BRINGING MEDIATION TO THE MASSES: THE EU REGULATORY APPROACH

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The EU directive on mediation (1)

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 on mediation (2)

- Cross-border disputes only
- Allows mandatory referrals or information sessions, without preventing access to courts
- Suspension of the limitation period
- Confidentiality
- Enforceability
- Quality of procedures and mediators

Problems and Opportunities

- **Use of mediation is limited**:
- 40% of companies surveyed in Italy have never used mediation to resolve business disputes
- 73% of registered mediators in the Netherlands never conducted a mediation
- "**No strong statistical evidence**" was found that in-court mediation programs brought significant reduction in **costs**, in the **time of disposition**, or significant improvement in **attorneys views of fairness**
- On the other hand: **higher satisfaction of the parties** in mediation (with some exceptions, e.g. women involved in family mediation)

“Against Settlement”…

ADR and informal justice are legitimated by **reductionism** in the social psychology analysis of conflict

ADR/mediation programs result in:

- privatization of justice;
- disempowerment of minorities by depoliticizing social conflicts;
- acceptance of social inequality;
- increased control on individual lives.

… “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?”

- The **mediation revival** is part of that movement back and forth between **justice without law** and **justice according to law**
- **Litigation romanticism** is based on empirically unverified assumption that **power imbalances** do not occur at trial
- A lot of time and resources are needed due to the formality of the procedure
- Mediated settlements generally occurs “**in the shadow of the law**”

Regulating mediation

1) **market regulation:** only for high-end commercial disputes
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**

The regulator's dilemma

Establishing consistency in mediation:

- ✓ puts at risk growth and innovation
- ✓ leads towards judicialization

Preserving spontaneity in mediation:

- ✓ prevents its widespread use by the legal profession;
- ✓ confuses disputants (750 different ADR schemes in EU business-to-consumer disputes);

Promoting mediation

- **Pragmatic approach:** experiment first, then regulate (Denmark, The Netherlands)
- **Cultural approach:** educational programmes, teaching value of early settlement (Switzerland)
- **Legalistic approach:** first regulate with comprehensive legislation, then see what happens… (France, Germany, Italy, Spain)

The Italian case

a) Starting in March 2010, **mediation in civil and commercial matters**, conducted by a **trained mediator** through an **accredited mediation provider**, enjoy substantial "**benefits**" ("administered mediation")

The "**adjudicative mediation**" model: when the mediation fails, the mediator is entitled to formulate a settlement proposal. If the parties end up in court, the winning party who refused to settle may have to pay for the costs of the trial proceeding incurred after the mediator's proposal

The Italian case

b) **Right to be informed**: lawyers need to inform their clients that they can resort to mediation

c) **Compulsory mediation**: a large number of disputes will have to go through mediation before going to court (estimate: 1 million out of 5 million cases entering the court docket every year).

Mediation will be mandated on an indiscriminate basis, with no regard to the specific case at hand.

Mandating ADR

- Mediation is viewed as an instrument for **diversion from courts** at the national and at the EU level
- The "paternalistic-libertarian" perspective suggests a **shift in the choice architecture**: mediation and not litigation should be regarded as the **default remedy**, with the **right to opt-out**