

Rubrieken

Internationaal

The Proposed EU Directive on certain aspects of Mediation in civil and commercial matters*

Introduction

The European Commission has published a 'Proposal for a directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters' ('Draft Directive').¹ The Draft Directive is a positive step for mediation in Europe and is to be commended in many respects as this contribution notes below. Nevertheless, there are discreet aspects which could be improved further to enhance the progress achieved in its current text and correct a few of its shortcomings. This paper suggests a number of those areas where the Council and Parliament can still take advantage of the opportunity to further improve the Draft Directive.²

Background

Through the Treaty of Amsterdam, the European Union (EU) restated its goal of establishing an area of freedom, security and justice within which free movement of persons is ensured. In 1999, the Tampere European Council urged alternative, extra-judicial procedures within the Member States in order to improve the access to justice in Europe.³ In response to earlier Council pronouncements on the desirability of establishing principles on alternative methods of dispute resolution as an essential step to simplify and improve access to justice, the Commission issued in April 2002 its Green Paper on alternative dispute resolution in civil and commercial law.⁴ The Green Paper assessed the current state of mediation throughout the EU and launched a broad consultation on possible steps to be taken to promote and harmonize mediation in the EU. Input from the Netherlands Mediation Institute (NMI) and from the Stichting ADR Centrum voor het Bedrijfsleven (ACB) were among the 160 submissions the Commission received before holding a public hearing in February 2003.⁵ The consensus of that consultation procedure included:

'A widely shared view that the Community could and should take measures to further stimulate the use of ADR in the EU, but widely differing views as to exactly what measures should be taken.'⁶

The Draft Directive is the culmination thus far of the efforts summarized above.⁷

The Draft Directive is a good start

One of the greatest attributes of the Draft Directive is the simple fact that it exists (and will hopefully be endorsed by the Council and European Parliament). It places mediation on the agenda of the Member States. Whether or not one agrees entirely with its contents, it is important for mediation that the EU thus focuses

attention on it and seeks to achieve minimal harmonization. A second strong point is the modest ambition of the Draft Directive. It does not seek to break more ground than is realistic (e.g. by already creating legal privilege throughout the EU for the mediator). It appears to recognize that at the European level mediation is still in its infancy. Countries like England and the Netherlands are at the forefront of development in the field of mediation. The other 23 member states, however, must be afforded time to pursue their own natural development. It would be potentially counterproductive to force them artificially to accelerate that development.

A further strength of the Directive is that it resists the temptation to regulate. This is positive because it respects the principles of party autonomy and flexibility which are cornerstones of mediation and does not try to impose any minimum qualifications or procedural requirements. The Draft Directive, for example, only raises the possibility of voluntary codes of conduct (Draft Directive article 4).

The most substantive provisions of the Draft Directive, the article 6 provisions on inadmissibility of mediation evidence in civil proceedings are fundamental and appropriate to address. Further 'regulation' is not necessary in this type of EU Directive.

* The author of this contribution, Shawn Conway, has assisted the NMI in connection with EU proceedings leading up to the Draft Directive. Nevertheless, the opinions in this paper are those of the author and not necessarily of the NMI.

1. The Draft Directive is available on line through the NMI website: www.nmi-mediation.nl under menu choice 'over mediation' / 'specials/dossiers'.
2. Many of the comments in this contribution formed part of a speech given by the author at a seminar on March 3-5, 2005 organized by the Union International des Advocats Forum of Mediation Centres and co-sponsored by the NMI.
3. The Annex to the Draft Directive points out that: 'A large number of Community acts call for the promotion of extra-judicial procedures for the solution of disputes arising under their application, such as the recently adopted Brussels Ibis Regulation on matrimonial matters and parental responsibility as well as in the field of the internal market. Two recommendations have been adopted by the Commission in the context of consumer policy. The Community has not yet taken any initiative that focuses on the very framework conditions for the development of mediation in general and the link between mediation and judicial proceedings in particular. This proposal will support the implementation of other Community acts by further promoting the use of ADR and improving the legal framework for such dispute resolution methods in the EU.'
4. COM (2002) 196 final, 19 April 2002.
5. See, Council Regulation (EC) No 2201/2003 of 27 November 2003. OJ L 338, 23 December 2003, p. 1; and Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (OJ L 115, 17 April 1998, p. 31) and Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies in the consensual resolution of consumer disputes (OJ L 109, 19 April 2001, p. 56).
6. Staff Working Paper, p. 3.
7. It is worth noting that the Commission has also initiated a group of stakeholders from throughout the EU to participate in the development (through self-regulation) of a 'European Code of Conduct for Mediations'. The final draft was finished in July 2004 and is available at the Commission's website.

Possible improvements

Notwithstanding the many benefits and positive aspects of the Draft Directive, there are certain areas where there is room for improvement. This section will briefly remark on them.⁸

1. A basic shortcoming of the Draft Directive is the fact that its Article 6 only applies to the mediator and administrators of mediation, but not the parties or other participants.⁹ Article 6 is virtually a verbatim copy of article 10 of the UNCITRAL Model Law,¹⁰ except that the Directive has replaced 'a party to the conciliation proceedings, the conciliator and any third person' with 'the mediator'. The biggest threat to the confidentiality of mediations is breach by the parties, not by the mediator. This can be corrected by reinserting the full language from the Draft of the UNCITRAL Model Law: 'A party, the mediator and any third person, including those involved in the administration of mediation services'.

2. The first category of protected communications in section 1 of Article 6 is questionable. It prevents any persons from disclosing the fact that there was an invitation to mediate or the fact that a party was willing to participate in mediation. I disagree with this aspect in the UNCITRAL Model Law as well. In many jurisdictions the courts require the parties to keep them informed of attempts to mediate and in others it is also a relevant factor in the assessment of costs at the end of litigation. I see no benefit on prohibiting a party from revealing that he was willing to mediate and invited his opponent to mediation but that the opponent refused. Being allowed to disclose this fact would actually encourage the use of mediation in my opinion. Section 1(a) of Article 6 can best be deleted.

3. Another area for improvement in section 1 of Article 6 would be to broaden sub-section (c)¹¹ to cover non-verbal conduct and other recorded conduct. For example, silence in response to a question or the re-enactment of an accident should also fall under the protections of confidentiality. The US Uniform Mediation Act provides a good example in this regard.¹² I would recommend revising this section as follows:

'(c) Statements or admissions made, *behaviour displayed*, or other information otherwise communicated by a party in the course of the mediation.'

4. The third section of Article 6 adds two new exceptions to those stated in the UNCITRAL Model Law.¹³ The first 'overriding considerations of public policy' may cover situations such as the threat of a crime, but a further (limited) exception is also needed to allow the mediator to defend himself against allegations of misconduct and to discuss the mediation with his professional insurance carrier in such circumstances. This could be improved as follows:

'(d) to the extent necessary for a mediator to inform his professional insurance carrier of a claim against him and to defend himself in legal or disciplinary proceedings in connection with such a claim.'

5. By the same token, not only voluntary codes of conduct but also complaint and disciplinary rules should be encouraged in order to enhance the quality of mediation and public confidence therein. This can be addressed by modifying section 1 of Article 4:

'1. The Commission and the Member States shall promote and encourage the development of and adherence to voluntary codes of conduct by mediators and organizations providing mediation services, at Community as well as at national level, as well as other effective quality control mechanisms concerning the provision of mediation services, *including an independent complaints procedure and independent disciplinary rules.*'

6. The provision in Article 7 on suspension of prescription/limitation periods is well intended, but ill-advised.¹⁴ In practice this could lead to potential confusion and unnecessary disputes over side issues such as whether and at what point in time the parties 'agreed to use mediation' and/or when the mediation has ended. It could also encourage insincere maneuvering by one party to lead his opponent into believing that mediation has or will be agreed so as to allow a limitation period to

8. The author gratefully acknowledges the input of NMI Director Paul Walters in the formulation of proposed revised texts in a number of the following paragraphs.

9. See footnote 9 for the text of the introductory sentence of Article 6.

10. The Draft Directive does replace 'conciliator' and 'conciliation' with 'mediator' and 'mediation'. In relevant part, Article 6 of the Draft Directive states: '1. Mediators, as well as any person involved in the administration of mediation services shall not in civil judicial proceedings give testimony or evidence regarding any of the following:

(a) An invitation by a party to engage in mediation or the fact that a party was willing to participate in mediation;

(...)

(c) Statements or admissions made by a party in the course of the mediation;

(...)

3. The disclosure of the information referred to in paragraph 1 shall not be ordered by a court or other judicial authority in civil judicial proceedings and, if such information is offered as evidence in contravention of paragraph 1, that evidence shall be treated as inadmissible. Nevertheless, such information may be disclosed or admitted in evidence

(a) to the extent required for the purposes of implementation or enforcement of a settlement agreement reached as a direct result of the mediation,

(b) for overriding considerations of public policy, in particular when required to ensure the protection of children or to prevent harm to the physical or psychological integrity of a person, or

(c) if the mediator and the parties agree thereto.'

See also S.C. Conway, *The UNCITRAL Model Law on International Commercial Conciliation*, TMD 2004, p. 96-98.

11. See quoted text of Article 6 in footnote 9.

12. The US Uniform Mediation Act's definition of 'Mediation Communication' covers non-verbal communication such as silence in response to a statement/question/accusation and the re-enactment of an incident: 'a statement, whether oral or in a record or verbal or non-verbal, that occurs during a mediation ...'. See also S.C. Conway, *Uniform Mediation Act (USA)*, TMD 2003, p. 6-8.

13. See quoted text in footnote 9.

14. In relevant part Article 7(1) provides: 'The running of any period of prescription or limitation regarding the claim that is the subject matter of the mediation shall be suspended as of when, after the dispute has arisen:

(a) the parties agree to use mediation,

(b) the use of mediation is ordered by a court, or

(c) an obligation to use mediation arises under the national law of a Member State.'

expire. In any event, Article 7 is not really necessary since courts and arbitrators are almost always willing to hold a case in abeyance pending mediation (once proceedings have been formally commenced tolling the limitations period). The question also arises how Article 7 can have effect if Article 6 section 1(a) is applied and the parties are not allowed to reveal the fact that they agreed to mediation. Article 7 can best be deleted.

7. Another weakness in the Draft Directive is the definition of 'mediator' in combination with the definition of 'mediation' in Article 2. Mediator is defined very loosely as essentially any person requested to assist parties to reach a settlement.¹⁵ Thus any time parties to a dispute informally agree to 'see if the neighbor across the street can help us resolve this' or 'let's ask the bartender what he thinks', one could argue that the neighbor or bartender qualifies as a mediator. This could be dangerous if a party then used that situation as the grounds for suspending the limitation period under Article 7. I would recommend tightening up both definitions as follows:

(a) 'Mediation' shall mean any process, however named or referred to, where two or more parties to a dispute are assisted by a mediator, on the basis of a mediation agreement concluded between them in writing, with the aim of reaching an agreement providing for a solution to terminate the dispute in a manner which accords with their interests, and regardless of whether the process is initiated by the parties, suggested or ordered by a court or proscribed by the national law of a Member State.

(b) 'Mediator' shall mean any third party conducting a mediation as a neutral mediation expert, regardless of the denomination or profession of that third party in the Member State concerned and of the way the third party has been appointed or requested to conduct the mediation.

8. The U.S. Uniform Mediation Act (section 9) like article 5 (5) of the UNCITRAL Model Law provide good examples of provisions requiring disclosure of conflicts of interest by a potential mediator. These strike me as non-controversial and a very basic safeguard for the integrity of mediation. The Directive misses an opportunity by not addressing this point. Language adapted from the UNCITRAL Model Law could fill this void:

'Before accepting an appointment as a mediator, the person approached shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. A mediator, from the time of his or her appointment and throughout the mediation, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him or her.'

Conclusion

The adoption of a Directive along the lines of the Draft Directive will be a significant step forward in promoting mediation in

general within the EU and also in increasing legal certainty and predictability as to confidentiality principles and the relationship between mediation and civil proceedings (especially in cross-border situations). There are certain areas (noted above) where refinement of the current Draft would even further improve the stated aims of the contemplated Directive. The Council and European Parliament are encouraged to consider these suggestions in their handling of the Draft Directive.

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15. Article 2 provides the following definitions: 'For the purposes of this Directive the following definitions shall apply:

(a) "Mediation" shall mean any process, however named or referred to, where two or more parties to a dispute are assisted by a third party to reach an agreement on the settlement of the dispute, and regardless of whether the process is initiated by the parties, suggested or ordered by a court or proscribed by the national law of a Member State.

It shall not include attempts made by the judge to settle a dispute within the course of judicial proceedings concerning that dispute.

(b) "Mediator" shall mean any third party conducting a mediation, regardless of the denomination or profession of that third party in the Member State concerned and of the way the third party has been appointed or requested to conduct the mediation.

Thus "any third party ... requested" to assist parties "to reach agreement on the settlement of [a] dispute" is a mediator.'