

Second report of the “Future of Mediation in Belgium” (FMB) initiative
[Following the brainstorming event of the 10th February 2014 - *Brussels Institute for European Studies (IES) Brussels*]

1. Introduction

The FMB initiative is an initiative that aims to provide a joint communication platform to all mediation stakeholders, thereby offering them the opportunity to contribute to identifying best practices (including legal amendments) and setting out a common action plan for the enhancement and promotion of Mediation in Belgium.

To this end, Belgian mediation stakeholders gather periodically (at least twice a year) in the form of brainstorming sessions and/or working groups. The meetings are held in English, Dutch and French (without simultaneous translation).

Each session is moderated by members of the FMB working group, currently composed of Benoit SIMPELAERE, Bernard CASTELAIN, Ivan VEROUGSTRAETE, Jef MOSTINCKX, Johan BILLIET, Philippe BILLIET, Willem MEUWISSEN and Barbara GAYSE representative of the Federale Bemiddelingscommissie- Commission Fédérale de Médiation.

The first FMB meeting was held on 27/06/2013 in the Brussels Palace of Justice and resulted in the first FMB report, available on <http://www.arbitration-adr.org/documents/?i=315>.

The second FMB meeting was held on the 10th of February 2014 and results in the present report, that will be made available on the 17th of March 2014.

The FMB project is an initiative that was created with the support of AIA IVZW (www.arbitration-adr.org).

2. Brainstorming event 10/02/2014

2.1 General: What should Belgium do in order for the EU Mediation Directive to reach its goals in Belgium?

The discussion started by introducing a very recent study conducted by the European Parliament entitled ‘*Rebooting the Mediation Directive 2014: Assessing the Limited Impact of Its Implementation and Proposing Measures to Increase the Number of Mediations in the EU.*’ This study is available on <http://www.arbitration-adr.org/news/>.

There was a consensus that the objectives of the European Mediation Directive have failed to reach their full potential in Belgium and would most likely continue to do so until mediation is suitably incorporated into Belgian Law and Practice.

A paradox was identified between the benefits of Mediation and its current very limited use. The referred 2014 study supports this finding by mentioning that despite most member states

of the EU having taken positive steps towards embracing mediation, statistics show that mediation is still used in less than 1% of cases.

Subsequently, the top ranked legislative measures provided by Member states to improve the status quo were discussed. Of these, the following options were discussed extensively:

- 1) Make mediation mandatory in certain categories of cases.
- 2) Require mandatory mediation information sessions before litigation.
- 3) Provide incentives for parties who choose to mediate.
- 4) Require counsel to inform parties of mediation as an alternative to litigation.
- 5) Impose sanctions for parties' refusals to mediate.
- 6) Grant judges the power to order litigants to mediation.

The participants were in favor of implementing points 2 – 5 in Belgium:

- Regarding mandatory mediation (e.g. Italy-family law) or mandatory mediation information sessions before litigation (e.g. Romania), reference was made to the fact that the study shows that a mitigated mandatory mediation system results in a significant increase of mediations.
- The general consensus was that where mandatory mediation as a whole may be viewed as too drastic a move, mandatory information sessions on mediation would be beneficial for Belgium. Reference was made to the Romanian Mediation Act providing for mandatory information sessions prior to access to court, resulting in a success story for mediation in Romania.
- Most were in agreement that mediation should remain voluntarily in essence but that this does not prevent judges from imposing cost sanctions (e.g. allocation of legal indemnity) on claimants who fail to demonstrate reasons why they did not try mediation or on parties who abusively refuse to mediate.
- Consensus was reached that legislation establishing a properly outlined education program, pilot projects, mediation vouchers, a 'settlement week' program in Belgium, political/agency promotion and uniform certification of mediators on an EU level is to be put in place.
- Consensus existed that lawyers should in the first place help their clients find an amicable settlement but that the standard training of lawyers does not even include a mediation and negotiation course. Many lawyers are therefore unable to properly inform their clients on the advantages of mediation and the mediation mechanism and are unable to properly guide their clients through a mediation or negotiation session.

2.2 Need for negotiation training

It was highlighted that there is no negotiation tradition in Belgium and to properly grasp the notion of mediation, people should first have a correct understanding of what a formal

negotiation involves and that the lack thereof, is part of the problem. Consensus existed on this point.

Examples were given of 'negotiation' situations demonstrating that finding a solution was impeded by a misunderstanding of the negotiation mechanism.

2.3 Need for mediation education

Consensus existed that children should be taught about mediation from a young age as part of their education.

Reference was made to the success of a negotiation, conciliation and mediation course in Lausanne, Switzerland taught over a two year period, and France, where the Ministry of Education has promoted mediation programs to reduce conflicts in schools in order to build better citizens. Moreover, in Romania, mediation is taught from the ages of 6-12 years old to introduce children to the basics of solving disputes.

The idea of introducing a parallel to 'l'avocat dans l'école' in order to promote 'le médiateur dans l'école' was favoured by all participants.

2.4 Should the 2005 Mediation Act be broadened to include all kinds of mediation?

The idea of having mediation available to all kinds of disputes was a matter of heavy debate.

The majority was in favor of making sure that any dispute could be subject to mediation. The scope of the Mediation Act encompasses already a wide variety of mediation; however it could be improved (like the new arbitration rules) by removing the reference to the public order (to include 'any kind of dispute' full stop and not 'any kind of dispute that could be settled'), and by including public legal entities within the scope of the Mediation Act.

A minority opined that restorative mediation should remain subject to specific rules as currently under the Criminal Proceedings Act.

No consensus was obtained.

During the discussion, participants asked to rephrase the question to consider whether instead of broadening the Mediation Act to all kinds of mediation, it is not more appropriate to ask whether the powers of the Federal Mediation Commission should be enlarged to regulate other kinds of mediation (not only family, social, civil and commercial) *Cfr Question 2.7*.

It was pronounced that this question ought to be answered positively.

2.5 Should there be only one category of mediators?

The introduction of a system of 'one mediator fits all' was subject to debate.

The majority found that one category of mediators (e.g. family, social and commercial matters) would be simpler for all involved. A mediator would have more cases and the parties could select them from a common list.

Others added that this might not be the best solution because corporate cases are inherently different from family cases and the context should be properly understood.

No consensus was obtained.

2.6 Does the Romanian mediation law offer ideas which could be implemented in Belgium?

Ms. Nicoleta Munteanu of Centrul International de Mediere (CIM) was invited as a guest speaker and introduced the group to the Romanian mediation law. Beginning from the first introduction of mediation in Romania following the pilot project launched in Craiova between the Ministry of Justice and EU Embassy in 2003, Ms. Munteanu then turned to the latest developments of the law in 2013.

Fundamentally:

- A prior information meeting on mediation became mandatory in Romania, with the enactment of a new regulation by GEO (no. 4) from January 2013 and the enforcement of the New Code for Civil Procedure. The court has to request the parties to show interest in attending the information meeting on mediation advantages in all civil lawsuits pending at that moment. The summons inadmissibility sanction came into force on August 1st 2013, gradually substituting for the fine which the magistrate could use as a penalty tool.
- The incumbency of the information meeting on mediation stipulated under Law 115/2012 specifies the special situations when the procedure prior to the law court must be followed: consumer protection, family law (divorce, partition, parental rights, etc), relationship of proximity (litigations on possession, definition of property boundaries, relocation of borders, etc), professional liability, especially malpractice and labour litigations. In the case of civil litigations, the meeting is mandatory if the value of litigation is less than 50,000 lei.

- The participation in the information meeting is supported by an information certificate released by the mediator following both parties' presentation at this first meeting. According to the law, this first meeting is free of charge, save for situations when the mediator is entitled to charge logistic expenses.
- Although the legislative modification initially included the mediation incumbency, namely penal litigations, when the New Criminal Procedure Code came into force, this measure was abrogated by Law no. 255/ August 2013, in consideration of the fact that Romanian society still has to prepare to accept such a provision generally deemed to favour the transgressor.

Ms. Munteanu touched on the fact that the more successful mediation cases are advertised and more mediation education programmes are implemented for the youth as well as social support programmes for persons with low income, the sooner citizens (litigants) will grow more confident and will opt for mediation voluntarily without being forced by the law court to do so.

In previous years, Romania registered a considerable increase of mediation activity. The mediation agreements concluded in 2010 were no more than around 500 per year whereas in 2013 tens of thousands of mediation agreements were reported.

Ms. Munteanu anticipated that in the future, just like attorneys, there would be a specialisation of mediators in various fields: commercial, civil, family, etc. Although Romanian mediators have various backgrounds: legal, economic, technical, medical etc., the skills and competences required to exercise the mediator profession exceed any limits set by the basic profession which ought to be doubled by vocation and commitment.

However, she emphasised that we must not disregard the quality assurance for mediation services and include the ongoing professional training of mediators, promoting mediation activity and active, transparent and effective information of litigants and the reinforcement and development of the professional body for mediators consisting of professional associations' representatives.

Ms. Munteanu highlighted further that it would be useful to prepare flexible common programmes for ongoing training or skill tests to be taken periodically by specialists, in order

to maintain the quality of services according to the market requirements and legislative amendments and to increase the consumers' confidence in the professional capabilities.

She proposed the following useful legislative and non-legislative measures:

Legislative:

- mandatory information meetings;
- mediation incumbency for particular categories of cases and
- mediation incumbency in specific cases with opt-out possibility.

As the current legislative approaches tend to provide an insufficient promotion of mediation eg:

- Confidentiality protection level does not significantly affect the number of mediations as confidentiality is guaranteed even in countries with less than 500 mediations per year.
- The courts' invitation to mediate has also generated a low number of mediations.
- The easy mediation agreement approval procedure cannot be considered a reason for the mediation not to operate, or the fact that parties are not encouraged to take part in a mediation because of an overcomplicated and/or long procedure to approve the agreement.
- The national accreditation systems for mediators also do not seem to be a factor which would discourage the parties to confide in mediation, as the systems received positive appreciations.

Many countries, such as Bulgaria, Latvia, Lithuania, Romania or Spain, offer incentives to those who choose mediation, however this measure has failed to increase the number of people resorting to this form of alternative dispute resolution mechanism.

Non- Legislative:

- Establishment of a program for mediation promotion and education in Law Schools;
- Development and implementation of pilot projects;
- Development of an "Agreement Week" European level programme;
- The increase of "mediation commitment" on a European level for members of particular industries;
- Appointment of mediation champions or ambassadors on a national level;

- Establishment of an EU Agency for Alternative Dispute Settlement in order to promote mediation;
- Establishment of a uniform mediator accreditation system on an EU level.

The proposal of providing a 50% discount off stamp duty like in Romania as well as appropriate training and mandatory information sessions were identified by the audience as proper incentives to promote mediation in Belgium. In addition, reference was made to the UK where sanctions are imposed in the case of an abusive refusal to mediate. Consensus was subsequently reached on the idea that cost sanctions should be put in place within the litigation forum where it is demonstrated that a party shows an abusive refusal to mediate or where the claimant fails to give reasons why the dispute cannot be mediated.

A consensus existed amongst participants regarding the need to implement certain ideas from the Romanian Mediation Act and the Romanian Mediation Practice in Belgium.

Subsequently, a joint request was made by the audience to the FMB committee to liaise with the Ministry of Justice (and ideally also with the Ministry of Education and Economic Affairs) to produce an improved Mediation Act and program for Belgian Mediation Practice.

2.7 Should the Federal Mediation Commission (FMC) be given more powers and resources?

There was a general consensus that to ensure mediation is functioning at its full potential, a strong professional body is required.

The FMC is currently mainly dealing with accreditation of mediators and mediation trainings. The option of further developing its powers was discussed and the Dutch example (NMI) demonstrates that the FMC could play a further role, at least if it was given more resources to do so.

A key point which was raised was that mediation is currently not made appealing enough to the public and that the FMC could play a key role in changing the status quo. Marketing and centralizing mediation initiatives (e.g. common data base) could significantly change the current landscape.

Reference was made to NMI in the Netherlands and the success mediation has in the Netherlands.

3. Conclusions:

1. The FMB committee should be received by the Belgian Ministry of Justice (preferably jointly by the Ministries of Education and Economic Affairs) to receive instruction regarding the production of an improved Mediation Bill and a working document for the enhancement of a Belgian Mediation Practice;
2. Mediation and negotiation skills should be taught in schools from an early age and throughout academic institutions at high school and university level;
3. Incentives should be given to the public to make mediation more attractive (e.g. 50 % off stamp duty, mediation vouchers, ...);
4. A mandatory mediation information session should be put in place prior to litigation. At least cost sanctions should be put in place within the litigation forum where it is demonstrated that a party made an abusive refusal to mediate or the claimant fails to give reasons why the dispute cannot not be mediated;
5. The authorities should set an example and be more open for mediation in disputes between themselves and civilians and undertakings;
6. An uniform mediator accreditation system on an EU level should be established (e.g. see www.emtpj.eu) to protect the EU fundamental freedoms of European mediators;
7. The Belgian Mediation Act should be amended to incorporate the consensuses reached during the FMB meetings and mirrored to the Romanian Mediation Act;
8. The Federal Mediation Commission's powers could be developed further to cater to the promotion of mediation in Belgium in a more wholesome way.

The FMB working group

Benoit SIMPELAERE
Bernard CASTELAIN
Ivan VEROUGSTRAETE
Jef MOSTINCKX
Johan BILLIET
Philippe BILLIET
Willem MEUWISSEN
Barbara GAYSE Representative of the FMC