The European Directive on Commercial Mediation: What It Provides and What It Doesn't

By F. Peter Phillips[1]

On May 21, 2008, the European Parliament enacted a Directive to encourage the use of mediation in civil and commercial matters, and to make uniform throughout the European Union the legal status of certain attributes of that practice. The Directive[2] culminated a ten-year process that occasioned each member state within the European community to consider the role of mediation in commercial affairs, and to take a position on the minimum requirements of the use of commercial mediation throughout the region.

The Directive represents an intentional effort, on a pan-European scale, to achieve a degree of homogeny and predictability in the treatment of mediated resolutions of commercial disputes. Such a singular event deserves study, encouragement and support.

CONTEXT OF THE DIRECTIVE

As the practice of commercial ADR has grown around the world, certain aspects of its legal and commercial recognition have followed – some quickly, as in the United Kingdom, and others slowly. Standardized legal status has been elusive. In the United States alone, some jurisdictions have adopted the Uniform Mediation Act and others have not; some states have approved ethical regulations requiring attorneys to advise clients of ADR and others have not; and so on.

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In Europe, the absence of uniform treatment of rudimentary ADR processes has been regarded by some observers as an inconvenience, and by others as a serious hindrance to commercial growth in the region. The process of regional homogenization began with a call, in 1998, for the European Commission to issue a Green Paper on the use of mediation in civil and commercial matters.

The European Commission's 2002 Green Paper[3] set forth some observations on the desirability of pan-European ADR practices in a wide range of civil disputes (including family law, commercial disputes and consumer complaints), and prompted more than 160 responses.[4] Despite this showing of interest, the European Parliament remained unconvinced that a centrally-promulgated set of shared requirements was needed in order to stimulate economic efficiencies in the management and resolution of commercial disputes in the region.

In 2005, Member of European Parliament Arlene McCarthy promulgated a questionnaire on the proposed ADR Directive that had the effect of convincing some skeptics that uniform treatment of ADR was in fact needed, at least in the commercial sector. The energy driving the movement was then recharged, and the Directive was eventually approved in 2008.

POLITICAL PHILOSOPHY OF THE EUROPEAN PARLIAMENT

Europe is not a sovereign state, and the European Parliament is not a strictly legislative body in the way Americans conceive the term. Rather, the sovereign states who are members of the European Union have agreed to grant to a European Parliament the power to issue "Directives," which are statements of political or governmental objectives that each of the sovereign states constituting the Union must thereafter achieve by enacting laws that are consistent with those objectives. That is to say, in the case of the ADR Directive, the members of the European Union must, within 30 months of passage of the Directive, enact their own laws whose provisions are consistent with the stated provisions in the Directive; but each state is free to do so pursuant to laws of its own making.

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He acknowledges the assistance of Mark Appel, Senior Vice President of the International Center for Dispute Resolution, in reviewing and commenting on this article.
2. The text of the Directive is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0052:EN:HTML.
3. The text of the Green Paper is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52002DC0196:EN:HTML.
4. See summary at http://ec.europa.eu/civiljustice/adr/adr_ec_en.pdf.

The Directive is therefore not a harmonious law applicable throughout Europe, but rather a statement of political principles that are to be enacted by the several states so as to be consistent throughout Europe.

Two philosophical principles inform this process, and their effects may be seen in the substance of the Directive itself. These are "subsidiarity" and "proportionality." The basis of these principles is set forth in a 2001 White Paper titled "European Governance":[5]

Proportionality and Subsidiarity: From the conception of policy to its implementation, the choice of the level at which action is taken (from EU to local) and the selection of the instruments used must be in proportion to the objectives pursued. This means that before launching an initiative, it is essential to check systematically (a) if public action is really necessary, (b) if the European level is the most appropriate one, and (c) if the measures chosen are proportionate to those objectives.[6]

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"Subsidiarity" teaches that no act should take place by any level of government that could equally effectively take place by a smaller one, or a more local one. Thus, in the ADR Directive, the government in Brussels is agreeing upon broad outcomes, but then instructing each of its constituent governments to do the actual enacting of legislation.

"Proportionality" instructs that a government should reach only so far as is absolutely necessary in order to accomplish a particular goal and no further. Adherence to this principle is evident in (for example) the provisions of the Directive that limit its scope to cross-border commercial disputes. Because the initial issue was homogenization of pan-European commercial transactions, then it follows that transactions within a particular member state were not properly within the domain of pan-European concerns and should not be included in the Directive.

PROVISIONS OF THE DIRECTIVE

Scope: The United Kingdom and Ireland have voluntarily agreed to be bound, and Denmark has exempted itself. As a result, all states within the EU except Denmark are bound.

As previously noted, the Directive applies only to cross-border disputes and only to civil and commercial matters. That means that matters that arise internally, between two French companies or between two German companies, are unaffected by the Directive. The Directive also excludes disputes sounding in family law and community law.

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Finally, the Directive does not apply "to rights and obligations on which the parties are not free to decide themselves." The import of this exclusion in a commercial context is unclear, since there are many commercial contracts with respect to which one could argue that one party or the other was "not free to decide themselves." Prospective McDonald's franchisees, for example, are presented with a contract that they may either accept or reject; McDonald's does not negotiate the provisions of its agreements with each franchisee. Thus the application of this proviso to numerous commercial transactions that are presumably within the intent of the Directive drafters will need to be developed; it will be interesting to watch what the various national legislatures do with the language.

Mediation Quality: The Directive calls on the states to "encourage voluntary codes of conduct by mediators and by organizations providing mediation services." This is substantially short of a requirement that mediators must be licensed. Instead, the states "shall encourage codes of ethics and shall encourage training of mediators to ensure effectiveness, impartiality, and competence in relation to the parties."

Status of Agreements Achieved Through Mediation and of Agreements to Mediate: The Directive requires states to provide for enforcement of agreements that result from mediation. This is particularly useful in a region of many languages and laws, almost all of whose civil justice systems are enshrined in a Civil Code. Each Civil Code will now grant judges the power to recognize settlement agreements obtained through mediation to be enforceable contracts.

5. COM(2001), 25.7.2001. Available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf.
6. Id. at 10-11.

However, the Directive does not address whether an agreement to mediate – including for example an agreement that mediation must take place as a condition precedent to arbitration – is enforceable.

Confidentiality: Article Seven of the Directive addresses the confidentiality of mediation processes and provides: "Mediators and those administering mediation shall not be compelled to give evidence in civil and commercial judicial proceedings or in arbitration" except in limited circumstances.

CRITIQUE

The Directive achieves its main goal: It recognizes and establishes uniform judicial treatment of cross-border commercial dispute resolution throughout the European market. This is a signal achievement – one that has frankly eluded the United States, whose various jurisdictions have failed to embrace the Uniform Mediation Act[7] and instead have adopted a hodgepodge of mainly court-initiated principles addressing the issues that the Directive considers.

The restriction of the Directive to cross-border commercial transactions is a disappointment. As noted, above the concept of "proportionality" would dictate that, if homogenization of practices among the member states is the goal of the Directive, then homogenization of practices within a single member state is unnecessary to attain it. Similar respect for the sovereignty of member governments informs American notions of federalism. Yet as a matter of practicality it would require no more effort to allow businesses to realize the economic benefits of commercial mediation in their dealings with domestic business partners than in their dealings with cross-border business partners. One hopes that, if and when such economies are actually experienced, business managers will apply the lessons of cross-border conflict management to domestic situations on their own initiative.

The Directive's concern about the quality of the mediation service seems disproportionate. It calls upon member states to encourage "voluntary codes of conduct by mediators and organizations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services." It also encourages "the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties."[8]

The challenge to the growth of commercial mediation in Europe, however, is not that it is practiced poorly or that mediation centers have not adopted effective codes of conduct. The problem is that commercial mediation itself is not practiced. Commercial enterprises in Europe have a comparatively poor understanding of the mediation process as a management tool, and are unaware of the benefits that accrue from its systematic use.[9]

Similarly, most European courts outside the United Kingdom[10] do not appreciate the nature of the process and the effect that court-annexed mediation can have on the efficiency of dispute resolution in their jurisdictions. The Directive does not address this central challenge of education, advocacy and end-user training, but rather addresses the ethical regulation and quality standards of a profession for which there is, sadly, very little current demand.[11]

By far the most egregious flaw in the Directive is its treatment of the confidentiality of statements made, and information produced, in the course of a mediation. Article Seven of the Directive provides:

CONFIDENTIALITY OF MEDIATION

1. Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:

   (a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or

   (b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

2. Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation.

7. The Uniform Mediation Act was promulgated by the National Commission on Uniform State Laws in 2003. The text of the Act, commentary on its provisions, and a list of state legislatures that have considered, adopted or rejected the Act is available at http://www.nccusl.org/Update/ActSearchResults.aspx.
8. Directive, supra note 1, at Article Four.
9. See generally Response of the International Institute for Conflict Prevention and Resolution ("CPR Institute") to Questions Posed by Arlene McCarthy, WEP, Concerning the Proposal for a Directive of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters (2005), available at http://cpradr.org/Portals/0/EU%20Parliament%20Questionnaire%20Response.pdf.
10. The 1998 changes to the Civil Procedure Rules that took the name "Woolf Reforms" had the intended effect of encouraging the mediation and settlement of civil and commercial cases in the United Kingdom within months of its enactment. See http://www.cedr.com/index.php?location=/news/archive/20000407.htm&param=releases.
11. The European Commission's seeming fixation upon the quality of (practically nonexistent) mediation services is illustrated in the fact that a proposed Code of Conduct for Mediators (see http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.htm) was posted in 2004, four years before the Directive itself was enacted.

The effect of this provision is that any statement, offer, demand or concession made by a party during mediated settlement discussions can be repeated, reproduced, compelled, broadcast or entered in evidence by anybody – except the mediator. Commentators tried to make clear to the drafters of the Directive that the mediator is not the problem – the parties themselves are. The heart of the concern is that no well-counseled party will enter into serious negotiations of compromise if one's adversary can take any statement made during negotiations and use it in open court, in arbitration, in regulatory proceedings, or in the press. A consortium of pan-European businesses[12] suggested that the Directive's confidentiality provision should:

- Act as both a privilege and a bar on admissibility. That is, statements, documents and other information conveyed in a mediation should not merely be non-admissible as evidence, but protected from discovery as confidential.

- Apply to all participants in the mediation process – parties, counsel, administrators, and others – not merely to mediators. The privilege should not only reside in all such persons, but also apply to them, meaning that each person should have the power to prevent disclosure by any other person.

- Not be limited to subsequent court proceedings, but rather should apply to any proceeding of any type whatsoever in connection with the dispute that was the subject of the dispute that was the subject of the mediation.

- Follow, in its wordings of any exceptions, provisions promulgated by globally recognized bodies such as UNCITRAL.

The decision by the drafters not to accept the core of these recommendations can only be attributed to a disagreement with the logic of their being suggested. It remains to be seen whether this has the effect of hindering efficient negotiations in mediation, or whether a patchwork of disharmonious evidentiary treatments will result. This flaw threatens the entire objective of the Directive.

CLOSING OBSERVATIONS

The Directive's very existence is a major event. The consideration of this Directive by the member states was thorough and deliberative. By virtue of its promulgation, and as witnessed by its passage, the Ministers of Justice of each of the European Union's constituent members studied a topic that most of them had never previously addressed as a legitimate component of public policy. The entire ten-year process of framing, and eventually enacting, the EU Directive speaks to the first plenary opportunity that Europe had to look at this process. In that sense, it is warmly welcome.

About the Author

F. Peter Phillips is a commercial arbitrator and mediator with substantial experience providing consultation on the management of business disputes to companies around the globe.

A cum laude graduate of Dartmouth College and a magna cum laude graduate of New York Law School, Mr. Phillips served for nearly ten years as Senior Vice President of the International Institute for Conflict Prevention and Resolution (CPR Institute). During that time, he earned a reputation as an author, teacher, industry liaison, and systems designer for the avoidance, management and resolution of complex and sophisticated business conflicts.

In 2008, Mr. Phillips formed Business Conflict Management LLC (BCM) in order to offer his direct services as a neutral and a consultant. Through BCM, Mr. Phillips also continues his career as a highly sought-after public speaker, facilitator and instructor.

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12. Response of the International Institute for Conflict Prevention and Resolution ("CPR Institute") to Questions Posed by Arlene McCarthy, MEP, Concerning the Proposal for a Directive of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters (2005), at 5-6. (Available at http://cpradr.org/Portals/0/EU%20Parliament%20Questionnaire%20Response.pdf.)