

“The EU Civil and Commercial Mediation Paradox ... and a Possible Solution”

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1. Introduction

Good morning everyone, and many thanks to the organizers, for inviting me to chair the working group on mediation, to my fellow panelists, and of course to all of you.

In this introduction I am going to focus on “mediation in civil and commercial matters”, in line with the scope of the 2008 Directive, but mediation in other fields can certainly be discussed during our work this morning.

Also, we all know that mediation has many values, such as improving dialogue, maintaining relationships, where possible, and self-determination in disputes resolution. Still, today I will focus primarily on numbers, that is, on the economic losses of not using mediation enough in the EU, and on how to possibly avoid those losses, at the policy level.

2. Einstein face and quote

As I saw the subtitle of this conference, Albert Einstein came immediately to my mind. Indeed, the severe challenges of very difficult economic times might eventually lead to policy decisions that, in my view, should have been made years ago in order to ripe the various benefits of mediation.

3. The research “The costs of Non-ADR- Survey Data Report”

And speaking of economic benefits, it’s always been clear that mediation can save both time and money, as compared to civil litigation. However, “how big, exactly, these savings are”, or can be, has always been somewhat uncertain. That question, though, was eventually tackled, in the context of an EC-funded study, in 2011.

The starting point of this study was the famous World Bank “Doing Business” Report, and especially the index named “Enforcing contracts,” which measures the efficiency of the judicial system of over 180 countries in resolving a specific type of commercial dispute.

Based on this starting data, experts from all over the EU were asked to estimate how much it would cost, and how long it would take, to mediate that very same dispute in their country.

A report containing all of the responses received is available online. Here I will highlight data for two sample countries.

4. Data/table on mediation in Italy, Belgium and EU

As you can see, litigating that model dispute would take 1.210 days in Italy and 505 in Belgium, at a cost, respectively of 15.370 Euros in Italy and 16.000 Euros in Belgium

5. Data/table on mediation then court in Italy, Belgium and EU

Assuming that all commercial disputes are similar to the model dispute of the study, and that all disputes are mediated before going to trial -- just hypothetically -- at a success rate of mediation of 50% we would have the following savings.

Belgium, savings of 207 days and 1.000 Euros

Italy, savings of 558 days and 3.315 Euros

EU, savings of 186 days and 2.722 Euros

6. PDF cover of the EU Parliament Research

Using progressively lower mediation success rates, last year I had the privilege of presenting right here, at a Parliament workshop, what one could call the mediation effectiveness break-even point, that is, the minimum success rate for mediation that still generates time and cost savings in each Member State.

7. Break-even point in Belgium

As you can see in our two examples, in Belgium, a 9% mediation success rate is the break-even for time-savings,

and 44% for costs.

8. Break-even point in Italy

In Italy, break even for time is 4%, and 28% for costs.

9. Break-even point in EU

Averaging data for all the Member States, the break-even point for time-savings is 19%, and 24% for cost-savings.

10. Image of a little thing doing something big

The key reason why even very low mediation success rates are efficient is this: the extra costs, in time and money, of having to go first to mediation and then to trial, if mediation fails, are significantly lower than the benefits of a successful mediation.

11. European Mediation Paradox

In the light of this extraordinary potential of mediation, policy-makers should feel puzzled by the impressively low number of civil and commercial mediations taking place in the EU. Take a look at these examples:

Bulgaria: 472

Romania: 300

Hungary: less than 2.000

England: 8.000

... and keep in mind that these are some of the top performers -- not the contrary! -- according to the September 13, 2011, Resolution of the EU Parliament, which assessed the status of the implementation of the 2008 Directive.

12. Italy

There is only one country in the EU with close to 150,000 mediations per year. That is Italy, also the sole EU country where pre-trial mediation, in 2011, was made mandatory by a Government decree. Not in all cases; just in certain types of civil actions.

Here you see the official statistics of the Italian Ministry of Justice, showing what happened when the decree came into force.

Please note the increasing trend in the filings, climbing almost to a whopping 20.000 per month - I repeat, per month - before the summer.

13. Breakdown of the mediation cases filed

As one would imagine, almost 4 cases out of 5 are mandatory cases. In short, people mediated because they had to.

Most interesting to note is also that the almost 20% of voluntary mediations were not there before the Decree, meaning that mandatory cases “dragged along” voluntary ones. Happy users that returned even when they did not have to mediate, presumably.

14. Other interesting data

In two cases out of three, the invited party decided not to show up.

When both parties did show up and sat down with the mediator, the procedure ended up with an agreement in almost one case out of two.

The total number of days saved by the successful mediations, minus the extra days spent when mediation failed, ranges between 25 million (if one considers the average duration of a first degree judgment only) to 75 million days (for going all the way up to the Court of Cassation). Average is 50 million days. That is, over 136 thousand years!

Money-wise, a study by the Italian Union of the Chambers of Commerce, estimated savings of more than 480 million Euros due to mediation, during the period September 2011-September 2012.

15. A bumpy road

If you think these are great numbers, imagine what they could have been without the opposition by part of the legal profession. In fact, you may know that an organization of Italian lawyers challenged the mediation Decree before the Italian Constitutional Court which, on October 24, issued a two-line press release announcing that the Decree was unconstitutional because of “excess of legislative power”, only to the extent the Decree had made mediation a condition precedent to trial.

Trying to simplify, according to the Court mediation cannot be made mandatory by an act of Government; an act of Parliament is needed. More cannot be said until the full judgment is handed down, but the decision does not seem to express any concerns with the constitutionality of mandatory mediation *per se*.

16. A possible solution, for Italy and beyond

As it happens often, if not always, the judgment seems to leave no clear winner. Hence, opponents and supporters of mandatory mediation are now working together on a possible solution that I believe to be most interesting for our group, because it is one way to solve, maybe not just in Italy, the mediation paradox we talked about -- that is, the existence of a wonderful tool very few people use.

The solution builds essentially on two pillars:

- 1) a three-year trial period during which it is mandatory to try mediation, in certain cases;

2) an “opt-out” system, allowing the parties that have to mediate first to withdraw at the first meeting with the mediator by paying a moderate fee, if they think the attempt has little hope.

The first pillar is needed to give mediation a chance, and to have solid data to evaluate further policies: without an obligation to try, you know what the numbers are, and not just in the EU. Also, without that obligation there would be even no significant data to evaluate.

The second pillar is needed to make mandatory mediation, during this trial period, a lesser burden on the parties, when the process has less chances of success. This lesser burden, in turn, should result in more people accepting the invitation to mediate, so that more people get exposed to the benefits of mediation during that first meeting with the mediator.

I would humbly submit that other, less problematic mediation promotion features -- such as mediation credentialing, enforceability of mediated settlements, the judges’ power to invite the parties to try mediation, and/or financial incentives -- are of course pretty good. These features, however, have been in existence in some EU countries well before the Directive, and have failed to bring the number of mediations even in thousands, let alone in the tens or hundreds of thousands.

17. Image horse 1

Now, we all know the counter argument to mandatory mediation: you can lead a horse to water, but you cannot make it drink (in other words, you can force people to sit at a mediation table, but not to reach an agreement). Well, of course! Compulsion TO mediation is not compulsion IN mediation. It is just an obligation to try.

Image horse 2 (drinking water)

Why an obligation to try? Well, because if you do lead the horse to water, the horse might change its mind and drink, especially if it is “thirsty” of dispute resolution, like almost all litigants are!

Image horse 3 (drinking beer)

Of course, we have to make sure it is good water, and not something else ... but that is another story.

18. The three “F”

Just like any other good policy, good dispute resolution policy is about encouraging and rewarding good behaviours. And sometimes that has to happen by law, at least initially; history shows us that human beings often resist change, even when they know it is good for them. Did people simply stop smoking in public places when they knew such smoking would not only damage their health, but also that of others? And what about using seat belts, or paying for car insurance?

When faced with a lawsuit, people demonstrate similar resistance to beneficial change: in particular, the notorious three “Fs” -- in English: Fight, Flight, or Freeze—come into play. When suing, or being sued, the immediate, natural instinct is not to mediate, despite repeated demonstrations that mediation remains the most effective way of dealing with lawsuits.

19. Book Cover

Inspired by the possibility of a legal approach to change, my colleague Mary Trevor and I sought a basis in existing EU law, if not for making mediation mandatory in certain cases, for at least making more mediations happen. Our book gave just the opportunity we needed.

After considering all of the EU mediation policies, and the virtual absence of mediation in several Member States, we focused on the language in Article 1 of the Directive calling for a “balanced relationship” between litigation and mediation. As a result, we came up with what we called -- not very originally, I must say -- the “balanced relationship target number theory”.

20. The Balanced Relationship Target Number Theory

In light of our restricted time today, I will limit my discussion of the theory to a quick summary: under the theory, each Member State should determine its own “balanced relationship target number”. This number – representing the minimum percentage of cases that would need to be mediated in each country – is the only quantifiable way of ascertaining whether the balanced relationship called for by the Directive has been effectively reached. Failure to determine that target, and of course to reach it, would be tantamount to failure to comply with the Directive.

Because of the almighty “subsidiarity principle” in the EU, each Member State should be allowed to choose the appropriate legal tools to reach its target number. For example, those that do not want to implement mandatory mediation could resort to tools such as mandatory information sessions, financial incentives, and the like. But should those tools prove ineffective, the Directive would, under this theory, require that particular Member State to make the necessary changes.

21. Oral question

On October 12, the EU Parliament approved an Oral Question asking the Commission’s interpretation of the “balanced relationship” theory, and what the Commission intends to do with the Member States that have not clearly achieved such a balanced relationship yet. The Commission will also assess progress toward the other main goals set forth in Article 1 of the Directive -- namely, “to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes”. We shall see.

22. NY Report Cover Page

Crossing the Atlantic Ocean for less than a minute, I would note that a few months after the “balanced relationship target number theory” was first released, in April of 2012, a prominent task force appointed by the Chief Judge of the State of New York (a State where, unlike others in the United States, mediation is not yet mandatory in commercial cases) recommended that one case out of five go first through mediation. In short, that task force recommended a “balanced relationship target number” of 20%. One out of five.

23. Here He Comes Again

As your chair today, the worst thing I could do – I mean, in addition to annoying you with my introduction – is to start by setting a bad example in time keeping. I will therefore just finish like this: whether or not there is already an EU obligation in the Directive for Member States to make more mediations happen, as Mary Trevor and I argue, it would be, frankly, stupid to stay put as far as mediation policy is concerned, especially at this difficult time. There are many opportunities to make mediation a more stable and relevant component of dispute processing. Not even trying, in the face of the many social goods mediation can bring, is an offense so severe to our fellow citizens that should not be mediated.

24. Thank you

