International Bar Association, Legal Practice Division, 2011 September, pag. 22

Dan Engström [1] dan.engstrom@salc.se
Cornel Marian cornel.marian@salc.se
Stockholm Arbitration & Litigation Center (SALC) Advokatbyrå, Stockholm

Striking the hard bargain: the implementation of the EU Mediation Directive in Sweden

After some delays, the implementation of the EUMediation Directive (2008/ EC/52) [2] in Sweden is back on track and the new legislative mechanisms came into force on 1 August 2011. Recent debates on the scope of application have sidetracked the implementation of the Mediation Directive by at least two months [3] . Of these, court-mandated mediation and the private mediation provisions for resolving rental and tenancy disputes were only recently resolved with the passing of the Government Proposition 2010/11:128, which was issued on 14 April 2011 [4] .3 The current legislative debate strains the deadline for implementation, as pursuant to Article 12 of the Directive, Member States shall bring their legislations in line before 21 May 2011 with the 'date of compliance' to be 21 November 'at the latest' [5] .

EU Mediation Directive 2008/EC/52 through Swedish eyes

The Mediation Directive – although not explicitly binding on Member States – is a sweeping proposition from Brussels that promotes alternative dispute resolution (ADR) mechanisms, and specifically mediation of civil and commercial disputes, across the European Union. The Mediation Directive has already been adopted in many countries, including Italy, Slovenia and Romania, or the local legislation has already been compliant with the Directive, such as in Germany and Poland. The Directive aims to harmonise legislation in Member States on mediation of cross-border disputes. The Directive does not, however, 'prevent Member States from applying such provisions also to internal mediation processes' [6] .

The Mediation Directive contains four major provisions that have prompted

---

1 Dan Engström is the founding partner of Stockholm Arbitration & Litigation Center (SALC) Advokatbyrå KB, a boutique law firm in Sweden with the practice exclusively limited to dispute resolution and litigation. Cornel Marian is an associate with the firm. The authors are grateful to their colleagues, Angela Mannaerts and Paolo Pontecorvi of Pontecorvi Mannaerts & Triboldi, for insights on the problems observed in Italy in the implementation of the Mediation Directive. The errors and omissions belong to the authors alone.

2 Directive 2008/52/EC of the European Parliament and of the Council 21 May 2008 of certain aspects of mediation in civil and commercial matters [2008] OJ L136/3 (hereinafter Mediation Directive). See also Commission of the European Communities, 'Green Paper on Alternative Dispute Resolution in Civil and Commercial Law', COM (2002) 196 final (19 April 2002).

3 See Swedish Justice Department, Memo on Mediation of Certain Civil Matters DS 2010:39, 23 November 2010, available at: www.ud.se/sb/d/12846/a/156281 (in Swedish original, last accessed 10 June 2011).

4 Swedish Justice Department, Government Proposition 2010/11:128 '*Mediation and Conciliation – increased opportunities to agree*'. 14 April 2011, available at: www.ud.se/sb/d/13654/a/166631 (in Swedish original, last accessed 10 June 2011).

5 See Mediation Directive, Article 12. The Swedish Parliament finally adopted the EU Mediation Directive in accordance with the Government Proposal on 16 June 2011. See also Report 2010/11:JuU23 and Parliamentary Report 2010/11:116 section 18.

6 Mediation Directive, Preamble paragraph 8.

considerable debate in Sweden [7]. First, the Mediation Directive requires Member States to encourage mediation and to provide for out-of-court mediation mechanisms [8] .

This far-sweeping obligation was heavily debated in Sweden. This provision has also generated significant debate in other countries, most notably in Italy, where the far-reaching mediation legislation requiring mandatory pre-trial mediation has led national lawyer unions to call for a national strike [9] .8 Secondly, the Mediation Directive contains an enforcement provision in Article 6(2), that provides for the enforcement in any Member State of an agreement to mediate and a judgment by a court endorsing a mediation decision. Of critical concern is the exclusion of the Directive's application in Denmark, a country with which Sweden shares considerable financial and legal ties [10] .

Thirdly, the Mediation Directive contains specific provisions regarding confidentiality that, if adopted improperly, may give rise to contradictory obligations. The Mediation Directive requires that Member States ensure complete confidentiality so that 'mediators or those involved in the administration of the mediation process shall [not] be compelled to give evidence … arising out of or in connection with a mediation process' [11]. The Directive also calls for Member States to increase the availability of public information on mediators, institutions and organisations providing mediation services, as well as to competent courts, which may process applications for enforcement of mediation agreements and decisions. The requirements to keep mediations confidential on the one hand, and to increase public information on the mediation process on the other hand, are likely to test Member States' ability to develop an appropriate mediation regime that is practical yet compliant with the Mediation Directive.

Finally, Member States are required to modify their rules on prescription (statutes of limitation), so that commencement of mediation proceedings does not elapse the prescription period under which a party may bring an action before a court or in arbitration, including investment arbitration proceedings against a state [12] .

Against this backdrop, the implementation process in Sweden saw numerous practical hurdles.

Government Memorandum DS 2010:39

To become compliant with the Directive, the Swedish Government first proposed to consolidate Swedish legislation – specifically the Law on Tenancy and Rent Tribunals (1973:188), the Code of Enforcement, the Code of Civil Procedure, the Publicity and Secrecy Act (2009:400) and the Ordinance on General Court Fees (1987:452) – to be in line with the Mediation Directive in Government Memorandum DS 2010:39 [13] .

While acknowledging that there is no 'coherent' regulation of mediation in Sweden

---

[7] See Dan Engström, Medling som tvistlösning metod (Stockholm: Jure Förlag, 2009), 149–70.

[8] Mediation Directive Articles 4–5.

[9] Vanessa O'Connell, '*Mandatory Mediation in Italy? Mamma Mia'*, Wall St J Blog, 14 March 2011.

[10] Mediation Directive Article 1 (3). Denmark opted out from the Mediation Directive in accordance with the EC Treaty.

[11] Mediation Directive Article 7.

[12] Mediation Directive Articles 8–9.

[13] See Memo DS 2010:39 at 9–24.

[14] , the proposal sought to incorporate all the major elements of the Mediation Directive: pre-trial mediation, enforcement of the agreement and decision, confidentiality and the stay of the statute of limitations. The government also made the determination that private disputes, primarily those involving tenancy and rent tribunals, may be referred to mediation in line with Article 5 of the Mediation Directive calling for the encouragement of out-of-court proceedings. The memorandum was very ambitious on the role of mediation: it envisioned mandatory provisions in rental agreements, so that in the event the parties failed to submit to mandatory mediation provisions, they would lose the right to compensation.

The proposal sought to go further than the Mediation Directive and provide for mediation of family law issues as well [15] . It went as far as to recommend modifications to the Children and Parents Code, so as to permit the mediation and enforcement of custody measures. The Memorandum also undertook the examination of whether the UNCITRAL Model Law may be adopted in parallel with the Mediation Directive [16] .

As discussed below, this proposal was plainly too ambitious and was subsequently narrowed.

Government Proposition 2010/11:128

Confronted with the impending deadlines prescribed by the Directive, the government finally passed in mid-April Proposition 2010/11:128, which in the amendment process abandoned some of the ambitious initiatives earlier advanced in Government Memorandum DS 2010:39. The actual delay was caused primarily by the inability to reach consensus on two fundamental issues:

(1) court-administered mediation: and

(2) the resolution related to mediation of rental and tenancy disputes.

In reference to the court administered mediation, the government determined not to implement a proposal for courtadministered mediation where the presiding judge could serve as the mediator [17] . Several local courts took issue with the proposal pointing to the conflicting interests for the judge [18] . Instead, the government opted for a voluntary practice where the judge would encourage parties to mediate without the judge serving as the mediator.

The district courts may refer the parties to voluntary mediation [19] . The six courts of appeal, which serve as the courts of first instance for challenges to and enforcement of arbitration awards, have considerable interests in seeing the parties settle, albeit to a lesser degree as district courts [20] . The legislative proposal opted for a limited provision allowing for mediation and conciliation at the appellate level as well as at the district level.

In reference to the resolution requiring mediation of rental and tenancy disputes, the initial memorandum did not envision the appeal of mediation decisions. As a result, the

---

[14] Memo DS 2010:39 at 29.

[15] Memo DS 2010:39 at 31–32.

[16] Memo DS 2010:39 at 39–40.

[17] Government Proposition 2010/11:128 at 22–24.

[18] Government Proposition 2010/11:128 at 23.

[19] Government Proposition 2010/11:128 Article 6.1 at 21.

[20] Government Proposition 2010/11:128 Article 6.5 at 33–34.

government adopted a provision that the mediator's decisions in such disputes shall be enforced to the same extent as court settlements [21] .

On another ambitious issue in the Memorandum, the proposal on mediation of family issues was abandoned for the more conservative proposal that restricts mediation to purely civil and commercial matters. This decision appears to be more in line with the Mediation Directive, which excludes family matters as defined to be issues where 'the parties are not free to decide themselves' [22] .

In terms of other issues, such as enforcement and suspending the prescription limits, the advising courts encountered no opposition and thus the proposal adopted clear provisions that ensured commencement of mediation proceedings suspend prescription limits. Given the determinative role of legislative history law when interpreting legal acts in Swedish law, it is important to note that the government proposal expressly stated that the UNCITRAL Model Law on International Conciliation and Mediation shall not be adopted in Sweden [23] .

Comments

The immediate consequence of the new legislation is the increase in mediation costs, as more practitioners need to be trained, and in particular with court-mandated mediation, complete new proceedings must be adopted [24] .

The new Swedish legislation started out as an ambitious proposal with broad mandatory provisions of mediation, but has, through compromise, evolved into narrower legislation that fits the parties' practice needs.

The difficult bargains have already been struck so that the Mediation Directive would be adequately implemented in Sweden and the local legislation would be brought in line with the European propositions.

Across Europe, one would agree that mediation is a desirable practice that should be encouraged. In this context, the Swedish legislature has agreed to some mediation practices, but has not embraced courtmandated arbitration in which the judge serves as the mediator. Moreover, in light of the increasing need for harmonised legislation on mediation, it is quite regrettable that the Swedish legislature did not pay credence to the UNCITRAL Model Law, when it is the UNCITRAL Model law on Conciliation that has first attempted to harmonise legislations on mediation across jurisdictions.

---

21 Government Proposition 2010/11:128 at 48–49.

22 See Mediation Directive Preamble, para 10.

23 Government Proposition 2010/11:128 Article 7.2 at 36.

24 Government Proposition 2010/11:128 Article 6.5 at 33–34.