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Cross-Border Mediation and Small and Medium Enterprises

Abstract: The European Union created a common market with free movement of persons, goods, services and capital, which has resulted in the “Europeanisation” of many civil relations, including trade, contracts and family issues. In recent years, at least 30% of companies within the European Union were involved in cross-border civil and commercial activities. Such commerce is not limited to big multinational companies but also engages small and medium size enterprises, which form the core of the economy. Nevertheless, a lot of companies still refrain from cross-border relations because each commercial activity inevitably carries at least a minimum risk of legal conflict and, consequently, involvement in a cross-border judicial process. Cross-border judicial processes can bring inconveniences, beginning from the language of the process and finalizing with the foreign regulation of civil procedure and possible application of foreign substantial law. For some small and medium size enterprises this can mean a significant loss and in some instances it can ruin the business. This article presents mediation as an alternative to the judicial process and considers the advantages and deficiencies that still prevent it from becoming a totally effective tool.

Keywords: cross-border mediation, SME, judicial process, Directive 2008/52, enforceability of agreement

Introduction

Globalisation, in general, and free movement of persons, goods, capitals and services in particular, has resulted in the “internationalization” and “Europeanisation” of many civil and commercial relations. If previously, multinational companies were mainly those involved in cross-border transactions, recently small and medium size enterprises (SMEs) have entered the European market. SMEs are sometimes referred to as the “backbone of the European economy” and “...represent 99% of European businesses and provide 85% of all new jobs.”¹

1 European Commission, Flash Eurobarometer 421: Internationalization of Small and Medium-sized Enterprises, June 2015, p. 3.

As with national civil and commercial relations, cross-border trade and contracts are also under the risk of possible legal conflict. The risk can be considered even higher in cross-border relations due to different approaches of parties to business culture, improper or ambiguous use of a concept in a foreign language or the misinterpretation of legal provisions. As a result, almost half of companies (result 44,8%) with experience of international relations have been involved in trial proceedings in foreign courts.²

If litigation at a national level requires considerable time, resources and patience and as Latin maxim says “multum lucratur qui a lite discedit”, cross-border litigation is even more complicated in terms of costs, limited knowledge of foreign legislation and judicial system as well as possible language and cultural peculiarities. In these circumstances, a more flexible conflict resolution tool, such as mediation, would be helpful. Some legal conflicts can be effectively solved only by the judicial authorities. Parties to commercial transactions are used to negotiation and compromise to find solutions that can benefit both parties, ensure future cooperation and sustain a good business reputation. Hence, the “win-win” philosophy of mediation can also be of benefit to them. As López-Barajas Perea has said, mediation is to justice as diplomacy is to international politics and should be treated as the first and natural way in resolution of a conflict.³

This article will present the extent of cross-border commercial relations in the European Union (EU), compare some aspects of mediation and judicial proceeding within the EU, and assess advantages and disadvantage of mediation on the basis of its European regulation and its implementation in Member States (MSs).

1. „Europeanisation” of market and legal cross-border conflicts

As a 2015 European Commission survey indicates, during the last three years 36% of EU SMEs in MSs were involved in import from other MSs. 30% exported to another MS; 14% used a subcontractor based in another MS; 11% worked as a subcontractor for a company based outside of its MS.⁴ Cross-border trade far beyond the borders of the EU have also increased and results in 20% of exports, 19% of imports, 7% of subcontracting of foreign entities and 5% of subcontracting by foreign enterprises.⁵

2 See: ADR Center, The Cost of Non ADR – Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation, Rome 2010, p. 18, http://www.adrcenter.com/jamsinternational/civil-justice/Survey_Data_Report.pdf (09.12.2015).

3 See. I. López-Barajas Perea, La mediación civil y mercantil y sus garantías: un paso más en la creación del espacio judicial europeo, “Revista general de Derecho Europeo” 2012, No. 27, p. 4.

4 European Commission, Flash..., *op. cit.*, p. 5.

5 *Ibidem*, p. 7, 9. The survey revealed that the main target extra-EU market of exporting is the Middle East and North Africa, Eastern Europe, the Caucasus and Balkans, the USA, India and South-East Asia, Russia and China.

Nevertheless, such economic progress and new opportunities for the SMEs also imply a risk of cross-border disputes and, as a direct consequence, addressing of cross-border legal conflict to the courts of one of the MSs competent under the rules of International Private Law.

At least one of the parties in a cross-border transnational matter normally will stand before a foreign court that will apply its national civil procedure and in some cases its own substantive law and use its national language. Resolution will require travel and, in the best-case scenario, retaining a lawyer who has experience in litigation applying that foreign law and speaking both the language of the client and the language of the judicial authority. In the worst-case scenario, finding a competent lawyer who can speak both languages may not be possible and an interpreter and/or translator will be required.

Additionally, despite the nature of the conflict (whether it is national or cross-border), the average duration of judicial procedure in civil or commercial matters within the EU is between 566 days⁶ and 700 days.⁷ In 2013 adjudications in courts of first instance took less than 100 days only in Luxembourg (53) and Lithuania (94), and more than one year in Croatia (386), Cyprus (638), Greece (407), Italy (608), Malta (750), Portugal (386) and Slovakia (505).⁸

These litigation conditions impose significant costs. It is said “that litigation in a foreign EU court is not worth pursuing for cases where the value of the dispute falls below €50,000”⁹

But what to do with disputes below €50,000? Or if a judicial resolution of the dispute above €50,000 is taking too much time and significantly damages the business of the SME?

These questions provoke uncertainty among SMEs about the possible consequences of a breach of cross-border contract.¹⁰ 37% of enterprises reported this concern influenced considerably their decision to enter the international market, 8% reported

6 European Parliament, Directorate-General for Internal Policies, Policy Department C Citizens' Rights and Constitutional Affairs, *Rebooting the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the number of Mediations in the EU*, Brussels 2014, p. 124.

7 See: ADR Center, *The Cost...*, *op. cit.*, p. 49. This survey provides information about litigations with the amount superior to 200.000 Euros.

8 It should be taken into account that figures on Belgium, Bulgaria, Ireland, the Netherlands, Poland, Spain and the United Kingdom. See: European Commission, *European Commission for the Efficiency of Justice, Study on the functioning of judicial systems in the EU Member States: Facts and figures from the CEPEJ questionnaires 2010-2012-2013*, February 2015, p. 104.

9 ADR Center, *The Cost...*, *op. cit.*, p. 23, 25.

10 See: J. Loss de Andrade, *Reconocimiento y eficacia de los acuerdos de mediación mercantil internacional*, (in:) H. Dalla Darnardina de Pinho, J. Loss de Andrade, *Contemporary Tendencies in Mediation*, Madrid 2015, p. 168.

that it “much” influenced them and in 5% of cases “very much” so.¹¹ On the other side of that coin, by avoiding cross-border civil and commercial relations, a SME can become less competitive with other SMEs and lose out on profit opportunities.

In this situation professors Menkel-Meadow, Love and Schneider point to an increasingly urgent need for an alternative to litigation¹² and this could be mediation. They consider that in the globalised world there is a need for flexibility in conflicts’ resolution, although also recognising that international mediation is not always an easy process.

According to different sources the average period of mediation within the EU is 43¹³ and 90 days¹⁴. The average difference in cost between litigation and mediation is €9,179 for litigation and €3,371 for mediation. Nevertheless, differences between MSs are varied and for example in Austria average costs of litigation would be €13,095 and of mediation – € 10,000; in Belgium: € 12,286 and € 3,478; in Denmark: € 21,159 and € 6,500, in Ireland: € 15,606 and € 1,250; in Spain: € 8,015 and € 1,833.¹⁵ In Italy a successfully mediated dispute can save 860 days and in excess of € 7,000.¹⁶

Furthermore, getting back to the idea of the “win-win” approach, mediation is a more flexible means for parties to decide the outcomes of proceedings.¹⁷ In some cases it can be of utmost importance as it allows to find a solution that does not lead to the ruin of one or other of the conflicting parties.

Taking all of these considerations into account, it would be advisable for SMEs to contemplate the use of mediation as an alternative to litigation and as a conflicts’ solution tool that, “can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties.”¹⁸

11 See: ADR Center, *The Cost...*, *op. cit.*, p. 26.

12 See: C.J. Menkel-Meadow, L.P. Love, A.K. Schneider, *Mediation: Practice, Policy and Ethics*, New York, 2013, p. 442.

13 European Parliament, Directorate-General for Internal Policies, *Rebooting...*, *op. cit.*, p. 124.

14 14 days in Bulgaria and 368 in Finland. See ADR Center, *The Cost...*, *op. cit.*, p. 49.

15 European Parliament, Directorate-General for Internal Policies, *Rebooting...*, *op. cit.*, p. 126.

16 See. European Parliament, Directorate-General for Internal Policies, Policy Department C Citizens’ Rights and Constitutional Affairs, *Quantifying the cost of not using mediation – a data analysis*, Brussels 2011, p. 4.

17 C.F. Lo, *Desirability of a new international legal framework for cross-border enforcement of certain mediated settlement agreements*, “Contemporary Asia Arbitration Journal” 2014, vol. 7, No. 1, p. 121.

18 European Commission, 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, Brussels, COM(2016) 542 final, p. 2.

2. European Legal Framework on Mediation in Civil and Commercial Matters

The first step towards alternative dispute resolution on the EU level was made by the Council in May 2000, by adoption of the Council Conclusions on alternative methods on settling disputes under civil and commercial law. Nevertheless, it took eight years to adopt Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters¹⁹ (Directive 2008/52/EC) that is applicable to all MSs except Denmark.

As Soletó Muñoz, professor and mediator points out, the “EU impetus for mediation converges with the necessities of the society and the citizen of the 21st age: the quality of conflict solution, the satisfaction of the citizen, efficiency of the judicial system that not only embraces judicial resolutions, but also integrates other complementary systems to the access to justice”.²⁰

Recital 8 Article 1(2) of Directive 2008/52/EC, determines that it is applicable to cross-border disputes. Nevertheless, it does not impede the spreading of its application to domestic conflicts as well.

Article 2 provides the definition of cross-border dispute relating it to one of the following alternatives:

- When at least one of the parties is domiciled in a MS other than that of any other party on the date on which:
 - the parties agree to use mediation after the dispute has arisen,
 - when mediation is ordered, or suggested by a court, or
 - when it derives as an obligation under national law.
- When the place of judicial process or arbitration following mediation is initiated in a MS other than that in which the parties were domiciled on the date first mentioned above.

In all MSs except Austria and United Kingdom, the provisions of Directive 2008/52/EC are transposed for the application to both domestic and cross-border disputes.²¹ In Austria, national mediation is regulated by the Austrian Code of Mediation in Civil Matters (ACMC) and EU cross-border mediation – by the EU Mediation Code. International mediation outside the EU does not have any specific regulation in Austria, but „if the parties choose a mediator, registered according to Austrian law,

19 OJ L 136, 24.5.2008, p. 3-8.

20 H. Soletó Muñoz, *Mediación y resolución de conflictos: técnicas y ámbitos*, Madrid 2011, p. 24.

21 See: M.J. Martínez Iglesias, *La Directiva de la Unión Europea sobre ciertos aspectos de la mediación en asuntos civiles y mercantiles y su aplicación*, (in:) M. García Tomé, J.L. Guzón Nestar, *La mediación en Europa*, Salamanca 2015, p. 47.

the ACMC is applicable²². In the United Kingdom a separate regulation for cross-border mediation has been adopted.²³ In other countries (for example, Hungary and Spain) a monistic approach is applied,²⁴ i.e., national and cross-border mediations are regulated by the same law.

The legislators of some MSs have gone even further, for example in Spain, provisions of Spanish Law 5/2012 of 6 July on Mediation in Civil and Commercial Matters (Law 5/2012) is applied not only to mediation within the EU, but to any foreign country. It also broadens the definition of cross-border mediation and considers as such a mediation which execution or some consequences occurs in other State.

The Directive is not applied to:

- rights and obligations that do not derive from the principle of disposition,
- pre-contractual negotiations or processes of an adjudicatory nature,
- customs or administrative matters,
- *acta iure imperii*.

Despite its excellent initiative to promote the use of mediation at the EU level, the Directive does not regulate mediation in detail and only establishes a:

- requirement of quality that has to be foreseen on a national level by means that the MSs consider appropriate;
- need for effective control mechanisms in the MSs;
- confidentiality rule for mediators and persons involved in administration of mediation. The only allowed exceptions are related to the protection of public policy or implementation/enforcement of mediation agreement of the procedure where they have been participating;
- requirement of availability of information about the method of mediation to the general public.

Nevertheless, the Directive is considered as “a ground-breaking and standard-setting benchmark in the field of mediation legislation”²⁵ as almost half of MSs previously had had very superficial regulation of mediation or no legislation at all and were forced to modify it in order to fulfil European requirements.

In order to promote mediation at the national level, some special rules were adopted by MSs. For example:

22 U. Frauenberger-Pfeiler, Austria, (in:) C. Esplugues, J.L. Iglesias, G. Palao (eds.), *Civil and Commercial Mediation in Europe*, Cambridge 2013, p. 6.

23 See: E. Crawford, J.M. Carruthers, United Kingdom, (in:) C. Esplugues, J.L. Iglesias, G. Palao (eds.), *Civil...*, *op. cit.*, p. 521-522.

24 See: J.L. Iglesias Buhigues, C. Esplugues mota, G. Palao Moreno, R. Espinosa Calabuig, C. Azcárraga Monzonís, Spain, (in:) C. Esplugues, J.L. Iglesias, G. Palao (eds.), *Civil...*, *op. cit.*, p. 450.

25 European Parliament, Directorate-General for Internal Policies, Policy Department C Citizens' Rights and Constitutional Affairs, *Quantifying...*, *op. cit.*, p. 3.

- All MSs have introduced provision that allows the court to suggest the use of mediation;
- In some MSs the court can impose an obligation to use mediation in certain cases or in some subject matters mediation is established as an obligatory step in dispute resolution;
- In some MSs the fees and costs of court proceedings are partly reimbursed if an agreement is reached through mediation;
- Some MSs envisage penalties for non-use of mediation or for breach of the mediation agreement.²⁶

It is very important to point out that enforceability of agreements resulting from mediation provision established in Article 6 of the Directive 2008/52/EC is unique and does not have equivalence at international level. It establishes the MSs' obligation to enforce mediation agreements if parties jointly (or one party with the consent of the other) apply for it. According to this Article, the enforceability can be refused only when: "the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability". Additionally, if an agreement is enforceable in one MS, it should be recognised as such in other MSs as well.

Each MS can choose whether agreement will be enforceable by a decision of a judge or other competent authority. Some of the MSs have gone even further and do not explicitly require the consent of both parties, for example Belgium, the Czech Republic, Hungary and Italy. In Greece and Slovakia the right to request enforceability without the consent of the other party is explicitly established.²⁷

3. Possible Obstacles in Cross-Border Mediation

If any dispute can be affiliated with such differences between parties as gender, age, social standing, profession, education, cross-border disputes also carry differences of culture, legal system and language²⁸ and all of these peculiarities will influence the mediation process.²⁹

Nevertheless, none of these aspects is mentioned either in the Directive or in the European Code of Conduct for Mediators. The latter refers to independence, impartiality and confidentiality requirements of the mediator, but not to his or her capabilities needed in cross-border mediation. The only provision that can, in some way,

26 See: European Commission, Report..., *op. cit.*, p. 7-9.

27 European Commission, Study for an evaluation and implementation of Directive 2008/52/EC – the "Mediation Directive", Brussels 2013, p. 18.

28 See: M. Gisbert Pomata, S. Díez Riaza, *El contrato de mediación y el acuerdo de mediación civil y mercantil*, Navarra 2014, p. 284.

29 See: M.M. Love Schneider, *Mediation...*, *op. cit.*, p. 262.

be linked to such needs states that, “circumstances of the case”³⁰ shall be taken into account.

At national level, MSs establish procedures of intra- and extra-judicial mediation, but without placing any additional emphasis on special competences of cross-border mediators.

For instance, in Spain under Law 5/2012, the requirements for mediators in national and cross-border disputes are the same. Although the Real Decree 980/2013 of 13 December on Development of Certain Aspects of the Law 5/2012 of 6 July on Mediation in Civil and Commercial Matters, provides some details on the training and registry of mediators, the only reference to cross-border mediation is made in one of its additional provisions, establishing that institutions responsible for mediation shall, in their annual reports, provide information about cases of cooperation with other ADR entities that facilitate cross-border mediation.

Thus, without the promotion of special trainings in cross-border mediation the Directive and its national transposition can convert into a formal possibility without its real implementation.

As already mentioned, the Directive does not specify whether agreements that results from mediation shall be treated as agreements of a procedural nature or as contracts. Thus, in some countries (Belgium, the Netherlands, Slovenia) it is treated as contract, in some – as enforceable title (Austria, Portugal), in others it depends on whether it has been enforced by a competent authority (France, Germany, Italy, Luxemburg, Poland, Sweden), while elsewhere it depends on whether it is an intra-state or cross-border agreement (United Kingdom).³¹

Such differences in regulation can provoke obstacles in the enforceability of cross-border cases where one MS considers it a contract and the other an enforceable title. For example, according to Spanish law, a mediation agreement is a procedural act and in order to be enforceable it shall have such power in the state where it has been concluded. Spanish legislation provides an opportunity for an agreement not enforced in the state of its conclusion to have confirmation of enforceability carried out by a Spanish notary on the joint request of the parties involved. But not all MSs envisage enabling such an opportunity.

In cross-border execution of an enforced agreement, the competent authorities of the executing MS can also question the rules of enforceability that were applied. For example, where the MS of execution requires a consent of all parties for the enforceability and such requirement has not been applied by the MS from where a set-

30 European Code of Conduct for Mediators, p. 2, http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf (12.12.2015).

31 See. Linklaters, Commercial Mediation – A Comparative Review 2013, p. 11, 16, 18, 24, 28, 33, 35, 42, 44 <http://www.linklaters.com/Insights/commercial-mediation-comparative-review-2013/Pages/Index.aspx> (29.01.2016); European Commission, Study..., *op. cit.*, p. 28.

tlement agreement comes from. As it was noticed previously, although Article 6 of the Directive establishes the necessity of the consent of both parties, some MSs have considered this a minimum standard and enforce agreements submitted by a single party as well.

Unfortunately, the European Commission in its recent report on application of the Directive has reflected only the issue of its transposition not its application in practice. Moreover, the Commission has not proposed any revision to clarify at the EU level some of its controversial aspects.

Conclusions

As stated in the Study of the European Commission: “In line with the Justice for Growth agenda and the Europe 2020 Strategy, mediation could be seen as a means to improve the efficiency of the justice system and to reduce the hurdles that lengthy and costly judicial procedures create for citizens and businesses.”³²

Bearing in mind the peculiarities of SMEs and their current growing position in the international marketplace, cross-border mediation could serve them well as a suitable alternative for cross-border judicial procedure in the solution of civil and commercial disputes.

The EU has taken very important steps towards the regulation of cross-border mediation among MSs, and its promotion. Nevertheless, the space available for national regulation in some aspects is too broad which could lead to misunderstandings or legal collisions at the execution stage of settlement agreements.

Greater clarity of the position at the EU level would improve these aspects making cross-border mediation more coherent across the EU and more advantageous for SMEs in the pursuit of their business activities.

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