

The Role of Lawyers in Mediation: Challenges and Opportunities

Perspective of the EU lawyer

Jenny W.T. Power, Ankara 13. March 2009

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The EU and the Member States' Legislation on Mediation

The EU legislation on mediation

■ European Directive on Mediation

- “Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters“ Directive 2008/52/EC of May 21st 2008
- Designed to encourage and facilitate mediation as an alternative form of resolution of cross-border disputes in the EU (with the exception of Denmark)
- Obligation to enforce settlement agreements, protect the confidentiality of mediation communications, and promote training of mediators
- Requirement to develop mechanisms to ensure the quality of mediation services and encourage mediators to adhere to voluntary codes of conduct
- Make mediated settlement agreements enforceable in the same manner as a court ruling
- However, does not expressly prohibit sharing of the “confidential” information
- The Directive should be transposed into the national laws of Member States by 21 May of 2011



Member States' regulation (Austria)

- The existing (they are in a state of flux as we speak) national legal frameworks of the EU Member States concerning mediation vary greatly
 - Some Member States have no regulations on mediation at all (at least until the May of 2011)
 - Few, most notably Austria, have existing laws that specifically address the mediation procedure
 - Austrian Mediation Act “Bundesgesetz über Mediation in Zivilrechtssachen”- ZivMedaitG, BGBl I 2003/29
 1. Establishes a mediator as a profession with fairly strict guidelines
 2. Confidentiality agreements protected through criminal penalties
 3. Suspension of time limits while the mediation is taking place
 4. However, it does not provide for a direct enforceability of mediation settlement agreements



Precautionary measures for the EU lawyers

- The EU lawyers should not start a mediation process without signing a proper mediation agreement that fully addresses:
 - the suspension of time limitation periods
 - the confidentiality obligations of the parties and of the mediator
 - the enforceability of the mediation settlement agreement
 - and it is of crucial importance for lawyers to be fully aware of the nature and the extent of the local laws regarding the mediation
- The EU Directive itself does not *expressly* prohibit the use of information gathered during the mediation proceedings, therefore lawyers (when relying on the Directive) should make sure that the confidentiality agreement will truly protect client's data



Principles and the Course of the Mediation Proceedings

Principles of Mediation proceedings

- Mediation is a guided negotiation
- It is NOT a trial that is solely based on legal and factual positions
- There is no judge to make a decision for us
- Cultural, psychological, personal elements play an important role

- It is sometimes difficult for lawyers to truly understand the differences between mediation and the other more adversarial proceedings
- Mediation is one of the hardest if not the hardest type of proceeding for lawyers to execute successfully
- On another hand lawyers are uniquely equipped to help their clients in mediation proceedings

- True understanding of the underlying principles of mediation may bridge this gap and enable lawyers to successfully help their clients in the mediation



Course of the Mediation Proceedings

Pre-Mediation	Mediation proper	Post-Mediation
<ul style="list-style-type: none"> • Consent -ad hoc; or -mediation clause (limited enforceability but easier to make a first step) • Appointment of mediator • Preparation of mediation -Scheduling -Briefs/documents -Diagnostic interviews 	<ul style="list-style-type: none"> • Opening -introduction, ground rules, agenda -information exchange/mini trial (presentations by parties, lawyers, experts) • Fact finding • Joint Negotiations sessions • Private Sessions (caucuses) -mediator gains a complete picture, “reality testing” of parties’ contentions, quantitative analysis of “BATNA”, exploration of settlement options • Closure (documentation of outcome) 	<ul style="list-style-type: none"> • Detailed documentation of agreement (as far as reached) • Follow-on procedure -continuing negotiation/mediation -high-low arbitration -final offer arbitration
<p>1 week – 3 months</p>	<p>1 day – 2 weeks</p>	<p>1 day – 3 months</p>



The Role of a Lawyer in Mediation

The Role of a Lawyer

What do clients think about mediation?

Some sound bytes:

- Some of the highly sophisticated businesspersons from Austria (mostly from construction industry) had this to say about mediation:
 - **“waste of time”**,
 - **“it is useless”**
 - **“we talk anyway”**
 - **“we want someone to solve the problem”, “we want an arbitrator, someone who makes a decision”**
 - **“we need you to fight for our interests”, “we need a hard hitter on our side”**
 - **“we see it as a lose-lose proposition”**
- This does not mean that there are no successful uses of mediation among large-scale commercial enterprises: it does mean that this a negative view on mediation is very prevalent in the business community



The Role of a Lawyer

What does it really mean for us lawyers?

- These few quotations seem to dispel most of the commonly cited advantages of mediation, in fact we could say that the clients (at least the sophisticated experienced businessmen) are explicitly repudiating any and all advantages of mediation. Especially telling comments are: **“we talk anyway”**, **“we want someone to solve the problem”**, **“ we need you to fight for our interests”** and **“ it is a lose-lose proposition”**.
- Is it just the case of not sufficiently informed clients? Do they have any valid points? Are there any structural reasons which make mediation not a desirable tool for serious businessmen?
- In any case, the message for us lawyers is that many, many clients are simply not interested in a mediation procedure at all and that some are even hostile to the idea of using mediation.
- We need to find the specific reasons that make them have a such a contempt for mediation



The Role of a Lawyer

Potential structural reasons that may validate some of the concerns expressed by the clients (not an exhaustive list)

- The Austrian Mediation Act, the first mediation specific legislation (followed by Belgium) in the EU, does not provide for a direct enforcement of the mediation settlement agreement.
 - the parties can change their minds after the conclusion of the mediation settlement agreement and pursue litigation, the” **waste of time**” comment is very applicable here
- The EU Directive (otherwise fairly comprehensive) does not **expressly** prohibit disclosure of the “confidential” information.
 - the parties could say that the mediation is not only “useless” but that it could be potentially dangerous
- The EU Directive and the Austrian Mediation Act are some of the best legislations on mediation.



The Role of a Lawyer

Other structural reasons that may discourage clients and lawyers from utilizing mediation

- Presently, in the EU no Member State has a fully comprehensive set of laws that would make a mediation a truly safe option for the experienced businessmen or lawyers
- The notion that some clients have that mediation is a “lose-lose” endeavor has some merit, especially when our client clearly has a stronger case
- Also, the need for an ultimate decider of the dispute is also very appropriate in many cases where parties have a very different interpretations of their rights and obligations this is why some clients would say that “we talk anyway”
- Mediation is not very conducive for the resolution of transactional disputes where parties do not have a long lasting relationship
- The clients are somewhat distrustful of mediation



The Role of a Lawyer

What can we do?

- Inform our clients about the mediation procedure, dispel the myth that mediation is just talking.
- Explain the course and the principles of mediation: it takes time.
- Determine the appropriateness of the mediation for their case
- Draft the settlement agreements (and arbitration agreements), this is one of our most important roles



The Role of a Lawyer

What can we do?

- Open the door for mediation
- Explain that it is not easy
- Talk about the costs and risks



Conclusion

- We need to have a right balance between the judicial and the mediation proceedings
- We need to inform our clients about the advantages and disadvantages of mediation
- Most of the current regulations in the EU are not sufficiently comprehensive, we need to improve the current regulatory framework
- Mediation is not the cure for all ills, it is clearly inapplicable in some cases
- Mediation is one of many tools in our toolbox
- Mediation can be useful and we should use it judiciously



Thank you for your kind attention!

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