MEDIATION AND EUROPE

Access to justice is a citizen's fundamental right. It is even the first of all fundamental rights. Indeed, when a citizen cannot access justice they cannot uphold their other fundamental rights. What is the purpose of freedom of movement or freedom to trade freely if one cannot go to court to prove one's rights against those who infringe such freedom?

I do not know what Law is, but I know what its absence is: the reign of thugs, the crushing of the weak by the strong, misery and ruins, a return to the Stone Age, violence. There is no civilisation without law. Barbarism and its horrors grow in lawless worlds.

Yet, my belief is that we are entering an era in which the right of access to justice will become threatened in Europe. This can be seen in the latest measures taken by some governments within the European Union.

Together, we need to offer citizens ways to achieve fair solutions for their disputes. We cannot replace justice. Justice is irreplaceable. But we can benefit from a complementary route in certain circumstances.

The European Union wishes to develop alternative dispute resolution schemes.

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I) THE 21 MAY 2008 DIRECTIVE AND OTHER EUROPEAN TEXTS


It is made up of 30 recitals (Principles) and 14 articles.

These articles give an overview (Articles 1 to 4) or try to define goals (Articles 5 to 9). They define one process and dismiss other methods or procedures (negotiations, etc.).

Mediation is defined quite vaguely as ‘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’.
However, while defining mediation as a voluntary process (recital 13), the Directive refers to national laws and the possibility to set time limits for the process or to draw the parties’ attention to the possibility of mediation (duty of information). It also considers that the Directive should not prejudice national legislation which makes the use of mediation compulsory or subject to incentives or sanctions (paragraph 14) ‘provided that such legislation does not prevent parties from exercising their right of access to the judicial system’.

This definition includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question.

The recitals which follow are essentially intended to define the scope (cross-border disputes, confidentiality, jurisdiction, concept of enforceable agreement, etc.).

The articles begin with the objective and scope of the Directive (cross-border disputes and their definition in Articles 1 and 2), and some specific definitions (in Article 3). Unfortunately, the Directive lacks clarifications regarding terminology. The boundaries between conciliation, mediation and other alternative dispute resolution mechanisms are not precisely provided for.

Besides these terminological issues, other articles seem to be essential:

- Quality of mediation (Article 4) explicitly mentions the initial and further training of mediators (without fixing quantitative or qualitative rules) in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties.

  The use of those three words to describe mediators reminds us that other mediators’ ethical aspects are essential (neutrality, rule against conflict of interest). Moreover, there is no mention of the profession of mediator. On the contrary, the Directive recognises a mediator ‘regardless (…) of the way in which the third person has been appointed or requested to conduct the mediation’.

- Article 5 of the Directive recalls the conditions for recourse to mediation and the right of access to the judicial system.

- The enforceability of agreements resulting from mediation is also addressed (Article 6) providing for the intervention of a court or a competent authority to enforce the agreement.

When seized, a judge can only refuse approval of a mediation agreement if its content is clearly contrary to any public policy provision understood as a principle of universal justice, which is considered as having an absolute value.
The confidentiality of mediation is also highlighted (Article 7). However, if the principle is to be approved, the exceptions provided for are dangerous. Indeed, this article states that confidentiality may be breached for ‘overriding considerations of public policy’ or “the protection of the best interests of children” or to prevent to prevent ‘harm to the physical or psychological integrity of a person’.

Any exception to confidentiality makes us fear for the worst. Who will define the ‘overriding considerations of public policy’? What is this concept of public policy which is not defined anywhere, and which is subjective? It is also the case for the term ‘best interests’.

These are purely psychological or intuitive factors which are not defined at all. One immediately thinks of key issues: money laundering, financing of terrorism, abuse and violence... But we also know that in some cases the legislator has moved from the fight against money laundering to the concept of tax evasion, from the idea of attacks on people to feelings of insecurity.

Article 7 of the Directive - as stated above – is intended to maintain confidentiality but provides 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. Such evidence naturally includes words exchanged, statements taken, evidence shown.

But there is one exception: an agreement between the parties, which is a violation of the mediation process and therefore an abuse of process.

Furthermore, the Directive describes the effect of mediation on limitation periods (Article 8), and urges States to inform the general public, courts and authorities of such a possibility. A time is set for a review (2016).

It could be seen as surprising that the Directive does not ever refer to the Code of Conduct for Mediators released on 4 July 2004 by the European Union. That is also a part of quality of mediation. But this is an error in terminology. We cannot evaluate the quality of mediation but we must evaluate the quality of mediators.

The Directive leads to reflection about the coordination between conventional processes and judicial proceedings.

We can imagine three possible scenarios developing:

- In so far as a judge may act as a mediator under national law, this Directive should also apply to mediation conducted by a judge who is not responsible for any judicial proceedings relating to the matter or matters in dispute.

- This Directive does not, however, extend to attempts made by the court or judge seised to settle a dispute in the context of judicial proceedings concerning the dispute in question.
Eventually, this Directive does not concern either cases in which the court or judge seised requests assistance or advice from a competent person.

In any case, the European legislator expressly encourages national judges to propose to parties in litigation to resort to mediation if they agree, and to order, if applicable, the suspension of the court proceedings until the outcome of the mediation process.

Other texts have been published.

The Commission published Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes. The idea is to provide a simple, swift and inexpensive solution to disputes between consumers and traders without the need to take legal action. It requires States to set up alternative dispute resolution procedures through the establishment of independent, impartial, transparent, effective, fast and fair entities.

Regulation No 524/2013 of the European Parliament and of the Council of 21 May 2013 deals with online dispute resolution for consumer disputes. It is connected to the Directive adopted on the same day. The goal is to resolve disputes online through a platform on which the plaintiff will fill in an electronic complaint form. The complaint will be forwarded to an ADR entity for the purposes of resolving this dispute.

On 17 November 2010 the Committee of Ministers of the Council of Europe adopted a recommendation in which it recommends judges to use ‘alternative dispute resolution’.

II) EUROPEAN COUNTRIES AND THE IMPLEMENTATION OF EUROPEAN TEXTS AND PROJECTS

Europe can be an accelerator for mediation. We realise that there is currently a strong promotion of mediation.

The use of alternative dispute resolution in Europe is diverse. In some countries, mediation was poorly regulated, if at all. In other countries, mediation is well-developed and implemented. Mediation increasingly sounds like a universal language for conflict resolution. It is impossible to give a comprehensive approach, but the situation of some countries can be presented.

In Greece, the Civil Procedure Code dealt with the judge presiding over conciliation proceedings. In 2000, an attempt at conciliation became compulsory for any dispute amounting to at least EUR 80,000. It is directly implemented by the parties’ lawyers, but a third party may be appointed to find a solution to the dispute. The term of mediator was not used. There was no specific regulation of the process. Then, in 2007, conciliation was introduced in family law, and in 2010, in consumer law. Finally, the Directive was implemented in December 2010. Training is scheduled for mediators by non-profit organisations (Bars and Law Societies, Chambers of Commerce). The Ministry of Justice will appoint a certification committee for mediators with 3 certified mediators.
and 2 lawyers. The definition given by the Directive on the voluntary process is adhered to. Mediation must be paid for, and will be charged to both parties, but it will be possible to charge different fees to the parties according to their means. The fees are calculated on an hourly basis, which cannot however exceed 24 hours, including the preparatory phase. The hourly rate will be fixed and adjusted by the Ministry of Justice. This is like the idea of a fixed tariff.

In Portugal, the Directive was implemented in 2009 (29 June 2009 Act). The Code of Civil Procedure has been completed. A distinction must be made between judicial and extrajudicial mediation. Any limitation period shall be interrupted in case of a mediation as recommended by the Directive. The possibility of judicial approval is mentioned. The scope is quite broad (civil law, commercial law, family law, consumer law and, soon, labour law). Clients have the right to be assisted by a lawyer during the mediation meetings. The judge may decide to refer the case to mediation, unless one of the parties objects.

In Germany, the judge was already a very active player to reach an agreement between the parties. Since 1 January 2000, mediation has become a prerequisite for legal action for some minor disputes (civil disputes amounting to less than EUR 750, neighbourhood conflicts, reputation loss or slander). In 2002, the Code of Civil Procedure was amended to allow the court to refer the parties to a mediator. Training of mediators is also provided, with the creation of mediation and conciliation centres and a code of deontology addressing neutrality and independence. The Directive was implemented on 21 July 2012. Mediation is not mandatory. The German federal states (Länder) are required to implement it into local legislation.

In Austria, the law on mediation in civil matters came into force in 2003. There is no official list but registration by the Federal Ministry of Justice. Mediators must train (120 hours to be on the list plus 80 hours of additional training). Continuing education is mandatory - one and a half days every year. University courses and training by the chambers of the regulated professions are also provided.

Lawyers are very much involved.

Other countries have developed mediation through different processes (Romania created a mediation board responsible for the selection of mediators, and the High Council of Judges and Prosecutors proposed to make mediation mandatory in labour law and family law; The Czech Republic created a regulated profession of accredited mediators, etc.).

In Belgium, judicial conciliation is part of the Judicial Code (Article 731). The 19 February 2001 Act relating to family mediation allows the judge to entrust the accompaniment of negotiation to a third party with the consent of the spouses. The 21 February 2005 Act extended such practice of mediation under judicial supervision to all fields of law. The judge may approve the mediation agreement unless it is incompatible with public order or the child’s interest. Negotiations shall be conducted by a mediator who is certified by the Belgian Federal Mediation Commission. Naturally, some ethical rules were established (including confidentiality).

Mediation suspends the limitation period. Mediators come from diverse backgrounds. However, we can observe that the Belgian Federal Mediation Commission, whose mission is to provide
accreditation to mediators, works under rather vague conditions. Lawyers, notaries and the legal professions are mediators as of right, but other professionals may be accredited by the Federal Commission. Private centres have been created besides professional associations of lawyers or notaries. The OBFG and OVB have enacted rules applicable to all lawyers on mediation. All regulations emphasize confidentiality, neutrality, impartiality, independence and qualifications as a mediator.

In Spain, the situation was quite complex. Indeed, a draft on mediation in civil and commercial matters was circulated in May 2011. This text provided for mandatory mediation. Inadmissibility for requests directly brought to court was provided for. However, mediation was only mandatory for disputes below EUR 6,000.

Subsequently, a decree-law was published on 5 March 2012, which completely changes the prior position as it establishes the principle that mediation takes place on a voluntary basis. The text makes it possible to have terms in contracts referring to mediation, and such clauses are essential. Information sessions are also supposed to be organised by mediation organisations.

In Italy, a law was passed regarding the efficiency of the judicial system. The 2013 Act provides for mediation provisions:

- the mandatory assistance by a lawyer in mediation processes,
- the compulsory nature, again, of mediation in some areas (succession, family, leases, medical liability, slander, insurance, advertising, banking, finance, etc.). Naturally, that means that the court cannot handle these matters.

In France - The 11 March 2015 decree provides that the matter submitted to the judge shall mention the attempts made to reach an amicable settlement. Mediation has been developing for over 20 years. But L.B. Buchman will now talk to you about it.

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Conclusion

Europe is in favour of alternative dispute resolution. Unfortunately, the reasons do not always seem relevant (taking cases out of the court system, budget savings). However, it is necessary to avoid excesses such as mandatory mediation or a new profession of mediators.

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