Regulating mediation in the EU

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The EU directive on mediation

The EU Directive on Certain Aspects of Mediation in Civil and Commercial Matters (2008/52/EC):

- light-touch regulation, reflecting existing guidelines and best practice;
- encouraging the wider use of mediation across the EU;
- implementing the area of “freedom, security and justice”.

The EU directive

- Cross-border disputes only;
- Allows mandatory referrals or information sessions, without preventing access to court;
- Suspension of the limitation period;
- Confidentiality;
- Enforceability;
- Assuring the quality of procedures mediators.

The Legal Process Approach

Each dispute process has its own morality:

- **Mediation:** deals with ongoing relationship in which parties need to be reoriented to each other
- **Arbitration:** enforcement of private rules established by the parties (contracts, collective agreements)
- **Adjudication:** authoritative and public decision of legal interpretation

ADR and the State

- The Multi-door Courthouse: National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Pound Conference - 1976)
- UNCITRAL
  - conciliation rules (1980)
  - model law on international commercial conciliation (2002)
- Uniform Mediation Act (2001)

The two souls of mediation

- facilitative, transformative, community-based soul of the mediation movement: individual empowerment
- The other soul, the evaluative, commercial, practitioner-oriented doctrine of mediation: efficiency

Psychological barriers to settlement

People use a variety of **shortcuts** and **heuristics** to deal with the flow of social information:

1. *Bias in assimilation or construal*
2. *Reactive devaluation of compromises and concessions*
3. *Loss aversion*
4. *Judgemental overconfidence*
5. *Dissonance reduction and avoidance*
6. *Anchoring and Primacy effect*

Problems

- 40% of companies surveyed in Italy have never used mediation to resolve business disputes (De Palo and Harley 2005, 473). In the Netherlands, at the forefront of the European mediation movement, only 27% out of the 4.700 registered mediators ever conducted a mediation (de Roo and Jagtenberg 2006, 284).
- "no strong statistical evidence" was found that in-court mediation programs had brought significant reduction in costs in the time of disposition, or significant improvement in attorneys views of fairness in the management of cases
- What is almost undisputed, is the high level satisfaction of litigants in mediation: 80% would opt again for mediation in the future (de Roo and Jagtenberg 2006, 287)

Reasons against mediation

- Significant power imbalance
- Public interest in judicial interpretation
- Differing views of the relevant law
- Need for a binding precedent
- Show firmness to other potential litigants (frivolous claims)
- Outcome that requires judicial supervision

Against Settlement…

- Adr is “a truce more than a true reconciliation, but it seems preferable to judgement because it rests on the consent of both parties and avoids the cost of lenghty trial”
- … “another form of the deregulation movement, one that permits private actors with powerful economic interests to pursue self-interest free of community norms” (FISS)
- … “the civil analogue of plea bargaining”, and “a capitulation to the conditions of mass society and should be neither encouraged nor praised” “reductionism in the social psychology analysis of conflict”, the mediation/ADR policy implies the “retreat from the politics of rights”, and “loss of a social justice component” (Harrington 1985).

Against Settlement…

ADR and informal justice are accused of:

- Privatizing justice
- Disempowering minorities by depoliticizing social conflicts
- Legitimating social inequality
- Increasing control on individual lives
- Exporting "culturally specific processes" to different cultures

… in defense of Adjudication

- Adjudication is a social process that uses the power of the state to interpret public values enshrined in the law and bring the reality into accord with them
- Settlement can realize public values only when the following elements are disclosed:
  - knowledge of the wrongdoing
  - values assessed for injuries or harms

"Whose dispute is it?"

- There is a "litigation romanticism" based on empirically unverified assumptions about what courts can do: laws can be inefficient, unjust or inapplicable
- Wrong assumption that power imbalances do not occur at trial: a lot of time and resources are needed due to the formality of the procedure
- Power imbalances also depend on access to the sources of information

“Whose dispute is it?”

- Settlement is not necessarily an “unprincipled compromise”: it generally occurs “in the shadow of the law”…
- … and parties may want to use settlement to agree on non-legal principles to resolve their disputes and to structure their relationships
- Adr procedures and outcomes should be monitored, but not all aspects of a difficult negotiation must occur necessarily in public
- movement “back and forth between justice without law, as it were, and justice according to law” (Pound 1922, 54).
- “ecological rebalancing of the relationship between conflict and remedy […] the wisdom of social system is certainly beyond any scientific formalization, even the most enlightened and fierce” (Resta 1999, 575).

The regulator's dilemma

- 1. market regulation (generally for high-end commercial disputes only);
- 2. self-regulation (collective regulation, mainly knowledge-inspired and expert-based, adopted by a community or industry);
- 3. formal framework (legal parameters within which self-regulation can fill in the details);
- 4. formal legislation.
- Regulators face the trade-off between consistency and spontaneity in mediation. Establishing consistency may stifle growth and innovation in mediation programs, and lead the process down to the same path of judicialization that arbitration walked (Press 1997, 910). Preserving spontaneity may prevent its widespread use by the legal profession and confuse disputants: we can just mention the 750 ADR schemes in business-to-consumer disputes counted by the European Commission in the EU (AFFAIRS 2009).

- Legalistic/pragmatic/cultural
- Coercion to mediate is embraced by policy makers who are more worried about the court backlog than the well-being of the disputants. The not-so-hidden agenda of mediation as “pure deflation” (Deodato 2010, 10) is also widespread at the EU institutional level. The underlying assumption is that citizens are not willing to spend in the administration of justice (de Roo and Jagtenberg 2006, 304).
- How to promote without compelling? The “paternalistic-libertarian” perspective suggests a shift in the “choice architecture”. The disputants often litigate because this is the default option, no matter what their chances are. §3.2, European Economic and Social Committee, Mediation in civil and commercial matters Brussels, 9 June 2005, Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on certain aspects of mediation in civil an d commercial matters COM(2004) 718 final – 2004/0251 (COD)