First report of the "Future of Mediation in Belgium" (FMB) initiative

[Following the Brainstorming event on 27/06/2013 – Brussels Palace of Justice]

1. Introduction

The FMB initiative is an initiative that aims to set out a common action plan for the enhancement and promotion of Mediation in Belgium and is supported by all Belgian mediation stakeholders.

To this end, Belgian mediation stakeholders gather periodically (at least twice a year) in the form of brainstorming sessions and/or working groups.

The meetings are held in English, Dutch and French (without simultaneous translation).

Each session is facilitated (moderated) by the FMB Committee, comprised of Philippe BILLIET (presiding), Dr Ivan VEROUGSTRAETE, Willem MEUWISSEN and Benoit SIMPELAERE. The FMB Committee may be enlarged following further development of the FMB initiative.

The FMB project is an initiative of the Brussels based AIA IVZW (www.arbitration-adr.org).

2. Brainstorming event 27/06/2013

The first FMB brainstorming event took place on 27/06/2013 at the Palace of Justice in Brussels.

This first session was introductory in character. The importance of a strong mediation system in Belgium and common future steps were discussed.

Most mediation stakeholders were present or represented at the session; e.g. the Belgian Federal Mediation Commission, AIA IVZW, Belmed, the (legal) insurance sector, independent mediators, private and public mediation providers, politicians, providers of mediation training, ADR centres, experts, judges, particular industries, lawyers, in-house counsels, ombudsmen, business organizations and consumer organizations.

The session was divided into two parts:

- In the first part, Linda REIJERKERK (Netherlands), John GUNNER (UK) and Paul RANDOLPH (UK) discussed recent developments in mediation in their respective jurisdictions.

  Together with the attending stakeholders, the following conclusions were made:

  1) It is misleading to merely place 'mediation' categorically within the field of 'ADR'. Rather than an alternative to litigation, mediation should be understood as a primary way of dealing with disputes.

     This change in perspective was considered a crucial parameter for the enhancement of mediation in Belgium.

  2) In order to effectuate this change in perspective and increase awareness, understanding and trust in mediation, more tailored training should be available for various mediation stakeholders.

Judges, lawyers, etc. should (at an early stage) be given proper mediation training. Reference was made to the Netherlands, where all judges received mediation training organized by CvC and the positive effects this had on the use of (court-referred) mediation in the Netherlands.

3) The group was divided on the question regarding whether or not a similar practice to the Italian mandatory mediation practice should be introduced in Belgium.

   Nevertheless, there was a consensus on the need for an introduction of a practice under which it would be mandatory for parties in litigation to be informed about the processes and the advantages of mediation.

- In the second part, the following controversial statements were discussed between all participants:

  1) Lawyers are/are not naturally adverse to mediation
  2) Mediation is/is not too costly
  3) There should be/not be limitations on who mediates
  4) Where should mediation be placed within ADR?

3. Overview of the main discussions

3.1 Lawyers are/are not naturally adverse to mediation

The following concerns were raised within the group:

- Statement 1: "*Due to the fact that most lawyers invoice on the basis of timesheets, it is reasonable to assume that lawyers are naturally more interested in (lengthy) litigation procedures as opposed to fast solutions through mediation*."

  ➔ Discussion arose regarding the momentum on which most cases are deviated towards a mediation settlement attempt. Shared experiences show that mediation would most frequently be used in either an early stage (early advise to mediate) or at a late stage when parties have carried significant costs related to litigation and are (or at least one of them is) unable to continue to finance legal procedures.

  ➔ Discussion arose regarding the extent to which ethical rules could be effective to overcome the fact that the lawyer-client relationship may incorporate such adverse interests.

  ➔ Discussion arose regarding whether an evolution towards the introduction of 'mediation lawyers' (i.e. lawyers specialised in mediation assistance) would/could be beneficial to counterbalance the existing concerns.

  No consensus was reached and the FMB Committee therefore welcomes any input that offers to help address the existing concern.

- Statement 2: "*Lawyers are trained to assess rights and wrongs in order to defend/advise on the legal positions of their clients. A legal defence merely aims to offer legal 'victory' to the client. An offer to mediate may subsequently be interpreted as a sign of 'weakness' and mediation may be (ab)used to conduct a trial pleading (in order to discourage the opponent) or to assess the pleading skills of the other side. This may even lead to 'fishing' expeditions regarding the strength of the opponents' case. Lawyers don't believe in the added value of a mediator. Indeed, how*

difficult could it be to 'mediate' and why would a third party need to be involved? This may even be interpreted by the client as if the lawyer him/herself is unable to guide parties towards a solution. Moreover, the mediator would likely be a lawyer him/herself as well, resulting in the perception of the client that he/she has more expertise in interest-driven solution finding. The latter concern may be offset by proposing a 'weaker' competitor to be mediator, following which/during which the lawyer can then 'steal the show' as 'dealmaker'."

➔ Discussion arose regarding the role of a lawyer during mediation and the extent to which a lawyer's attitude may create an obstacle to the mediation processes, in which the parties' interests are and should remain key.

➔ Discussion arose regarding the fact that beginning (pro deo) lawyers are not sufficiently making use of mediation to deal with pro deo cases. This would create huge financial burdens on public spending.

➔ Discussion arose regarding the idea of mediation providers (e.g. as the Hertfordshire University Mediation Program does) should issue mediation vouchers for first time users of their services. The majority found that this would be a sound commercial decision.

The majority opined that public cost savings would be effectuated if the value of pro deo points for mediation services would be increased, as the increase of mediations would allow to save higher costs (see under title 5 below).

Consensus existed on the importance of proper mediation training for all lawyers during their law studies. The majority opines that law studies in Belgium generally lack the required level of mediation training.

The FMB Committee welcomes all input that offers to help address the existing concerns.

3.2 Mediation is/is not too costly

The following concerns were raised within the group:

- Statement 1: "*The bridge between 'having right' and 'obtaining right' is ever increasing (time & cost-wise) and, in the absence of proper third party funding mechanisms, justice becomes a privilege for the economic stronger party. The increase of mediation is therefore a symptom of a 'failing' judicial system (e.g. lack of party funding, judicial backlog,..) and it would be wrong to mitigate the symptom instead of curing the underlying disease. Moreover, provided this 'fall-back' role of mediation, the economically stronger party is more likely to obtain a better ('unfair') settlement even if it has only 'weak' legal arguments.*"

➔ There was a Consensus on the importance of mediation and the risk that mediation, if not sufficiently known to all legal stakeholders, would be viewed as a mere symptom of a dysfunctional legal system. (This relates to the 'change in perspective' referred to under point 2 above).

➔ Discussion arose regarding the way how dispute funding should be tailored to ensure fair and equal access to justice and mediation to all parties.

No consensus was reached, but when representatives of the legal insurance sector informed that they would cover mediation costs at up to 200% (as the use of mediation is far cheaper than ordinary court litigation), this caught the attention of many participants. There appeared to be a

consensus to investigate the role and input of legal insurers regarding the cost aspect (linked with the use) of mediation.

The FMB Committee further welcomes all additional input that could be helpful to address the existing concerns.

- Statement 2: "*To some extent, mediators have adverse interests to the parties in the mediation, as most of them invoice on the basis of timesheets. This means that mediators prefer the mediation to last as long as possible and to include several follow-up meetings*."

  ➔ Discussion arose as to whether this is a real concern. Mediators seem to focus on a high success rate rather than on a large number of hours. Participants were however open to the idea to work on the basis of flat fees for mediations.

  ➔ Neighborhood mediation seems to work well and is becoming increasingly popular. Discussion arose regarding potential discrepancies that may arise between public mediation (e.g. neighborhood mediation) operated with subsidies on the one hand and private mediation providers that seem to not always be able to find funding/subsidies for their initiatives on the other hand. The question as to whether other interested stakeholders would be willing to sponsor mediation providers was asked. Suggestions were made regarding the extent to which 'pro mediation labels' and annexation/involvement to/of business/consumer organizations may render mediation into a product in which stakeholders are willing to invest.

  ➔ Discussion arose regarding the creation of a fund (e.g. comprised of contributions from those that would be condemned for reckless litigation) to cover the cost of accredited mediators. Doubts exist as to whether this fund could generate significant revenues.

  ➔ Discussion arose regarding the question of whether or not it is positive if a mediator is paid by a particular sector (cfr sector mediation).

  The FMB Committee welcomes all additional input that could help to address the existing concern.

3.3 There should be/not be limitations on who mediates

The following concerns were raised within the group:

- Statement 1: "*Mediation is currently offered by various public and private providers, making it hard for those looking for a mediator/mediation provider to determine who to turn to. Moreover, various sectors (e-bay, banks, insurers, etc) offer their own mediation or similar (e.g. ombudsmen, conciliation,…) services.*"

  ➔ Discussion arose regarding whether there should be a central platform listing all mediation providers and helping to direct parties to find experienced mediators and mediation providers.

  ➔ Discussion arose regarding the extent to which a mediator shall be independent of the parties (cfr sector mediation).

  ➔ Discussion arose regarding whether or not courts should have mediation permanences (informal presence/ dealing with formal court referrals).

  ➔ Discussion arose regarding the task of a judge. To what extent can/should he help/encourage/convince parties to find a solution for their dispute. Several stakeholders advocated for judges being given a mandate to actively help parties find a solution to their problem, with parameters regarding neutrality and impartiality of the judge.

➔ Discussion arose regarding the question whether the mediator him/herself should have expert knowledge of the subject matter at hand and/or the applicable law.

The FMB Committee welcomes all additional input that could be help address existing concerns.

3.4 Where should mediation be placed within ADR?

The following concerns were raised within the group:

- Statement 1: "*As mediation has not had much exposure and therefore general awareness is low, hybrid structures under which mediation is imbedded in a certain ADR mechanism (e.g. MED-ARB, ARB-MED, ARB-MED-ARB,…) are a fortiori unknown and therefore not used.*"

  ➔ Discussion arose regarding whether ADR providers would conduct more mediations if they provide for clear procedural rules on hybrid ADR mechanisms. Fear that these procedural rules may remain unused as long as mediation stakeholders are insufficiently trained (e.g. formation of lawyers,…) on the use of ADR hybrids was highlighted.

  Consensus existed on this point and on the fact that hybrid ADR mechanisms are very often best placed to serve all parties interests in the case of a dispute.

  The FMB Committee welcomes all additional input that could help address existing concerns.

4. Cost savings through mediation

During the session, reference was made to EU research regarding cost-savings through the use of mediation.

This triggered great attention and the FMB committee conducted initial research on private and public costs that could be saved through systematic use of mediation in Belgium where possible. (This research should be expanded on within a working group - see point 5 below - and could be presented at the next FMB meeting):

- Recently, the Survey Data Report entitled "*The Cost of Non ADR – Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation*"funded by the European Union, highlighted the time and cost effectiveness of mediation as a dispute resolution method. According to the statistics provided for Belgium, if the dispute is worth 200.000 €, it will take the parties in average at least 525 days to terminate it via litigation, whilst resolving the dispute by mediation would only take an average of 45 days (almost twelve times less than the first option). Moreover, the costs of litigation in this scenario would in average amount to at least 16.000 €, whilst mediation would be more than twice less costly for the parties, racking up an average bill at 7.000 €.

- The directorate general for internal policies of the European parliament made the same calculations in their report "*Quantifying the cost of not using mediation- a data analysis*". This report confirms that it takes a lot more time and money to terminate a dispute through litigation than it would where the dispute was resolved through mediation. Under this report, the average number of days required in Belgium to terminate a dispute through litigation is 505 days, while it takes only an average of 45 days to find a solution when parties use mediation. The report also

confirmed that mediation is less costly for the parties than litigation. The average cost of litigation amounts to 16.000 euros in Belgium, while a solution through mediation costs only 7000 euros in average for those who opt for mediation. (The costs included in this calculation were: the attorney cost plus, depending on which option chosen, the mediation cost or the court cost and enforcement cost.)

- To make a complete assessment, one should take into account the success rate of mediation, as a failed mediation would call for litigation so the costs would inevitably rise and the entire procedure would take more time. It is therefore necessary to identify the lowest level of mediation compliance that still yields cost and time saving benefits. The break-even point was calculated in the aforementioned report on "*Quantifying the cost of not using mediation*". For Belgium, already a 9% success rate is the break-even point concerning time savings, or the point at which using mediation does not create any time advantage. Concerning cost savings, the break-even point was found at a 44% mediation success rate, or the point at which using mediation does not create any financial advantage. Given the fact that the actual mediation success rate is above 75 % (some sources speak of 85%), mediation is definitely worth a try.

- It is not only individuals and companies that benefit from mediation. Governments all over the world are looking for ways to finance their budget. The Belgian government has recently announced the introduction of VAT on lawyer's fees. This may make it actually even harder and more expensive for individuals to take their case to court and find justice, increases public costs related to the pro deo system with 21% and may actually not generate much budget in first years as lawyers could probably deduct some of their historic VAT payments. The above demonstrates that, instead of this new VAT measure, lots of public costs could actually have been saved by inciting parties to use mediation. The Belgian Federal Mediation Commission stated in its report "*Baromètre de la mediation 2012*" that, in 2010, approximately 690.00 cases that were brought to litigation in matters that could have been resolved through mediation.

- With the above figures, it is clear that even limited implementation of mediation could save valuable resources and costs.

5. Next steps

The next FMB session will be held on 19/12/2013 at the VUB University.

Should you wish to receive an invitation for future sessions, please send an email to Olivia STAINES at administration@arbitration-adr.org, specifying in which of the following stakeholder groups you would like to be registered:

1. *Legal insurers*
2. *Sectorial*
3. *Independent mediators*
4. *Mediation providers,*
5. *Mediation training providers*
6. *ADR centres*
7. *Experts*
8. *Judges*
9. *Lawyers*
10. *In-house counsels*
11. *Ombudsmen*
12. *Business representatives*

13 *Consumer representatives*
14 *Politicians & policy makers*
15 *Other (please specify)*

Should you wish to take part in a working group for the preparation of the upcoming session, please send an email to Olivia STAINES at administration@arbitration-adr.org, specifying which of the following topics you would like to contribute to in preparation of the next session:

1. Formulation of specific proposals following the 27/07/2013 session (to be voted by participants and stakeholder groups on 19/12/2013)
2. Public & private cost savings through the use of mediation
3. Mediation in Belgium and the recent EU initiatives on consumer ODR
4. Mediation in Belgium and the recent EU initiatives on consumer ADR
5. Mediation in Belgium and the recent Belgian initiatives on 'class actions'

(Please note that each session will cover particular topics and that following and on the basis of each session an agenda/action plan will be proposed.)

Moreover, it is anticipated that every working group will entail representatives coming from all mediation stakeholder groups.

The annual EMTPJ reception (this year on 31 August 2013 at the HUB University- see www.emtpj.eu) can serve as a first informal gathering between those interested to become member of one or more working groups. Please save this date in your agendas.

6. Sponsoring opportunities

The first FMB session was sponsored by the law firm Billiet&Co (www.billiet-co.be).

Mediation stakeholders have the option of sponsoring one or more of the upcoming FMB sessions (at least 500EUR per FMB session). Should you be interested in becoming a sponsor, please contact Olivia STAINES at: administration@arbitration-adr.org .

Sponsorships will be used to prepare upcoming sessions, to create a dedicated website for the FMB initiative (in case of sufficient funding) and should allow for the keeping of low thresholds for all participants.

Sponsors will be named in invitations for the correlating FMB session and will be listed on the FMB website (to be created in case of sufficient funding).

The FMB Committee
26/07/2013

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