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A New European Parliament Mediation Resolution Calls On Member States and the EC to Promote More Use

BY LEONARDO D'URSO

Last September, the European Parliament approved a resolution on the implementation of the 2008 Directive on certain aspects of mediation in civil and commercial matters. (Available at http://bit.ly/2Efff0E.)

After almost 10 years of the Directive's implementation, the goal of this resolution was to recommend to the European Union Commission and the Member States actions to undertake in order to further encourage mediation use in European civil and commercial matters and, above all, to evaluate if the Directive needed some amendments.

The resolution and its recommendations have been based mainly on four studies carried out over the past decade. The first three of these studies have been coordinated by the author and Giuseppe De Palo, a co-founder of the ADR Center with the author currently at the United Nations, and with the support of ADR Center's staff. The studies are:

(1) Giuseppe De Palo and Leonardo D'Urso, "The implementation of the Mediation Directive—Achieving a Balanced Relationship between Mediation and Judicial Proceedings" (2016)(available at http://bit.ly/2F5cG2e);

(2) Giuseppe De Palo, Leonardo D'Urso, Mary Trevor, Bryan Branon, Romina Canessa, Beverly Cawyer and L. Reagan Florence, "Rebooting the Mediation Directive: Assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU" (2014)(available at http://bit.ly/1cNv9hR);

The author is co-founder of ADR Center, a leading European ADR provider based in Rome, and a member, as scientific expert, of the mediation working group of the Council of Europe's European Commission for the Efficiency of Justice, best known as the CEPEJ (see http://bit.ly/2D0UAhi).

(3) Giuseppe De Palo, Ashley Feasley and Flavia Orecchini, "Quantifying the cost of not using mediation–a data analysis" (2011)(available at http://bit.ly/2CO1lp9); and

(4) Directorate-General for Justice, European Commission, "Study for an evaluation and implementation of Directive 2008/52/EC–the 'Mediation Directive'" (2014)(available at http://bit.ly/2CQKsuA).

In addition, in August 2016, the European Commission published an Impact Report which was required by Article 11 of the Directive, based on the four studies above, and on a public consultation that was undertaken in the fall of 2015. See "Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters" (2016)(available at http://bit.ly/2cr5LH0).

Finally, all of these studies have been well summarized by Ex-Post Impact Assessment Unit of the European Parliamentary Research Service in a comprehensive report. Jan Tymowski, "The Mediation Directive: European Implementation Assessment" (2016) (available at http://bit.ly/2m8a2RL).

KEY MILESTONE

These studies and research projects concluded that the 2008 EU Directive on Mediation has been a key milestone for all Member States in introducing various national legislation on mediation in civil and commercial matters.

While the Directive's transposition into the national laws didn't encounter any difficulties, the concrete results in terms of number of mediations generated varied considerably across Europe for two main reasons: the wide differences in pre-existing levels of national mediation systems in place, and the diverse manner in which the Directive was adopted, because the Member States were left with a large margin of freedom to choose specific implementation steps and procedures.

Regarding the first reason, as the EU Impact Report emphasized, "15 Member States already had a comprehensive mediation system in place prior to the adoption of the Directive. In these Member States, the Directive has brought about limited or no changes to their system."

The Impact Report continued:

- [Nine] Member States either had scattered rules regulating mediation or mediation in the private sector was based on self-regulation. In these Member States, the transposition of the Directive triggered the adoption of substantial changes to the existing mediation framework.
- [Four] Member States adopted mediation systems for the first time due to the transposition of the Directive. In these Member States, the Directive triggered the establishment of appropriate legislative frameworks regulating mediation.

Regarding the adoption processes, however, the Member States have used four distinct mediation models to implement the Directive that generated very different results: Full Voluntary Mediation; Voluntary Mediation with Incentives and Sanctions; Required Initial Mediation Session and, in a few cases, Full Mandatory Mediation.

Despite the lack of homogeneous statistics, in almost all of the Member States, mediation is used in less than one percent of the cases in

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court: for every one mediation, 100 cases go to court.

As a consequence, the goals stated in Article 1 of the Directive, toward encouraging the use of mediation and especially achieving a "balanced relationship between mediation and judicial proceedings," have clearly not been realized.

The only exception is the result of the Required Initial Mediation Session model, which currently is used in Italy in a small portion of civil cases. It is emerging as a best practice. Last month, for example, the Greek Parliament debated a similar model based on the Italian experience that required a mandatory first meeting before going to court for some civil and commercial dispute matters.

TIME TO AMEND?

Based on the concrete results showing a scarcity of numbers of mediations, the cited study above, (1) "The implementation of the Mediation Directive," suggested amending the Directive. It recommended that the EU legislature should consider revising Directive Article 5.2 requiring parties, in certain disputes, to participate at least in an initial mediation session with a trained mediator. This mediation attempt should be fast and inexpensive.

On the other hand, the report carried out by the Ex-Post Impact Assessment Unit of the European Parliamentary Research Service took a more conservative approach and concluded,

> Continuous exchange of best practices and results between the relevant national authorities, legal practitioners and other stakeholders, does not exclude a useful revision of the Mediation Directive, if a convincing argument to extend or deepen its limited scope and content is made.

As result, the EU Resolution did not suggest, at least for the short term, revising the 2008 Directive. Instead, it made two sets of recommendations to the Member States and to the European Commission.

The EU Parliament encourages the Member States to increase their "use of mediation in civil and commercial disputes, through appropriate information campaigns providing citizens and legal persons with appropriate, comprehensive information regarding the thrust of the procedure and its advantages in terms of economizing time and money." It also stresses the need for an exchange of best practices.

In the resolution's recommendations, the EU Parliament also calls on the European Commission

1. to assess the need to develop EU-wide quality standards for the provision of mediation services, especially in the form of minimum standards ensuring consistency;
2. to assess the need for Member States to create and maintain national registers of mediated proceedings, which could be a source of information for the European Commission but also used by national mediators to benefit from best practices across Europe;
3. to "undertake a detailed study on the obstacles to the free circulation of foreign mediation agreements in the [EU] and on various options to promote the use of mediation as a sound, affordable and effective way to solve conflicts in internal and cross-border disputes," and
4. "to find solutions in order to extend effectively the scope of mediation also to other civil or administrative matters, where possible; [the EU Parliament also] stresses, however, that special attention must be paid to the implications that mediation could have on certain social issues, such as family law."

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After 10 years, the 2008 Directive seems to have exhausted its capacity to foster the use of mediation and to have a continuing impact on national legislations. In shaping the next decade of European mediation, law and policy makers, together with ADR experts, should analyze what policies effectively worked in promoting the recourse to mediation.

The Italian mediation law, based on a first mandatory mediation meeting with an easy opt-out or a voluntary continuation, could represent a best practice for many jurisdictions.

Continued monitoring and further economic research would show that achieving a truly balanced relationship between mediation and court proceedings might save billions of Euros and millions of days of unnecessary litigation, every year.

It is worth noting that another important institution like CEPEJ—the European Commission for the Efficiency of Justice—within the Council of Europe, after a long interruption, has resumed its working group on mediation with a new mandate to assess the impact in the 47 Member States of the existing 2007 CEPEJ Guidelines on civil, family, penal and administrative mediation, and draft further tools aimed to ensure their effective implementation. This new report will be published in mid-2018.

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Coming soon in Alternatives, *author Leonardo D'Urso will discuss the main features of the current Italian mediation law and its results, four years after implementation, in reducing incoming cases and backlog in the Italian courts.*

Spreading The Word

The assessments: A decade in, here's a report on studies of the European Commission's directive requiring mediation in cross-border disputes.

The results: The work confirms early indications that actual use is low, and the original EC aspirations aren't being met.

Time to … double down. The European Parliament resolves to make mediation the commonplace practice envisioned when it passed the directive in the first place. More efforts appear to be on the horizon.