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

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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 directive1 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 alternative dispute resolution (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 (UMA)2 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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1 The text of the directive is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0052:EN:HTML.
2 The Uniform Mediation Act was promulgated by the National Commission on Uniform State Laws in 2003. The text of the UMA, commentary on its provisions, and
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.

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.

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\(^3\) The text of the Green Paper is available at http://eur-lex.europa.eu/LexUri-Serv/LexUriServ.do?uri=CELEX:52002DC0196:EN:HTML.