
Introduction

In the process of enhancing the access to justice, European Union “EU” issued a mediation directive (2008/52/EC) concerning cross-border commercial disputes, which provided rules to govern mediation practices, offering a powerful institutional framework. Professor Jacqueline Nolan-Haley from Fordham University examines the current status of the directive and assesses the legal culture creating thereby.

I will analyze this subject from the perspective of Finnish law. Finland has revised its legislation by issuing a new law concerning the mediation in civil matters and confirmation of settlements in general courts (394/2011).

Provisions of the directive

The article introduces the most significant provisions of the directive. The mediation directive defines mediation as a voluntary process in which a third party assists two or more disputing parties to reach a settlement. A prerequisite to the whole process is the consent of both parties to participate in the mediation. According to the directive, courts can invite parties to use mediation. The court mediation process in Finland also requires the consent of both parties, they have to apply for the mediation and the court decides about the beginning of the process. The precondition for court mediation is that the matter is amenable to mediation, and a settlement is appropriate in view of the claims of the parties.

The directive requires MS’s to provide enforcement mechanisms by the court or other competent authority. The notification of the competent courts to enforce mediation agreements was actually the first deadline to comply by the MS’s after the directive came into force. Finnish court mediation resolution is confirmed by the judge and instantly enforceable. The law also regulates the confirmation of enforceability of a settlement reached in out of court mediation. Section 18 of the mediation act defines this process as follows: “For the purposes of this Act, “out of court mediation” refers to a structured process conducted on the basis of an agreement, rules or another similar arrangement and in which the parties to a civil matter voluntarily seek on their own to solve their conflict amicably with the assistance of a mediator.” The district court may confirm all or part

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1 Jacqueline Nolan-Haley: Evolving Paths to Justice: Assessing the EU Directive on Mediation, page 1
3 The Finnish law on the mediation in civil matters and confirmation of settlements in general courts (394/2011), section 3, 4.
of a settlement reached in out of court mediation enforceable. Proceedings shall be commenced by a written application submitted to the district court office.\(^5\)

Other thing is the quality of the process, since member states “MS” are required to develop effective quality control mechanisms including the code of conduct and mediation training. The article underlines the importance of training concerning the cross-cultural mediation, which probably has not had relevant attention in the member states.

Implementation and compliance with the directive

Member states were obliged to implement the directive. The article however showed that 9 MS’s had not implemented the directive in time. Some states already had sufficient mediation procedures and there has been activity in that sense before, which enabled good conditions for issuing this directive. In Finland’s reply on 16th of September 2011 to the European Commission was stated that directive 2008/52/E is fully implemented (Publications on European information 124/2012). The law on the mediation in civil matters and confirmation of settlements in general courts (394/2011) entered into force in May 2011. The nature of the directive is to give guidelines for the MS to find the proper practices to comply with the directive.

The Finnish mediation procedures seem to be quite successful based on the recent study by Kaijus Ervasti on 29.6.2011 “Court mediation – a quick method of resolving disputes”. Thus, Court mediation is used in all kind of civil cases, which are normally also handled by courts. Especially, this method is used between private persons (62 %). An average disputed interest is 16 724 euro which corresponds to average interests of civil actions in the courts. Most often mediation concerns disputes related to families and housing. In 2006 – 2009, court mediation was requested in the courts of first sentence in 412 cases; mediation was initiated in 358 cases (86 % of requested cases). On yearly level, 100 – 150 cases go to court mediation meaning that this method has been taken into use rather slowly in Finland. However, it has been discovered that the mediation method is faster, helps managing risks, enables reaching versatile solutions and keeps the relations of the parties on a better level.\(^6\)

Future of the mediation

The article addresses as a major challenge of mediation the lack of a uniform model for training and qualification of the mediators. The Directive does not address what level of qualification and training mediators should acquire.\(^7\) This complicates also the implementation of the directive, since MS’s are required to develop efficient methods for training, but they do not have the adequate models for doing that. Referring to the Finnish system, the court mediation is done by a judge. In order to secure the expertise necessary in the matter or otherwise to further the mediation, the

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\(^5\) The Finnish law on the mediation in civil matters and confirmation of settlements in general courts (394/2011), section 20.

\(^6\) K. Ervasti 29.6.2011 “Court mediation – a quick method of resolving disputes”

mediator may with the consent of the parties have an auxiliary. In the out of court mediation, the mediator has to be trained to mediate and conducts mediation tasks privately or in an organization. However, the law does not define further requirements.

Furthermore, the article raises the need of widespread culture of mediation and alternative dispute resolution. Three development areas are brought up. First, to require lawyers to advise clients about ADR processes. Although the directive encourages the lawyer to advise about mediation, it should be taken further, as putting down an obligation to do so. Mediation training should be introduced already in law schools, students to have at least the basic knowledge of mediation. Secondly, EU should increase confidentiality protection, since only the mediator is prohibited from disclosing information. Thirdly, EU should develop ethical norms for mediation advocates in cross-cultural settings. The European Code of Conduct for Mediators was developed in 2004 providing ethical advice to the mediators. To achieve a certain level of ethics it would be good to have the knowledge already from law schools.

Conclusion

The directive on mediation has been working as a starting point to mediation processes. At least in Finland it has been quite successfully complied. However, the mediation process should be developed further and try to solve the problems with training and qualifying the mediators as well as the inadequate information to clients about the process. Confidentiality and ethical dilemmas also need solving. Now it seems that these problems are left for the MS’s to solve, however to achieve a unified mediation process in Europe might need more actions from the legislative bodies in EU.

8 The Finnish law on the mediation in civil matters and confirmation of settlements in general courts (394/2011), section 5.

