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**AIA Upcoming Events**

The Association for International Arbitration is proud to invite you to its upcoming:

**Lecture on International Arbitration**

AIA in collaboration with the BICCS of the Vrije Universiteit Brussel has organized lectures and seminars on diverse topics of integral importance in the field of international arbitration in the months of April and May. The next and final lecture is scheduled for May 10, 2012 from 16:00 to 19:00 (see details below)

and

Conference on

**Arbitration in CIS countries: Current Issues**

LOCATION: Brussels, Belgium

DATE: June 21, 2012

See details below and on [www.aiaconferences.com](http://www.aiaconferences.com)

and

**European Mediation Training For Practitioners of Justice**

LOCATION: Brussels, Belgium

DATE: September 3-15, 2012

See details below and on [www.emtpj.eu](http://www.emtpj.eu)

and

**Intensive International Arbitration Training Program  
with particular focus on India**

LOCATION: Chennai, Tamil Nadu, India

Consisting of sessions on four consecutive

**Saturday's (June 9, 16, 23 and 30, 2012)**

AIA will conduct the training in association with the Nani Palkhivala Arbitration Center, India.

**AIA UPCOMING EVENTS**

**1. Lecture on International Arbitration**

AIA in collaboration with the Brussels Institute of Contemporary China Studies (BICCS) of the Vrije Universiteit Brussel (VUB) organizes lectures and seminars on diverse integral topics in the field of international arbitration. Sessions were held on consecutive Fridays in April. The next session will be conducted on May 10, 2012 by Mr. John Barnum, a renowned legal counsel specializing in international arbitration and commercial litigation will deliver a lecture followed by a questioning session on "Choices, Strategies and War Stories in International Commercial Arbitration" from 16:00 to 19:00 at VUB Campus, Pleinlaan 5, 1050 Brussels, Belgium. The participants will be provided 3 legal points each. For the Registration form mail to: [events@arbitration-adr.org](mailto:events@arbitration-adr.org)

## 2. Arbitration in CIS Countries:

### Current Issues

On June 21, 2012 the Association for International Arbitration will host an international arbitration conference on Arbitration in CIS Countries: Current Issues. Speakers from various CIS jurisdictions will discuss a range of issues related to arbitration in the region. The participants will particularly focus on Russia, Kazakhstan and Ukraine.

Conference speakers include:

- ⇒ Vladimir Khvalei, Partner, Baker & McKenzie, Moscow; Vice-President of the International Court of Arbitration of the ICC
- ⇒ Maria J. Pereyra, Counsellor, Legal Affairs Division, WTO
- ⇒ Natalia Petrik, Legal Counsel, the SCC
- ⇒ Timur Aitkulov, Partner, Clifford Chance LLP, Moscow
- ⇒ Roman Zykov, PhD, LL.M, Senior Associate, Hannes Snellman (Helsinki, Moscow)
- ⇒ Valery Zhakenov, Partner, BMF Group LLP; Head of Arbitration Court under Chamber of Commerce and Industry of the Republic of Kazakhstan
- ⇒ Andrey Astapov, Managing Partner, Astapov Lawyers International Law Group
- ⇒ Yaraslau Kryvoi, Dr., Senior Lecturer at the University of West London
- ⇒ Igor Sierov, LL.M, Associate, ARBITRADE Attorneys-at-law
- ⇒ Dmitry Davydenko, PhD, Director of the Institute of Private International and Comparative Law (Moscow, Russia); Senior Associate, Muranov Chernyakov & Partners, Moscow
- ⇒ Dilyara Nigmatullina, LL.M, Manager, Association for International Arbitration, Of Counsel, Billiet&Co

Conference moderators include:

- ⇒ Edouard Bertrand, Of Counsel, Campbell, Philippart, Laigo & Associés, Paris
- ⇒ Geert Van Calster, Prof. Dr., Partner, DLA Piper UK LLP, Brussels
- ⇒ Johan Billiet, President, Association for International Arbitration, Senior Partner, Billiet&Co

Preliminary program

8.30 – 9.00 Registration

9.00 – 11.15 General Policy of CIS Countries Towards Arbitration

- ⇒ Recommendations to non-CIS parties when choosing arbitration in CIS countries
- ⇒ General policy of Russia towards arbitration
- ⇒ General policy of Ukraine towards arbitration
- ⇒ Arbitration in Kazakhstan: contemporary status and perspectives of development

11.15 – 11.45 coffee-break

11.45 – 13.00 Specific Issues in Arbitration in CIS Countries (part 1)

- ⇒ Arbitrability of corporate and real estate disputes under Russian law
- ⇒ Bribery and Russia-related Arbitration

13.00 – 14.30 lunch

14.30 – 15.30 Specific Issues in Arbitration in CIS Countries (part 2)

- ⇒ Interim measures at the stage of recognition and enforcement of international arbitral awards on the territory of Ukraine: practical concerns
- ⇒ Enforcement of the arbitral award annulled in the country where it was rendered (experience of Russia)

15.30 – 16.00 coffee-break

16.00 – 17.30 Sector-Specific Arbitration

- ⇒ Arbitration in the Energy Sector involving parties from CIS countries
- ⇒ Investment Disputes at the SCC involving parties from CIS countries
- ⇒ WTO dispute settlement system and the CIS experience

17.30 – 19.00 Reception

Lunch and a book compiling the conference material is included in the participant fee. Each participant will be provided 6 legal points for attending this conference.

More information about the conference and the registration form are available on [www.aiaconferences.com](http://www.aiaconferences.com)

## 3. European Mediation Training For Practitioners of Justice



After two years of success, Association for international Arbitration (AIA) is proud to announce the third edition of its European Mediation Training for Practitioners of Justice (EMTPJ). AIA initiated the EMTPJ project in the year 2010, with the support of the European commission and in collaboration with the HUB University of Brussels, Belgium and Warwick University, United Kingdom.

EMTPJ is recognized by the Belgian Federal Mediation Commission according to the Belgian Law of February 21, 2005 and the decision of February 1, 2007 concerning the settlement of the conditions and the procedure for the recognition of training institutes and of trainings for recognized mediators.

The program is accredited by mediation centres and has attracted many prominent and experienced mediators. The EMTPJ course is unique because it brings together attendees from all over the world, creating a multinational and multicultural environment that fosters exchange of different perspectives, experiences and gives possibility to form a genuine international mediation outlook. Upon successful completion of EMTPJ, students may apply for accreditation at mediation centres worldwide.

EMTPJ 2012 is a two-week training program that will take place this year from 3<sup>rd</sup> to 15<sup>th</sup> of September. In line with previous training courses, the EMTPJ 2012 program aims to introduce and promote the



concept of European mediators in civil and commercial matters. The course will consist of 100 hours of intensive training sessions including an assessment day, which will cover the following essential topics: conflict theory and mediation, intervention in specific situations, theory and practice of contract law in Europe, EU ethics in mediation, analytical study of conflict resolution methods, the stages in mediation process, and practical training sessions.

The course lecturers for EMTPJ 2012 are: Mr. Eugene Becker, Mr. Johan Billiet, Mr. Philipp Howell-Richardson, Mr. Philippe Billiet, Mr. Alessandro Bruni, Mr. Andrew Colvin, Mr. Frank Flerackers, Dr. Paul R Gibson, Ms. Lenka Hora Adema, Mr. Willem Meuwissen, Ms. Linda Reijkerker, Mr. Arthur Trossen, and Mr. Jacques de Waart.

For registration and a more detailed program of the course schedule, logistical information and lecturers, please visit the website: [www.emtpj.eu](http://www.emtpj.eu).

The participant fee includes a book compiling the entire training material and lunch on all days of the program.

If you have any further questions, please feel free to contact us at: [emtpj@arbitration-adr.org](mailto:emtpj@arbitration-adr.org).

## Refusing to Mediate may have Consequences

-by Anand Ayyappan Udayakumar

The High Court of Justice, London determined recently the case of *PGF II SA v OMFS Company and Bank of Scotland PLC* {[2012] EWHC 83 (TCC)} in which the implications of refusing an offer to mediate was discussed.

The case concerned a dilapidations claim arising out of alleged breaches of repairing covenants of underleases. A Part 36 offer (an offer to settle) as provided under the English Civil Procedure Rules, 1999 which was made by the defendant on April 11, 2011 was accepted by the claimant on January 10, 2012, the day before the trial was due to start. The general position under Part 36 is that the defendant would pay the claimant's costs up to 21 days after which the Part 36 offer was made (May 2, 2011). After accepting the offer, the claimant sought an order that the defendant should pay the claimant's costs after May 2, 2011, contrary to the usual norm. This departure would be an exception rather than following the rule and in determining if the usual order would be unjust, the court should take into account the information available to the parties at the time when the Part 36 offer was made. After hearing the parties, the judge decided that the claimant had not satisfied the Court that the case fell within the exceptional category which would render it unjust for the claimant to pay the defendant's costs after expiry of the relevant period. In addition, the Court was urged to consider the claimant's argument that the refusal to mediate by the defendant was unreasonable.

### Question of refusal to mediate by the defendant

The defendant did not respond on both the occasions when claimant suggested mediation (April 2011 and July 2011). While addressing the issue of failing to respond to the offer of mediation, the defendant argued that mediation would not have been successful if it had taken place when the claimant suggested it because there was insufficient evidence available from disclosure and expert evidence at the time. Further, the defendant added that the absence of response did not amount to refusal and in any event there was no reasonable prospect that mediation would have been successful.

The burden of proof imposed, required the claimant to establish that mediation had a reasonable prospect of success, not that it would be successful. The judge found that there was a reasonable prospect that well advised commercial parties such as in the instant case, with the benefit of experienced lawyers would be able to arrive at an agreement. In answering the defendant's argument in relation to lack of expert evidence relied on, the court found that the report had existed but that the defendant had not even asked for it.

The judge finally determined that the defendant by failing to respond to the claimant's letter was refusing to mediate and stated that the defendant had not raised any of the arguments it now relied on at the time the claimant suggested mediation.

The judge determined that a reasonable prospect that the dispute would have been settled by mediation existed, had the defendant not unreasonably refused to mediate. The Court did not go to the extent of ordering the defendant to pay claimant costs for refusing to mediate but instead made no order as to costs from the expiry of the relevant period of the Part 36 offer.

This judgment clearly enunciates that refusing to mediate has consequences and the following points clarify the position of mediation in the United Kingdom:

- ⇒ Silence is not golden and ignoring the request of mediation may be taken as refusal to mediate;
- ⇒ The grounds for refusing to mediate have to be communicated at the time the mediation is proposed and lack of good grounds to refuse mediation may result in the court imposing substantial penalties in the form of costs, immaterial of the party being successful;
- ⇒ The question to mediate must be reconsidered depending on the existing position. For instance if mediation is initially refused because of the need of expert evidence, then this refusal has to be reconsidered once that evidence is received.

### Analysing this judgement with regard to the EU Mediation Directive

Article 5 of the EU Directive deals with recourse to mediation in cross-border disputes. Article 5(2) states that 'this directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system'.

In the light of this provision, it can be stated that the EU Mediation Directive even though applicable to cross-border disputes only, has a significant influence on the domestic mediation trend and this judgement evidences the presence of a judicial sanction directed at increasing the usage of mediation. It will not be surprising if this pro-mediation tendency of the judiciary aimed at encouraging parties to resort to mediation is followed by other jurisdictions.

The entire judgement of the case cited herein can be accessed at: <http://www.bailii.org/ew/cases/EWHC/TCC/2012/83.html>



# Forensic Mediation in the Netherlands

-by W.J. Lukaart YARD FM

Since 2002, the term 'Forensic Mediation' obtained common usage in the Netherlands as a method used by an expert appointed by the judge, mostly in divorce and custody cases. To avoid the risk of confusion with the term 'forensic mediation' is no longer in use. Alternatively, preference is given to the term "expert opinion with the use of mediation" (Deskundigenbericht met toepassing van mediatie), which can be defined as:

"A procedural method which combines research and mediation with the aim to provide the judge, on the one hand, with the information needed to make a decision, and on the other hand, to offer parties the opportunity to come to a (partial) settlement".

A forensic mediator is appointed by a judge and works within the framework of the given mandate. The forensic mediator deals with disputes regarding parenthood and custody of children during or after the separation/divorce of the parents, and also on complicated financial disputes such as the assessment of business assets and the determination of distributable profits. A research method combining the two aforementioned goals (namely expert research and mediation) is more preferable than the classical method which only focuses on research and reporting. In relationship oriented disputes for instance, the real conflict frequently lies below the surface. Traditional research tends to focus more on the phenomenon and neglects the underlying dispute. In such a scenario, an depth analysis is essential to reach an amicable agreement.

When forensic research contributes to a court decision and mediation simultaneously, it influences the manner in which parties approach to resolve their disputes without resentments. Hence, forensic research stands beneficial for the parties and the society on the whole.

The appointment of an expert by a judge happens *ex lege* (by virtue of law). Both the expert and the parties need to realize that there is no contractual relationship between them. This also applies to the relationship between the expert and the court. The law determines the relationship between the expert and the judge as well as the relationship between the expert and the parties (Netherlands Civil Procedure Code, Articles 194 to 200).

The research is conducted by the expert either under supervision of the judge or by the expert independently (Netherlands Civil Procedure Code, Article 198 paragraph 2). Hence, it is inferred that the judge is competent to establish rules concerning the research. The expert is obliged to take into consideration the generally applicable rules imposed by the judge. These rules in addition to having an impact on the expert, also establish the status of the parties in the procedure and clearly indicate what is expected from them. The rules can be amended or supplemented depending on the peculiarities of the case. The judge is provided discretion to apply certain rules to the case.

The rules applicable to the expert opinion with the use of mediation are:

- ⇒ The forensic mediator is an expert appointed by a judge and performs his activities and/or provides his services on the basis of such appointment;
- ⇒ The expert works within the framework established by the judge;
- ⇒ The expert shall send a written invitation to the parties

and if possible, include a list of issues that will be discussed during the meeting;

⇒ Parties are obliged to appear in person;

⇒ It is upon the expert's sole discretion to decide whether it is necessary or desirable that (one of) the parties (is) are represented by a lawyer or consultant of another discipline;

⇒ Parties are obliged to provide the expert with all the necessary and desired information, to support his evaluation;

⇒ The expert shall ensure the communication of the information to all the parties and that each party has sufficient understanding of the information provided;

⇒ The expert informs parties of their rights and responsibilities, of those of other parties concerned (for example, children) and regarding disputes between them that are under examination. If considered appropriate, the expert will inform this at the beginning, during or at the end of the research;

⇒ The expert is entitled to contact other parties concerned (for example, children) without the knowledge of parties to the dispute. The expert can invite the concerned persons to be present at the meetings;

⇒ The expert writes reports (or at least summaries) of the meetings. Parties receive these reports and are entitled to comment on them, if necessary. The reports and comments are confidential. The expert is authorized to add the reports, entirely or partially, to his findings for the judge;

⇒ As regular as requested by the judge, or when the expert deems appropriate, he will report to the judge about the ongoing research. Parties and concerned persons will receive a copy of this report, which can be discussed with the parties in advance, or at least presented to them. The expert can also notify children (of the parties) about (parts of) the content of the report;

⇒ If during the research, parties reach an agreement and the expert agrees that a settlement is feasible, then a final report, possibly containing written conditions for the settlement, will be drawn up for the judge. Depending on the nature of a case, the judge may be requested to frame the settlement in a court decision;

⇒ If the expert believes that continuation of the research will lead nowhere, he is entitled to terminate the research at any stage;

⇒ Parties and judge will be informed in writing of the expert's decision (to terminate the research). The expert will make his final decision, after the parties concerned have had the opportunity to express their opinion;

⇒ The judge is entitled to revoke the expert's mandate at any phase of the research. The judge can do so discretionary or at the request of the expert;

⇒ Parties are obliged to compensate the expert, according to the rules





determined by the judge at the beginning of the procedure, for the services the expert would provide.

The objectives of the Foundation of Forensic Mediation (hereafter referred to as 'Foundation') are:

1. To develop research methods that are useful and applicable in legal procedures in order to enable the judge to be aware of the points the parties might need an opinion of an expert to increase the possibility to settle their legal disputes;
2. To develop training modules, including research methods of the Foundation based on insights of participating professional organizations. These training modules can be incorporated in the training program of designated training institutes.
3. To train lawyers, accountants and psychologists, who have completed the general mediation training. Further, training can also be provided for those who practice forensic mediation and forensic mediation trainers;
4. To grant the title "FM" (Forensic Mediator) to the persons mentioned under No. 3 who have properly completed the forensic mediation training, have participated in an assessment or those who have successfully participated in the exam and finally, those who acquire sufficient training credits as mentioned in the Foundation's Regulations;
5. To keep a register of forensic mediators up to date. This register will be publicly available for consultation;
6. To acquire (financial) resources to support the objectives of the Foundation;
7. Other objectives that are considered useful or desirable by the Foundation for the support of the objectives mentioned under No 1 to 6.

Source: [www.forensichemediation.nl](http://www.forensichemediation.nl)

## Is 'Mediation Privilege' Necessary to Uphold Confidentiality in Mediation?

-by Anand Ayyappan Udayakumar

Confidentiality and privilege in mediation are generally ensured by the mediation agreement which contains a clause to this effect and by the words of the mediator during the start of the mediation proceedings that everything mentioned during the mediation process is strictly confidential and privileged. Further, all these communications cannot be relied on or referred to by parties outside the mediation proceedings. This evidences that mediation is confidential and imposes confidence on the parties to resort to this alternative dispute resolution method.

Confidentiality in mediation is not absolute

The 'without prejudice principle' lays down the rules for the admissibility of evidence and provides that upon the mediation process not being successful, whatever transpires in the course of mediation proceedings cannot be referred to or relied upon in subsequent proceedings. The without prejudice principle is not absolute and is subject to various exceptions.

One exception can be considered as admitting without prejudice communications to establish whether a settlement has been concluded. Even in the presence of confidentiality provisions in the mediation agreement, these provisions could not be relied upon to prevent the use of communications that had taken place during the course of me-

diation at a later date. The admission of these communications, fall within the settlement exception of the without prejudice rule [*Brown V. Rice* [2007] EWHC 625 (Ch)]. In addition, there are other established exceptions to the without prejudice rule, which also apply to mediation. For instance, without prejudice material may be produced to the court in order to establish that an agreement, apparently concluded between the parties should be set aside on the grounds of misrepresentation, fraud or undue influence.

The case of *Farm Assist Limited (in liquidation) v Secretary of State for the Environment, Food and Rural Affairs (No.2)* [[2009] EWHC 1102 (TCC)] is of significant importance in this context as the issues of confidentiality, privilege and the without prejudice principle in mediation were discussed in detail. In this case, almost six years after the mediation, the mediator was called as a witness to the court proceedings.

As a result of insolvency of one of the parties, the liquidators stated that mediation settlement had been reached through economic duress. The court had to determine if the settlement had been achieved through economic duress and the evidence of the mediator was of vital importance to arrive at a conclusion.

The mediation agreement contained a confidentiality provision that clearly stipulated that the mediator was imposed with a duty of confidentiality and cannot be called as a witness in any litigation or arbitration in relation to the dispute at issue and is restricted from acting in a similar capacity without written agreements of all parties.

On being approached, the mediator declined to provide a statement. Upon being served with a witness summon seeking the mediator's attendance at trial, the mediator applied for setting aside the summon on the grounds that the mediator's evidence was subject to express provisions of confidentiality and was legally privileged.

The judge dismissed the mediator's application and stated the following:

⇒ The court in general will give legal effect to confidentiality but, where it is necessary considering the importance of the evidence, the court will request that the evidence needs to be given or produced. In the current case, the mediator's evidence was of vital importance to establish whether or not the mediation settlement agreement was reached by economic duress.

⇒ Mediation is generally covered by the without prejudice privilege principle. This is a privilege available between parties and not in relation to the mediator. In this case the parties had, by accepting that they were entitled to take witness statements from the mediator, waived the without prejudice privilege. Hence, there was no privilege issue.

⇒ If there are other privileges attached to documents which were shown to the mediator by one of the parties, then that party still holds that privilege and it will not be waived because of disclosure to the mediator or by waiving the without prejudice privilege principle.

## Interpretation of confidentiality in the EU Mediation Directive

The EU Mediation Directive 2008/52/EC in Article 7 deals with confidentiality in mediation proceedings. This Article states that:

### "Confidentiality of Mediation

1. Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:

(a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or

(b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

2. Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation."

Based on this Article it can be said that in certain situations the principle of confidentiality can be overridden.

Article 7 stands implemented in England and Wales through the changes in the Civil Procedure Rules and the Cross-Border Mediation (EU Directive) Regulations 2011. Hence, it can be said that there are two effective tests to determine whether the principle of confidentiality in mediation can be overridden. The exception in cross-border disputes is 'the overriding considerations of public policy' and for domestic mediations, the test is 'in the interests of justice'. This may result in a situation where contradictory decisions may be reached depending on whether a court is reviewing a cross-border or domestic mediation procedure.

### The future of the privilege principle in mediation

One of the primary advantages of mediation is the confidentiality in its broadest sense. However, post the *Farm Assist* decision, confidentiality in mediation and the without prejudice rule are subject to the same exceptions.

In order to address these concerns, it is necessary to uphold and increase the awareness of mediation. Further, protection has to be afforded in the form of a special type of mediation privilege, aimed at protecting the confidentiality between the mediator and individual parties. The existence of such a privilege will add credibility to the mediation process and aid in achieving a resolution of the dispute, with the knowledge and confidence between the parties that the communications in the course of mediation proceedings cannot be disclosed in the future.

Article 7(2) of the EU Mediation Directive as mentioned above, stipulates that Member States are entitled to enact stricter measures to protect confidentiality in mediation. **The introduction of 'mediation privilege' will restore higher levels of confidence in the mediation proceedings.** The limits of confidentiality in mediation are fact sensitive issues

and will depend on the case at hand. Only time will tell if the privilege principle in mediation will find favour amongst the courts. 'Mediation privilege' however does not confer absolute authority and the parties will have to recognize that the courts are empowered to quest into the mediation proceedings, even after it has reached completion.

## Report on CPR Institute's Young Attorneys' Seminar On Developments in International Arbitration

-by Olivier P. André



On February 8, 2012, leading international practitioners gathered, under the auspices of Y-ADR, the young attorneys' group of the International Institute for Conflict Prevention & Resolution (CPR Institute), at the Paris office of Shearman & Sterling LLP to hear presentations about the latest developments in international arbitration.

As international arbitration has come under attack in recent years due to some of its perceived shortcomings, particularly relating to costs and delays, the goal of this program was to enable young attorneys to hear from and engage directly with in-house counsels on this topic. Attendees had the opportunity to hear from a distinguished panel composed of Mireille Bouzols-Breton, Former General Counsel of Technip, Bruce Gailey, Chief Litigation Counsel of Alstom (Switzerland) Ltd., John Lowe, General Counsel of Qioptiq, and Maria Vicien Milburn, Legal Adviser & Director, Office of International Standards and Legal Affairs, UNESCO. The panel was moderated by Mark S. McNeill of Shearman & Sterling LLP and welcome remarks were delivered by Jean-Claude Najjar, General Counsel France of General Electric and Chair of CPR's European Executive Board.

There was consensus among these leading European counsels that international arbitration remains an instrument of choice for resolving cross-border commercial disputes, offering advantages in terms of neutral decision-making, procedural flexibility, finality and enforceability of awards. Throughout the evening, the speakers offered their perspective on how arbitration can be used most effectively to achieve the best results, from the drafting of arbitration clauses to the selection of arbitrators and counsels. The speakers also shared their views on the qualities they are looking for in their outside counsel. The evening ended with a networking reception which gave the opportunity to young lawyers to continue the discussion in a more informal setting.

CPR's Y-ADR Group regularly organizes seminars and networking events throughout the United States and Europe with the goal of familiarizing young attorneys with the full spectrum of alternative dispute prevention and resolution mechanisms used by multinational corporations. Attendees get an opportunity to meet with in-house counsels and ADR experts to analyze and hone techniques, processes, and systems that improve commercial conflict resolution efforts around the globe. This seminar on international



arbitration and many others are available online as CLE on demand at [www.cpradr.org](http://www.cpradr.org) and WestLegalEdcenter.com. The next Y-ADR seminar will take place at the New York office of Allen & Overy LLP on July 24, 2012. For more information on the CPR Institute and Y-ADR, please visit our website at [www.cpradr.org](http://www.cpradr.org) and join Y-ADR on LinkedIn to find out more about future Y-ADR events.

## EU Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters: a new culture of access to justice?

-by Simone White

Mediation is not yet solidly established in the EU and is still a niche activity. It is however well-established in the EU justice policy-making agenda, where it is seen as the means to remedy the ills of civil justice – too slow, too expensive – by offering a cost-effective alternative. As a result, the EU adopted Directive 2008/52 on certain aspects of mediation in civil and commercial matters (the Mediation Directive) in 2008, requiring the Member States to implement it by May 2011. This paper further develops some remarks made at a recent seminar at the Institute of Advanced Legal Studies on international aspects of mediation.

The proposition here – indeed the hope – is that a new legal culture is likely to develop as a result of the Directive and of its implementation. It is argued that, whilst the Directive is a major step forward in establishing mediation in the EU, some issues will need to be addressed as the Member States develop their individual approach to implement the Directive. A recent European Parliament Report states that differences in application have brought to light loopholes, varying from Member State to Member State.

The evolution of this new, European, legal culture is being driven by several factors, as outlined below.

### Access to justice

Access to justice has been defined broadly by the European Union, to include not only access to courts, but also access to out of court or 'extra-judicial' dispute resolution and legal aid. When it comes to cross-border disputes, Directive 2003/8 improves access to justice in cross-border disputes and provides legal aid even at the pre-litigation stage. The Mediation Directive itself sets out no specific obligations in this regard. Access to justice presumes a resolution within a reasonable time, because justice delayed is justice denied. There is no doubt that mediation can provide a quicker (and more cost effective) solution for the resolution of some disputes, as amply demonstrated by a 2011 European Parliament report called 'Quantifying the cost of not using mediation'. The study shows that the average cost to litigate in the European Union is 10,449 euros, while the average cost to mediate is 2,497 euros. The Directive states that 'benefits become even more pronounced in situations displaying cross-border elements'.

### A sectoral approach at EU level

The Directive was adopted on the basis of Article 61(c) of the Treaty on the European Treaty (TEC) and the second indent of Article 67(5) TEC. Article 61(c) enabled the Council to adopt measures in the field of judicial cooperation in civil matters. The second indent of Article 67(5) enabled the Council to adopt, by qualified majority as mentioned in Article 251 TEC, measures in the field of judicial coopera-

tion in civil matters having cross-border implications (with the exception of aspects relating to family law), in so far as they are necessary for the functioning of the internal market. This reflects the EU approach of dealing with mediation in three separate strands: civil and commercial disputes; consumer rights, i.e. the resolution of disputes with the individual consumer; family disputes including, in particular disputes involving children. The Directive excludes family law aspects. Although a sectoral approach continues to prevail at EU level, it is clear that developments in one sector impact others.

### A 'balanced relationship'

The objective of the Directive is to 'facilitate access to alternative dispute resolution and to promote amicable settlement of disputes by encouraging a balanced relationship between mediation and judicial proceedings'.

### Defining 'balanced relationship'

A 'balanced relationship' suggests that mediation should not be a threat to established, formal justice. It is understood that the traditional legal system will provide the best solution in situations where, for example, there are public interests to protect or where there is a serious imbalance of power between the parties. These are important limitations, which must be borne in mind. It seems important that this 'balanced relationship' (or sharing of competences) should be upheld and nourished, yet it is not articulated in the Directive, nor is it mentioned in the EU Code of Conduct for mediators.

### Voluntariness, incentives and compulsion

It is in the nature of a Directive to seek to encompass all possible scenarios for the use of mediation that may arise in Member States. This can lead to compromises verging on contradiction. For example, Article 3(a) of the Directive defines mediation as follows:

'A structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, *on a voluntary basis*, (emphasis added) 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* (emphasis added) or prescribed by the law of the Member States. It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question.'

Some Member States whose judicial systems are overburdened have resorted to financial incentives and to rules making recourse to mediation compulsory. In Bulgaria, for example, parties receive a refund of 50% of the state fee already paid for filing the dispute in court if they successfully resolve a dispute in mediation. Romanian legislation provides for full reimbursement of the court fee if the parties settle a pending legal dispute through mediation. This means that disputes cannot be filed in court until the parties have first attempted to resolve the issues by mediation. The compatibility of this approach with Article 6(1) ECHR, in the light of the English case *Halsey v Milton Keynes General NHS Trust; Steel, Joy & Halliday* [2004] ADR.L.R. 05/11 continues to be debated. In *Halsey* the Appeal Court



By contrast, the European Court of Justice ruled in *Rosalba Alassini v Telecom Italia SpA*, *Filomena Califano v Wind SpA*, *Lucia Anna Giorgia Iacono v Telecom Italia SpA* and *Multiservice Srl v Telecom Italia SpA* (C-317/08, C-317/08, C-319/08 and C-320/08), that a compulsory mediation scheme imposed by Italian law did not amount to a breach of Article 6(1) ECHR. Critics have argued that the Court had assumed mediation to be a beneficial process without examining empirical evidence.

Mandatory mediation requirements are not seen as a positive development by everyone. Article 3(a) has been described by Toulmin as 'an uneasy compromise'. He argues that it is difficult for a mediation 'ordered by the court' or 'prescribed by the law of a Member State' to be consistent with an attempt by the parties to reach an agreement on the settlement of their dispute with a mediator 'on a voluntary basis'. As Toulmin observes, 'If a court orders parties to attempt to reach an agreement, it is difficult to see how a refusal by a party to undertake the mediation process in good faith (a voluntary act) can be regarded as compliance with an order for compulsory mediation'.

According to Article 5(1) of the Directive, a court may invite parties to a dispute to use mediation; it may also invite parties to attend an information session on the use of mediation. This means that Member States are free to adopt legislation to make mediation mandatory. Indeed in some Member States such legislation already existed prior to the Directive.

Yet, on the basis of American experience of institutionalisation of mediation and the subsequent creation of compulsory mediation programmes, Nolan-Haley has suggested that:

'Europe should step back, and be more cautious about following what could end up being a primrose path to justice. The central ideology of mediation is voluntariness. Tampering with this principle could play havoc with access to justice.'

The price for good symbiotic cooperation with the courts and for a steady flow of referrals to mediators may well be that the (crucial) voluntary aspect of mediation may be weakened. An extreme closeness to the court system – or even the co-option of mediation into the court system – can be seen as a double-edged sword. The Rt Hon The Lord Judge, commented as follows during the Civil Mediation conference on 14 May 2009:

'The mediation process could, unless the danger is recognised and addressed, particularly if it is part of the court process, may eventually and quite unintentionally and by unforeseen accretion become increasingly formalised and procedural. It really must not become just one more part of the expensive process that all of us are trying to avoid.'

Commenting on the implementation of the Directive in 2011, the European Parliament found that the financial incentives for participation in mediation introduced by some Member States, as well as mandatory mediation requirements helped to make dispute resolution more effective and reduce the courts' workload. However, it also points out that 'the main objection to coercion is the risk that it may reduce the use of mediation to a mere formality, which in the final analysis benefits nobody except the lawyers.'

The European Parliament believes that there is a need to raise awareness and understanding of mediation. Further action is needed in relation to education, increase of mediation awareness, enhancing mediation uptake by busi-

nesses and requirements for access to the profession of mediator. Furthermore, national authorities should be encouraged to develop programmes in order to promote adequate knowledge of alternative dispute resolution and that those actions should address the main advantages of mediation – cost, success rate and time efficiency – and should concern lawyers, notaries and businesses, in particular SMEs, as well as academics.

#### Conclusion

Will the Directive promote a new culture of access to justice in the European Union? A lot will depend on the interface of mediation with the court system in Member States, since the Directive contains no obligation in that respect. The Commission's Action Plan implementing the Stockholm Programme foresees a Communication on the implementation of the Directive in 2013, where no doubt some of these issues will be aired ahead of the 2016 review.

The Directive has created renewed interest by provider organisations in the training and accreditation of mediators. All issues discussed in this paper (and more) will no doubt extensively be discussed by mediators over the next four years. The monitoring of both mandatory and voluntary mediation schemes in particular will be important.

There remain divergences regarding the accreditation of mediators. We will find out to what extent cross-border mediators will have their qualifications recognised throughout the EU and how easily it will be for them in practice to obtain EU-wide liability insurance. Both these questions will have to receive a positive answer if cross-border mediation is to mean much in practice. That aside, disparities between Member States in their implementation of the Directive are to be expected. Such disparities should not detract from the overarching aim of the Directive, which is to encourage a legally-sound (but not exclusively legal) mediation culture to evolve across the EU. How this culture evolves – by being co-opted into the legal system or by developing its distinct, multi-disciplinary flavour – will soon become clearer.

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