European Union Directive on Mediation:
Assessing the Developments and Challenges

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Abstract

The enactment of EU Directive on Mediation in 2008 has been a landmark achievement in the recent times in EU. The Directive promises to bring mediation at the centre-stage of dispute resolution paradigms, thus facilitating the cause of access to justice in member states of EU. The Directive has been largely welcome by the mediating communities across EU, except certain reservations over some key issues surrounding mediation Directive. The present paper aims to make a focussed study on the multi-faceted aspects of growing mediation discourse in EU domain. In doing so, it offers analysis and examination of the key provisions of EU Directive on Mediation. In the end denouement is provided drawn on the basis of relevant discussions in this paper.

I. Introduction

Like in several legal jurisdictions of the world, civil justice in Europe are also facing their share of crises as delays and costs connected with courts and the litigation process have considerably affected citizens' access to justice.\(^1\) In the background of several systemic problems, hampering access to justice, the alternative dispute resolution (ADR) movement have gained a growing presence in both civil and common law jurisdictions across Europe. In the last two decades, the European Union (EU) has calculatedly propagated the idea of mediation and other forms of ADR for advancing citizens’ access to justice, which it has done with an increased intensity, especially in the last decade.\(^2\) Out of the available range of ADR processes, mediation especially, has been placed at the top front of EU policy on promoting access to justice and efficient dispute resolution. The transition toward mediation

\(^1\) Marfording, Annette: Civil Justice in Crisis: Comparative Perspectives Of Civil Procedure, UNSWL. J, Vol. 48, 2000, (Book Review)

indicates the growing trend in EU reflecting the centre stage which mediation now occupies among the broad spectrum of ADR.

Mediation is equated with the access to justice movement. Its importance as a vehicle for greater access to justice within EU states was enhanced by the Mediation Directive issued in 2008 by the European Parliament and the Council. While directed primarily at cross-border disputes, it encourages all 27 member states to adopt laws, frame regulations and implement structures to comply with the directive prior to full implementation by May 2011. The purpose is that disputing parties should have same methods available for resolving disputes wherever disputes arise in the EU.

A common set of rules is provided under the Directive to regulate mediation practice in the EU, thus increasing the legitimacy and credibility of mediation as a dispute resolution process. By incorporating mediation in the Directive, the EU has pushed for a solid institutional framework to guide mediation practice across EU, which is quite a significant promotion given the existing challenges in dealing with divergent national laws, languages and cultures. Following the transplantation of this Directive within EU member states, a new proposition, which is about using mediation for dispute resolution has spread across a wide spectrum of institutions in EU, including judiciary and bar. Even though the apparent multiple advantages of mediation have pushed EU to give it institutional backing, the same has also generated a lot of challenges from various stakeholders. These challenges or ‘faultlines’ relate to definitional uncertainties within the current EU Directive, including codes of conduct for mediators, their training and credentialing, along with controversies on differing mediation styles, court-mandated mediation, party autonomy, enforceability of mediated settlements,


Some of the advantages of mediation can be: Confidentiality, economical decisions, rapid settlements, mutually satisfactory outcomes, high rate of compliance, comprehensive and customized agreements, greater degree of control and predictability of outcome, personal empowerment, preservation of an on-going relationship or termination of a relationship in a more amicable way, workable and implementable decisions, agreements that are better than simple compromises or win/lose outcomes. See generally, Benefits Of Mediation, August 1998, available at http://www.mediate.com/articles.cfm (last accessed 10-11-2017); See generally, Spencer, David & Brogan, Michael: Mediation Law and Practice, Cambridge University Press, 2006

As for example, Art. 3(a) of the EU Mediation Directive defines mediation as a structured process, but it does not say anything what is meant by structured process, see, Bosnak, John M.: ADR In Business: Practice And Issues Across Countries And Culture, Kluwer Law International, Vol. II, 2010, pp. 625-627


In facilitative style of mediation, mediator facilitates the parties, whereas in evaluative one, mediator apart from facilitating also actively suggests solutions and tries to direct the parties. Evaluative model is criticized as not in keeping with the definition of mediation. See generally, Waldman, Ellen A.: The Evaluative-Facilitative Debate In Mediation: Applying The Lens Of Therapeutic Jurisprudence, Marquette Law Review, Vol.82, No. 155, 1998, pp. 155-170
II. Prominent Aspects of EU Directive on Mediation

The 2008 Directive offers a strong account of mediation. It aims to put mediation in the centre stage of dispute resolution. It encourages mediation specifically in cross-border disputes in the EU. It ensures a sound relationship between judicial proceedings and mediation.

Nature and Scope of the Directive

Directives issued by EU are legislative acts. Directives, in general, require members of EU to attain a particular goal without EU actually controlling the means of achieving it. Member states are generally


10 Party autonomy or voluntariness is the other very fundamental feature of mediation. It implies parties’ consent to try mediation and their own power to negotiate. In mandatory mediation such autonomy is likely to be compromised.

11 Indeed, confidentiality is considered fundamental to mediation processes and is often cited as one of its most significant advantages. But confidentiality may have to be compromised with if the court considers the ‘disclosure’ necessary in the interest of justice or public policy. Such grounds are considered vague and need to be made objective. Seegenerally, Gray, Owen V.: Protecting The Confidentiality Of Communications In Mediation, Osgoode Hall Law Journal, Vol. 36 No. 4, 1998. Available at http://www.ohlj.ca/archive/articles/36_4_gray.pdf (last accessed 05-12-2017).

12 As for example, compulsory mediation which is given a lot more importance in countries like Italy, is not preferred in other countries like England. In cross-border disputes, such varying structure can create a lot of problems. Further, the nature of ‘Directive’ itself requires that Member States would be free to fashion their own mediation schemes. See, Art. 249 of the Treaty of Rome (Mar. 25, 1950, 298 U.N.T.S. 11.) which defines the term ‘Directive’. “A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.” Available at http://sixthformlaw.info/01_modules/mod2/2_3_2_eu_sources/07_sources_of_ec_law.htm (last accessed 05-12-2017).

13 Except Denmark

14 Art. 249 Treaty Establishing the European Economic Community, opened for signature on Mar. 25, 1957, 298 UNTS 11, Art. 249 (entered into force from Jan. 1, 1958), also known as the Treaty of Rome. Although binding on states and not individuals, in exceptional cases where the terms of a directive are unconstitutional and sufficiently certain it can have ‘direct effect’. See, European Court of Justice Decision, ECJ Case 41/74- Yvonne van Duyn v Home Office [1974] ECR I-01337
granted considerable leeway in respect to the kind of regulatory instrument which they choose and the exact rules they adopt.\(^\text{15}\) The Directive sets up a regulatory framework and within such framework member states are mandated to frame policy and implement the various aspects of mediation law. In other words, it may be said, that general outline and content of mediation law is specifically prescribed, thus allowing member states to make sure how the regulation of various facets of mediation law are to be determined. This also leads to likely normal differences in national rules which may, and do, crop up within the framework of the Directive. However, the existence of the single jurisdiction of the European Court of Justice ensures that risks connected with different national approaches are minimized and a uniform and coherent approach to private international law is encouraged.

What the Directive will usher in is that it will offer a level of predictability in respect to certain facets of mediation law. It will ensure that fundamental feature of mediation, especially its flexibility, is retained. Directive, in this regard, is very categorical when it lays down that member states will be guided by the fundamental principles while enacting their national legislations in compliance with the Directive.\(^\text{16}\)

The Directive applies to cross-border disputes and it does not cover disputes arising exclusively within any particular member state of EU.\(^\text{17}\) Yet, in any case looking at the Preamble, it may well be said that intention of the Directive goes beyond cross-border. Recital 8 states that nothing should prevent member states from directly applying Directive’ provisions to their domestic mediation processes. Following the mediation Directive, a number of countries in Europe has capitalised the positive impetus created by the Directive and seized the opportunity to regulate mediation for cross-border as well as for domestic disputes. As for instance, in Italy, Slovenia, Germany, many of the principles of Directive are adopted for their domestic disputes. In other notable jurisdictions, like UK, prevailing national laws on mediation on their own applied to cross-border disputes, and therefore, there was already a sort of partial compliance with the Directive\(^\text{18}\).

Mediation and mediator for the purposes of this Directive are broadly defined. The purpose is to achieve a greater application of the Directive, and the definitions have therefore been left rather general. A second purpose has been to avoid introducing subjective or abstract elements, as the application of the Directive to a given situation should be initiated by the nature of the process in question and not by who acts/acted as a mediator. Therefore Directive has made no reference to qualifying criteria such as the neutrality or independence of the mediator.

The Directive has left out adjudicatory processes from the scope, and also the processes wherein recommendations, be it binding or not, are issued by the third party for the resolution of the dispute in a given manner. Attempts made by judge for conciliation within the context of civil proceedings are also excluded, as those attempts are basically part of the methods of case management which are generally available to the judge, and since most of the substantive provisions of the Directive are not appropriate for that particular situation. However, court-connected/annexed mediation schemes, on the other hand, where mediation can be conducted by a different judge of the same court, have been covered.\(^\text{19}\)

Therefore, it may be stated that the Directive has got application where the parties to a given dispute are located in different member states and where national law stipulates that an equivalent domestic dispute will be dealt with by mediation, or where the court entertaining the disputes has specifically asked the parties to consider mediation.\(^\text{20}\)

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\(^{15}\) See generally, Craig, P. & and Burca, G. De.:EU Law: Text, Cases and Materials, OUP, 5th ed., 2011


\(^{17}\) Arts. 1 (2) and 2 of the Directive on Mediation

\(^{18}\) See, the European Communities (Mediation) Regulations 2011, S.I. No. 209 of 2011

\(^{19}\) See generally, Quek, supra n. 9

Key Provisions of the Directive

Apart from the scope of application as discussed above, the Directive covers the following key themes:

- Definitions (Article 3)
- Quality of mediation (Article 4)
- Courts and mediation (Article 5)
- Enforceability of mediated settlement agreement (Article 6)
- Confidentiality (Article 7)
- Effect of mediation on limitation and prescription period (8)

Definition of Mediation

Mediation is broadly defined under Article 3, which terms it as a “structured process”, in which parties to a dispute, on their own (voluntarily) attempts to resolve their dispute with the mediator’s assistance. The definition further differentiates between judicial settlement and judicial mediation. The first practice refers to trial court judge trying to settle the dispute by mediation before proceeding with the actual trial of the case. Such practice has a long history in several common and civil law jurisdictions. The second practice refers to judicial mediation in which the judge mediating the dispute is not the same as trial judge. In the event of non-settlement or failure, the mediating judge refers the matter back to trial judge for full hearing. The rationale behind it is to separate the person of the mediator from that of the judge, which is very essential for maintaining the integrity of the mediation process. The Directive in this regard basically supports the judicial mediation and not the practice of judicial settlement.

Ensuring the Quality of Mediation:

Article 4 of the Directive provides for the quality standards of the mediator and mediation process. The Directive recommends member states to foster, by appropriate means, the devising of, and adherence to, voluntary rules of conduct by mediators and institutions that provide mediation services, and other quality control measures related to mediation services. Further, the Directive encourages the initial and advanced training of mediators, for ensuring effective and impartial mediation services.

In addition the Directive leaves a great amount of freedom to EU members to make provisions with respect to ensuring quality of mediation services. In this respect, the EU Commission has been very categorical in stating that “self-regulation” will be the most suitable policy for ensuring proliferation of mediation laws in member states.

Option to Mediate

The Directive stipulates that courts before which an action was brought may at any stage of the procedure, if required, and having taken into consideration all the relevant circumstances of the particular case, invite the disputing parties to explore mediation so to settle the dispute. In this regard, Article 5 of the Directive is aimed at the instance where one or both parties to the litigation have refused the possibility of using mediation as they lack knowledge of mediation. It is categorically provided that possibility of using mediation should not be rejected merely because parties do not know anything about mediation. If the parties have legal representation then that is sufficient to explore mediation in the first place in appropriate cases.

The opinion of EESC on the bodies which can recommend mediation is also remarkable. EESC has stated that apart from law courts, judicial or quasi-judicial and public body which have right

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21 See, Recital 12 and Art. 3 of the Directive on Mediation
22 Preferably through legislation.
24 European Economic and Social Committee is the consultative body of EU, set up by the Treaty Rome in 1957.
to ensure compliance with the mediation agreement, can recommend the use of mediation in appropriate situation.

The Directive permits national legislations, according to which use of mediation is compulsory or subject to certain incentives or sanctions, whether before or after proceedings have started, provided, in any case, the national legislations do not prevent the parties from exercising their right to access the judicial courts.

**Enforceability of Mediated Settlement Agreements**

Article 6 of the Directive stipulates that member states, either by court or “other competent authorities”, will offer appropriate mechanisms for ensuring the enforcement of the mediated agreement. For the purpose of enforcement, the content of settlement agreement should not be contrary to law of that particular member state where request is made. The Directive provides a great deal of leeway with respect to choice of competent institution for the sake of enforcement of mediated agreement. However, one very important aspect is missing from the Directive, in that it does not address a key question, namely, enforceability of clauses (within any contract) to mediate those disputes arising in future.25

**Confidentiality**

Confidentiality is the fundamentally important aspect of mediation. The parties’ willingness to disclose information in the mediation setting forms the basis of success of mediation. The party disclosing/sharing confidential and sensitive piece of information will never do so, if mediation/mediator does not offer confidentiality protection. This is highly required, as lack of confidentiality protection will surely deter candid flow of information. A party will be reluctant in sharing information, in that he will think that whatever he will disclose might be used against him by an unscrupulous party.26

According to Article 7 (1) of the Directive, member states are bound to ensure that all concerned persons (mediator, parties, translators, legal counsel, experts, etc.) engaged in the administration of mediation process, shall not be compelled to furnish evidence in any judicial proceedings or arbitration, in respect of the information arising out of or in connection with the mediation between the parties.

Article 7(2) permits member states to legislate more strictly for ensuring confidentiality protection. To this end, rules could be incorporated which might restrict parties’ rights to introduce evidence and to testify in court proceedings.

**Limitation and Prescription Period**

Article 8 of the Directive on mediation requires that member states will ensure that parties who opt for mediation are not afterwards precluded from taking recourse to regular court proceedings or arbitration in respect of a particular dispute merely because, during mediation process, statutory period of limitation or prescription has got expired.27 The provision is similar to confidentiality protection, in that it also inculcates a sense of security and freedom in the minds of disputants, so that they may search for mutually beneficial solution to their disputes without bothering about any consequential disadvantages, such as expiration of limitation period, while they make any honest attempt towards mediation. In this regard, it is safe to conclude that period invested in mediation process shall be excluded while calculating the limitation period for the purpose of filing related civil action in the courts.

The above safeguards are designed to ensure smooth implementation of the Directive.

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26 See generally, Gray, supra n. 11
27 See Palo et al, supra n. 25 at pp. 37, 38
III. The Question of Mandatory Mediation

As discussed above, Article 5 while stipulating that mediation is voluntary makes no restriction as regards the possibility of court compulsorily asking the parties to use mediation in certain cases. The question normally boils down to- whether mediation is voluntary or mandatory? This question has generated a lot of controversy, and has been a subject of intense debate and discussion among jurists and mediation practitioners, especially following the EU Directive on mediation. In this regard, the Italian case of Rosalba Allassini and Others28 have dealt with this controversial issue in detail. The case has reiterated the view that mandatory mediation is not in violation of EU law. The above case was dragged to the ECJ, as one of the contentions was that mediation on mandatory basis might offend the Article 6 of the European Convention on Human Rights that sets out “right to access to justice as human right”.29 In March 2010, the ECJ acknowledged that an Italian law mandating a telecom dispute to be referred to settlement outside the court, before being tried by the court, was not prevented by EU law. Thus the ECJ held that EU Directive on mediation by inserting such a provision did not breach Article 6 of ECHR.

In some member states, mandatory mediation has been made a part of civil procedure code. As for instance, in Romania, courts have allowed the mandatory mediation from 2010. Slovenian courts have also allowed mediation from 2010. Its amended Alternative Legal Dispute Resolution Act30 stipulated that courts are to call the parties to mediate in the first place.31

Following the controversy on mandatory mediation, most of the jurisdictions, however, are encouraging voluntary mediation as an alternative to the litigation process. Mandatory mediation, even though not considered ‘bad’ by ECJ, is not able to garner enough support among the purist mediators. According to them, mediation must remain voluntary and any element of ‘compulsive participation’ can destroy the essential tenet of mediation. Others, however, argue that decision-making in mediation process rests with the parties. Within mediation, a party may or may not reach agreement depending on his level of satisfaction and successful negotiation; hence, there is no harm in mandating a party to explore mediation first. Compelling parties to mediate will only help in decongesting the courts, and so there are no disincentives in using mandatory mediation.31

IV. Challenges Ahead for Mediation in EU

Among other things, the major challenge which the advocates of mediation in EU are facing is about bringing uniformity in mediation standards, practices in cross-border disputes.32 At the moment, the Directive is silent on credentialing the mediators. The qualification standards, training etc. of mediators are not addressed in the Directive. At present, any person can simply declare himself/herself as mediator. Lack of mediation regulation in several jurisdictions is hampering the development of mediation profession. Some institutions such as International Mediation Institute (private and based in Netherlands) has developed the protocol for inter-cultural competency which mediation professionals

28 Joined Cases C-317/08 to C-320/08, Rosalba Allassini and Others [2010] ECR I-2213
29 Article 6 of ECHR, 1950 (1. “In the determination of his civil rights and obligations……everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…”)  
30 See, Palo et al, supra n. 25 at pp.290-302, 317-327  
32 Challenges to mediation can be described as multi-faceted. This is commonly analyzed from two-fold perspectives, namely, theoretical/conceptual and practical or implementational. Theoretical dimension entails critical discussions on mediation’s bases in acceptable theories, principles, whereas, the latter entails the gap- between theory and practice of mediation. The latter further generates a lot of ethical tensions for the former, in the sense of emerging divergent views in the mediation literature. For wide ranging discussions on mediation in Europe, See generally, Palo, Giuseppe De & Trevor, Mary B., eds., EU Mediation: Law and Practice, OUP, 2012
require to mediate across diverse legal jurisdictions.\textsuperscript{33} Yet there is no concrete step taken by EU on this very pressing matter which has so many implications for wider acceptance and growth of mediation in Europe.

As the mediation activities are growing manifold within EU, there is a concern that post-mediation litigations\textsuperscript{34} will increase accordingly too, however, EU directive is remains silent on the potential post-mediation related litigations, especially the disputes over enforceability of mediated agreements.

Other challengeable considerations within the EU mediation discourse, inter alia, include, issues of confidentiality protection, lawyers’ role in mediation, developing a set of ethical norms agreed to by member states, developing a solid strategy for mediation education and awareness etc. As of now, the EU responses have been mainly centred on member states’ compliance with mediation Directive of 2008 and not on the finer nuances of mediation. It is likely to review the entire mediation discourse in 2016, when it will assess the overall impact of 2008 Directive within EU in general.

V. Denouement
This paper has attempted to situate the mediation in EU, by analysing and examining the EU Directive on mediation. It is widely understood that the Directive has played an important catalysing role in generating and streamlining mediation activities across EU member states. This is a very remarkable development in EU history. However, there are still more to be done for promoting mediation as a vehicle of alternative means of justice, especially in the areas of theory-practice gap and host of other critical issues as pointed out in this paper. Besides, there are several gaping holes in the Directive itself. Quality and monitoring of mediation services need further re-structuring, given that, for cross-border mediation, uniformity in certain aspects of mediation is highly essential. At the moment, EU is gearing towards comprehensive review of the EU Directive, when in 2016, EU mediation pundits will meet to review and measure the overall impact of the mediation Directive within EU member states.

However, at any rate, it is conceded that in spite of visible shortcomings, the Directive can be said to be an exceptional scheme for ushering in a visible shift in the attitude of the overly litigious society.


\textsuperscript{34} US in particular, in recent years, has seen a barrage of post mediation litigations concerning, as for example, mediator’s malpractices, enforcement of mediated agreements, breach of confidentiality, mediators’ incompetency etc.