Listening to Disputants: Changing the Frame, Framing the Change[1]

"The fundamental problem about mediation is that it's a good idea and nobody uses it."[2]

This statement, from an experienced user of dispute resolution processes, captures the conundrum that mediation continues to face as it seeks to establish its position as a recognised and respected dispute resolution process. In spite of the frequently acknowledged qualities of mediation, its usage appears to remain stubbornly low, particularly in the cross-border context.[3] Despite numerous national and international measures to foster the use of mediation, there seems to be little movement in mediation's uptake.

At a time of renewed interest in examining the limited impact of the EU Mediation Directive (2008/52/EC)[4] on the promotion of mediation in the EU[5], it is timely to return to some of the key findings from my empirical research with users of EU cross-border commercial dispute resolution processes. This short article considers some of the main findings from my research, as set out in detail in *EU Cross-Border Commercial Mediation; Listening to Disputants,* regarding why parties do not use mediation for their EU cross-border commercial disputes. Drawing on those findings, this article calls for a fundamental shift in the EU's approach to promoting the use of mediation.

This article briefly explains the methodology of my empirical research with in-house counsel of multinational companies. It then considers some of the main reasons identified by these experienced users of dispute resolution processes as to why mediation is not used. Finally, this article considers those findings in the context of the EU's continued efforts to promote mediation and recommends a new focus as the EU's seeks to encourage the use of mediation.

Methodology

In light of the recognition that the EU Mediation Directive has had a limited impact on the use of cross-border mediation[6], my research sought to explore the perspective of the users of

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[2] Interviewee 18 (In-house counsel of multinational company) during his interview as part of the research examined in Howard *ibid* at 1.

[3] See for example S.I. Strong, "Realising Rationality: An Empirical Assessment of International Commercial Mediation" (2016) 73 Washington & Lee Law Review 1973, at 1983 & 1984. See further Howard *supra* n. 1 at 4.

[4] Council Directive 2008/52/EC of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters [2008] OJ L136/3 (EU Mediation Directive).

[5] See, for example, the Rebooting the EU Mediation Directive Study 2024 following the original Rebooting Study of 2014 which seeks to identify measures to increase the use of mediation across the EU. https://www.dialoguethroughconflict.org/rebooting-the-eu-mediation-directive-2024-edition/ (accessed 29 November 2024).

[6] For example, in 2013 research commissioned by the European Commission on the implementation of the EU Mediation Directive noted that "stakeholders ... reported a very limited number or no cross-border mediation cases." See European Commission, Study for an Evaluation and Implementation of Directive

dispute resolution processes as to why they do, and do not, use EU cross-border commercial mediation. For the purpose of this study, users were senior in-house counsel of multinational companies which operated across the EU and were therefore parties to EU cross-border commercial disputes for which they had to select a dispute resolution process.[7]

My research focused on the users' perspective for two reasons. First, the views of users of dispute resolution processes are regarded as particularly valuable and distinct from other participants in the process, such as mediators.[8] Secondly, in spite of the recognised value of the users' perspective, there is a very limited body of research on mediation to which users have contributed, particularly in the cross-border context.[9] Further, that limited body of research is mainly comprised of quantitative research, by way of surveys.[10] The use of qualitative research, by way of in-depth interviews, afforded the opportunity to gather rich "thick description"[11] on issues relating to the use of mediation. As Stipanowich has identified, if we want to truly understand alternative dispute resolution in practice, we cannot rely solely on quantitative research; we need to "qualitatively illuminat[e]"[12] the experiences of those who participate in it. In-depth interviews with experienced users of EU cross-border dispute resolution processes enabled new insights into the use, and lack of use, of mediation to emerge. This article will consider novel and important themes which emerged from the research as to why parties do not use mediation for their EU cross-border commercial disputes.

Before considering those themes, it is important to provide some further information on the research participants. 21 senior in-house counsel were interviewed, and the average duration of the interviews was 36 minutes. The interviewees worked for large multinational companies (which had turnover ranging from approximately £170 million (lowest) to approximately £150 billion (highest)) from a variety of sectors including financial services, energy, engineering, technology, telecommunications and construction. The interviewees' companies operate across the EU (and beyond), with two-thirds of their companies operating in all or most EU Member States.[13] As regards their companies' headquarters, many were headquartered in

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2008/52/EC (16 March 2016) at VII and 79. On the limited impact of the EU Mediation Directive, see further Howard *supra* n.1 at 13 – 14.

[7] For further information on the methodology including the interviewees see Howard *supra* n.4, Chapter 4 (Methodology) at 73.

[8] See for example Felix Steffek, "The Relationship between Mediation and other Forms of Alternative Dispute Resolution in European Parliament, The Implementation of the Mediation Directive, Workshop 29 November 2016 (2016) PE 571.395, 47 at 57 which identifies the primacy of the users' perspective. See further Howard *supra* n. 1 at 80 – 83.

[9] See Howard *supra* n.1, Chapter 3 which examines the empirical research on cross-border mediation.

[10] See the review of the relevant quantitative research at Howard, *supra* n.1 at Chapter 3.

[11] Clifford Geertz, *The Interpretation of Cultures* (3rd ed. Basic Books 2017) at 6. See further Howard, *supra* n.1, at 75 – 78 (The choice of qualitative research).

[12] Thomas Stipanowich, "ADR and the 'Vanishing Trial': The Growth and Impact of 'Alternative Dispute Resolution" (2004) 1(3) Journal of Empirical Legal Studies 843, at 847.

[13] See further Howard *supra* n.1 at 104. It should be noted that as the research was conducted before the UK left the EU, the UK was included in the interviewees' lists of the EU Member States in which their companies operated.

London (11 companies), while others had headquarters in Germany (4), France (3), Netherlands (1), Switzerland (1) and the USA (1). All of the companies had experience of EU cross-border commercial disputes in the 3 years preceding the date of the interview and their collective experience of such disputes involved parties from a wide variety of EU Member States.[14]

While no distinctive trends emerged in the data according to the sector of the interviewees' companies, a theme did emerge as regards jurisdiction. A number of interviewees highlighted the greater use and awareness of mediation in the UK in contrast to what were then *other* EU Member States.[15] A variation in the awareness and use of mediation across Europe has also been identified by other studies.[16] These findings suggest that the EU's continued efforts to promote cross-border mediation may benefit from an enhanced focus in certain jurisdictions.

Why parties do not use mediation for their EU cross-border commercial disputes

Before considering some of the themes that emerged from my research regarding why commercial parties do not use mediation, it is important first to provide some context which frames those findings. The main focus in the promotion of mediation by the EU is on mediation as an alternative to (and avoidance of) litigation. The various recommendations to "reboot"[17] the EU Mediation Directive arise from understanding mediation in this way.[18] For example, such recommendations include information measures on the time and cost savings of mediation compared to litigation; a quota of the number of mediations compared to judicial proceedings and an enforcement mechanism so that mediation is not considered to be inferior to judicial proceedings.[19] In other words, mediation is viewed through the frame of litigation and the reference point in the EU's review of the EU Mediation Directive has been mediation's relationship with litigation.

However, a key theme which emerged from my empirical research was the interviewees' clear understanding of mediation as extended or assisted negotiation and, importantly, as an extension of their early negotiations. Further, the interviewees identified these early negotiations as their preferred method of dispute resolution.[20]

In mediations' close association with negotiation there is both an opportunity for, and an obstacle to, mediation's increased use. The opportunity is to be found in mediation's

[14] For further information on the interviewees see Howard *supra* n.1, Chapter 5.
[15] See further Howard *supra* n.1 at 175 – 179.
[16] See, for example, European Parliament "Rebooting the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU" (2014) PE 493.042 at 6 which includes a comparison of the number of mediations in various EU Member States.
[17] See *supra* n. 5.
[18] See Howard *supra* n. 1, Chapter 2, and see p. 194 for a brief summary on the proposals to increase the use of mediation by reference to focusing on mediation's relationship with litigation.
[19] See Howard *supra* n.1, Chapter 2.
[20] See Howard *supra* n.1, Chapter 6.

association with a dispute resolution process which is familiar to, and favoured by, parties. The obstacle arises because mediation's close relationship with negotiation lead to barriers to the use of mediation, which are considered in this article. Put another way, the association which disputants make between mediation and negotiation affects their willingness to use mediation. Certain reasons why parties do not use mediation come into clear sight only through viewing mediation through the frame of negotiation, and not through the frame of litigation.[21]

This article considers three of the reasons which emerged in my research as to why parties do not use mediation. These reasons appear to be applicable to mediation in general and are not confined to the cross-border context. They are therefore of broad relevance.

1. Failure

> *The business see going to mediation as an admission of failure. They haven't been able to deal with it commercially."*[22]

An awareness of the key role played by negotiation in dispute resolution and the consequent shift to consider the relationship between mediation and negotiation reveals a new and intriguing reason as to why parties do not use mediation. This reason is a concern of being regarded – to draw on the words of one of the interviewees – as having failed if one needs to resort to mediation to resolve the dispute. Put another way, viewed through the disputants' perspective, proceeding to mediation draws attention to the fact that they were unable to resolve the dispute themselves in their own, unassisted negotiations.

As another interviewee explained:

> "*if you have professional people and negotiations have failed, and then let's continue with a 3rd party. If you don't wrap it carefully, it's perceived that I didn't do a great job*."[23]

There is a sensitivity about proposing mediation as that could be interpreted as a suggestion that the parties had performed poorly in their negotiations.

The issue of failure relates to the conclusion of the mediation process as well as to entry into the process. Interviewees identified a concern that parties may fail in the sense that others might view the outcome reached in the mediation as a "bad deal". As an interviewee explained:

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[21] See Howard *supra* n.1, Chapter 8.
[22] Interviewee 4. See further Howard *supra* n.1 at 158.
[23] Interviewee 4. See further Howard *supra* n. 1 at 158.

> *"A lot of management saying if I go to mediation and then settle I might get shot at for agreeing a bad deal. If I let it get ruled by court I can say that they got it all wrong. I'm kind of exculpated*."[24]

This recognition of the risk that parties take in determining the outcome of their disputes is related to a further reason identified by interviewees as to why they do not use mediation: the avoidance of responsibility.

2. Responsibility

Interviewees identified a reluctance to take responsibility for resolving the dispute, given the potential consequences of doing so, as a further reason for not using mediation. As an interviewee explained:

> "*Resolving by mediation rather than non-consensual methods requires a certain amount of accountability and let's say a certain management style… You need to have management that – excuse my French – has balls. I take that risk because it is the best solution for the company*."[25]

The interviewee further explained that a "more entrepreneurial" risk-taking culture would be needed for there to be greater use of mediation.[26]

While the dispute resolution literature has acknowledged that mediation requires parties to continue to take responsibility for their disputes,[27]it is valuable to hear from the disputants themselves that their appetite for taking responsibility for the resolution of the dispute is a factor which can influence their willingness to use mediation. Their comments are also a further challenge to the assumption that mediation is for those who are risk-averse, or even weak, while litigation continues to be for the courageous.[28]

3. Why bother mediating when you have already negotiated?

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[24] Interviewee 18. See further Howard *supra* n.1 at 158.
[25] Interviewee 18. See further Howard *supra* n. 1 at 161.
[26] See further Howard *supra* n.1 at 161.
[2727] Eijsbouts has noted that while retaining control of the conflict by continuing negotiations with the assistance of mediation may increase the chances that a commercial solution may be found, retaining control also requires the party to maintain responsibility for the resolution of the conflict: Jan Eijsbouts, "Mediation as Management Tool in Corporate Governance" in Ingen-Housz (ed) *ADR in Business, Practice and Issues Across Countries and Cultures* Vol II. (Wolters Kluwer 2011) at 76. Hicks has also noted that "Resorting to positional litigation can feel safer and easier than entering into a collaborative process of uncertain outcome in which one must take responsibility for the conflict and its resolution." Tim Hicks, *Embodied Conflict* (Routledge 2018) at 153.
[28] Macfarlane explains how the assumption that going to court is "the way of the warrior" while mediation or negotiation is for those who are risk-averse is inconsistent with what has been learnt from the Prisoner's Dilemma. Macfarlane explains that the Prisoner's Dilemma suggests that proposing negotiation – and "offering to cooperate without any certainty regarding the other side's good faith" – is the riskier option while litigation is the safer option. Jule Macfarlane, *The New Lawyer* (UBC Press 2008) at 86 & 87.

A further theme that emerged from the interviews regarding why parties do not mediate was a pronounced scepticism as to what mediation adds to the parties' own negotiation efforts. For example, an interviewee remarked:

> "*People do not see the need to keep negotiating with a third party as they are already trained in being a negotiator.*"[29]

Similarly, in describing his frustration when his company's proposals to mediate are rejected by the other side, another interviewee conveyed the commonly held view that mediation would not add to parties' own negotiation efforts:

> "*More often the opponent is not willing to enter into a mediation. It's: we're so great at negotiation that we don't need a mediator … I hear it and feel it all the time. It's irrational*."[30]

The scepticism of what mediation can add to parties' own negotiation efforts is a reason for not using mediation which emerges only by reference to the dispute resolution process of negotiation. In other words, negotiation is a key comparator for disputants in considering whether to use mediation. This scepticism suggests that the EU's focus in conveying the usefulness of mediation is too narrow. In the EU's recommendations, the usefulness of mediation is anchored in an understanding of mediation as an alternative to litigation. For example, the European Parliament's resolution of 12 September 2017 calls on Member States "to boost awareness of how useful mediation is"[31] and, in particular, mediation's "advantages in terms of economising time and money."[32] Accordingly, mediation's usefulness is portrayed as the time and cost that mediation can save compared to litigation. However, for parties who are reluctant to use mediation because of their scepticism as to what mediation might add to their own negotiation efforts, information on the efficiency of mediation compared to litigation will not address their concerns. Demonstrating that mediation is efficient compared to litigation does not necessarily demonstrate that mediation is effective compared to the parties' unassisted negotiations. The interviewees' insights suggest that an important area of focus for those seeking to promote the use of information is the value that mediation can add to parties' own negotiation efforts.[33]

Changing the Frame; Framing the Change

Viewing mediation through the frame of the disputants' perspective leads to framing mediation not as an alternative to litigation, but rather as assisted and extended negotiation.

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[29] Interviewee 11. See further Howard *supra* n.1 at 163.
[30] Interviewee 12. See further Howard *supra* n. 1 at 164.
[31] European Parliament, Resolution of 12 September 2017 on the Implementation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects pf Mediation in Civil and Commercial Matters (the "Mediation Directive") [2018] OJ C337/2, para. 11.
[32] *Ibid*.
[33] For a review of the small body of empirical research on the issue of what mediation might add to parties' own negotiation efforts see Howard, *supra* n.1 at p. 171.

Such an understanding of mediation reveals barriers to the use of mediation which have not been considered by the EU to date in its efforts to promote the use of mediation. These barriers include a scepticism as to what mediation can add to negotiation; an associated fear of being regarded as having failed for not having been able to resolve the dispute through negotiation; a reluctance to maintain responsibility for the resolution of the dispute (which disputants are required to do if they proceed to mediation and of which they can be absolved if they send the dispute to an adjudicative process such as litigation); and a concern about being criticised for failing to get a good deal in the mediation.

An awareness of such barriers leads to a recognition of what is being *asked of* disputants in pursuing mediation which differs to the EU's approach of emphasising what mediation enables disputants to avoid (i.e. litigation). Framing the use of mediation in this way presents the changes which are needed in its promotion. To promote mediation in a way that resonates with potential users, such a promotion will need to acknowledge what is being *asked of* disputants in using mediation, for example, by conveying what mediation might add to disputants' own negotiation efforts and by supporting those who may choose to use it. Such an approach would be a marked change to that which has been employed by the EU to date with its focus on mediation's relationship with litigation, and in particular how mediation enables disputants simply to avoid the cost and time of litigation.

Further, and on a broader note, a promotion of mediation which draws on the relationship between mediation and negotiation, rather than simply focuses on how mediation enables parties to avoid the cost and time of litigation, could be a more principled one if it were to promote mediation on the basis of what mediation can bring to the parties' own negotiation efforts. In the context of the UK's continued focus on the encouragement of the use of mediation, Genn has argued that a more principled justification for mediation policy is needed.[34] Under a principled promotion of mediation, the case must be made for mediation's effectiveness as compared to unassisted negotiation, rather than the EU's continued sole focus on mediation's efficiency compared to the courts. Such a promotion would have at its core a focus on achievement (what mediation might add to the parties' own negotiation efforts) rather than avoidance (the time and cost of court). Simply put, such a promotion would be *for* rather than simply *against* something.[35]

[34] Hazel Genn, *Judging Civil Justice* (Cambridge 2010) at 123-124.

[35] For recommendations of how the EU might promote mediation with a principled focus i.e. a focus on what mediation can achieve see Howard *supra* n. 1, section 9.03 at 199 – 207.