

Preventing and managing international commercial
disputes – Towards a EuroMed Alternative Dispute
Resolution Infrastructure
Closing speech

Introduction

Government has a role to encourage trade and investment. To tackle barriers – real or just perceived - which limit business and citizen's opportunities. One of the obstacles that hinder trade and investment is a lack of mechanisms to deal swiftly and affordably with commercial disputes. Disputes are inherent in trade and business relationships. Companies will hesitate to engage in commercial relations in a foreign country if they are not sure that there is an appropriate way of solving them.

That problem is particularly relevant for small and medium sized companies [defined at EU level as companies with fewer than 250 employees]. SMEs make up **99 per cent** of businesses in the EU. They are the

backbone of the EU economy. And they are central also to MEDA countries.

Business, especially smaller ones, can be put off by the complications of working across borders. SMEs are often not familiar with the legal and judicial environments in the country they want to invest in. They do not have a lot of money to invest in legal advice. Part of encouraging trade and investment is ensuring access to justice for them if problems do occur.

Providing access to justice is not synonymous with offering access to the court systems. Indeed the courts can deter commercial organisations with their complexity, length of proceedings or costs. Providing access to alternative dispute resolution is an important part of providing access to justice. This is why the Commission has launched, in 2001, the project for the promotion of international arbitration and ADR techniques in the MEDA countries of which this conference forms part.

This conference has discussed Preventing and Managing International Commercial Disputes in the Mediterranean.

This conference has brought together voices from the 37 [*thirty-seven*] countries involved in the Euro Med area.¹

The value of alternative dispute resolution and, in particular, mediation has been stressed in the past two days.

Alternative Dispute Resolution is not a new idea. It has long been used to resolve disagreements. But it is an underused one and not always easily available. I will now set out the benefits of alternative dispute resolution and what the international community can do to support it.

I. Problem of court-based litigation

Firstly we must understand the problems with traditional, court-based, ways to resolve commercial disagreements.

Court-based litigation is already problematic to resolve purely domestic disputes. The main problems with the court-systems are:

1. The **volume of disputes** brought before courts is increasing,

¹ 27 EU Member States and 10 MEDA countries (Algeria, Egypt, Jordan, Lebanon, Israel, Morocco, West Bank & Gaza, Turkey, Syria, Tunisia)

2. Proceedings are becoming more **lengthy**; and
3. Partly caused by longer proceedings, **costs for litigants** are increasing.

Working on a cross border scale magnifies these problems and creates additional ones. Cross border disputes usually last longer than domestic ones. Often, several law firms have to be involved to advise the litigant. Documents have to be translated into the language of the court. Some documents might require diplomatic or consular legalisation. The taking of evidence becomes more complex. A bond or deposit might be required from the foreign litigant. All of these factors increase the costs and length of litigation. Add to this the problems of different, often conflicting, laws which make the outcome of the court ruling difficult to predict for the litigant.

Some of the problems of cross-border court litigation have been tackled by Community legislation. Nevertheless, court-based litigation can render access to justice difficult, in particular for SMEs. This is even more the case in relation to countries outside the

European Community. This is why the Commission promotes alternative means of dispute resolution.

2. Advantages of ADR

Means of alternative dispute resolution can bring many benefits for trade and investment that court proceedings and even arbitration cannot offer. I will outline **three benefits of ADR, and, in particular, mediation**, some of which have been highlighted at this conference.

1. Speed and costs. Mediation is in most cases faster and, therefore usually, cheaper than ordinary court proceedings. This is especially true in countries where the court system has substantial backlogs and the average court proceeding takes several years, sometimes decades. Here in Italy, delays in the court system have increased the appetite for alternative dispute resolution. Cases blocked in the court system for years can be solved within days by mediation.

Shorter proceedings often mean **lower costs**, especially where lawyers are paid by the hour. Alternative dispute resolution is therefore cheaper for business and citizens. And lower costs encourage trade and investment.

2. Creative solutions. Mediation can find more creative solutions than those available in court. Parties are not limited to the solutions offered by the law but can reach any agreement which accommodates their needs. Parties are also able to introduce additional elements into the negotiations in order to facilitate an agreement on the controversial element. For example, a commitment by one party to sign a future contract can motivate the other party to settle for a lower sum. This creativity complements dynamic business environments and increases investor confidence.

3. Less confrontational – better long term working. ADR requires parties to talk to each other directly rather than to communicate only through their lawyers. It therefore avoids the confrontation between parties which is inherent in court proceedings. The voluntary nature of

ADR also facilitates compliance with a settlement agreement. Both sides are more likely to buy into a result if it was mutually agreed than if a decision was imposed on one 'losing' side. Mediation therefore allows the parties to maintain their relationships beyond the dispute. Good relationships are often the key to long-term foreign investment. Often the original dispute may not be what makes long term co-operation difficult. But once a dispute is stuck in litigation, the adversarial nature of court and arbitral proceedings lead to a deterioration of the business relationship and make ongoing and future co-operation difficult if not impossible.

For these reasons, the Commission promotes the use of ADR, both inside and outside the European Union. The availability of alternative dispute resolution schemes creates a favourable climate for trade and investment. Countries that use ADR clauses in their foreign investment contracts have reported positive experiences, both for the state and the companies. [And we have heard many other examples of the beneficial effect of ADR on trade and investment at this conference.]

II. The role of international organisations to promote ADR

The benefits of ADR are clear. But what can be done by the international community to support it and encourage trade and investment?

Firstly, establishing an appropriate legal framework for ADR is of key importance to promote ADR. The European Community, the Council of Europe and UNCITRAL (The United Nations Commission on International Trade Law) are, or have been, working on legislation and "soft law" on ADR. These activities aim to increase parties' confidence in ADR by establishing procedural guarantees and guidelines for the mediation process.

In the EU, the value of ADR has long been acknowledged. European heads of state and government meeting in Tampere in 1999 called for the creation of alternative extra judicial procedures for dispute resolution to improve access to justice in Europe.

The Commission consulted broadly on this matter before adopting, in 2004, a proposal for a directive covering certain aspects of mediation in civil and commercial

matters. Following the consultation, it was decided that legislation should be limited to ensuring a sound relationship between mediation and judicial proceedings. On the other hand, a self regulatory instrument, the European code for mediators, was considered to be the best approach to set standards for the mediation process and the appointment and accreditation of mediators.

The proposed directive contains five substantive rules:

1. It obliges Member States to encourage the **training** of mediators and the development of, and adherence to, voluntary codes of conducts,
2. It gives every **judge the right** to invite parties to try mediation if he considers it appropriate given the circumstances of the case,
3. It requires Member States to set up a mechanism for settlement agreements to be rendered **enforceable** if both parties so request e.g. through certification by a public notary or court approval.
4. The proposed directive ensures that mediation takes place in an atmosphere of **confidentiality**. It provides that the mediator cannot be compelled to give evidence about what took place during

mediation in judicial proceedings between the parties to that mediation.

5. The proposed directive guarantees that the parties will **not lose their day in court** as a result of the time spent in mediation. As with the rule on confidentiality, this provision promotes the use of mediation by ensuring that the parties' access to more traditional forms of justice is preserved should mediation not succeed.

The proposal for the directive has been in the legislative process for almost three years now and the Commission now welcome the Portuguese Presidency's firm intention to give priority to this legislative project and reach a compromise by the end of the year. The Commission is very grateful for the support the Commission received from mediators and mediation organisations throughout this process. We know that the proposed directive has already encouraged many Member States to take forward initiatives to develop projects or legislation for mediation.

The Commission is financing this project for the promotion of international arbitration and ADR techniques in the MEDA countries. The French – Belgian – Italian consortium has led it admirably. It is a pilot project and we will have to evaluate its results before deciding on a possible follow up. The Commission also finances training for mediators, conferences and seminars and other project under its financial programme for civil justice which involve at least two Member States.

Activities by international organisations can also trigger private initiatives to promote ADR. Part of the Commission's pilot project on ADR in MEDA countries sought to build consensus amongst practitioners about the need to introduce dispute resolution mechanisms into international contracts. Building such a consensus amongst the legal and business communities of the region is the best means to minimise the impact of commercial disputes on trade. The Euro-Mediterranean Charter on Appropriate Dispute Resolution is the product of those activities and the Commission is very satisfied with the progress achieved.

In conclusion: This has been a successful conference in support of a successful form of dispute resolution. There is a clear business case for ADR. The extra time and costs of cross border disputes makes ADR an attractive way of providing access to justice. This in turn helps encourage trade and investment. This conference has demonstrated the potential of ADR to resolve commercial disputes in the EuroMed region. The Commission confident that it will contribute to develop a sustainable ADR infrastructure in this region. Alternative means of dispute resolution have a role to play in any modern dynamic justice system. This has been impressively illustrated by this conference.