

RESPONSE OF THE INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION AND RESOLUTION (“CPR Institute”)

To

QUESTIONS POSED BY ARLENE McCARTHY MEP

Concerning

**THE PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN
PARLIAMENT AND OF THE COUNCIL ON CERTAIN ASPECTS OF
MEDIATION IN CIVIL AND COMMERCIAL MATTERS**

(COM(2004) 718)

Preliminary Statement

The International Institute for Conflict Prevention and Resolution (“CPR Institute”) respectfully submits the following Response to certain questions posed by Arlene McCarthy MEP concerning the Proposal for a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters (COM(2004)0718).

CPR Institute is a non-profit educational organization whose mission is to spearhead innovation and promote excellence in public and private dispute resolution, and to serve as a primary multinational resource for avoidance, management and resolution of business-related and other disputes. CPR Institute has previously assisted and consulted with the European Commission, notably by submitting its Response to the Commission’s Green Paper on Alternative Dispute Resolution in Civil and Commercial Law (COM(2002) 196 Final) dated 19 April, 2002 ; by participating in a series of consultations in connection with the Commission’s Code of Ethics and its draft Directive; and by featuring members of the Commission staff on its periodic invitational conferences on developments in dispute management in Europe and around the world.

CPR Institute is supported by, and works actively with, a group of over 400 global businesses, law firms, judges, professors and public agencies to create and promote alternatives to adjudication of complex public and private disputes. This Response is submitted on behalf of the following businesses active in Europe (the "Endorsing Corporations"):

Akzo Nobel N.V.
Baker Hughes Incorporated
British American Tobacco
The General Electric Company
Johnson & Johnson
Nestlé S.A.
Northrop Grumman Corporation
Texas Instruments Inc.

This list is as of 15 December 2005, and may be supplemented in the future.

Questions

1. Is the proposal for a Directive necessary and justified in the light of the principle of subsidiarity and, if so, why? What would be its concrete benefits?

The CPR Institute and the Endorsing Corporations unequivocally support the Directive. It is not only necessary and justifiable, but urgently needed.

The primary concrete benefit of the Directive is that it will encourage the growth of commercial mediation. Encouraging that practice is vitally important to the competitive status of European markets.

Commercial mediation is a phenomenon of global significance, and is rapidly becoming an attribute of global commerce. It is frequently practiced in North America, Australia, Asia and the United Kingdom. The commercial pressures for its broad adoption throughout Europe are unavoidable. It is therefore necessary that commercial mediation be encouraged throughout the Member States, and within each such state. So pervasive is commercial mediation that the failure of Europe to adopt the practice would place the Member States at a competitive disadvantage.

Businesses in many countries – including in some Member States – widely accept commercial mediation as a primary means of managing business relationships, quite apart from its effectiveness in managing transaction costs of disputes. That is why markets in which businesses are reluctant to engage in commercial mediation are susceptible to missing opportunities for economic growth that are otherwise achievable. The commercial utility of commercial mediation in Europe is all the more compelling – and all the more urgent -- in light of the expansion of the number of Member States, many of whose commercial laws and practices are non-identical, with variable enforcement mechanisms.

A second concrete benefit of the Directive is that it will ensure uniformity regarding certain fundamental attributes of the commercial mediation process that are essential to achieving its commercial benefits on a regional scale.

Companies doing business among the Member States must have a reliable expectation of the legal and business consequences of their business decisions. Dissimilar ramifications of the same business decision among the various Member States creates uncertainty regarding, and thus hampers, economic activity in the region.

The use of mediation to manage or resolve business disputes is particularly vulnerable to lack of harmonization. The decision to make an offer of settlement in the course of a mediation should not have different legal consequences depending on the internal laws of the Member States of each party to the mediation, or of nonparties present at the mediation,

or of the mediator, or of the *situs* of the mediation. Moreover, an agreement to mediate (or an agreement to settle a dispute as a result of mediation) should not have one legal status in one Member State and a different legal status in another.

It is also a basic principle of global commercial activity that the substance of such uniform legal status adhere as closely as possible to the standards and practices adopted elsewhere in the world. While the CPR Institute and the Endorsing Corporations have suggestions for improvement, we strongly endorse the proposed Directive as an excellent product, reflecting a very high level of consultation and analysis. We unequivocally urge the Parliament to promptly adopt the proposed Directive, with or without the suggestions set forth below.

2. Would you prefer more attention to be given to encouraging codes conduct and additions to or improvements of the existing Commission communications?

The challenge is not that commercial mediation is not practiced *well* enough – it is that it is not practiced *enough*.

The CPR Institute and the Endorsing Corporations are far more concerned with legislative and regulatory enactments that will encourage commercial mediation, and harmonize the legal consequences of its practice, than we are with the adoption of professional codes or regulations designed to create or enforce standards within the mediation community. We believe that most businesses have, or can identify, the commercial sophistication necessary to find good practitioners. What they lack is the assurance that, when they propose mediation to a business partner in Europe, they can do so with some expectation that their partner will understand the term, and with some level of commercial certainty as to its consequences.

3. Should the scope of the Directive be limited to cross-border cases? What experience do you have of cross-border cases and what types of disputes are concerned? What is the monetary value of the average dispute?

The CPR Institute and the Endorsing Corporations recognize important and unique benefits to commercial mediation irrespective of its application to companies located within a Member State, in different Member States, or in a Member State and a non-Member State.

Every month, the Endorsing Corporations engage in economic activity on a global scale involving thousand of transactions and hundreds of billions of Euros. They are therefore engaged in disputes with respect to some fraction of those transactions, whose aggregate monetary value is vast. The locus of any particular dispute, or the residence of the parties, is immaterial. The question is whether a single, effective method to manage these disputes may be reliably exercised in the region of the European

Economic Market, and we believe that the Directive, if adopted, can achieve this crucial outcome.

4. Should certain types of dispute (e.g. family law) be taken outside the scope of the proposed Directive? If so, why?

The CPR Institute and the Endorsing Organizations express no view with respect to any aspect of the proposed Directive except for its application to business-to-business commercial disputes.

5. Are the definitions of “mediation”/“mediator” satisfactory? If not, why not?

We find those aspects of the proposed Directive to be satisfactory.

6. Do you see any difficulties with the provision on enforcement of settlement decisions? If so, please specify.

Businesses who are unfamiliar with commercial mediation often express uncertainty about the legal status of any agreement that may result from the process. We interpret the proposed Directive to grant a legal status to agreements that arise from mediation that would be equal to any contractual agreement. This status is of fundamental importance in encouraging companies to engage in the mediation process, which at heart is intended to result in a legally enforceable agreement.

7. Do you see any difficulties with the provision on admissibility of evidence? If so, please specify.

No single attribute of commercial mediation goes so to the heart of the process as does the expectation of complete confidentiality of statements made, and other information exchanged, during the course of the process. Those wishing to encourage any settlement process must assure parties that offers of settlement or other statements made in the course of the negotiation not only cannot later be introduced in court or other proceeding, but indeed are privileged against disclosure. In the absence of this assurance no well-counseled party would fully and whole-heartedly engage in settlement discussions, and the universally recognized social utility of out-of-court resolution of disputes would seldom be realized.

So important is this principle that the CPR Institute and the Endorsing Corporations urge the Parliament to consider the following modifications to ensure that the Directive accomplishes its objectives:

1. Article 6 should act both as a privilege and as a bar on admissibility of evidence. That is, statements, documents and other information conveyed in a mediation should not merely be non-admissible as evidence, but protected as confidential.
2. Article 6 should apply to all participants in the mediation process – parties, counsel, administrators, and all others – not merely to mediators. The privilege should not only reside in all such persons, but also apply to them, meaning that each person should have the power to prevent disclosure by any other person.
3. The evidentiary prohibition in Article 6 should not be limited to its use in subsequent court proceedings, but rather to its being offered in any proceeding whatsoever in connection with the dispute that was the subject of the mediation, including without limitation arbitrations, administrative proceedings, or other non-judicial proceedings.
4. The wording of any exceptions to this overall prohibition should closely follow – ideally should be identical to – the wording of similar provisions promulgated by globally recognized bodies such as UNCITRAL of the United Nations, or NCCUSL in the United States.

8. Do you see any difficulties with the provision on suspension of limitation periods? If so, please specify.

As currently drafted, Article 7 may unintentionally dissuade commercial parties from engaging in mediation. A simple change would correct this outcome.

The Directive currently imposes a mandatory suspension of time limitations during the mediation period. Mediation thus automatically slows down the litigation process, and extends the period of time when a party is exposed to suit.

This outcome is not always welcome or wise. A party may wish to exercise preliminary remedies at law or equity while also engaging in mediation. Alternately, a party may wish to mediate a claim early in the limitations period, while not intending to extend the period. Finally, the current provision may reward parties who initiate mediation for the sole purpose of suspending a limitation period.

In this as in most aspects of mediation, party autonomy is a key to the solution. We suggest that the Directive should provide that an agreement of the parties to suspend the time limitations shall be enforced.

9. Do you consider that the Commission's consultation was concluded satisfactorily?

Yes, the Commission was tireless in its efforts to include – indeed, to solicit – expertise from a wide variety of interested stakeholders in this process. The CPR Institute and the Endorsing Corporations commend the Commission for its aspirations and for the inclusive process it undertook to accomplish those aspirations.

Please, send your submissions to the following e-mail address:
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