

Cross-border mediation: the same, but different ...

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1. Introduction

Contrary to what you might think, cross-border mediation is more than ‘ordinary mediation, only in English, with partners from different countries’. For businesses that operate internationally, mediation is a good way to limit legal and business risks and it is important to be well prepared for it. Challenges in cross-border mediation may lie in the different expectations the parties have about what mediation entails, who takes part in it, in which country it will take place, in which language it will be conducted and what law will apply to the mediation proceedings. If points like this are not identified beforehand, the mediation process itself may give rise to a new dispute with all the associated consequences.

Drawing examples from a (fictitious) international case² involving contract law, this article presents an overview of the possible pitfalls and above all provides tips about what you should be aware of with regard to cross-border mediation.

2. The caseⁱⁱ

Imagine the following situation. The Dutch company Genes has placed an order with the Austrian company i-Tech to install a cloud server. The costs will be EUR 1,500,000, of which 60% has already been paid. Genes bought the hardware from the Italian company CompuItalia, because it was EUR 50,000 cheaper than what i-Tech offered. The system does not work. According to i-Tech this is due to the hardware. Genes claims it is due not to the hardware, but to the software or the way it was installed by i-Tech. Genes’s two biggest customers are now threatening to cancel their orders. I-Tech is demanding full payment, Genes wants its deposit back, a system that works, and for i-Tech to compensate all losses incurred by Genes. Negotiations have reached an impasse and i-Tech has proposed mediation.

3. Initiating mediation

I-Tech proposes a team of co-mediators consisting of an Austrian IT consultant, Heidi Klein, and a Dutch mediation lawyer, Piet de Vries. Genes thinks this is unnecessarily complicated and has the feeling i-Tech wants to delay the process for its own benefit. To speed things up, they suggest – as a compromise – appointing a well-known British barrister, John Smithon, with whom their lawyer has had good experiences. I-Tech also wants to involve CompuItalia in the mediation. CompuItalia is prepared to take part and to pay a maximum of EUR 3,800 towards the mediation costs. i-Tech thinks this is ‘typical Italian haggling’, but consents, as does Genes. All those involved agree to the appointment of Smithon as mediator.

Smithon asks the parties each to send a position paper within two weeks and names a date for ‘the mediation day’ at his office in London. Genes knows that in the Netherlands in some cases there is a pre-mediation briefing, but they have no idea what a position paper is. The mediator explains in an e-mail to all those involved that this is a document in which each party sets out, in five to ten pages, their own point of view and what they think about the other party’s point of view. These documents are exchanged between the parties before the first mediation meeting. Smithon asks the parties to be careful to indicate clearly on any other documents whether they contain confidential information for the mediator or are intended for all parties involved.

4. Key points and dilemmas

What points may be particularly important for you as Genes’s legal adviser or company lawyer? Is i-Tech trying to delay or complicate matters unnecessarily? Perhaps i-Tech’s attitude in this regard is less likely to raise doubts if you are aware that in Austria a male-female co-mediation team is regarded as good mediation practice, preferably with a lawyer and a non-lawyer. In some cases this is even required by law. Moreover, in Austria the focus is not on finding a solution as quickly as possible, but on ensuring the mediation process is carried out in the best way possible.

Are the Italians acting in bad faith by putting a cap on the mediation costs? Italian law lays down maximum amounts and for a dispute involving a financial interest with a value between EUR 500,001 and EUR 2,500,000 that is a maximum of EUR 3800 per party, regardless of the number of meetings or hours spent. From the Italian point of view it is a reasonable offer to contribute this full sum.

This excursion into mediation legislation may also raise the question of which law applies to this mediation. In cross-border mediation different legal systems nearly always apply – the law that governs the existing legal relationship between the parties and the law that will govern their future legal relationship. The issue of applicable law may be part of the dispute, and the law that will apply to any arrangements made should be discussed and clearly agreed on during the mediation session and recorded in the settlement agreement. Then there is the law that applies to the mediation process itself – in other words, the law that governs the legal relationship between the parties and the mediator. This choice of applicable law should be made before mediation begins and should be recorded in the mediation agreement. In practice it seems an obvious choice to opt for the country of the mediator, and sometimes the mediator requires this for insurance reasons. Nevertheless, this is not a hard and fast rule, and ‘mediation forum shopping’ may be a good idea, for instance to avoid mediation law with unfavourable regulations, or because you want to opt for facilitating legislation such as the Dutch mediation legislation which is

now being prepared. If no explicit choice of applicable law is made, the ordinary rules of private international law will apply, with all the associated issues and complications.

What you include in the position paper is also important. For instance, should you write down only positions and legal arguments, or also interests? Do you want to send any other documents to the mediator? What information can be shared with the other parties? Or would you prefer not to exchange any documents at all in advance? What is the other party's view? In which country and when will the first meeting take place and how long will it last? Who will represent your side at the mediation sessions and are there representatives of the other side whose presence you regard as crucial? What language will be spoken during the mediation sessions?

Obviously these are all aspects a good mediator will raise and settle in advance, but it is also important to be aware of them as the representative or adviser of a party: it is your process, and, along with the other party, you should determine how the mediation is structured.

5. During the mediation session

Each party has had an independent report drawn up to answer the technical questions. It turns out that these reports are contradictory. During mediation one jointly appointed expert can be called in to provide clarity in this regard. As far as the intrinsic problems are concerned, this case seems very suitable for mediation. The interests involved include a rapid solution, preventing Genes's customers from pulling out (with all the associated financial and reputational damage), preserving i-Tech's good name, preventing a lawsuit against CompuItalia, saving costs, avoiding a bankruptcy, etc. Apart from all else, the parties have the common interest that they all want to get back to work rather than being embroiled in legal battles. From a business perspective several attractive solutions are available.

Right at the beginning of the first mediation session CompuItalia is surprised that Genes is represented only by its CEO, whereas i-Tech has brought along its company lawyer, the CEO and the project leader. CompuItalia demands that both other companies – like CompuItalia itself – have external lawyers take part in the mediation. After some discussion it becomes clear that unlike Italian mediation legislation, English law, which applies to this mediation, does not require legal assistance from an external lawyer in mediation. It also turns out that CompuItalia had expected that the purpose of this first session would be to provide information about the mediation procedure, as is usual and required by law in Italy. Because CompuItalia has experience with mediation, they are happy to go ahead. The mediator then asks all the parties to respond in an opening statement to the other parties' position papers. He then states that he has also read all the other documents. As the 'plaintiff', Genes is asked to start, to which i-Tech says that the parties should determine in consultation with each other who will be the first to speak. In their opinion it is obvious that they should begin, since they took the initiative to request mediation. They are also wondering what those other documents are. They sent only the position paper requested. CompuItalia states that they do not wish to begin. Arguing that

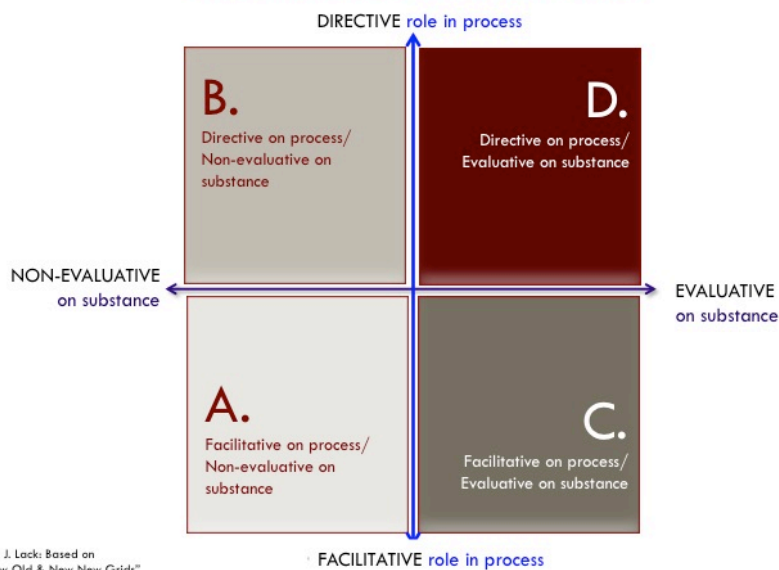
they have already accommodated i-Tech by agreeing to mediation, Genes wants to be the first to speak. The mediator then asks Genes to speak and says that immediately afterwards i-Tech will have the same opportunity. Genes explains why they chose to do business with i-Tech, what their expectations were, what had gone wrong in communication (in their opinion), that they feel ripped off and that they are up to their necks in problems with those customers threatening to cancel their orders. The mediator interrupts and asks Genes to limit itself for now to responding to the position papers of Genes and CompuItalia. Genes becomes confused, because in their opinion the whole point of mediation is to explain your own perspective and not to respond to the views of others. In their opening statement i-Tech then does exactly as asked and responds in detail to the position papers of Genes and CompuItalia by refuting the content point by point. CompuItalia says that their hardware works extremely well, that they serve a large number of major international customers and have never had any problems. The problem must therefore have been caused by i-Tech and i-Tech should just solve it.

Then the mediator says it is time to move on to caucuses (separate meetings) with each of the parties. i-Tech asks the mediator if they can first draw up a joint agenda of the points they want to discuss, based on the issues they have listed in Appendix 3 of their position paper. By this time they have lost all confidence in the process, partly because they have the impression that the mediator (who was proposed by Genes) is not neutral and impartial and in any case hasn't got a clue about mediation. CompuItalia has similar thoughts (except that they are not unhappy about it, because it seems to be working to their advantage). Genes first wants to respond to a few points raised by i-Tech and rectify them. In addition, some new technology was mentioned and they would like to know more about it.

At the mediator's insistence the parties finally agree to the separate meetings. The mediator starts with i-Tech. During the next caucus with Genes the mediator soon puts forward a financial offer on behalf of i-Tech: on condition that Genes lower their compensation claim by 50%, i-Tech is prepared to claim only 75% of the outstanding amount. Genes think this is premature and unnecessarily complicated and want to know more about the new technology i-Tech mentioned. The mediator urges Genes to give an answer he can pass on to i-Tech and uses reality testing: if Genes fails to give any signal to i-Tech that they are prepared to consider moving away at least a little from their positions, i-Tech may well end the mediation, which will result in a lengthy and expensive international lawsuit with an uncertain outcome.

In the meantime CompuItalia is calmly waiting, in the reassuring knowledge that the recent technological development i-Tech mentioned will enable the problems to be solved quickly, but only by both companies together. That means additional work and therefore extra turnover. If the parties cannot reach agreement, CompuItalia expects the mediator will put forward a proposal for settling the matter. However, if the mediator puts forward a proposal halfway through the afternoon because there is a deadlock, i-Tech will end the mediation.

Mediation process: 4 types



6. Design of a mediation process

What is going on here? Everyone involved, including the mediator, has different expectations about how mediation is supposed to be conducted, and no attention has been paid to this beforehand. There are no standard rules for international mediation. It depends on what the parties want, and that is partly determined by what is customary in their own countries. The way a mediation proceeds is a combination of the way the process is structured and the way the substantive aspects are handled. Examples of process-related issues are how long a session lasts, whether or not there are caucuses, the exchange of documents, and opening statements. The mediator’s approach to the content varies from not expressing any opinion at all through reality testing to being prepared to make a proposal for settlement. In addition, in several countries there are legal requirements to be met by a mediation procedure or a mediator.

The grid shown above, based on Riskin,ⁱⁱⁱ is a handy tool which can serve as the basis for a discussion about the type of mediation process desired among all parties involved. Each type has its advantages and disadvantages, and it would go beyond the scope of this article to discuss each type. You can read more about this in *The Variegated Landscape of Mediation*, M.A. and F. Schoneville (2014).^{iv}

How are our parties in the case described above positioned in this grid?^v The Austrian company i-Tech would probably incline towards quadrant A: purely facilitative with a focus on the quality of the process. I-Tech expects mainly joint meetings with in-depth direct exchange between all parties involved. The Dutch company, with its pragmatic approach (‘let’s find our own solution quickly’) would probably switch between quadrants A and B: facilitative to directive on process and non-evaluative on content (although business mediation in the Netherlands is also increasingly involving evaluative elements). A caucus is seen as a tool – it is not a choice based on principle.

The Italian company CompuItalia would be more likely to expect quadrant C: facilitative on process and evaluative on content. Italian law provides that at the request of the parties a mediator may put forward a written, non-binding settlement proposal. If the parties decide to go to court, this proposal will become part of the file for the court. If the court’s decision is similar to the mediator’s proposal, this may result in sanctions. A mediator from an English-speaking country is often used to operating in quadrant D: directive on process and evaluative on content. As a rule, after the exchange of views on position papers the rest of the day is spent on caucuses, in which the mediator soon proceeds to negotiations about the financial aspects.

If not discussed, these widely diverging views on the role of the mediator can lead to misunderstandings such as assumptions of bad faith or incompetence, with a high risk of mediation failure. In the worst case this may result in a new dispute and a grievance procedure about the mediation.

Tips for writing a **pre-mediation briefing or position paper**.

- A. Start by summarizing the dispute and the legal aspects:
 1. Facts and events about which there is agreement or no agreement.
 2. Main legal issues.
 3. Compensation desired.
 4. Any court proceedings.
- B. Then describe the progress of negotiations so far:
 1. Your client's interests and needs.
 2. Settlement proposals and what has already been undertaken to reach a solution.
 3. Obstacles preventing the case from being solved.
 4. Expectations of the mediation, matters which require specific attention and any possible solutions you would like to explore.
- C. Conclude with other essential information such as who will represent you at the mediation and add documents you would like to include in the mediation as appendices. Write clearly on each document whether it is confidential and for the mediator only or can be shared with all parties involved.

For example, as the adviser of Genes you might let the mediator know in confidence that Genes is in a difficult financial position and that they are facing the threat of bankruptcy if they do not have a functioning system soon. In the memo sent to the other parties you might say that your client's interest is that it needs a functioning system quickly and that Genes wants to explore technical solutions.

Because Genes is under time pressure, it is worthwhile to consider opting for a one-day mediation with joint meetings alternating with caucuses. Having the mediation in a different country rather than the country of one of the parties is a good idea, particularly if you opt for a short mediation process. If you opt for a mediation process with several meetings so that you have an opportunity to test the arrangements made in reality, it might make sense to have the mediation closer to home, in Brussels for instance. Or part of the mediation could be done by videoconferencing.

7. Tackling cross-border mediation successfully

The interesting feature of cross-border mediation is the possibility of customization. However, this also makes it more complicated. We usually recommend starting with a preliminary meeting of all parties involved to discuss – with the help of tools such as the grid – how the mediation will be structured and only then which mediators are suitable. Start in the middle of the grid and think about what the best approach would be to reach a solution with these parties. Make it quite clear that depending on how things play out during the mediation it will be possible to work in different quadrants. Also discuss how the process is going during the mediation and don't focus only on the content.

The most important thing is to make clear arrangements with the other party and the mediator in advance. Good expectation management accounts for more than half of the success of a cross-border mediation. The process itself is the first thing to mediate, even before the start of the actual mediation.

ⁱ Manon Schonewille is legal business mediator in Amsterdam and Rotterdam.

ⁱⁱ This is an imaginary case especially prepared for this article, any resemblance to actual companies or persons is coincidental.

ⁱⁱⁱ Grid developed by M.A. Schonewille and J. Lack based on L. Riskin (1994, 1996, 2003). 'Who decides what? Rethinking the Grid of Mediator Orientations'. *Dispute Resolution Magazine*, vol. 9 no. 2, p. 22.

^{iv} The variegated landscape of mediation. A comparative study of mediation regulation and practices in Europe and the world. M.A. Schonewille and F. Schonewille, 2014, Eleven international publishing. Chapter 2, p. 19-44: Mediation in the European Union and abroad: 60 states divided by a common word? M.A. Schonewille and J. Lack. This chapter can be downloaded in the international section on www.schonewille-schonewille.com.

^v These are tendencies that we have seen in our international practice. I am well aware that this is a generalization and that there are many exceptions to any such 'general rules'.