Eurochambers

Position paper
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Mediation as a mean to resolve disputes in civil and commercial matters

Preliminary observation

Disputes are part of human nature and resolution of conflicts comes at high cost [1]. This is not only about legal and economic costs borne by the people involved, but also the social, developmental, environmental and strategic costs of conflict.

Mediation as a dispute resolution process is unanimously recognised as an alternative efficient tool to reduce justice cost and to improve access to justice. It impacts positively on the parties involved in a dispute (at microeconomic level) and the European economy as a whole (at macroeconomic level).The study "*rebooting the mediation Directive*" published by the European Parliament in January 2014 estimates that if trial was systematically preceded by mediation in civil disputes only, the yearly direct cost saved would be in between €15 billion and €40 billion and the yearly saved cumulated waiting time would be 8 million years!

Streamlining commercial dispute resolution is, in EUROCHAMBRES opinion, a way to save on these costs and work on the competitiveness of our economy [2]. The European Commission, Parliament and Council have all stressed on several occasions the importance of promoting mediation. EUROCHAMBRES hereby call the institutions to take further steps in that direction.

For the purpose of this paper and as defined in the mediation Directive 2008/52/EC:

- "Mediation" means a structured process 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.
- "Mediator" means any third person who is asked to conduct 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.

1 – Consistency of definition

The word "mediation" is used in a wide variety of contexts and takes different meanings across the EU Member States' legal frameworks. This is confusing for the users and

[1] The trend towards globalization of trade led to an increase of cross-border disputes in the B2B sector and thus to an increase of costs spend on cross-border litigation.

[2] It is to be stressed that mediation has a lot more benefits than just cost and time savings. It is also a win-win situation since it is the parties themselves that arrive at a decision/settlement. This in turn helps to preserve rather than terminate business relations. Furthermore mediation is characterised by privacy and confidentiality and creates an atmosphere of concession rather than confrontation.

complicates significantly awareness raising activities.

To take but a few examples, mediation is used in the following contexts: insurance mediation, mediation in criminal cases, institutional mediation, mediation on copyright levies, WTO mediation, in-house mediation, debt mediation…

Recommendations:

- To look for more consistency in the usage of the term mediation and refrain from multiplying its use in another context that the one of Directive 2008/52/EC.

- To avoid the usage of the term mediation for any dispute resolution process where the third person ("*neutral*") is not independent from the parties (such as institutional mediation or in-house mediation) and decide ultimately on the solution to the dispute (such as arbitration).

2 – Mediation is a voluntary process but needs to be encouraged

Mediation is a process designed to increase party participation and self-determination and to create a mutually acceptable outcome. However, experience shows that parties unfamiliar with the mediation process do not go spontaneously to the mediation table. This legitimates attempts to encourage parties to sit together: the mediation clause, the judiciary injunction to mediate or the mediation imposed by law for some type of disputes.

The expectation is for all parties to participate in the mediation process in good faith but the parties and or the mediator have the freedom to leave the process at any time. The parties cannot be forced (by contract, a judge or the law) to reach an agreement.

Recommendations:

- When mediation is made "mandatory" through a contractual clause, a decision of the judge or the law,

  · foresee that the obligation for the parties will be limited to the good faith participation in a meeting with the mediator where the applicability of mediation to the specific case will be explored. In all cases, parties will be allowed to "walk away" at any time and at reasonable cost. Parties in a conflict shall never be obliged to reach an agreement or sign a memorandum of understanding at the end of the mediation process.

  · make sanctions possible for parties' refusals to attend the first mediation meeting without justification, such as holding these parties liable for litigation costs even if they prevail in the subsequent trial of the case.

- Require parties who refuse to participate in mediation to provide a reason for this refusal.

- Provide incentives for parties who choose to mediate, such as public subsidies (legal aid), fiscal incentives or refunds of court fees,.

- Require counsels to inform parties about mediation as an alternative to litigation when relevant and enforce penalties for lawyers who fail to do so.

3 – Training mediators: standards and accreditation

A critical issue for the development of mediation is to build trust and for that, much depends on the mediator's skills and training. One bad experience will generally ruin credit into mediation. Mediation has a structure, timetable and dynamics that "ordinary" negotiation lacks. Mediators use various techniques to open, or improve, dialogue between disputants, aiming to help the parties reach an agreement. There is a myth that lawyers are automatically qualified to mediate by virtue of their bar cards.

The development of European standards related to mediation skills and training will

pave the way for accreditation systems (private or public) and steer the quality of the mediators and the mediation.

At present, there is no uniform European regulatory scheme governing the practice of mediation unlike other professions, such as law or medicine. Some Member States, governmental bodies (including courts) and mediation Centres set forth different requirements for mediators and have foreseen voluntary or mandatory accreditation systems. Accreditation systems steer the quality of mediators.

Accreditation systems make it possible to identify the number of mediators and by way of surveys to assess the market and the practice of mediation. Some accreditation systems distinguish the domain of expertise of the mediator (family, civil and commercial and social mediation) offering more information to the parties. On the same line, mediation trainings are not of even quality. The development of an accreditation system for training programme will enhance the quality.

Recommendations:

- Mediation is a structured process that proves to enhance chances of success. A training in mediation should be required from the candidate mediator as well as continuing training so that their skills remain updated.
- The European Commission should support the development of standards related to mediator skills and mediation training which will make possible a progressive convergence of mediator skills and facilitate mutual recognition of mediators (in cross border mediations).
- Member States should promote public or private accreditation system in order to improve the quality of the service but also in order to make research on mediation possible (scoreboard).
- Mediation should be part of the curriculum of the Master Degree in Law.

4 – Court annexed mediation

Judges must be allowed to call the parties (with or without their counsel) to advise them on mediation and refer the case to a mediator or mediation centre at any time.

Recommendations:

- Grant judges the power to suggest litigants to try mediation (with the ability to opt out at little or no cost during the first meeting).
- Grant judges the power to ask the parties the reasons for refusing to try mediation and possibly condemn the refusing party to the litigation costs.
- Require judges to state why they did not refer a case to mediation.
- Establish a mediation advocacy education program for judges.
- Bring referral to mediation as part of judges' assessment.

5 – Enforcement and the role of mediation Chambers

Fortunately, practice shows that it is not difficult to enforce a mediation agreement. In the very large majority of cases, the agreement will be implemented by the parties without additional formalities. However with the objective to promote trust in the mediation process, it is advisable to facilitate the enforcement of the mediation settlement. Most Member States have legislation dealing with enforcement of mediation. It may be noted that the parties may, in case of settlement, subject to the consent of the Mediator, agree to appoint the Mediator as an Arbitrator and request him/her to confirm the settlement agreement in an arbitral award.

Recommendations:

- Chambers of Commerce and Industry should be entrusted to act as trusted third party and register mediation settlement in the area of commercial mediation.

6 – Mediation pledge

The concept of "*mediation pledge*" is a public statement in which those who sign it (corporations, law firms, governmental agencies etc.) declare to adopt a systemic approach to dispute resolution with more focus on mediation. In different forms ADR pledges have been promoted in many countries, including the United States, the United Kingdom, France or Singapore.

Recommendations:

- Create an EU-wide "*mediation pledge*" for corporations, law firms and governmental agencies with the policy support of the European Institutions.

7 – Absence of robust mediation data and balanced relationship

Mediation is a reality in Europe but it is impossible to gather robust data on the practice. This is due to the specificity of the process which is by far and large voluntary and confidential. There is no obligation to report on cases and mediation centres are regularly bypassed by the parties [3] .

The mediation Directive states that its objective is "to encourage the use of mediation by ensuring a balanced relationship between mediation and judicial proceedings" [4] . Whether this balanced relationship is 2 mediations for 1 judicial case or, as it is by now 1 mediation for 100 judicial cases is not specified. The Balanced Relationship Target Number (BRTN) is the minimum percentage of cases to be mediated to arrive at "*balanced relationship*" with that of litigated cases.

The BRTN policy should be ambitious. European Chambers consider that mediation should be the rule, litigation the exception.

Recommendations:

- Mediation should be at the forefront of the EU judicial scoreboard.

- The European Commission should improve the quality of data collection about mediation. One option could be to request mediators to register either to a public or private register and conduct annual surveys [5] .

- Each Member State must determine its Balanced Relationship Target Number (BRTN). Failure to set and reach the BRTN is a failure to comply with the Diretcive.

8 – Practice what you preach !

Mediation is rarely used by public authorities. The European Commission, e.g., often refers in its contracts to amicable settlement but with what outcome? Such standard clause of amicable settlement routinely included in EC contracts is not a mediation clause but a mere invitation to negotiate a solution before escalating the dispute to courts.

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3 See Go to Mediation report by Unioncamere on "Pan-European mediation practices – survey on the use of B2B mediation", www.gotomediation.eu.

4 Directive 2008/52/EC article 1.1.

5 The surveys should be anonymous. Otherwise we will not get the right information.

The practice of inserting a mediation clause in contracts is a commitment to try to find a solution to the conflict through a mediation process. It does not oblige the parties to find an agreement and allows the parties to opt out of the mediation process at early stage should it not be fruitful.

Recommendations:

- Public administrations should be obliged to consider systematically the option of integrating a mediation clause in its contracts.

- An example of mediation clause would be: "*in the event of a dispute between the parties in relation to the interpretation, application or validity of the contract which cannot be settled amicably, the parties will attempt to resolve this dispute through mediation [in accordance with the rule of xxx mediation Centre]. In absence of mediation agreement, the parties will bring the dispute before the courts of [the place of employment of the competent authorising officer]*". The mediation clause is more robust if it refers to the procedure of a designated mediation Centre.

Conclusions

A legislative intervention of the European Union is needed to:

- require counsels to inform parties of mediation when relevant as an alternative to litigation and enforce penalties for lawyers who fail to do so;

- require parties who refuse to participate in mediation to provide a reason for this refusal;

- make sanctions possible for parties' refusals to attend mediation proceedings, such as holding these parties liable for litigation costs even if they prevail in the subsequent trial of the case;

- grant judges the power to order litigants to try mediation, with the ability for the parties to opt out at little or no cost during the first meeting;

- require judges to mention why they did not refer a case to mediation.

A non-legislative intervention (recommendation) of the European Union is needed to:

- recommend to not use the usage of the term mediation for any dispute resolution process where the third person ("neutral") is not independent from the parties (such as institutional mediation or in-house mediation) and do not decide ultimately on the solution to the dispute (such as arbitration);

- look for more consistency in the usage of the term mediation and refrain from multiplying its use in another context that the one of Directive 2008/52/EC;

- provide incentives for parties who choose to mediate, such as public subsidies, fiscal incentives or refunds of court fees;

- when mediation is made mandatory (by contract, a decision of the judge or the law), the obligation for the parties should be limited to the good faith participation in a meeting with the mediator with objective to explore the applicability of mediation to the specific case. In all cases, parties will be allowed to "walk away" at any time and at reasonable cost;

- support the development of standards related to mediator skills and mediation training;

- mediation should be part of the curriculum of the Master Degree in Law;

- parties in a conflict will never be obliged to reach an agreement or sign a memorandum of

understanding at the end of the mediation process;

- chambers of Commerce and Industry could be entrusted to act as trusted third party and register mediation settlement in the area of commercial mediation;

- mediation is a structured process that proves to enhance chances of success. A training in mediation should be required from the candidate mediator as well as continuing training;

- member States should promote public or private accreditation systems in order to improve the quality of the service but also in order to make research on mediation possible (scoreboard);

- establish a mediation advocacy education program for judges and particularly for the ones of the new Court to be created, the Unitary Patent Court judges;

- assess judges in part on the number of cases referred to mediation;

- create an EU-wide "mediation pledge" for corporations, law firms and governmental agencies with the policy support of the European Institutions;

- public administration should be obliged to consider systematically the option of integrating a mediation clause in its contracts;

- further promote mediation in the EU countries that have not yet a mediation culture through awareness raising campaigns;

- private entities should be encouraged to include mediation clauses in their contracts and Chambers should develop standard mediation clauses and disseminate them to their members.

Further information : Mr Vincent Tilman and Ms. Alexia Hengl, Tel +32 2 282 08 850, tilman@eurochambres.eu or hengl@eurochambres.eu

Press contact : Ms. Guendalina Cominotti, Tel +32 2 282 08 66, press@eurochambres.eu

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