Abstract

The objective of this dissertation is the determination of the significance of procedural aspects of mediation and the answer to the question to what extent it has been considered within European Union law. The research is based on the assumption that the acknowledgment of a procedural relevance of mediation is crucial for its overall effectiveness.

Mediation is besides its feature as a communication technique becoming ever more important as a dispute resolution procedure for civil and commercial conflicts in Europe. In this context the role of mediation within and in relation to other procedures for the resolution of disputes has to be considered.

While on one hand the terminology and the differences between mediation and other forms of Alternative Dispute Resolution (ADR) as well as certain judicial attempts of settling disputes may not always be easily determined, on the other hand, it can be stated that the ADR form of mediation is beyond its early stages and clearly shows its own procedural relevance.

The comparison of European national jurisdictions in the field of mediation leads to a core definition of mediation as a voluntary process where a third person without the authority to pass a binding decision over the dispute between the parties, systematically assists them to reach by themselves a resolution of their conflict. This definition already indicates mediation specific principles of which the principle of the autonomy of the parties and based here upon the voluntary nature of the mediation process can be addressed to as constitutive elements of mediation, together with the principle of the neutrality of the mediator and the confidentiality of the mediation process. Besides, also general procedural principles apply to mediation. Emphasis must be laid on the fair and equal treatment of the parties as a necessary minimum standard of the mediation process.

Overall, it can be said that mediation does not take place in a „legal vacuum“ but that the law needs mediation as a relief measure and mediation needs the law in order to ensure its functioning.

Based on this background, the development of mediation has reached a level where institutional rules for the sake of safeguarding mediation and creating certain mediation standards have become necessary. Such rules already partly exist throughout and outside Europe and overall there can be found a „structure of mediation rules“, consisting of contractual instruments as well as codified national rules and supranational and international frameworks for the regulation of mediation.

This leads to the fact that the relevant question is not *whether* there is a need for legal rules on mediation, but rather of *which kind* these rules should be. The answer depends on the actual contents and the single aspects of the mediation process subject to potential regulation. Bearing in mind that informality and flexibility form important values of mediation and overregulation

must therefore be avoided, there is, however, the need of regulation and codification especially concerning those areas of mediation, where an interaction between the mediation process and concurrent or subsequent court proceedings emerges.

In order to encourage the use of mediation, mediation laws and procedural legal rules must protect the mediation process from potentially negative influences of concurrent or subsequent court proceedings. Such influences can - depending on national legal systems - belong to the area of procedural as well as substantive law and concern first of all the danger of expiry of limitation periods during the mediation process. Another important issue is the legal protection of confident information, which has been revealed during the mediation. A party must be able to trust that such facts or documents will be treated as confidential, especially in the case that mediation fails and the dispute in question becomes subject of a court proceeding. Further, regulatory action is required as far as a higher (direct) enforcement level of settlement agreements reached in mediation is concerned. The legal fixation of the mentioned aspects is hereby not contradictory to the parties‘ autonomy, which is crucial in mediation, but the regulation of these areas on the contrary fosters such autonomy of the parties as it provides them with the necessary basis in order to develop independent and interest oriented solutions. Furthermore, a legal framework of default rules about the effective conduct of mediation can ensure the quality and a higher acceptance of mediation by potential users.

Quite a different issue is whether there is a necessity of harmonisation of mediation rules. It can be concluded that as long as there are differences in mediation regimes in the Member States of the EU, the effectiveness of the European mediation market is limited. Parallel to the area of conventional procedures of dispute resolution, which is being attended by the so called EU procedural law, there is therefore also a need for approximation of laws and regulations concerning mediation.

Based on the outcome of a comparative study within selected jurisdictions in the EU and the hereof deducted requirements and necessities of the mediation process, the analysis of the instruments of EU law with relation to mediation shows that while there are without doubt forward pushing approaches, there are at the same time not neglectable loopholes in the regulation of procedural aspects of mediation on the EU level.

First steps toward the acknowledgement of procedural significance of mediation have been manifested in the creation of important principles for certain forms of ADR in the area of consumer protection and in particular in the Commission Recommendation 2001/31/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes. Individual procedural aspects of mediation have been regulated within the area of judicial cooperation in civil matters above all in the Directive 2008/52/EC of the European Parliament and the Council of May 2008 on certain aspects of mediation in civil and commercial matters. The objective of the Mediation Directive to establish a sound relationship

between mediation and civil proceedings certainly constitutes an important pre-requisite for the regulation of procedural aspects of mediation. However, it cannot be denied that the overall motivation to achieve a better access to justice by regulating mediation and hereby promoting the use of mediation and as a consequence off-load pressure on the court systems of the Member States is mirrored in a certain loss of „mediation friendliness“ in the Mediation Directive.

Within the legislation process towards the Mediation Directive, already existing regulatory instruments on mediation of international organisations and third countries have been examined and/or taken into consideration by the EU law makers, which is why they also constitute a relevant basis for comparison and evaluation of the concepts on mediation applied in EU law. As a result, the following positive and negative features of procedural aspects of mediation in EU regulatory instruments can be presented.

The Mediation Directive makes an important statement about the admissibility of different types of mediation concerning the controversial interpretation of the voluntary element in mediation as it applies a narrow and therefore liberal understanding of the voluntary nature of mediation which therefore does not constitute an obstacle to mediation obligatory by law or a court order. Opposed to this issue, the Mediation Directive does not clarify the relation between agreements to mediate and the (premature) initiating of court proceedings. Overall, the legal act remains rudimentary about the procedural impacts of the different ways of initiating mediation. Another unfortunate approach of the Mediation Directive has to been seen in the decision against safeguarding the confidentiality of the mediation process by requiring restrictions on admissibility of evidence from mediation in subsequent court proceeding, also binding for the parties. Especially in this area the Mediation Directive stays behind the confidentiality provision of comparable legal instruments, e.g. the UNCITRAL Model Law on International Commercial Conciliation.

A feature fostering mediation is the mechanism of the Mediation Directive on the enforcement of settlement agreements, which in connection with, for example, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, constitutes an important contribution in closing existing regulatory loopholes in this area of mediation.

On the whole, the Mediation Directive is, however, lacking regulatory depth concerning the main provision of the legal act as well as the fact that it generally refrains from regulating the mediation procedure as such. This limited concept is only partly compensated by the European Code of Conduct for Mediators. While in total a homogenous instrument, which provides for important and, for example, in the area of the independence and impartiality of mediators,

exemplary drafted provisions and constitutes a certain model mediation process, as an soft law instrument, the impact of the European Code of Conduct for Mediators is certainly limited.

An essential value for mediation can be derived from the judgment of the Court of Justice of the European Union in the case *Alassini and others v. Telecom Italia SpA and others* of 18 March 2010, C-317/08 - 320/08. In its decision the Court found that from the point of view of EU law a mandatory attempt of an out-of-court settlement prior to a court proceeding which merely and not essentially delays but does not hinder a court proceeding in the matter in question, is not contradictory to the principle of effective judicial protection. This finding of the Court is of outstanding significance for ADR procedures in general and mediation and its relation to court proceedings in particular and it completes as such the legal instruments of the EU regulating mediation.

Overall, regardless a certain incompleteness of the EU law in the given context of procedural aspects of mediation, in particular the binding main provisions of the Mediation Directive push forward the adaptation of national rules on mediation also to already existing international regulatory instruments. It cannot be denied that the EU lawmakers have contributed to the safeguarding of the mediation process and have confirmed the overall trend of regulation and „proceduralisation“ of mediation. In any case, a sensible legal framework for mediation and its institutional guarantees have been created in the EU.

Based on the limitation of the scope of the Mediation Directive to mediation with cross-border implications and the shifting of the regulation of the mediation process as such to the stakeholders, however, the complete and satisfactory regulation of mediation, its procedural issues and in the consequence the level of functioning of the mediation process throughout Europe depends to a large extent on the approach of the Member States concerning the implementation of the Mediation Directive.

Nevertheless has the EU law come a long way in fostering the development and the use of mediation and a significant further evolution of this form of ADR procedures should be expected.