

Mediation in Restructuring and Insolvency

Prof. Bob Wessels explains mediation, the role of the mediators, the grounds for introducing such a person and their tasks... and asks who appoints, pays and supervises the mediator?



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USA: mediation in corporate insolvency is rising

In the world of rescue and insolvency a mediator is not a stranger. In the USA mediation is frequently used in insolvency procedures, including Chapter 11 cases.¹ In 2015, for complex multi-party restructurings it has been contended that in the USA ‘... the use of mediation to reach consensual plans of reorganisation, while not standard protocol in cases, has become common and is no longer controversial’.²

Areas of deployment of mediation include creditors’ meetings (to have creditors negotiate and agree regarding their voting on a plan of arrangement) or structured negotiating to manage and resolve a large number of claims.

A much talked-about mediation concerns the Lehman Brothers liquidation Chapter 11 cases, where hundreds of disputes arising from derivative contracts due to Lehman’s filing for bankruptcy were negotiated.

From a January 2016 report it follows that 495 ADR-processes³ have resulted in a sum above the \$3b mark for the various Lehman estates. Settlements have been achieved in 424 ADR matters involving 541 counter-parties. Until 13 January 2016, 245 ADR matters have reached the mediation stage and have been concluded, 232 have been settled in or subsequent to mediation; only 13 mediations have terminated but remain unsettled.⁴

So recently, in the USA, mediation has been used in

larger, multi-party reorganisations, the costs, including the compensation of the mediator, being paid by the estate.⁵ The purpose is for all parties to find common ground while protecting their interests: ‘Its ultimate success in large and complex Chapter 11 cases stems from facilitating parties’ goals rather than simply evaluating the merits of their positions ... and the interests of all creditors for an expeditious resolution, rather than years of deadlocked litigation.’⁶

Esher submits that in the EU mediation in insolvency ‘... may be problematic without some form of Court or regularly compulsion.’⁷

Mediation in the EU in civil and commercial law matters

In Europe, mediation is rather young in years. A Directive on certain aspects of mediation in civil and commercial matters entered into force in 2008.⁸ The Directive does not concern mediation in national cases, but only in cross-border disputes, in which at least one party is domiciled or is habitually a resident in a Member State other than that of any other party on the date on which e.g. the parties agree to use mediation after the dispute has arisen.⁹

In the Directive ‘mediation’ is defined 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. This process may be initiated by the

parties or suggested or ordered by a Court or prescribed by the law of a Member State.’¹⁰

Recital 6 to the Directive clarifies that mediation should be promoted because: ‘Mediation can provide a cost-effective and quick extra-judicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties.

Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements.’

Many EU Member States do not seem to be convinced, however. A recent study submits that its implementation generates only mixed feelings. The study shows for instance that the Directive’s minimum common legal framework for mediation in the Member States has not been enacted at all in Belgium; in Finland it is only in relation to court-annexed mediation; whilst the Netherlands and the UK only have implemented the Directive in relation to cross-border mediation.¹¹

Revision of the Mediation Directive is underway.¹² Although within the scope of the Mediation Directive, the study mentioned does not reveal, and I have not found evidence, that the European Commission also had in mind disputes in matters of restructuring or insolvency. It is submitted that ‘civil and commercial matters’ include matters of ‘rescue and insolvency.’¹³



THE EUROPEAN COMMISSION’S RECOMMENDATION OF MARCH 2014 ON A NEW APPROACH TO BUSINESS FAILURE AND INSOLVENCY INTRODUCES A ‘MEDIATOR’



Insolvency mediation in the EU

In the EU, mediation in matters of restructuring and insolvency is used in some Member States, including Belgium, England¹⁴, France (in the *mandataire ad hoc* and *règlement amiable/conciliation* proceedings an out-of-court workout is enhanced), Greece, and since 2013, Spain (*mediator concursal*).¹⁵ In the Netherlands, since 2012, a pilot project called 'Mediation in Bankruptcy Liquidation Cases' has been initiated by the District Court in Amsterdam in 2012, but its results have not been evaluated yet. In other EU Member States mediation in insolvency has not come (yet) from the ground.

Rather unnoticed, the European Commission's Recommendation of March 2014 on a new approach to business failure and insolvency¹⁶ introduces a 'mediator'. Debtors themselves should be able to restructure their business, but on a case-by-case basis the Court could appoint '... a mediator, in order to assist the debtor and creditors in the successful running of negotiations on a restructuring plan.'¹⁷

There's work to be done!

To make the Recommendation's suggestion work in practice, further study is needed. It would, obviously, need a focused approach on the status of 'mediation in restructuring and insolvency' in the EU Member States and the role and professional qualifications of such an 'insolvency mediator' in a national setting.

It should include study and proposals regarding the general civil/procedural framework necessary to function fully satisfactory as such a mediator, such as the basics of a mediation agreement, including the mediation procedure to be followed, addressing issues such as commencement of mediation, opting-out, timetable; choice and appointment of the mediator;



compensation, immunity, as well as the confidentiality of the process.¹⁸

Other issues to address would be the criteria for referrals by Courts to mediation, the legal effect of mediation on prescription terms and pending proceedings. Such a study should be comparative in nature (between the EU Member States), should include the USA as well, and should also concentrate on the question of which topics should be subjected to a form of regulation on EU level and which ones can be left to the EU Member States.

Who will take the first step? ■

Footnotes:

- 1 See already I. Meier, 'Mediation and Negotiation in a Court or in an Out-of-Court Reorganization Procedure' in: H. Peter, *The Challenges of Insolvency Law reform in the 21st Century: Facilitating Investment and Recovery to enhance Economic Growth*, Zürich: Schulthess 2006, 292ff.
- 2 Jack Esher, 'Recent Use of Mediation for Resolution and Effective Management of Large Case Insolvencies', in: *International Corporate Rescue* 2015-6, 349ff.
- 3 ADR = Alternative Dispute Resolution.
- 4 Letter to Honorable Shelley C. Chapman Regarding Seventy-third ADR* Status Report, see <http://dm.epiq11.com/LBH/Document/GetDocument/2717939>.
- 5 Cases included Residential Capital LLC, Cengage Learning Inc., Nortel Networks, Radio Shack and Energy Future Holdings Corp. In many instances in the USA judges act as mediator, see Janice Miller Karlin, 'The "M" Word: Mediation Musings', in: *ABI Journal* 26 November 2015, 26ff.
- 6 So Benjamin D. Feder and David Hahn, <http://www.abi.org/committees-post/mediation-in-large-chapter-11-cases>.
- 7 Jack Esher, 'Recent Use of Mediation for Resolution and Effective Management of Large Case Insolvencies', in: *International Corporate Rescue* 2015-6, at 351.
- 8 Directive 2008/52/EC of the European Parliament and of the European Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters ('Mediation Directive').
- 9 Article 2(1) Mediation Directive.
- 10 Article 3(a) Mediation Directive.
- 11 Carlos Esplugues Mota (ed.), 'Civil and Commercial Mediation in Europe. Volume II: Cross-Border Mediation', Cambridge-Antwerp-Portland: intersentia 2014, 769ff.
- 12 See Giuseppe De Palo et al., 'Rebooting' the Mediation Directive: Assessing the Limited Impact of Its Implementation and Proposing Measures to Increase the Number of Mediations in the EU', Report to the European Parliament 2014, see [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURL_ET\(2014\)493042_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURL_ET(2014)493042_EN.pdf). In May 2016 the European Commission has to report on the application of the Directive and, if necessary, propose amendments to the Mediation Directive. The consultation process started late September 2015. See http://ec.europa.eu/justice/newsroom/civil/opinion/150910_en.htm.
- 13 Also see Horst Eidenmüller and David Griffiths: 'Mediation in Cross Border Insolvency Procedures' (2009), www.gforensics.com/resources/CrossBorderMediation.
- 14 Chancery Court Guide 2013, article 3.1, provides that Courts should '...accommodate mediation or any other form of settlement negotiations', see www.justice.gov.uk/downloads/courts/chancery-court/chancery-guide.doc.
- 15 Also listed in Annex C to the EU Insolvency Regulation Recast. See Laura Ruiz, 'Spanish Insolvency Act: the legislation created by the crisis', in: *Insolvency and Restructuring International*, September 2015, 25ff; Alberto Núñez-Lagos Burguera, 'Recently Enacted Spanish Out-of-Court Debt Restructuring Laws Join the Current European Trend for Efficient Restructuring and Lead Innovation for Restructuring Solutions', in: *International Corporate Rescue* 2015, 216ff. In 2015 some amendments to the mechanisms of the ESP and the role of the mediator have been introduced. See Pilar Galeote, *Mediación Concursal El acuerdo extrajudicial de pagos y el mediador concursal*, available at <http://ssrn.com/abstract=2659255>.
- 16 See http://ec.europa.eu/justice/civil/files/c_2014_1500_en.pdf
- 17 Recommendations 8 and 9.
- 18 These topics are mentioned in the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation 2009, but would need attention in a national setting too.



TO MAKE THE RECOMMENDATION'S SUGGESTION WORK IN PRACTICE, FURTHER STUDY IS NEEDED



Share your views!

