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Gauging The Growth In Global ADR

Law360, New York (December 19, 2011, 12:17 PM ET) -- Commercial mediation in Europe has been the subject of legislation at the national and intranational level. Each jurisdiction is different and has its own reasons for promoting mediation. What these jurisdictions share are cost-conscious clients and an increasing commercial caseload for the judiciary. Layered on top, and unevenly spread, are a range of influences. They include economic factors, brought on by recession and the financial crisis, and issues of practical expedience as court dockets continue to grow.

Thus, this year, the United Nations General Assembly passed a resolution encouraging member states to mediate disputes wherever possible; we've also seen the implementation of the 2008 EU Directive on Mediation, which Italy used as a platform to institute mandatory mediation as a necessary precursor to almost all civil litigation.

The Italian model is bold, but it has wide appeal to countries whose civil justice infrastructure is unable to cope with demand. Further east, we know that Slovenia and Poland are watching Italy's progress with interest. There is additional legislation before the parliaments in both Spain and Germany at the time of writing.

Overall, however, commercial mediation in Europe is still in its infancy. EU-wide, estimates suggest that less than 1 percent of civil and commercial cases are mediated. All indicators, however, suggest that this is changing. And there may be clues as to the likely pattern of change in studying mediation's path to common acceptance in the U.S.

One characteristic of the U.S. mediation community is its willingness to embrace different styles of mediation. In the U.S., for example, evaluative mediation has become the norm in commercial disputes; in Europe, a more hands-off facilitative style remains predominant.

On an intellectual level, facilitative mediation appeals: Parties own the dispute and determine its fate with assistance from the mediator. Such mediations aim to be future-focused and dedicated to creating value through brainstorming options for mutual gain. Facilitative mediation retains a strong emphasis on psychology, negotiation theory, problem solving and consensus building.

But while facilitative mediation can be shown to be highly effective across a broad range of disputes, its core competences are abstract, alien to current business cultures, and difficult for the market to value. Thus, questions arise as to its commercial viability.

The same cannot be said of evaluative mediation, as demonstrated in the U.S., where evaluative mediators play a more interventionist role: Parties look to the mediator for advice and to temper unrealistic expectations with wisdom, tact and discretion. Evaluative mediation is also more accepting of parties' lawyers in the process; facilitative mediation encourages parties to take the lead, often sideling or bypassing lawyers.

Marginalizing mediation's biggest buyers in this way has not proved to be a successful strategy for encouraging the proliferation of mediation. By putting the legal merits further to the fore, evaluative mediation, by contrast, offers a more comfortable environment for lawyers. It draws on a similar skill set which works well in the 95 percent of cases that settle without resort to the courts or alternative dispute resolution.

The aspirations of evaluative mediation, it must be conceded, are more modest, and arguably therefore more realistic. Facilitative mediation seeks to turn a dispute (a negative) into something more positive. The intent is unarguably laudable, but is it necessary? Fees and self-interest aside, lawyers settle cases because, after assessing the probable amount at stake and multiplying it by the likelihood of success or failure, then subtracting the costs, the client will receive more in mediation (or pay less) than if the case went to court. This is evaluative mediation's appeal: a better deal.

The bigger picture benefits touted by facilitative mediators may be surplus to requirement. Research undertaken by JAMS demonstrates in around 90 percent of cases, the parties had no ongoing business relationship. The exception to this trend is construction cases, where an ongoing relationship was likely. Effort put in to building peace and healing broken business relationships would therefore appear to be wasted effort, and, significantly, a false premise on which to predicate one's entire approach to a dispute.

Simply put, for most parties, settlement is enough. They are free of an imposing burden on their lives, and can refocus on their core business. And a mediator who is willing to make a proposal in order to conclude negotiations is often sought and welcomed.

Offering this kind of process may be among the reasons that mediation is proving desirable in U.S. states where entering the process remains voluntary — as is the case in much of Europe. European mediators to date have resisted market demand for evaluative mediation, preferring instead to believe that clients can be educated out of a rights-based mindset. Clients so far have not proved receptive to two decades of this kind of education.

To move mediation forward in a way that is universally recognized to be desirable, European mediators may have to reign in some of their more aspirational desires for mediation and offer a more pragmatic product. This is a message that will sit uncomfortably with mediation trainers who have been strongly and vocally opposed to evaluative mediation.

The critical question for European mediators now is whether they listen to their clients and customers, or to mediation trainers. As ever, the market will determine the answers, but successful mediators will be those who move in anticipation of market demand and align their services accordingly.

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