The Mediation Landscape in the EU

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Mediation in the EU: Language, Law and Practice
Trier, 5 - 6 November 2018

Co-funded by the Justice Programme 2014-2020 of the European Union.
Opening Thought

“If I’d asked my customers what they wanted, they’d have said - ‘a faster horse’ “

Henry Ford (1863-1947), Founder of the Ford Motor Company
The Chain of Conflict

- Disputes are part of a chain
- There are opportunities or choices at each stage to deal with the escalation
- One can learn from “why” the parties escalated
Conflict Management – from Conflict Avoidance to Dispute Resolution

- Conflict is inevitable, disputes are not (de Bono)
- Conflict can be functional or dysfunctional – disputes are commonly dysfunctional (Parker-Follet)
- Conflict spans a range
Conflict Management v Conflict Resolution

- Creating Movement
- Stressing the process rather than the substance
- Devising processes that actually create change
- Devising reasonable processes

Some benefits of better conflict management:

<table>
<thead>
<tr>
<th>Efficiency</th>
<th>Lasting Effects</th>
</tr>
</thead>
<tbody>
<tr>
<td>Empowerment</td>
<td>External Positive Effects</td>
</tr>
<tr>
<td>Relationship Building</td>
<td>Game Changing</td>
</tr>
<tr>
<td>Differences can be a source of Value</td>
<td></td>
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</tbody>
</table>
Causes of Conflict

Conflict is Dynamic - Cycles of Conflict

Rummell / ADR Group
How people behave in conflict

<table>
<thead>
<tr>
<th>De-Escalating</th>
<th>Escalating</th>
</tr>
</thead>
<tbody>
<tr>
<td>Withdrawal from the transaction</td>
<td>Contending</td>
</tr>
<tr>
<td>Inaction</td>
<td>Inaction</td>
</tr>
<tr>
<td>Yielding</td>
<td></td>
</tr>
<tr>
<td>Problem Solving</td>
<td></td>
</tr>
</tbody>
</table>
And what influences their choices?

<table>
<thead>
<tr>
<th>Concern for Self</th>
<th>Concern for others</th>
</tr>
</thead>
<tbody>
<tr>
<td>Importance of Values Affected</td>
<td>Interpersonal Bonds</td>
</tr>
<tr>
<td>Effect of the Dispute in other realms</td>
<td>Positive Mood</td>
</tr>
<tr>
<td>Fear of Conflict</td>
<td>Dependence</td>
</tr>
<tr>
<td>Love of Conflict</td>
<td></td>
</tr>
</tbody>
</table>
The Correct focus?
“Alternative” Dispute Resolution?

Out of Court or Unlike Court or Alternative to Court..?
Redress Spectrum

- Between “No Action” and “Court Action”
Types of ADR - What’s in a name?

ISO 1003
“Facilitative”
“Advisory”
“Determinative”
### Some Comparisons

<table>
<thead>
<tr>
<th>Contrasts</th>
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<tbody>
<tr>
<td>Adjudicative vs. Non-Adjudicative (Facilitative, Evaluative, ..)</td>
</tr>
<tr>
<td>Rights vs. Interests (or needs)</td>
</tr>
<tr>
<td>Consensual vs. Mandatory</td>
</tr>
<tr>
<td>Adversarial vs. non Adversarial</td>
</tr>
<tr>
<td>Public vs. Private ; Confidential v. non Confidential</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Adjudicative (decision)</th>
<th>Non-Adjudicative (agreement)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Litigation</td>
<td>Mediation</td>
</tr>
<tr>
<td>Arbitration</td>
<td>Conciliation</td>
</tr>
<tr>
<td>Expert Adjudication</td>
<td>Negotiation</td>
</tr>
<tr>
<td>Ombudsman</td>
<td></td>
</tr>
<tr>
<td><strong>Evidence, Due Process</strong></td>
<td><strong>Good Faith, Safety &amp; Confidentiality</strong></td>
</tr>
</tbody>
</table>
What is Mediation?

• A process of assisted or facilitated negotiation ...

• Mediation is the intervention of an acceptable, impartial and neutral third party who has no authoritative decision-making power to assist contending parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute.


• ..reorient[s] the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and disposition toward one another

  Lon Fuller (1971)
Mediation Directive – 2008/52/EC – Art 3:

Mediation’ means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.

It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seised to settle a dispute in the course of judicial proceedings concerning the dispute in question.

‘Mediator’ means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.
Mediation – Elements and Concepts

• No (one) definition of mediation / conciliation
  • Law Reform Commission Report 2010
  • Local understanding of “conciliation” – additional recommendation phase.

• Different approaches to the process across the continents

• Styles of Mediation
  • Facilitative
  • Evaluative
  • Transformative

• Rules
  • Many ADR bodies promulgate Rules e.g. ICC, LCIA, CEDR, ADR Group / FriaryLaw;
  • Some trade bodies also

• Typical Phases in Mediation / Conciliation
  • Preparation – before negotiations begin
  • Opening
  • Exploring
  • Negotiating
  • Concluding

• The use of Caucusing
• Position of pleadings, evidence and legal submission
• Role of Advocates
• Conventions concerning costs
• Concerns
  • Safety
  • Confidentiality
  • Limitation of Actions
  • Prejudice
• Enforcement
“Pareto-Optimal” Potential
Win-Win

- **Accommodate/Compete**: (you get 10, I get 1)
- **Collaborate**: (you get 10, I get 1)
- **Compromise**: (you get 5, I get 5)
- **Avoid/Ignore**: (you get 10, I get 1)

Shift the Solution Possibilities Frontier through collaboration

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Contrasting Mediation Styles

<table>
<thead>
<tr>
<th>Bargaining Style</th>
<th>Therapeutic Style</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Purpose:</em> mediation is to reach settlement</td>
<td><em>Purpose:</em> helps parties reach understanding</td>
</tr>
<tr>
<td>Job of mediator is to look for bottom-lines, narrow issues, control process, be an agent of reality</td>
<td>Disputes viewed as communication problems</td>
</tr>
<tr>
<td>Structured</td>
<td>Focus is on communication and relationship</td>
</tr>
<tr>
<td>Frequent use of causus</td>
<td>Parties encouraged to express feelings and attitudes</td>
</tr>
<tr>
<td>Settlement based on parties “wants”</td>
<td>Emphasized mutuality</td>
</tr>
<tr>
<td>Claim authority based on expertise in managing process and in law</td>
<td>Claim authority based on expertise in managing relationships</td>
</tr>
<tr>
<td>Less direct communication between parties</td>
<td>Explode past relations</td>
</tr>
<tr>
<td>Agreements written without parties present</td>
<td>Less discussion of legal issues</td>
</tr>
<tr>
<td></td>
<td>Agreements written with parties present</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Problem-Solving Approach</th>
<th>Transformative Approach</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individualist worldview</td>
<td>Relational worldview</td>
</tr>
<tr>
<td>Disputes viewed as problems to be solved</td>
<td>Disputes viewed as opportunity for moral growth and transformation</td>
</tr>
<tr>
<td>Focused on reaching agreement</td>
<td>Greater sense of own efficiency</td>
</tr>
<tr>
<td>Mediators decide what case is about, drop issues that cannot be handled, directive style</td>
<td>Two dimensions</td>
</tr>
<tr>
<td>Conflict emerges from unmet and incommensurable needs</td>
<td>1) Empowerment — strengthening of self to reflect, make choices and act</td>
</tr>
<tr>
<td>Solutions maximize joint satisfaction</td>
<td>2) Recognition — ability to move beyond self to relate to others</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Settlement Frame</th>
<th>Communication Frame</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mediators work to uncover elements of a deal and convince parties to accept</td>
<td>Goal is to help understand conflict</td>
</tr>
<tr>
<td>Directed, activist role, “dealmaker”</td>
<td>Influence how issues are framed and understood</td>
</tr>
<tr>
<td>Evaluative — provide case precedent and risks to non-settlement</td>
<td>Conversation/facilitator agreements</td>
</tr>
<tr>
<td>Make suggestions, persuade and influence</td>
<td>Settlement secondary to attaining mutual understanding</td>
</tr>
<tr>
<td>Make judgments about good and bad agreements</td>
<td>Less directive, “orchestra leader”</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Evaluative Approach</th>
<th>Facilitative Approach</th>
</tr>
</thead>
<tbody>
<tr>
<td>Urges parties to accept settlement</td>
<td>Helps parties evaluate proposals</td>
</tr>
<tr>
<td>Develops and proposes settlement</td>
<td>Helps parties develop proposals</td>
</tr>
<tr>
<td>Predicts court outcomes and impact of not settling</td>
<td>Assists about likely court outcomes</td>
</tr>
<tr>
<td>Assesses strengths and weaknesses of legal claims &amp; probes parties interests</td>
<td>Helps parties understand issues and interests</td>
</tr>
<tr>
<td></td>
<td>Assists about strengths and weaknesses of legal claims and focuses discussion on underlying interests</td>
</tr>
</tbody>
</table>

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Successful Outcome Rates

Ireland & UK:
- CIF > 80% settlement (voluntary)
- CEDR > 75% settlement (mixed)
- Commercial Court > 65% settlement (mandatory)

Wider
- Voluntary 80-90%
- Mandatory > 60%

Italy
- 35% of respondents appeared before the mediator. Where the respondent was present, 48% of mediations had a positive outcome.
- Settlement is often reached before the meeting or after the closure of mediation, but still as a result of it.

Increased Satisfaction Levels Reported Throughout
Some US Success Rates

American Arbitration Association (depending on sector): 70-85%  

Mediation Research and Education Project (Northwestern University Law School) over 23.5 year period: 86%  

Equal Employment Opportunity Commission: 52%  

Federal Circuit Court Patent Cases (through 2007): 42%  

National Average, Court-Ordered Mediation: ~50%  
(significant jurisdictional variation) – (2008)  
Docket Management 101: Case Referral, Yeend and Pruett  
Encouraging Mediation

- Compulsory mediation
- Mediation information
- Cost sanctions
- Improving access
EU Initiatives

European Code of Conduct on Mediation

EC Recommendations 98/257 and 2001/310
- 98/257 – Active (puts solution to parties)
  - independence, transparency, the adversarial principle, effectiveness, legality, liberty and representation.
- 2001/310 – Passive (assists parties to their own solution)
  - impartiality, transparency, effectiveness and fairness

Mediation Directive 2008/52/EC

Consumer ADR Directive 2013/11/EU

ODR Regulation

Preamble

(5) The objective of securing better access to justice, as part of the policy of the European Union to establish an area of freedom, security and justice, should encompass access to judicial as well as extrajudicial dispute resolution methods. This Directive should contribute to the proper functioning of the internal market, in particular as concerns the availability of mediation services.

(6) Mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements.

(7) In order to promote further the use of mediation and ensure that parties having recourse to mediation can rely on a predictable legal framework, it is necessary to introduce framework legislation addressing, in particular, key aspects of civil procedure.

(8) The provisions of this Directive should apply only to mediation in cross-border disputes, but nothing should prevent Member States from applying such provisions also to internal mediation processes.
The Mediation Directive - 2008/52/EC

**Article 1 – Objective and Scope**
- Article 2 – Cross Border Disputes
- Article 3 – Definitions
- Article 4 – Ensuring the Quality of Mediation
- Article 5 – Recourse to Mediation
- Article 6 – Enforceability of Agreements Resulting from Mediation
- Article 7 – Confidentiality of Mediation
- Article 8 – Effect of Mediation on limitation and prescription periods
- Article 9 – Information for the General Public
- Article 10 – Information on Competent Courts
- Articles 11 to 14 – Implementation (21 May 2011) and Review of the Directive
### Article 1 – Objective and Scope
Objective is to encourage use of mediation; Scope is cross-border civil and commercial disputes. Certain types of dispute are excluded.

### Article 2 – Cross Border Disputes
The Parties must be habitually resident in different Member States; or judicial or arbitration proceedings giving rise to the mediation are in another Member State

### Article 3 – Definitions
"Mediation" means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. "Mediator" means any third person who is asked to conduct a mediation in an effective, impartial and competent way

### Article 4 – Ensuring the Quality of Mediation
Member States are encouraged to promote voluntary codes of conduct amongst mediators and bodies providing mediation, and to promote training of mediators.

### Article 5 – Recourse to Mediation
Courts may invite parties to use mediation to settle their disputes. Compulsory mediation requirements are permitted, subject to the right of access to the judicial system.

### Article 6 – Enforceability of Agreements Resulting from Mediation
Written agreements resulting from mediation are to be enforceable unless the content is contrary to law in the enforcing state.

### Article 7 – Confidentiality of Mediation
Neither mediators nor those involved in the administration of the mediation process can be compelled to disclose information arising in connection with a mediation, except where public policy so requires, or where disclosure of the content of agreement reached at mediation is required to enable its enforcement. Stricter standards of confidentiality are permitted.

### Article 8 – Effect of Mediation on limitation and prescription periods
Parties to mediation are not to be prejudiced by the expiry of legal time limits during the mediation process (except where those time limits are provided in international agreements to which Member States are party).

### Article 9 – Information for the General Public
Member States are required to provide information for the public on how to contact mediators and bodies providing mediation services.

### Articles 10 to 14 - Implementation and Review of the Directive
Provisions relating to the identification of competent courts, entry into force, review and transposition. Member States are required to implement the Directive by 21 May 2011.
Implementation Contrasts

Mandatory
- Mediation (Italy)
- Information (Czech)

Judicial Discretion
- Mediation
- Information (Ireland, Many Others)

Incentives
- Costs Sanctions (UK)
- Funding / Refunding (Bulgaria, Romania)

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## Implementation Contrasts

<table>
<thead>
<tr>
<th></th>
<th>Mediation Directive</th>
<th>France(*)</th>
<th>Poland(*)</th>
<th>The Netherlands(*)</th>
<th>UK</th>
<th>Germany(*)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Recourse</strong></td>
<td>voluntary; court may suggest mediation</td>
<td>voluntary; court may direct once during proceeding, parties may decline</td>
<td>voluntary</td>
<td>voluntary; court may take into account parties' attitude to a reasonable offer of mediation</td>
<td>voluntary</td>
<td>voluntary; court may suggest mediation</td>
</tr>
<tr>
<td><strong>Scope</strong></td>
<td>cross-border disputes</td>
<td>domestic &amp; cross-border disputes; MS are to encourage training and effective control mechanisms (self-regulatory processes)</td>
<td>domestic &amp; cross-border disputes; self-regulation; NGOs &amp; universities may create mediation centres &amp; (non-compulsory) lists of mediators</td>
<td>domestic &amp; cross-border disputes</td>
<td>cross-border disputes</td>
<td>domestic &amp; cross-border disputes</td>
</tr>
<tr>
<td><strong>Quality</strong></td>
<td>subject to exceptions, no evidence can be given arising out of the mediation procedure</td>
<td>in NJM: principle of confidentiality of declarations arisen out of mediation; in national non-judicial mediation (NNJM): self-regulation</td>
<td>required; mediator may be authorised by parties to reveal facts learnt during mediation; invoking any statements from mediation process before the court: legally ineffective</td>
<td>parties allowed to not give evidence if confidentiality of mediation was explicitly agreed; exceptions apply</td>
<td>respected as to obtaining mediation evidence (ME) by witnesses and depositions, and disclosing or inspecting ME under control of a mediator</td>
<td>universal obligation of secrecy levelled by reservation of statutory powers; overriding obligation to press criminal charges</td>
</tr>
<tr>
<td><strong>Confidentiality</strong></td>
<td>judicial proceedings suspended as soon as parties agree to settle dispute by mediation</td>
<td>judicial proceedings suspended as soon as parties agree to settle dispute by mediation</td>
<td>PLP suspension not provided for; in domestic mediation, possible if parties agree or if request is lodged with the court</td>
<td>suspension of prescription periods during mediation</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Prescription &amp; limitation period (PLP)</strong></td>
<td>nothing provided for</td>
<td>remuneration depends on the subject-matter of the case</td>
<td>fee determined by the mediator &amp; agreed upon before the mediation begins</td>
<td>depending on the value of the claim, from 50 to 95 Pound per hour</td>
<td>mediation by a judge without decision-making power: cost-neutral; otherwise negotiated</td>
<td></td>
</tr>
<tr>
<td><strong>Costs</strong></td>
<td>no official website on mediation, but some information available</td>
<td>provided on the website of the Ministry of Justice; campaign conducted (posters, brochures, media content, etc.)</td>
<td>provided on the Netherlands Mediation Institute’s website</td>
<td>available on the website of the Ministry of Justice</td>
<td>no information on an official website available</td>
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ECJ - *Rosalba Alassini v. Telecom Italia SpA* (C-317/08) – mandatory mediation is not a breach of Art. 6(1) because:

- the mandatory mediation procedures
- cannot result in a binding decision
- cannot cause substantial delay in bringing proceedings;
- cannot expend any time-bar period; and
- cannot give rise to more than minimal costs.

- UK – *Halsey v. Milton Keynes General NHS Trust* [2004] EWCA (Civ) 576 (Eng.)
  - *Courts cannot force parties to mediate because that would be a breach of Art 6(1)*
Some more implementation contrasts

Italy
- Law 69/2009 → Legislative Decree 4 March 2010, n. 28 –
  - Mandatory pre-trial mediation in a wide range of causes of action
- Decree “Frozen” by Constitutional Court on December 6 2012 because Decree exceeded mandate from legislature
- New Law “Reloaded” September 20 2013 with modifications
  1. Mandatory pre-trial mediation remains, but narrower categories
  2. Parties now allowed to withdraw from mediation if they consider settlement unlikely – but mediator may recommend a solution and court may fix rejecting party with all costs if judgment reflects the recommendation
  3. Parties required to be assisted by counsel in mediation
  4. Lawyers entitled as of right to act as mediators in their fields of expertise, while others must obtain an accredited mediator qualification.
Some more Implementation contrasts

• **Ireland** - European Communities (Mediation) Regulations 2011 (SI 209 of 2011). Mediation Act 2017

• **Netherlands** - mostly private regulation but some legislation regarding prescription limits, privacy, and court powers to refer to mediation

• **Czech Republic** Act 202/2012 – until recently, mediation regulated in the criminal sector. New civil rules with obligatory first session, registered mediators, heavy administrative sanctions for breach of requirements.
Encouraging ADR through costs sanctions - England

- **Hurst v Leeming** [2001] EWHC 1051 (Ch) – cost sanctions for unreasonable refusal

- **Dunnett v Railtrack plc** [2002] EWCA Civ 303 (CA) – having a watertight defence does not guarantee refusal is reasonable

- **Halsey v Milton Keynes General NHS Trust** [2004] EWCA Civ 576 – principles for determining whether refusal unreasonable

- **Reed Executive Plc v Reed Business Information Ltd** [2004] EWCA Civ 887 – "without prejudice" communications cannot be disclosed to prove unreasonableness of refusal

- **Askey v Wood** [2005] EWCA Civ 574 – mediation is sterile if it is to try to apportion quantum while liability is undetermined.

- **Hickman v Blake Lapthorn** [2006] EWHC 12 – similar principles applied to a refusal to negotiate
In determining unreasonableness, the court must have regard to all the circumstances of the particular case. This will include:

(i) the nature of the dispute;
(ii) the merits of the case – the fact that a party reasonably believes that he has a strong case is relevant to the question of whether he has acted reasonably in refusing ADR;
(iii) the extent to which other settlement methods have been attempted;
(iv) whether the costs of ADR would be disproportionately high;
(v) whether any delay in setting up and attending the ADR could have been prejudicial; and
(vi) whether the ADR had a reasonable prospect of success – this will often be relevant to the reasonableness of one party’s refusal to accept the other’s invitation to agree to mediation, but is not necessarily determinative of the fundamental question of whether the successful party acted unreasonably in refusing to agree to ADR.
Encouraging ADR through Costs Sanctions – Ireland

• Draft General Scheme of Mediation Bill 2012, head 17
• Order 99 1B of the Rules of the Superior Courts (as amended in 2010)
• Kay-EL (Hong Kong) Limited -v- Musgrave Limited [2005] IEHC 418
  Kelly J: “I should mention that the mediator expressed the view that the parties came to the mediation in good faith and made genuine efforts to reach a compromise. Such being so the lack of success at mediation carries no costs implication for the litigation.”
• Fitzpatrick -v- Board of Management of St Mary’s Touraneena National School [2013] IESC 62
  McMenamin J – “Many common law jurisdictions have espoused ADR or mediation as being an entirely necessary adjunct to the legal process. Some suggest the process, when availed of, must always be voluntary. I do not agree; there may be cases where such a process should be mandatory. But it must be fair. The fact that there may be a penalty of costs for failure to engage in such a process is not, I think, sufficient argument against it, especially when court lists become lengthy and litigation costs become significant.”
Encouraging ADR through Costs Sanctions – Ireland

- Hollybrook (Brighton Road) Management Company Ltd -v- All First Property Management Company Ltd [2011] IEHC 423 – no costs order unless refusal is against an order of the court under Order 56A

- Kilarden Investments Limited -v- Kirwans (Galway) Limited [2013] IEHC 602 – reasonable refusal to mediate

- Mediation Act 2017
  - In force since 1 Jan 2018
  - Obligation of lawyers to advise about mediation in contentious matters
  - Section 16 – the court may order the parties to consider mediation
  - Section 22 – costs may be awarded adversely for failure to mediate
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ADR Issues
Commission
2011
Proposals

1. Gaps in coverage
   • Sectors
   • Member States
   • Fill gaps by mandatory horizontal cover
   • Lessons from Netherlands/Nordic unified model
   • ODR platform

2. Lack of awareness
   • How increase usage?
   • visibility and adherence: National, EU and global umbrellas

3. Variation in quality
   • Quality principles (the 2 recommendations) and
   • regulatory scheme with national competent authorities
• **Directive on ADR in Consumer Disputes 2013/11/EU**
  • quality out of court ADR entities must exist to deal with any contractual dispute between a consumer and a business
  • entities acting as ADR bodies must meet certain quality criteria, i.e. are well-qualified, impartial, transparent, effective and fair
  • businesses must inform customers in relation to ADR entities to which they subscribe to deal with potential contractual disputes
  • ADR entities must aim resolve disputes within 90 days

• **Regulation on ODR in Consumer Disputes 524/2013**
  • ODR Platform
Estimated number of mediations per year in the EU

<table>
<thead>
<tr>
<th>Number of mediations</th>
<th>Countries</th>
<th>Nr. of countries</th>
<th>% of countries</th>
</tr>
</thead>
<tbody>
<tr>
<td>More than 10,000</td>
<td>Germany, Italy, Netherlands, UK</td>
<td>4</td>
<td>14%</td>
</tr>
<tr>
<td>Between 5,000 and 10,000</td>
<td>Hungary, Poland</td>
<td>2</td>
<td>7%</td>
</tr>
<tr>
<td>Between 2,000 and 5,000</td>
<td>Belgium, France, Slovenia</td>
<td>3</td>
<td>11%</td>
</tr>
<tr>
<td>Between 500 and 2,000</td>
<td>Austria, Denmark, Ireland, Romania, Slovakia, Spain</td>
<td>6</td>
<td>21%</td>
</tr>
<tr>
<td>Less than 500</td>
<td>Bulgaria, Croatia, Cyprus, Czech Rep., Estonia, Finland, Greece, Latvia, Lithuania, Luxembourg, Malta, Portugal, Sweden</td>
<td>13</td>
<td>46%</td>
</tr>
</tbody>
</table>
Time and Money Savings

Rebooting the Mediation Directive

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# Potential Savings?

## Table: Potential Savings

<table>
<thead>
<tr>
<th>Aprox. nr. of civil and commercial litigious cases at 1st instance courts (Cepej 2012)</th>
<th>Saved costs with mediation preceding each case (50% of success rate)</th>
<th>Saved «direct costs» (conservative estimate)</th>
</tr>
</thead>
<tbody>
<tr>
<td>13 000 000 x</td>
<td>€1 219 =</td>
<td>€15 847 000 000</td>
</tr>
</tbody>
</table>

*Giuseppe de Palao*

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The EU Mediation Paradox

• Less than 1% of cases EU wide go to mediation ......
“Rebooting the Mediation Directive”

Survey of 816 Experts across the EU
Favoured Legislative Means to Increase mediation uptake

Rebooting the Mediation Directive

G Brian Hutchinson, UCD Sutherland School of Law, Dublin
Favoured non-legislative means to increase mediation uptake

|   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| 37. Establish a mediation advocacy education program for law schools |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| 33. Develop and implement pilot projects |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| 34. Develop an EU-wide "settlement week" program |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| 36. Create an EU-wide "mediation pledge" for members of certain industries |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| 35. Designate national mediation champions or ambassadors, defined as public figures |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| 39. Create an EU Alternative Dispute Resolution Agency to promote mediation |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |
| 38. Create a uniform certification of mediators at the EU level |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |   |

Rebooting the Mediation Directive

G Brian Hutchinson, UCD Sutherland School of Law, Dublin
Conclusions of “Rebooting”

“introducing a ‘mitigated’ form of mandatory mediation may be the only way to make mediation eventually happen in the EU.”

Mitigated = some form of opt-out but with potential sanction for unjustified opt-out

Two rebooting methods proposed

Amend the Directive or

Require Member States to designate a “balanced relationship target number”
Art 1 of the Mediation Directive

1. The objective of this Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.
Tensions of Rebooting

• Mandatory v. Voluntary
  • Is mandatory mediation an oxymoron? Does making it mandatory deprive it of its validity and effect?
  • Leading the horse to water?
  • The effect of trial periods (New York, Italy)

In an experimental federal court program over 80% of the attorneys whose cases were required to use ADR said they would select a form of ADR for use in other cases if it were available, but no attorney whose case was not assigned to ADR requested to participate on their own. Although attorneys could request to have their cases removed from the ADR track, very few opted out. According to the authors, "[T]his indicates that litigants and their attorneys often followed the path of least resistance, simply staying on the [ADR] track into which they were initially slotted regardless of their judgments about the suitability of that track for their case. What may appear to be complete freedom of choice to participate in alternative dispute resolution may actually result in no real choices being made at all."


Encouraging Federal Agencies to Use ADR leads to development of best practice and leads by example
“What went wrong?”

<table>
<thead>
<tr>
<th>Oxymoron of mandatory mediation</th>
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<tr>
<td>Suspicion of state imposed process</td>
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<tr>
<td>Over focus on litigation savings</td>
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<td>Poor marketing of mediation</td>
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<td>Self serving mediators</td>
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<td>Division amongst mediators</td>
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<td>No overarching code of conduct</td>
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Christian-Radu Chereji and Constantin-Adi Gavrila.

G Brian Hutchinson, UCD Sutherland School of Law, Dublin
Consumer ADR

- E Commerce, Access to Justice, Wider Conflict Intervention

- Directive on Consumer ADR 2013/11/EU, 21 May 2013
  - By 9 July 2015 Member states must ensure that at least one “ADR entity”, meeting the requirements of the Directive, is available to consumers for domestic and cross border consumer disputes.
  - ADR providers are not obliged to comply or sign up unless they wish to benefit from the exposure provided
  - Traders will have to notify consumers of ADR schemes to which they are party (or obliged to subscribe) if any
  - Traders do not generally have to use ADR

- Regulation on Consumer ODR , 524/2013, 21 May 2013
  - Online Access to “ADR entities” listed under 2013/11/EU above through Commission Portal from 9 January 2016 (it was a little late).
  - “ADR entities” are obliged to have a website and accept electronic communications
  - Online traders will have to supply a link to the EU Portal
The EU ODR Regulation

- “Ten Things You Wanted to Know about the European ODR Regulation (but were too afraid to ask?)” (2015) 1 Journal of Technology in International Arbitration

- Question 1: Is the EU going to provide online dispute resolution?
- Question 2: So who is going to resolve disputes referred to the ODR Platform?
- Question 3: Who can use the ODR Platform?
- Question 4: Who must use the ODR Platform?
- Question 5: So is there anything that businesses or consumers will be obliged to do when the ODR Regulation comes into force?
- Question 6: Can all consumer disputes be referred to the ODR Platform?
- Question 7: Will it cost anything to use the ODR Platform?
- Question 8: What are the Advantages and Disadvantages of using the EU Platform versus a Private Platform?
- Question 9: When is all this happening?
- Question 10: What could go wrong?
Peace over Justice?
The Quality of Mediation

• “There must be no Alsatia in England in which the King’s writ does not run” – Scrutton LJ, Czarnikow v Roth, Schmidt & Co. [1922] 2 K.B. 478, CA

• Contrast Art 5. UNCITRAL Model Law on International Commercial Arbitration

• But ETIPS and EU Investor Courts.

• Owen Fiss – “Against Settlement”

• Laura Nader – “Harmony Ideology”

• Ken Feinberg – “Against Settlement … sometimes”

• Hazel Genn – “Understanding Civil Justice”

• Peace as justice....
How to ensure justice in ADR?

“Design” it into the structures

- e.g. Consumer ADR Directive requirements of expertise, independence, impartiality, transparency, effectiveness, fairness, liberty, legality

Provide oversight

- Regulatory oversight – give the job to someone else
  - Competent Authorities in approving ADRs
  - Competent Authorities in *monitoring ADRs*
- Appeal / Review – give the job to the users
  - Appeal before the courts
  - Review of the procedures by the courts
The European Code of Conduct for Mediators

- Voluntary Principles
  - Competence, Appointment, Fees, & Promotion of Mediators Services
  - Independence and Impartiality
  - Mediation Agreement, Fairness of the Process and Settlement
  - Confidentiality
Confidentiality

• Mediator Confidentiality vs. Party Confidentiality
• The Role of Confidentiality in Mediation
• Types of confidentiality and concerns
  • Confidentiality as to the fact of the mediation taking place and settlement
  • Evidence at trial of offers and conduct on the application of one party
  • Evidence of misconduct normally likely to vitiate a settlement agreement
  • Private meeting exchanges between mediator and party
  • The possibility of having to give evidence at a later trial
  • Suit for damages or any other remedy (eg injunction)
Source of confidentiality requirements

• Imposed by operation of law or by agreement?
  • Mediation Directive Art 7.

Confidentiality of mediation

1. Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:
   (a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or
   (b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

2. Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation.

• Wider confidentiality would need to be agreed unless national law provides.
Conclusions, Comments, Questions...
Thank You

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