

Association For International Arbitration

# IN TOUCH



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## Conference report on the New EU Directive on Mediation

Like all three previous meetings of the Association of International Arbitration, the Fourth Annual Conference on the New EU Directive on Mediation was deemed as highly successful. As a yearly tradition, speakers and visitors from all over the world travelled to Belgium on the 17<sup>th</sup> October 2008 to attend this one-day event at the facilities of the Catholic University of Brussels. The large attendances for the Conference would not have been made possible without the assistance and contributions of many. First of all, AIA would like to thank all speakers who



preserved the necessary spare time in their busy schedule to indulge our audience by providing them with a powerful presentation on the present topic of Mediation. Moreover, a great deal of gratitude is owed to those that contributed to the organisation of the Conference, in particular those who ensured the facilities at the Catholic University of Brussels. Most of all, however, AIA wishes to grant a special thanks to all the international visitors and numerous students who attended the afternoon Conference and who enthusiastically took part in the live discussions with all our speakers.



This year's Conference was dedicated to the introduction and promotion of the new EU Directive on Mediation of 21 May 2008, which embodies a new step forward into the use of Alternative Dispute Resolution mechanisms in the European Union. After a warm welcoming word of AIA's president

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Johan BILLIET, several speakers representing the institutions of the European Union, gave a broad overview of both the historic background of the European legislator's work in regulating cross-border civil procedure law, including ADR, and the content of the newest Directive on certain aspects of mediation in civil and commercial matters.

### **Insight of the European Community's regulatory considerations**

First to speak was Mr. Markus ZALEWSKI, representative of the European Commission, who outlined the historic mindset of the new directive by pinpointing 1999 as the year where the European Commission was given a political mandate to develop legislative

instruments in the line of ADR, mediation in particular. Although a first proposition was made and presented in 2004, the European Parliament considered the used scope of application too broad and ambitious and narrowing it down to only cross-border related disputes, nevertheless including disputes arisen between parties who originally had their domicile

in the same Member State but had decided to move to another EU country within the duration of the dispute. A second subject Mr. ZALEWSKI addressed, was the possibility of specific funding opportunities for both national and European organised mediation trainings not later than 2011. It is in this aspect, Mr. ZALEWSKI hopes and believes that the Member States will use *Article 4, 2° of the Directive* to not only implement training requirements for mediators specialised in cross-border disputes, but also implement these for national mediation purposes.



Mrs. Maily RAMONATXO, representative for the EU Council, was next to speak. She elaborated on the content of the Directive itself, focusing primarily on the exact interpretation of the definition of mediation as a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis,

to reach an agreement on the settlement of their dispute with the assistance of a mediator (*Article 3, (a) of the Directive*). Specifically, she addressed the importance of



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the literal wording of the guarantee that parties can always end settlement talks during the mediation to pursue their goals in front of national courts instead. Further on she emphasised the importance of a correct and EU-guided approach to the implementation of the provisions of the Directive by the Member States. She acknowledged the fact that the Dutch legislation on mediation can serve as an example which can help and benefit other Member States in their implementation processes.

### Ambiguous role of judges in mediation

Mr. Ivan VEROUGSTRAETE, president of GEMME, explained the effects of mediation in day-to-day judicial practice. He showed that due to several circumstances, including the uprise of mediation in Belgium and other EU countries, judicial backlog in national courts diminished strongly. Additionally, he underlined the importance of impartiality of national judges concerning mediation procedures they could potentially influence. Although for instance the Belgian mediation law (*Articles 1724- 1737 of the Belgian Judicial Code*) does not prohibit judges explicitly to master the profession of mediators, it is of common usage that magistrates do not mediate disputes anymore, mostly due to the fact that they lack the formal training required by Belgian law. In a broader discussion Mr. VEROUGSTRAETE illustrated the more economic and ethical pros and cons of judges acting as mediators. To highlight just a few of the possible ad-



vantages of such a mechanism, he named the proven impartiality of judges, the large extent of technical experience they pertain in specific dispute settlement and agreement drafting as being major assets of a judge acting as a possible mediator. An important downside, however, would be the question from which point onwards such a mediating judge would have to relieve himself of his obligation to mediate and reclaim his duty to litigate a dispute. This question remains purely ethical as the Directive in its *Article 3, (a)* explicitly excludes the possibility of having judges mediate the same disputes in which they function as magistrates. Another counterargument for mediating judges is an economic one, as many believe that retraining a judge into a mediator and giving parties access to mediation as a public service would overburden public officials and constitute substantial wastes in state resources. In the later stages of the discussion, Mr. VEROUGSTRAETE exemplified this ambiguous relationship between court proceedings and mediation processes by quoting a 2005 French Supreme Court decision that preferred national courts to stay their procedures, when parties have already commenced serious attempts to mediate their differences on the basis of a binding mediation agreement (*Cour de Cassation Fr., 07 December 2005*). Deeper



For more information concerning the New EU Mediation Directive, AIA offers a comprehensible and extensive booklet on the subject.



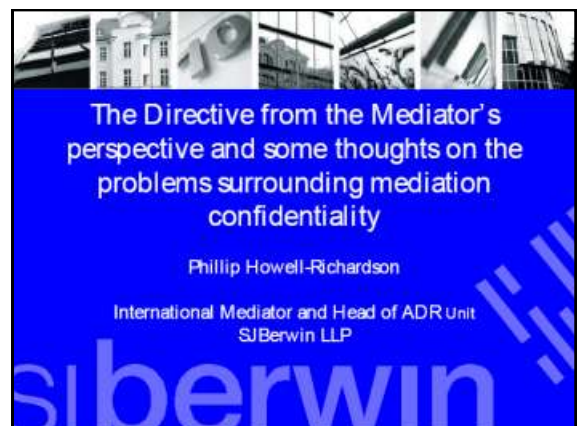
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into the analysis of the problem at hand, Mr. VEROUGSTRAETE rightfully addressed the question of dividing the costs for mediation after a decision of one of the parties to terminate settlement negotiations. One could think of dispersing the costs to the party that would *male fide* obstruct any serious mediation talks to avoid disadvantageous financial consequences for the party that might lose the overall dispute in court, notwithstanding its full cooperation to mediate.

After a quick and refreshing break, Mr. Philip HOWELL-RICHARDSON, mediator in over 300 civil and commercial disputes and consultant at SJ Berwin LLP, was the next in line to enlighten the crowd with insights of the UK evolution of mediation and its viewpoint towards the new Directive. He showed much relief after the diminishment of the scope of application of the mediation Directive by the European Parliament as the previous Commission proposition of 2004 would have interfered too much with the considerably less regulated mediation practice in the UK. Furthermore, he picked up the discussion that Mr. VEROUGSTRAETE started concerning the interrelation of national courts and dispute mediators by interpreting Article 5 of the Directive more closely. He underlined the importance of the possibility of Member States to compel parties to start mediation, nevertheless prohibiting national legislators to oblige parties to continue such mediations in the prospect of a successful and happy result, being the mediation agreement.

### Confidentiality in mediation from a British point of view

A particular point, Mr. HOWELL-RICHARDSON made, was the eternal dilemma between the confidentiality of private information and the right of the public to be informed. Referring to *Article 7 of the Directive*, mediation should be a safe haven where parties should be able to sit back and relax and talk about their grievances without fear of having privately shared information unfavourably exploited in front of a national court. Consequently, mediators cannot be asked to provide a national court or arbitrator with evidence produced in the process of a mediation. Mr. HOWELL-RICHARDSON even asked the audience to consider the possibility of introducing the rule or right of confidentiality in civil alternative dispute resolution mechanisms as a public policy principle. Undoubtedly, the discussion to what extent information is private and where national courts can set aside the private nature of that evidence for public purposes is far from over.



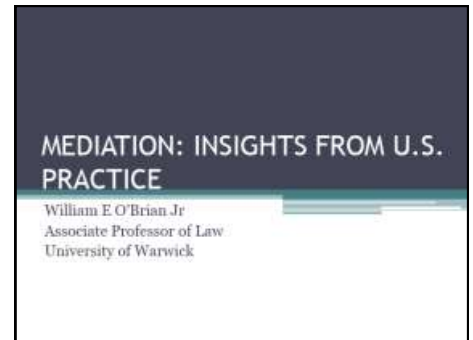
of introducing the rule or right of confidentiality in civil alternative dispute resolution mechanisms as a public policy principle. Undoubtedly, the discussion to what extent information is private and where national courts can set aside the private nature of that evidence for public purposes is far from over.



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## An American perspective on the EU Directive on Mediation

The penultimate speaker of the afternoon was Mr. William O'BRIAN, Associate Professor of Law and Director of the International Economic Law Masters Program at the University of Warwick. He explained some aspects of mediation from a comparative angle, where he put European mediation next to the specificities of US American mediation. One area of particular interest was the very liberal approach of US civil evidence rules, specifically pros and cons of the Anglo-Saxon focus on pre-trial discovery and the risks of dealing with excesses in depositions. He continued his outset with an economical thought: "the more expensive dealing with the dispute is, the more parties will be motivated to settle". In cases where parties make a prediction on the outcome of a certain dispute, they usually decide on that basis to either mediate, arbitrate or litigate. It enables them to search for the best strategy in order to get maximum benefit from their dispute, where mediation in particular can grant parties the chance to come to a win-win-situation. Mr. O'BRIAN's field of specialty led him to the particularity of insurers' motivation to mediate. When an insurer is obligated to reimburse a certain amount of money for damage suffered by its beneficiary and the damage is greater than the possible contractual liability of the insurance company, an insurer might find it preferable to litigate the damage reimbursement instead of choosing for mediation. This follows from the fact that starting a national court procedure could still leave the option open for the insurer to not be obliged to pay anything at all. This in clear contrast with mediation, where an insurer would automatically have to admit to a certain amount of damage reimbursement in order to persuade his beneficiary to meet him halfway.



## Mediation: a new way of legal thinking

Last, but definitely not least, Frank FLEERACKERS, Dean of the faculty of law at the Catholic University of Brussels, took the floor on what was a metaphysical and interdisciplinary approach to mediation. Psychologically inspired, Mr. FLEERACKERS interpreted alternative dispute resolution as the embodiment of the solution of the classical clash of convictions between man. In order to resolve such disputes and to overcome those burdens, man is more and more directed towards a different way of 'reasonable thinking' and towards a new per-





### In next month's issue:

- Russian Arbitration
- Book report of Maxims Global Ltd's new publication on International Arbitration
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spective on legal perception. The latter sheds a new light on the theory of legal thinking as Mr. FLEERACKERS pointed out that law today is still perceived as the opinion of the majority of democratic representatives in national Parliaments. Instead, the rule of law should be perceived as a challenge to persuade the minorities of those Parliaments to abide by the law. The former being crucial in the education of the future generations of lawyers as they will be bound to analyse a judicial problem by using the case itself and its facts as a motor to enhance and expedite the resolution of the dispute. Concretely, lawyers of tomorrow need to direct the interaction of the parties in dispute, indulging themselves into the convictions of both parties in order to find the interactive truth buried within. Gracefully concluding this year's edition of the AIA Conference, Mr. FLEERACKERS emphasised the new role of lawyers into the civil disputes of tomorrow and summed up his presentation with a famous quote of Jacques Derrida: "Lawyers will be the Philosophers of the XXI th century."

### The Role of Lawyers in Interaction

Mediation, ADR  
and Legal Thinking

Prof. dr. Frank Fleerackers  
Brussels

