

Kimo Cavdar, Jasmina Dimitrieva, Zoran Sapurik: European Standards and Principles in the Law on Mediation in the Republic of Macedonia...

European Standards and Principles in the Law on Mediation in the Republic of Macedonia in View of the European Directive 2008/52/EC on Cross Border Mediation

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Abstract

Mediation, as an alternative dispute resolution (ADR) method, represents the fastest, the most accessible, and the most cost-effective way of resolving disputes. In the Republic of Macedonia, mediation is regulated by the Law on Mediation. It has been introduced in the Macedonian legal system as a counter-measure to problems identified in the judiciary, such as the unreasonable length of proceedings and ineffectiveness. The authors of this chapter provide an analysis of the applicable European standards and principles, which have an impact on mediation regulation in the Macedonian legal system. Mediation legislation from Italy, France, Germany and the UK is analyzed in order to learn from their experience in the transposition of the EU cross-border mediation directive. The scope and effectiveness of the Macedonian Law on Mediation is further analyzed, as well as the transposition of the EU cross-border mediation directive in the Macedonian legislation. The results of this research show that mediation is not just needed in Macedonia for the sake of ticking a box in the area of legal approximation with the EU; on the contrary, it has great potential in enabling effective, just and less expensive long-term solutions in legal traffic when certain conditions, such as mediation quality, legal certainty, public confidence and understanding of the process are met. Recommendations are provided regarding the enhancement of the legal infrastructure as well as the manner for the effective implementation of mediation. The need to raise the awareness of citizens and their understanding of mediation as the first stage of the dispute resolution procedure, should prevent the judicial settlement of disputes, thereby helping to save time and money. The methods used encompass legal analysis, comparative analysis and desk research. Semi-structured interviews were conducted with experts from the Ministry of Justice (MoJ), from the European Policy Institute (EPI), from the Macedonian Center for Mediation and from the Judicial Strengthening Project. Information has been collected and collated from the Chamber of Mediators, MoJ, EPI and the EU website.

Keywords: mediation, peaceful dispute resolution, extra-judicial settlement of disputes, civil procedure, Directive 2008/52/E3.

Introduction

Judicial adjudication is the primary, but not the only method used for dispute resolution in contemporary societies. In parallel, other extra-judicial methods for peaceful dispute resolution exist that are known in legal theory as alternative dispute resolution (ADR) (Funken, 2002). Mediation, which belongs to the ADR group, according to Petrović Tomić (2010) is a structured process facilitated by a third neutral party called the mediator, who provides a mutually satisfactory solution to its objective (pp. 475-494). This article focuses on mediation as the most cost-effective and flexible type of ADR, in the light of the EU cross border directive on mediation. The aim of this chapter is to explore the use of mediation as defined by the EU cross border directive on mediation in selected EU countries, and to examine the transferability of EU mediation law and practice in Macedonia, in view of the on-going EU integration process. The article explores the following questions:

1. What are the positive and negative sides of mediation?
2. What is the EU law and best practice regarding mediation?
3. What are the lessons that may be learned from the transposition of the EU cross-border directive in selected EU countries?
4. What can Macedonia learn from the experience of the EU and EU countries in the mediation arena?

The methods used encompass legal analysis and desk research. In addition, semi-structured interviews with mediation experts from the Ministry of Justice (MoJ), the European Policy Institute (EPI), the Judicial Strengthening Project and the Macedonian Center for Mediation helped collect and collate empirical and statistical data about the current state of mediation in the Republic of Macedonia. A comparative review of selected EU countries contributes to the body knowledge on the transposition of the EU “cross border” directive in national legislations. The EU countries have been selected based on the longevity of the tradition in mediation and legal culture.

Mediation: Benefits, Drawbacks and Risks

From a historical perspective, there was a mention of the use of mediation originating from 500 B.C, with conflicts being settled in a peaceful manner by the chiefs of tribes and village judges for centuries (Gavric et al., 2012). The tradition to settle disputes peacefully continues nowadays, as

demonstrated by the legal systems of the Western European countries such as Germany, France, and Italy.

Whereas the mediator does not need to be an expert in the area where the dispute has arisen, the mediation paradigm requires him or her to be neutral and impartial, in the function of stirring the negotiation process of the parties willing to reach a dispute settlement. The mediator can also be a judge, but he or she must never be involved in any judicial proceedings or arbitration ensuing from or connected with the dispute. There can be one or more mediators in a dispute, depending on the complexity of the issue and the preferences of the parties. As a rule, mediation is a voluntary act, but the law may also foresee compulsory mediation for certain disputes, such as insurance, employment, and financial matters on balance with the right to access to court. The results of mediation are not automatically enforceable. In short, mediation is not a formal process, in which the legal value of the arguments is assessed by a mediator as a prevailing criteria in order to discern who is right and who is wrong. On the contrary, it should be used as a process in an innovative way, as an escape for the parties from their own box of convictions and stereotypes, in order to avoid a "Pyrrhic victory". Therefore, mediation is not only used in order to relieve the courts of their backlog, but also as a tool for the resolution of social and other conflicts in a peaceful manner, as it creates conditions for the parties to a dispute to resolve their issues in a constructive and friendly manner, and to come up, as says Liebmann (1995) with a win-win solution (p. 10).

Mediation, as a tool for dispute resolution, finds its practical value in all areas of human life. As a process, it can help resolve problems and undo wrongdoings in criminal matters, and juvenile justice, in addition to its recognized value in civil and commercial law disputes. It relies on the human dimension and uses emotional intelligence in solving problems. States that foresee mediation in their laws positively influence the assessment of the level of legal protection, and thus, mediation contributes to the attractiveness of a country for foreign investments.

From a plethora of reasons going in favor of mediation, we would like to emphasize the following:

First, with mediation the parties to a dispute have a second chance to re-examine their problem and find a good solution for it, with lower legal costs, which makes it a more accessible dispute resolution procedure in comparison to judicial procedure. It improves access to justice guaranteed by major European human rights instruments, such as the European Convention on Human Rights and the EU Charter of Fundamental Rights.

Second, mediation relieves the courts from their backlog. Consequently, the courts are able to use their capacities in a more efficient and effective way, and thus live up to the guarantee for a trial within a reasonable time stipulated in Article 6 of the European Convention on Human Rights.

Third, the unwritten mediation procedural rules prone to adjustments create a positive atmosphere for the parties concerned and the persuasion that they can reach an agreement with the aim of avoiding going to court (Šimac, 2006).

Fourth, the principle of confidentiality applies in the mediation procedure. This is precisely the biggest comparative advantage of mediation vis-à-vis judicial and arbitration procedures, and provides the most valued mediation attribute in the business world, as it minimizes the possibilities for negative publicity. It is the rule on discretion that creates the expectations of the parties that information given during mediation will not be shared to their detriment in the case of a judicial adjudication of their dispute.

At the end of the day, ending a dispute by the use of mediation means ending all future court disputes between the parties. In short, mediation saves time and money.

On the negative side, the following obstacles must be overcome in mediation:

First, the parties to a dispute may not perceive mediation as being a successful tool for a dispute resolution, which brings us to the two dimensional issue of confidence, in other words that of confidence in the form of mediation as such, and confidence between the parties who are already hostile to each other.

Second, certain disputes, especially cross-border disputes, need specialized knowledge and skills from the side of the mediator, which might not be available in small countries like Macedonia.

Third, parties in the mediation process may agree to terms that may not be subjected to mediation, without even knowing that there are legal obstacles to mediation.

Fourth, mediation agreements are not automatically enforceable, and may not even be allowed to be enforced in the country where they have been concluded. It follows that unless the parties fulfill the obligations from the mediation agreement *bona fide*, frustration of the mediation agreement may occur. *Finally*, mediation can be abused by a dishonest party to lure the other party to a dispute into a mediation agreement by coercion and duress.

The EU Rules on Mediation

The EU, as a hybrid between an international and supranational organization, uses a specific lawmaking system based on primary and secondary sources of law. Directives belong to the latter, which require the EU member states to attain a specific objective, by freely choosing their measures. This legal instrument has been precisely chosen by the EU to manifest its interest in the development of alternative methods for cross-border dispute resolution. The possible motive for choosing a directive over any other legal instrument may be found in its flexibility, which allows each EU member state to fulfill the EU requirements on balance with its own policies and existing legislation. Since mediation creates a legal framework for a wide range of disputes from commercial and civil areas across the EU, a more rigid legislation might have produced counter effects to the wishes expressed in EU policies, thereby discouraging potential parties from using cross-border mediation.

The EU adopted Directive 2008/52/EU on certain aspects of mediation in civil and commercial matters on 21 May 2008, based on a wide range of consultations with experts and practitioners in its member states and public debates in line with the principles of inclusion, transparency and legislative legitimacy, as well as the protection of human rights. EU policy makes it clear that mediation is a desirable way of settling cross-border disputes in the interest of a single market and the community building of European citizens based on the principles of four freedoms, security and justice. Its main aim is to encourage an increased use of mediation for parties to a cross-border dispute in order to create space for greater access to justice in wide areas such as, consumer rights, contractual disputes, family law, investments, and insurance. While the Directive underscores that its provisions are applicable to cross-border disputes, it makes clear that its provisions can be used to structure domestic mediations.

The Directive is based on the following tenets:

1) free will, 2) neutrality, 3) the equality of the parties, 4) the quality of mediation, 5) confidentiality, 6) legal certainty and 7) public information. Regarding the *first* tenet, it emphasizes mediation as a voluntary act. The parties are the ones initiating mediation, selecting the mediator, and determining the subject and process of mediation. For example, contractual parties can foresee, out of their own free will, a provision for mediation in their contract. Furthermore, the parties may terminate mediation proceedings at free will as long as a mediation agreement is not signed. In short, the Directive makes it clear that in mediation the parties are granted much more autonomy in

comparison with formal judicial proceedings. The Directive foresees the mediator as signing up to neutrality and impartiality, to treat the parties equally and to be able to maintain a balance between the wishes and expectations of the parties concerned, and thus as states Phillips (2011) win their confidence. It follows that the *second* and the *third* tenets are interlinked, as there is no neutrality in a procedure without treating the parties as equals. Yet another (*fourth*) tenet has been specified in the function of building confidence in mediation as a process, namely that of quality. That is even more the case, when disputes with cross-border elements are at stake. According to the Directive, the *fifth* tenet - confidentiality is a *sine qua non* for the greater use of mediation. The mediation process is not public, the parties remain discreet regarding the subject-matter of mediation and other data surrounding it. A mediator cannot be summoned in court proceedings, and information from the process cannot be used following unsuccessful mediation. The *sixth* tenet, on legal certainty contributes towards building a secure space, which enables the conflicting parties to freely and sincerely provide their arguments and discuss facts, without the fear that somebody will (ab)use them, and thus makes mediation more accessible to all EU citizens. For that reason, the time-limits in judicial proceedings are stopped while the mediation process is on-going, so the parties do not feel that mediation will preclude them from bringing their case to court. *Last but not least*, public information about mediation serves to inform the citizens, business, legal and natural persons alike about the availability and power of mediation.

Subject-matters linked to *acta iure imperii*, to public interest (such as national defense) or recognition as a person fall outside the ambit of mediation procedure.

The EU cross-border Directive foresees *ex-post* evaluation about its effects and developments in mediation in the EU member states with the possibility of being revised in 2016, and ties-up with the European Parliament's Resolution 2011/2026 (INI), which *inter alia*, provides *ex-post* monitoring of the transposition of the EU Directive in national legislation. The Resolution also calls upon national authorities to conduct awareness-raising activities on the benefits of mediation.

As a bottom-line, the 2008 EU cross-border Directive builds upon European values and commitments, such as the peaceful resolution of disputes, the protection of human rights and freedoms and the rule of law, and counts on the support of EU member states. It offers a simple solution to complex issues that can range from doing business across the EU to settling a divorce.

Regardless of its practical sides, mediation cannot be imposed upon its beneficiaries, as a construct of the policies created in Brussels. Indeed, according to the 2014 Survey on Rebooting Mediation Directive commissioned by the European Parliament, mediation achieved modest results in the EU. Revision of the Directive may be expected, based on the recommendations of the Survey, which was used as a tool for *ex post* monitoring of implementation and effects of the mediation legislation.

European Standards and Principles: A Comparative Overview

In view of the importance of mediation and the requirement for the transposition of the EU cross-border directive, a comparative overview of mediation legislation and the practice of some of the EU member states is presented herein. Whether or not the proceedings are voluntary or mandatory, who provides mediation, the enforceability of the mediation outcome and incentives to use mediation have been used as indicators for comparison.

In the **French** legal system there is a long-standing tradition of mediation. Starting from the mid-19th century, certain arbitrators made decisions based on the principle, *ex equo et bono*, before the referral to the courts. Articles 95-125 of the 1906 French Civil Code encouraged peaceful settlements of disputes by a third party. Mediation, as a rule, is practiced on a voluntary basis, except for certain family disputes. Mediation is used also for small value disputes, not exceeding €10,000. Once the parties reach an agreement, it becomes binding and enforceable when approved by the court. The 2011 Decree transposed the Directive into the French legal system and provides a legal framework for the friendly settlement of disputes which can be mediated by judges (judicial mediators) or outside judicial proceedings (conventional mediators). The regulation of mediation rests firmly entrenched in the various associations for mediation.

In compliance with the Directive, a new mediation law in **Italy** made mediation mandatory for certain types of disputes, such as in the fields of the settlement of defamation cases, contracts, insurance, banking and finances. The mediation procedure must commence before the judicial proceedings are initiated. Mediation is provided by certain organizations and institutions registered in a special register to which the mediation case gets allocated. Mediation procedure is based on the principle of self-regulation by mediation associations. Upon the resolution of a dispute, the mediation agreement is approved by the court and becomes directly enforceable. A voluntary paradigm

still exists and applies to civil and commercial disputes. Smaller value disputes of up to €50,000 are considered especially amenable to mediation. According to the statistics, out of the total number of mediations, 76 % of the disputes were resolved under the compulsory mediation procedure, whereas 24% of the disputes were resolved on a voluntary basis. All documents, acts and measures in the mediation procedure are exempt from administrative tax or other charges, as an incentive to use mediation (EU Directorate General for Internal Policies, 2014).

In **Germany**, in 2012 a separate mediation law was passed in order to transpose the Cross border Directive. There is a basic training program that each mediator must complete, and additional training in order to become a certified mediator. Parties to a dispute are encouraged first to actively seek mediation, otherwise they must explain to the court why they did not consider this in the first place (EU Directorate General for Internal Policies, 2014).

However, no compulsory mediation has been introduced at the federal level. Reconciliation is mandatory in divorce proceedings, but it is conducted by a judge who has territorial jurisdiction to hear the divorce cases, while the divorce proceedings are on-going (EU Directorate General for Internal Policies, 2014). The mediation outcome can be enforced through a notary or through the courts.

In addition to the positive practice that mediation depicts in the **UK**, its value for the settlement of disputes has been re-confirmed in the light of the above EU Directive, which, *inter alia*, re-enforces the confidentiality of the process. Mediation is regularly used in civil and commercial areas, in particular, in family, labor and social disputes. Although there is no separate law in the UK regulating mediation in civil and commercial matters, the courts may refer the parties to mediation. There is court-annexed mediation in small claim cases. In civil cases, the parties can face high court expenses, if they had not previously attempted to reach a settlement through mediation. Mediation providers are accredited by the Civil Mediation Council. A settlement reached through mediation needs a court order in order to be enforced.

From the above it transpires that all examined countries transposed the cross border directive in their national laws, while retaining the most important features of their legal systems. All countries foresee by law some type of training for mediators who must remain impartial. Italy and the UK foresee mandatory mediation for certain types of commercial cases. Most of the countries from the sample foresee mandatory mediation for family disputes. While all countries foresee some incentive or “sanction” to encourage the use of mediation, they

differ from country to country. As a rule, the enforcement of the mediation outcome passes through the courts, with Germany allocating an important role also to the notaries.

Law on Mediation in the Republic of Macedonia

Mediation was officially introduced in 2006, when the old Law on Mediation was adopted by the Macedonian Parliament. The main aim was to reduce the backlog in the courts, as well as modernizing the Macedonian legal system. While the Law proscribed for substantial self-regulation in the mediation area by the Chamber of Mediators, the analysis of the MoJ and the EPI showed that mediation had failed to execute its goal, due to the low quality of proceedings and insignificant number of mediation cases. In addition, in 2008 the EU cross – border Directive came to light.

The new Law on Mediation no. 188/2013 (the Law) was adopted in December 2013, with the expectation that it would improve the quality of the mediation procedure, increase public confidence in mediation as well as approximate mediation in commercial and civil matters with the EU's applicable directive, in view of the prospective EU membership. It almost fully transposes the above Directive (the MoJ Table of Correspondence) in compliance with its afore-mentioned tenets. Mediation is a voluntary act, and remains as such, despite some efforts to introduce compulsory mediation in disputes worth less than 1,000 000 MKD. Equality of the parties is guaranteed with mediation carried out by a neutral mediator. Mediation is confidential and held *in camera*. As a rule, access to information in other types of proceedings is prohibited. Confidentiality was quoted as one of the reasons for not allowing judicial mediation, although it functions well in certain countries belonging to EU. Enforcement of the mediation agreement is achieved when it is certified by a notary, in order to safeguard legal certainty and foresight. When the mediation settlement is reached during court proceedings, it represents the basis for a judicial settlement. As an incentive, certain mediation costs may be covered by the state when legal conditions are met (articles 6-14, 28).

When looking at the other side of the coin of the Directive's tenets, which have not been fully translated into Law, the corresponding Table shows the remaining gaps with regard to public information about mediation. Indeed, although through the Dutch sponsored project MATRA, the EPI has organized information events and funded the Chamber of Mediator's website, no follow-up to this project has been envisaged. Furthermore, the above-mentioned

website is no longer available. In this regard, the counterparts also mentioned a lack of interest in pushing for a greater use of mediation by the Chamber of Commerce, the judges or even the mediators themselves who are for the most part practicing lawyers. All in all there have been only 45 registered mediation cases since 2006, and none of them concerned a cross-border dispute, which makes mediators totally inexperienced in the Directive's subject-matter.

Furthermore, the Law appears to be over-detailed, which might in some way help the legal certainty of the Law, but the question arises, why secondary legislation has not been used as a tool to achieve the same effects in line with the rest of European good practice? From all discussions with counterparts, it appears that the quality of mediation is the biggest controversy when the mediation paradigm in Macedonia is tackled, and that was the prevailing reason to include greater detail in the Law. The Law attempts to increase the quality of the mediators by detailing out groups of examinations and foreseen licensing arrangements. However, although the Law entered into force in September 2014, still no exam for the licensing of new mediators has as yet taken place. The Law foresees that the Mediation Chamber will cease to exist and that the current mediators must be licensed to continue their practice. While the new licensing system, which aims to increase the quality of mediation and increase public confidence represents a positive step taken by the MoJ, further delays in its implementation, leave the mediation mechanism in a state of limbo, which was most certainly not the intention of the drafters of the Directive.

Conclusions and Recommendations

In conclusion, mediation has the power to reduce the costs, time and resources which otherwise would be deployed for the judicial resolution of disputes. It also represents the values of the EU, especially in the areas of tolerance, the peaceful settlement of disputes and access to justice, which should be reflected in Macedonian society, if any hopes remain that Macedonia will become a full member of the EU club one bright day.

While the Government recognizes the values of mediation, the delays in the implementation of the Law, adversely affect the whole mediation mechanism, which has been built since 2006 in terms of training, knowledge, experience and public information.

When there will be some practice developed out of the Law, the Government will have to repeat its good practice regarding the *ex post* evaluation of the 2006 law, which represented one of the pillars of the

mediation reforms, in order to achieve its strategic goal, namely, an increased number of mediation cases. By the same token, the Government may wish to implement a program aimed at raising awareness of mediation, which will target specific groups, such as businessmen, members of the Chamber of Commerce and Centers for Social Works, in order to get them on board for the further popularization of mediation.

The Macedonian government should conduct an awareness raising campaign, not only about its use in domestic matters, but also regarding cross-border matters in view of the EU Directive, mentioned above. Overall, mediation may come cheaper for the state budget, which funds the court system and its functioning, by reducing the backlog in the courts and the length of proceedings.

The transposition of the EU Cross Border Directive in Macedonian legislation is commendable not only because of the prospect of EU integration, but due to the fact that Macedonia is surrounded by EU member countries and countries with the prospect of European integration, as well as the fact that many commercial and civil disputes have arisen and have the potential to arise between EU countries. It follows that by creating conditions susceptible to cross-border mediation, Macedonia could feel the positive effects in trade, consumer protection, and small claims disputes. However, the Macedonian government must examine, in particular, how to ensure the quality of mediators, as cross border mediation may require specialization, as there is also the language issue, and the possibility of using IT equipment.

The Macedonian government should look closer into the possibilities of using mediation in various types of cases, and encourage its use in small claims cases and defamation cases, in balance with the freedom of expression guaranteed by the European Convention on Human Rights, as well as in labor law disputes and in electoral disputes.

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