A Note on Institutional and Ad Hoc Mediation

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Institutional and ad hoc mediation is a topic that cannot be approached in the international context without making reference first to the different reasons why mediation has succeeded in different countries and without taking into consideration cross-cultural diversity.

THE SUCCESS OF MEDIATION IN DIFFERENT JURISDICTIONS

Briefly, it can be stated that in the United States, the success of mediation is strongly linked, among other things, to legal costs. Judge Smith refers to mediation’s success in the United States as a “financial issue.”1 In England and Wales, the boost given by the judiciary has been a determinant for the success of commercial mediation in those jurisdictions.

There are countries in which the lack of independence of the judiciary is the cause for the incipient presence of mediation as a dispute resolution mechanism for businesses. However, in countries where legal fees are comparatively not that high, such as most of the civil law jurisdictions of Europe, and where the judiciary is reliable, the development of commercial mediation has been slower. The discussion in the negotiation of the European Union (EU) Commission’s proposal for a Directive of the European Parliament and the Council on certain aspects of mediation in civil and commercial matters2 show the diversity of legal and cultural approaches to mediation in Europe. It must be stated, nevertheless, that the mere fact of the existence of the draft Proposal has implied that all the


member States’ Ministries of Justice have studied the issue, stated their views on it, and some have even adopted regulations on it.

CROSS-CULTURAL DIVERSITY

As a matter of fact, the only jurisdictions in which commercial mediation has succeeded up to now are Anglo-Saxon, common law jurisdictions. This is true also of the business mediation models developed in these countries. There is clearly great value in these models, and they can certainly be applied in other cultural settings, but thought must be given to the need to adapt them to different realities, different sensibilities, the different ways things are done in different parts of the world.

Yves Derains’ first tip for international arbitrators is to show and maintain neutrality: he says parties need to feel at home. It is exactly the same in international mediation: parties need to feel at home. And feeling at home is made up of many nuances.

None of us feels at home when using words and techniques with which we are not familiar. This happens in many parts of the world when talking about brainstorming or telling the parties that the mediator will keep confidential whatever is said to him or her in the private meetings unless the party allows that information to be given to the other party.

There are also non-verbal language issues. In cultures where people speak also with their hands, a mediator who hardly moves them may be perceived as hierarchic or haughty. Perhaps a mediator raising an eyebrow can be very effective in some places, but it can be fully misunderstood in others. A sense of humor is undoubtedly a powerful tool for the mediator, but a sense of humor is very different in different countries and different cultures.

The inner rhythm of things and people also differ from one culture to the other. Jon Lang states that parties are outcome-focused and successful mediators are, by and large, deal-completion focused. This is true in some countries, and yet in other cultures, such as, in my experience, the Arab and the Latin American cultures, the way the outcome is reached may, in particular cases, be more significant than the outcome itself. In these cases as well, deal-completion focused mediators can be counterproductive.

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5 Id.