for assisting the courts, parties and their advisors when selecting neutrals for cross-border

28 Austrian-born American management consultant, educator, and author, who greatly influenced the philosophical and practical foundations of modern management, and developed the concept 'management by objectives'.

29 EU Mediation DirectiveArticle 11.

disputes, and encourage the free movement of mediators and mediation services across the EU.

3) The creation of basic, practical guidelines or a checklist suggesting how to set up an appropriate, culturally-balanced mediation process, if parties and their counsel, who come from different countries, have different understandings or expectations of what the process to which they agreed actually entails.

It is unlikely that a 'common core' will ever be found to characterise mediation within the EU or across the 60 countries surveyed. One of the original definitions of commercial mediation by Folberg & Taylor dating back to 1984 describes mediation as '... the process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual agreement that will accommodate their needs'.[30] This definition could be a good starting point to provide a new common basis for consolidating the good work that has happened since the EU Directive was issued in 2008. We submit that using a more precise definition, and distinguishing mediation from conciliation (while continuing to cover both) should be a priority when the Directive is reviewed in 2016. The presence of the word 'needs' in the Folberg & Taylor definition of mediation suggests that the process need not be norms-based but that it should focus on the parties' needs. This is true for issues of process as much as of substance. A broader but more precise vocabulary that would focus on helping parties to understand and correlate their procedural needs to the type of mediation process (or combined processes) they may wish to use would be an excellent step in the right direction. Many countries surveyed also do not appear to adhere to or place value on a systematic approach that covers all of the elements contained in the Folberg & Taylor definition. Positional negotiations are common and an interests-based negotiation can appear counter-intuitive at times, so the steps of focusing on subjective interests and exploring possible options that may address both parties' subjective interests are often ignored or forgotten. These were seminal steps in the concept of interest-based negotiation introduced by Harvard's 'Getting to Yes' model.[31] A new glossary, distinguishing different types of mediation processes, their descriptive terms, and guidelines to help entities in different countries to safely discover, explore and define their joint procedural needs, and assist them to do so, would be a welcome step. Helping parties to distinguish 'mediation' from 'conciliation' may be a helpful exercise in common-law as well as civil-law countries. Including both of these processes in the Directive, but specifying the differences between them so that they can be used more skilfully (possibly in combination), could also be a useful development.

Being more specific could even be viewed as an ethical obligation of mediators and mediation advocates. If the three pillars for ethics in mediation are (i) party autonomy, (ii) procedural fairness and (iii) substantive fairness,[32] it is essential for all concerned to clearly specify the differences and cultural assumptions that are beginning to emerge country-by-country. Party autonomy requires that a party has self-determination and informed consent. This cannot be the case if a party is unexpectedly caught by an evaluative process it did not consent to, or vice-versa. Procedural fairness is not only a matter of power balances in process design, but also a matter of impartiality (or rather, equi-partiality, multi-partiality, and/or omni-partiality) of the

30 J. Folberg & A. Taylor, Mediation: *A comprehensive guide to resolving conflicts without litigation* (San Francisco: Jossey-Bass, 1984), p. 7.

31 *Getting to YES: Negotiating agreement without giving in* is a best-selling non-fiction book first published in 1981 by Roger Fisher and William L. Ury.

32 These three pillars are introduced and described in E. Waldman's book '*Mediation ethics: Cases and commentaries*' (San Francisco: Jossey-Bass, 2011), the first textbook on ethics in mediation that also includes several different national views.

mediator and the process itself. Providing a choice between a 'facilitative' process and a 'directive' process in itself provides for greater procedural fairness, especially in a cross-border setting. Finally, substantive fairness is predicated on party autonomy and procedural fairness, but it is also difficult to accept mediation as fair if it results in a mediator's proposal (even if it is non-binding) as part of a process that responds more closely to the cultural preferences of only one of the parties. How caucuses are used and how information received in caucuses may have influenced a mediator's proposal are also difficult issues to decide on, which is why some mediators – albeit a minority – recommend never caucusing when a mediator's proposal is to be put forward.

In the cross-border example given in this section, apart from the fact that many courts today would not know how to select the type of mediator or the mediation services provider who could provide a competent and suitable mediator for that case, it is clear that it would also be inappropriate to solely suggest the use of a Country D or a Country A mediator or mediation services provider.[33]

Problems will arise in cross-border cases if the parties and their lawyers have different expectations of what mediation is, what a mediator does, how a mediation process needs to be conducted and what it encompasses. The question: 'Which mediation process should a court or the parties choose for a cross-border dispute?' can lead to a two-step process: (i) a first discussion on procedural issues, and the type of mediation the parties are looking for; and (ii) a substantive process in accordance with the process designed as a result of the first step. Mediators and mediation advocates or advisors who work across borders should therefore be aware of the different national approaches to mediation and regulation, and their impact. Professionals acting or advising across borders should undergo training on how to initiate cross-border cases, and this topic should be included in EU mediator and mediation advocacy training.[34]

The authors do not mean to appear critical of the EU Directive. It is a hugely positive and very important piece of legislation whose impact is seen as critical to the EU as a whole and beyond. Our belief, however, is that more is needed. This section is intended to do some reality testing to help the parties (in this case the EU and its Member States) like a mediator may do in some countries to think of potential opportunities that remain which could be developed to help parties to generate their own processes and solutions, leading to interests-based justice. Our wish is that legislators in the EU and beyond be more aware of their national biases and preferences, and determine whether and how mediation can be improved in the future, both domestically and internationally, and how to help maintain diversity and encourage informed consent. There are many things that can (and arguably must) be done to take mediation to the next level for it to realise its full potential.

If mediation represents access to 'interests-based justice' as opposed conciliation which represents access to 'norms-based justice', what procedural safeguards can be built into the Directive to ensure that the parties are always encouraged to consider both options? Do they

33 If an Italian party were involved in the case, however, this may be a very real problem as only an Italian registered mediator, who is certified by the Ministry of Justice, can conduct legal mediation that will have a legal effect in that country. This seems to violate the EU principle of non-discrimination, and Italian law appears to contravene EU law by not allowing certified mediators from other EU Member States to act in legal mediation in Italy.

34 For the recent conclusions of an IMI mediation advocacy taskforce that touches on several of these points, see http://www.imimediation.org/advocacy-taskforce.

wish to settle their disputes based on their subjective needs and interests, rather than based on a third party's perceptions of who may be 'right' or 'wrong'? Or a combination of both? What values or outcomes can be promoted and may be attractive to all Member States? What should be the purpose of the Directive: to stimulate access to interests-based justice as distinct from norms-based justice? To encourage party autonomy and collaboration? To have disputants recognise and accept their own responsibilities? To be more efficient, reduce costs and save time? To lighten the workload of the courts in an increasingly litigious and self-centred consumer society? Is there a need to develop public precedents and norms when mediation is used? The answers to these questions will vary greatly depending on which Member State is being asked. Presumably greater diversity, precision, choice and informed consent will be of mutual interest to all Member States and their residents.

Mediation (in its broad sense) will evolve best if it remains flexible and diverse. It should also be compatible with the local legal cultures and social values of individual Member States. Flexibility in styles and approaches in mediation are crucial. However, if we aim at stimulating cross-border mediations, we also need a predictable framework based on whatever common cores may or may not exist, or at least by having greater conceptual clarity (and with that, guided choice, greater party autonomy, procedural fairness and substantive fairness). More research and analyses are also needed, and new hybrids, such a co-mediation using a mediator and a conciliator and mediators from different jurisdictions, should be explored and made available. The International Mediation Institute already provides a forum where users, scholars and practitioners are discussing and assessing how to find the most suitable (as distinct from competent, which is a prerequisite) mediators on the internet, free of charge. The EU should facilitate such initiatives and help parties to find and adopt the right balance between flexibility, diversity and clarity. In any case, we need mediators, parties and their counsel who are keenly aware of the different types of mediation that exist and different expectations about the mediation process and mediation styles. This could transform the issue of 60 countries divided by a common word into a golden opportunity, especially within the EU.

APPENDIX I

Possible issues to consider and possible differences in expectations when initiating a cross-border commercial mediation between two companies

	Country A Expectations	**Country D Expectations**
1. Choosing the mediator(s):	Co-mediation is desirable whenever possible, preferably a man and a woman. Mediators are trained, have 200 or more hours of experience and are not assumed to be people of high status.	One mediator, usually having 40 hours of training, and assumed to be a person of high status, such as an experienced lawyer, barrister, solicitor, engineer, etc.
2. Pre-mediation activities:	Briefing of parties and lawyers (*if* lawyers have been retained) about the mediator's preferred style of mediation and mediator fees.	Briefing of mediator by counsel.
3. Choosing venue and date:	A neutral place, maybe in the countryside, and at least one overnight stay for people to be able to reflect on things the following morning.	A business venue for one mediation day (usually offices in a city).
4. Documents:	Case summaries and bundles of documents seldom sent to the mediator(s), but if so are exchanged between the parties. Summaries should focus on the parties' needs and interests, and not on past facts. If at all requested (which is rare), parties will be asked for 'interest statements' in contrast to 'position papers'.	Case summaries and bundles of documents can be sent to the mediator(s). Private or confidential information can also be sent by each party independently, which is not shared with other party. A mediation brief or 'position paper' is often sent to the mediators and exchanged by the parties.
5. Caucus or joint session:	The mediator(s) are seldom separate and work mainly in joint sessions (>80% of time).	Everyone gathers for a first joint session; after that at least 70% of the time is spent in caucuses. The mediator shuttles between the parties' rooms.
6. Parties' opening presentations:	Opening reflections by whoever wishes to go first (preferably a party rather than a lawyer).	Formal statement by the lawyer of the plaintiff (possibly followed by the party). Followed by a formal statement by the lawyer for the defendant (possibly followed by the party).
7. Mediation process:	Occasional group exercises to encourage perspective-taking, bring out needs and interests, and to give the parties an opportunity to show they have understood one another's needs and interests. Possible meetings between various parties (without the mediator(s) needing to be present).	Business-like meetings, focussed on reaching an outcome, directed by the mediator. Much use of bracketing techniques (trying to narrow the ranges of offers) in what can often be a positional negotiation about numbers.

	Country A Expectations	Country D Expectations
8. Mediator task and style:	The mediator(s) avoid(s) forming a view of what could bring about a settlement, but works with the parties to explore and generate as many options for mutual gain as possible (e.g., brainstorming sessions, and assessing options as opposed to expressed needs and interests).	The mediator rigorously reality tests the substantive aspects of the case (e.g., the facts and the law) and is often increasingly directive on the process as time goes by. The mediator usually forms a view of where parties might settle, and then attempts to bring parties to that point using dispositive norms as a basis for negotiation.
9. Time scope	Avoid time pressure to complete settlement. Try to give as much time as possible to ensure parties have had full opportunity to reflect on the settlement terms, and still agree with them. Either settlement is reached and documented then and there, or no settlement is reached and the mediator(s) continue(s) to be available to the parties to identify why a settlement was not reached and possible additional steps that could be taken to resolve any remaining differences.	Pressure to complete settlement within the time available (1 to 2 days). Either a settlement is reached and documented then and there, or no settlement is reached, and there is no emphasis spent on analysing the differences any further.