

Mediation Manifesto

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Preliminary observation

Disputes are part of human nature and resolution of conflicts can come at a high cost. This is not only about legal and economic costs borne by the people involved, but also the social, developmental, environmental and strategic costs of conflict.

Mediation as a dispute resolution process is unanimously recognised as an efficient alternative tool to reduce the cost of justice and to improve its access. It impacts positively on the parties involved in a dispute and on the European economy as a whole. The study “rebooting the mediation Directive” published by the European Parliament in January 2014 estimates that if trial was systematically preceded by mediation in civil disputes only, the yearly direct cost saved would be between €15 billion and €40 billion and the yearly accumulated waiting time avoided would be 8 million years!

Streamlining commercial dispute resolution is, in the opinion of European Chambers of Commerce & Industry, a way to save on these costs and enhance the competitiveness of our economy. Chambers hereby call on the EU institutions to take further steps in that direction, notably:

1. Ensure the consistency of definition
2. Promote mediation
3. Ensure the training of mediators: standards and accreditation
4. Work on court annexed mediation
5. Launch a mediation pledge
6. Gather robust mediation data
7. Pursue a more balanced relationship between court cases and mediation cases
8. Practice what they preach by integrating mediation into their own contract terms!

EU legislative intervention is required to:

- Require counsels to inform parties of mediation when relevant as an alternative to litigation and enforce penalties for lawyers who fail to do so.
- Require parties who refuse to participate in mediation to provide a reason for this refusal.
- Make sanctions possible for parties' refusals to attend mediation proceedings, such as holding these parties liable for litigation costs even if they prevail in the subsequent trial of the case.
- Grant judges the power to order litigants to attempt mediation, with the facility for the parties to opt out at little or no cost during the first meeting.
- Require judges to specify why they did not refer a case to mediation.

EU non-legislative intervention (recommendation) is required to:

- Recommend against use of the term mediation for any dispute resolution process where the third person ("neutral") is not independent from the parties (such as institutional mediation or in-house mediation) and do not decide ultimately on the solution to the dispute (such as arbitration).
- Seek more consistency in the use of the term mediation and refrain from multiplying its use in another context than the one of Directive 2008/52/EC.
- Provide incentives for parties who choose to mediate, such as public funding, fiscal incentives or refunds of court fees.
- Limit the obligation - when mediation is made mandatory (by contract, a decision of the judge or the law) - to participation in good faith in a meeting with the mediator with the objective to explore the applicability of mediation to the specific case. In all cases, parties should be allowed to "walk away" at any time and at reasonable cost.
- Support the development of standards related to mediator skills and mediation training.
- Press for mediation to form part of the curriculum in a Master Degree in Law.
- Ensure that parties in a conflict are never obliged to reach an agreement or sign a memorandum of understanding at the end of the mediation process.
- Assign Chambers of Commerce and Industry to act as trusted third parties and register mediation settlement in the area of commercial mediation.
- Require candidate mediators to complete initial as well as continual training in order to maximise the value added of mediation and enhance the chances of success.
- Encourage Member States to promote public or private accreditation systems in order to improve the quality of the service, as well as to make research on mediation possible (scoreboard).
- Establish a mediation advocacy education programme for judges and particularly for those of the new Unitary Patent Court.
- Include the number of cases referred to mediation as part of the assessment of judges' performance.
- Create an EU-wide "mediation pledge" for corporations, law firms and public agencies.
- Oblige public administrations to consider systematically the option of integrating a mediation clause in contracts.
- Further promote mediation in the EU countries that do not yet have a mediation culture.
- Encourage private entities to include mediation clauses in their contracts and engage Chambers to develop standard mediation clauses and disseminate them to their members.

This paper is an abstract of a position paper published in April 2014 on:

http://www.eurochambres.be/objects/3/Files/EUROCHAMBRES_Position_Paper_B2B_mediation.pdf

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