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# Mediation news

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# The past, present and future of commercial mediation in Iberia in a nutshell – a jurídico-cultural perspective

**A** common error of the inexperienced (or naive) international legal practitioner is to think that the same legal institutions, concepts and approaches will work, or should work, with similar effectiveness in different jurisdictions. This view fails to take account of the legal, cultural and societal context, or substrata, onto which those institutions, concepts and approaches are superimposed, or from which they might have evolved in a certain place and time.

The experienced international legal practitioner will be sensitive to these matters. This sensitivity should permit reasonable assessment to be made as to the likelihood with which (and rate at which) trends, practices and ideas from other jurisdictions will impact upon legal and commercial practices in a given jurisdiction.

For the same reasons, a common error of the inexperienced (or naive) legislator, politician, journalist and lawyer is to think that enacting or amending legislation is always an effective way to affect individual and collective conduct. The experienced legislator knows better.

Mediation is a good example of these two errors. In this author's view at least, the cultural context/baggage of a legal nature that surrounds this area in a particular jurisdiction is essential in determining its likelihood of taking root as a meaningful form of alternative dispute resolution. For example, the recent enactment of enabling legislation in Spain and Portugal may be unlikely (in itself) to change anything in a material and short-term way, largely due to the rather limited cultural receptivity to the institution that can be expected in the two countries.

## Legislative and political background

The principal impetus to commercial mediation in Europe is the May 2008 EU Directive 2008/52/EC on certain aspects

of mediation in transnational civil and commercial matters. The Directive states as its objective the encouragement of the use of mediation in cross-border civil and commercial disputes by 'ensuring a balanced relationship between mediation and judicial proceedings' and invites member states to develop 'by any means which they consider appropriate... effective quality control mechanisms concerning the provision of mediation services'.

The Directive sets out certain basic requirements which the national implementation must cover (including as to the effect of mediation on limitation and prescription periods, the enforceability of agreements resulting from mediation and the confidentiality of the process) and it required transposition (enactment into national law) by May 2011.

Portugal implemented the Directive in 2009 by means of limited amendments to various provisions of its Code of Civil Procedure.

Spain implemented the Directive in July 2012 by means of a law (Law 5/2012, of 6 July, on mediation civil and commercial matters) which deals with domestic as well as cross-border mediation and includes rather detailed (and, some would say, rather heavy-handed and bureaucratic) provisions regarding the mediation process, contemplating the creation of a public register for accredited mediators and institutions of mediation, a requirement for professional liability insurance for mediators and appropriate training for mediators, all of which is to be developed by way of implementing regulation. The draft regulation currently on the table is relatively 'light', at least compared to the expectations (and fears) of many: the registry is voluntary in nature, the amount of required liability insurance is rather low and the training requirements (particularly in terms of the number of hours required) is less onerous than might have been expected.



### Mediators without mediations? A virtually blank slate

The training and development of mediators is a key element of the Directive and its national implementing legislation. Indeed, Spanish bar associations, chambers of commerce, arbitral institutions, universities and institutions and similar organisations are now scrambling to enter what might be the challenging, interesting and lucrative business of training civil and commercial mediators.

The question, of course, is one of chicken-and-egg: who will train the trainers, where the trainers themselves (as a general rule) have no direct experience in mediation?

Focusing in particular on Spain, the jurisdiction in which I have practiced for many years, is it realistic to expect mediation to prosper in the short-term when, for example, at a UIA conference held in Lisbon in January 2012, attended by some 150 practitioners from all over Europe, not a single Spaniard attended? Or where (for another example), as I learned after taking a course in mediation offered in Lisbon by the Centre for Effective Dispute Resolution (CEDR) – the most prestigious European mediation training organisation – that I was only the eighth or ninth Spanish resident to have received CEDR accreditation?

Leaving aside certain specialised areas (such as family and, to a lesser degree, labour matters) it is not a great exaggeration to say that civil and commercial mediation in Spain (and, to my more limited knowledge, Portugal as well) starts from a virtual blank slate.

Legislation exists. A certain political will exists. Certain commercial opportunities are perceived. But there is little or no history, knowledge, familiarity or understanding of the institution of mediation; in a word, there is little or no ‘culture’ of mediation. And very few experienced mediators.

### The culture (or non-culture) of mediation

A recurrent theme in a recent series of columns by leading Spanish dispute resolution lawyers in Spain’s principal online legal periodical is precisely this lack of a mediation ‘culture’ or ‘mentality’ in the country. One commentator, a former judge, referred in his piece to the ingrained idea ‘that justice ineluctably implies resolution of disputes via contentious (particularly judicial) proceedings’.<sup>1</sup> Another states that:

‘The generalised submission of disputes to third parties (particularly, judges) with power to impose their decision is evidence of the immaturity of our society and the manifest absence of the dialogue required in these times. The success of mediation requires a profound change in mentality and the commitment and active involvement of legal professionals, many of whom are more concerned with provoking and maintaining claims than addressing the ultimate needs of their clients.’<sup>2</sup>

Other commentators echoed the same point, with one saying ‘Spain, unlike other jurisdictions, has not to date developed a real mediation culture, which is a prerequisite for the broad and solid acceptance of the institution.’<sup>3</sup> Another states similarly that ‘mediation will be effective to the extent that there can be created a culture of seeking agreement which is far from existing today’.<sup>4</sup>

### The sources/causes of culture and non-culture in this context

What does the term ‘culture’ mean in this context? What are the reasons for or causes or sources of a certain ‘culture’ (or lack of culture) in this area? Why does such a ‘culture’ exist in certain jurisdictions and not in others?

In its broadest terms, these are surely questions more appropriately studied by sociologists than by lawyers, but my own speculation on the question (with a legal/judicial focus) has identified a small handful of underlying factors of a ‘cultural’ or societal nature – some surely trite and stereotypical, others (hopefully) more meaningful, which may be among those which explain the relative receptiveness to mediation in certain legal/commercial systems/jurisdictions (eg, New York and many of the common law jurisdictions) and the relative unreceptiveness in others (eg, Spain and Portugal, and many other civil law jurisdictions).

### ‘One bite at the apple’

While the American lawyer and his/her client knows that there will be one trial of the facts, and one trier of the facts, the Spanish lawyer and client knows that there is always the opportunity for a second ‘bite at the apple’. The essential finality of the American fact-finder’s one-time determination surely stimulates openness to and proactivity towards settlement (albeit on the courthouse steps)

in US litigation professionals and creates receptivity to third-party involvement in furthering settlement.

### *Religious/sociological underpinnings?*

There may be a deeper sociological (or even religious) factor at play here. Those of us who remember Max Weber's classic *Protestantism and The Spirit of Capitalism* will recall the societal differences that he attributed to the Protestant's emphasis on *personal* responsibility and conduct in light of a stern and demanding divinity versus the Catholic's reliance on the second chance ('bite at the apple') afforded by a hierarchical, confessional system with a more indulgent and benevolent divinity.<sup>5</sup>

### *The jury system*

The existence of the institution of the jury (essentially unknown in civil law jurisdictions and virtually unique, in civil and commercial matters, to the US) and its (perhaps) predisposition to somewhat unpredictable and potentially emotional determinations as exclusive fact-finder may be another 'wild card' that pushes parties in American disputes to try to resolve disputes themselves.

Similarly, the existence of the jury as fact-finder opens the door for active involvement of the American judge in settlement talks in jury trials, making third-party assisted settlement (ie, mediation) a familiar and non-threatening part of the legal and commercial landscape.

### *Legal costs and typical fee arrangements*

In the US, parties typically bear their own costs of legal proceedings; in most jurisdictions, particularly civil law jurisdictions like Spain, costs tend to be 'shifted', meaning borne by the losing party in proportion to the ultimately determined merit of its arguments/conduct (or lack thereof). In the US, contingency fees are commonplace for the plaintiff's work, whereas until recently in civil law jurisdictions such as Spain, such fees were prohibited or severely limited.

Both of these systemic features incentivise settlement in the US – the general absence of cost-shifting because even a prevailing party will almost always have to assume its own (generally substantial) costs, and the contingency fee because it gives lawyers the incentive to push clients towards early

resolution (ie, settlement) and surely creates receptiveness to third-party assistance in reaching settlement.

### *Familiarity/confidence with non-judicial dispute resolution*

Where lawyers and clients (not forgetting judges and other legal professionals) have had favourable experience with private non-judicial means of binding dispute resolution – typically, arbitration – they will be favourably predisposed to private means of stimulating party-controlled dispute resolution, for example, mediation. The US experience with arbitration is long and generally successful: virtually no lawyer or client doubts that an enormous cadre of capable, experienced, honest and discreet arbitrators can be tapped to resolve any type of dispute and virtually no judge looks askance at arbitration.

In Spain, experience with arbitration is more limited, more recent and (at the risk of oversimplification, and notwithstanding progress being made) less satisfying. Many Spanish companies and counsel continue to have doubts about the independence of arbitrators and many (whether as cause or consequence is debatable) envision the role of party-arbitrator precisely more as one of dependence than as one of independence. And some Spanish courts continue to be relatively unfavourable to arbitration, due to perceived abuses or improprieties, or to perceptions of lack of appropriate independence. I suspect the situation in Portugal is similar.

A lawyer or client who doubts the independence of an arbitrator is unlikely to be sufficiently confident in the independence and discretion of a mediator in order to accept mediation, or if accepted, to trust the mediator sufficiently so as to permit the process to be successful. A judge who has similar doubts will not be quick to become a mediation advocate. A vicious circle is thus created: lack of confidence in the process damages the process and its chances of success, which limits confidence further... and so on: a kind of self-fulfilling prophecy with a negative dynamic that is hard to break.

### *Good faith/bad faith*

The Spanish (and civil) law system places what the common law-trained professional would consider to be a peculiarly high emphasis on questions of good faith and bad faith in



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commercial and legal relations. Rarely, if ever, have I seen a Spanish dispute which did not, sooner or later, degenerate into an exercise of pointing out the *mala fides* of the other side (and the dubious practices of its counsel) and the *bona fides* of one's own client and counsel. After months or years of such high volume, high emotion acrimony and name calling, sitting down to try to reach an amicable settlement, or inviting a third party to help in such endeavour, is no easy task.

### 'Macho Ibérico'?

Finally, and although here we leave legal culture and enter into popular culture, there is probably some connection between the stereotypically 'macho' attitude of the Spanish male which renders him reluctant to suggest (or be the first to suggest) direct settlement talks or involvement of a third party for this purpose.

Perhaps Spanish mediation will only take off when women hold the upper hand in the legal and commercial community?

### Conclusion

Readers from common law jurisdictions with relatively mature mediation markets should understand that the future of mediation in Iberia (or elsewhere) cannot, and will not, be identical to the experience in their own jurisdiction. However, readers in Iberia should understand that the mere enacting of legislation will not quickly and meaningfully change the way people and companies think and conduct themselves in respect of mediation (or anything else).

Both should understand that there are a large number of important underlying factors of a legal cultural and societal nature, some of which I have tried to identify here, which condition the way legal institutions and

commercial practices (including mediation) are 'received', accepted and utilised in one jurisdiction or another.

Insofar as Iberia (particularly Spain) is concerned, the future of mediation is uncertain for these very reasons. But the obstacles also present an opportunity. Another of the commentators in the series of articles referred to above states that the Spanish law could jump-start a kind of 'regime change' in the local legal and commercial mindset and practice: 'Although not exempt from risks or difficulties, the law presents a magnificent opportunity to develop a practice of mediation and conciliation in the civil and commercial area... ie, in the world of business generally, which can put an end to the focus from third-party dispute resolution to a party-controlled process aimed at creating value.' In other words, to shift from the typically zero-sum game of litigation/arbitration to the frequently value-creative, win-win game of mediation. Time will tell...

### Notes

- 1 Blas González, *Reflexiones sobre la Ley de Mediación III* (<http://www.diariojuridico.com/opinion/reflexiones-sobre-la-ley-de-mediacion-iii-blas-calzada-abogado-socio-de-cuatrecasas-magistrado-en-excedencia.html>).
- 2 Juan Jiménez-Laiglesia, Samuel Rivero, *Reflexiones sobre la Ley de Mediación IX* (<http://www.diariojuridico.com/opinion/reflexiones-sobre-ley-de-mediacion-viii-juan-jimenez-la-iglesia-y-samuel-rivero-socio-y-asociado-dla-piper.html>).
- 3 Virginia Allan, *Reflexiones sobre la Ley de Mediación VII* (<http://www.diariojuridico.com/opinion/reflexiones-sobre-ley-de-mediacion-vii-virginia-allan-attorney-at-law-y-counsel-de-uria-menendez.html>).
- 4 Blas González, *Reflexiones sobre la Ley de Mediación III* (<http://www.diariojuridico.com/opinion/reflexiones-sobre-la-ley-de-mediacion-iii-blas-calzada-abogado-socio-de-cuatrecasas-magistrado-en-excedencia.html>).
- 5 Antonio Vázquez-Guillén, *Reflexiones sobre la Ley de Mediación XII* (<http://www.diariojuridico.com/opinion/reflexiones-sobre-la-ley-de-mediacion-xii-antonio-vazquez-guillen-socio-allen-overly.html>).