RECENSION

G. De Palo and M.B. Trevor, *EU Mediation Law and Practices*, Oxford, Oxford University Press, 2012 at pp. XXXV, 593

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EU Mediation Law and Practices, edited by Giuseppe de Palo and Mary B. Trevor, offers a compelling and structured overview of the status quo regarding implementation of mediation law across 27 European Union (EU) member states (Member States), and is accompanied by commentaries from practitioners from each of those countries. The book includes all EU countries, which at the time of the study have complied, or are in the process of complying with the directive 2008/52/EC (the 'Directive') including an update of the mediation situation in Denmark (which opted out of implementing the Directive). It shows which countries (successfully) implemented the Directive within the deadline, which failed to meet it, and aptly illustrates the difficulties that the EU encounters in the realization of its objectives – encouraging the use of alternative dispute resolution, especially mediation law, across the different member countries.

The EU adopted the Directive "on certain aspects of mediation in civil and commercial matters" drafted by the European Parliament and

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the Council, on May 21 2008.[1] The Directive aims to encourage and facilitate mediation as an alternative tool for resolving cross-border disputes in the European Union (EU).[2] The Directive promotes "the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings". Member States of the EU were obliged to comply with the Mediation Directive by May 21 2011, except for Article 10 dealing with 'Information on competent courts and authorities,' which required compliance as of November 21, 2010. The book under review enriches dispute resolution in Europe, especially with regards to mediation practices in the different European Union (EU) countries.

Viviane Reding, Vice President of the European Commission, Member of the European Commission *Responsible For Justice, Fundamental Rights And Citizenship*, has written the foreword and begins the book with a comprehensive summary of its objectives:[3]

> The Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters is an important EU legal instrument making access to justice easier, more economical and friendlier for citizens and business. This instrument contributes to creating a more consensual culture in resolving problems and disputes. Mediation enables the parties to find creative solutions to their dispute, which they could not obtain in court. [...] The book examines the practical implementation of the Directive in the members. [...] and is an indispensable instrument both for legal practitioners and for those members of the general public wishing to discover how important it is to pursue non-litigious methods of resolving disputes.

A table of contents, a brief biography of the two main editors and the 39 contributing authors follows her introduction. The book provides a short table of relevant cases, and an extensive table of legislation organized by country, listing the national legislations with regard to dispute resolution processes, including mediation. This type of compendia is a resourceful tool to compile and compare the various EU perspectives on dispute resolution and mediation.[4]

The introductory chapter describes the background against which the EU has increased its focus on mediation and other methods of alter-

1. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0052:en:NOT>.
2. As specified in Recital 30 of the Directive, Denmark is not bound by the Directive. However, the book offers a chapter on Danish mediation laws This effort contributes to a global view of the mediation developments in the EU.
3. <http://ec.europa.eu/commission_2010-2014/reding/index_en.htm>.
4. *Ibid.*

nate dispute resolution. The struggle with increasing court costs, court congestions' and differences in legal systems forming obstacles for facilitating cross-border economic activities, led the EU to intensify its efforts to promote alternative dispute resolution. The European Commission proposed the Directive in October 2004, it took four years to adopt and to pass it, and countries were given another few more years to adopt and comply with it.

The Directive originally applied only to cross-border disputes. The limitation to cross-border disputes is consistent with the approach taken with regard to family mediation and e-commerce (SEC (2009) 283) – Commission Staff Working Document, March 5, 2009. It sidesteps legislating on purely national disputes. However, in Recital 8 of the Directive, the option is provided for "Member States to also apply its provisions to internal mediation processes". Some of the EU countries choose to use this option when adopting the Directive in national laws, such as Belgium, France, Germany, Greece, Italy, Portugal and Slovenia; whereas in England and Wales, the Directive is transposed in national laws that uniquely apply to cross-border disputes.

Using standardized questions, the book illustrates that the Member States implemented the Directive often partially, and in clearly different manners. As a result, far from creating a harmonious cross-border system, this book suggests that the legal differences among states remain in the future even though the idea of the Directive was to create more uniformity.

The answers to 13 standardized questions constitute the body of each chapter representing the 27 EU Member States. This kind of format enables the reader to relatively quickly get a sense of what is going on in other EU countries, to compare practices and to find a common core for regulatory aspects. To some extent, the standardized questions are organized around the following four themes covering a large spectrum of topics:

1) The legal aspects of mediation (e.g. the existence of protections provided to ensure confidentiality of mediation proceedings, enforceability of mediation agreements, impact of mediation on statutes of limitation).

2) The requirements for parties and lawyers to *consider* mediation as a dispute resolution option, and requirements for parties to *participate* in mediation.

3) The requirements regarding the profession of mediator such as accreditation requirements for mediators, mediator duties, duties of legal representatives and other professional mediation participants.

4) Statistics and the current situation regarding the national laws. The statistics related to court referral to mediation and court-annexed mediation schemes.

The book efficiently presents each of the EU Member States' implementation, while leaving it up to the reader to synthesize the information on the range of variations among them. Although several countries simply implemented the Directive in its integrity – aside from those elements of which implementation is mandatory – a few Member States clearly took the opportunity of leveraging the obligation to implement mediation in national laws by going further than strictly complying with the Directive. The two main areas in which Member States have chosen to go beyond the core requirements of the Directive are principally by applying financial incentives for participation in mediation, and by installing additional mandatory mediation requirements. The book demonstrates that in a number of countries some of the issues set forth in the Directive are still not addressed in their national legislations.

Furthermore, the systematic approach adopted in the book along with the provided (unofficial) English translation of the EU countries laws related to mediation, allows for a comparison and a clear view on the most critical issues in which countries differ in their application. Some of the main differences might be summarized, as followed:

1. Court referral to mediation processes[5]

There are different ways parties get referred to mediation. Parties can either be assisted by the court itself with dispute settlement – or simply *must* go to mediation in certain cases – at any time during the proceedings, or they can petition directly and request the use of mediation themselves. The court can – when appropriate – inform the parties about institutions that are qualified for alternate dispute resolution or refer the parties directly to mediation.

5. Cases referred to mediation include only those disputes that parties are permitted to dispose of by settlement agreement under national law.

2. Enforceability of the mediation agreement

There are also serious differences in the conditions under which the mediation agreement is enforceable. In Belgium, for instance, parties may submit the content of the mediation agreement for approval as long as it does not violate national law. The judicial settlement is then enforceable. In Estonia, however, if the mediator is not an attorney or a notary, the mediation agreement can only be enforceable after a formal hearing in which the court determines that the mediator is impartial and independent.

3. Mandatory consideration or participation requirement to mediation

The mandatory aspects of using mediation also know some variances. For instance, in Finland, attorneys are required by the Bar association's code of conduct to consider whether the dispute could settle or be resolved through the use of alternate dispute resolution and parties can never be required to participate in mediation, whereas in Slovenia, the court must provide alternate dispute resolution options to parties in each case, unless it is inappropriate under the specific circumstances. The court may require parties to attend special mediation information sessions.

4. Impact of mediation on the statute of limitation

As expected in the majority of countries, proper commencement or continuation of mediation proceedings interrupts the limitation period and prevents it from expiring, but it does not suspend procedural time limitations. For instance, in Ireland the prescription period is suspended from the onset of the process until 30 days after the mediation is concluded. In Italy, the mediation can toll the statute of limitation once for a period of four months. It is worth noting that Austrian law has some specific rules that allow the parties to agree in writing to suspend the limitation period.

5. Incentives or sanctions regarding the use of mediation

Only a few European states provide financial incentives to parties who refer cases to mediation. Others do not even consider it. The clearest examples can be found 1) in Bulgaria, where parties will receive a refund of 50% of the state fee already paid for filing the dispute in court if they successfully resolve a dispute in mediation, 2) in Romania and Hungary, full reimbursement of the court fee is possible if the parties settle a pending legal dispute through media-

tion, 3) in the Czech Republic, in case parties refuse to go to a mediation session by court referral, the court has the option to deny the awarding of costs to that party, and 4) in Italy, all mediation acts and agreements are exempt from stamp duties and charge.

6. With regard to the accreditation requirements for mediators

Most of the countries remain vague about the required training, or simply ignore such requirements. Only a few have enacted a minimum provision with regard to the requirements for providing mediation services and have adopted statutory requirements for the accreditation of mediators, mediation and training organizations. The most striking example can be found in Austria and Bulgaria. For instance, in Bulgaria, statutory law requires mediators to successfully complete a theoretical training, a practical training and an interview at an accredited training institution. Then, based on this certificate and absent of criminal records, mediators may apply to the Minister of Justice to be entered in the Uniform Register.[6]

The book comprises appendices including a comparison table, an (unofficial) English translation of country laws related to mediation, and legislative updates and comments on material that came into force whilst the book was in production in 2012. It also presents an index that includes both specific topics and relevant national legislation and cases.

The comparative table of the different mediation laws allows the reader to get an overview of the main information across the countries and to quickly compare a myriad of relevant material for each jurisdiction. Furthermore, as previously indicated, the unofficial English translations of country laws helps the reader to understand the basic concepts embodied in each of the country laws and provides a good platform to reflect on the differences in how mediation is understood at national level. It provides a common understanding of the national law of the different countries and helps to better compare national laws related to alternate dispute resolution and mediation.

6. The theoretical training is composed of different sets of modules (e.g. such as introduction to the history of problems and the development of mediation including their basic assumption and models; procedural development, methods and phases of mediation with special regard to dispute oriented and solution-oriented approaches; basis of communication techniques, the conduct of meetings and moderation with special regard to conflict situations; conflict analysis; theories of personality and psycho-social forms of intervention; ethical problems in mediation, in particular the position of the mediator). The practical training covers modules such as individual self-awareness and practical experience seminars, role-play, simulation and reflection.

In sum, the book offers a thorough account of the practices and understanding of mediation in Europe and describes perspicaciously the significant differences in its implementation across countries. The systematic approach of this book provides a comprehensive overview of the current landscape of mediation in the EU and demonstrates the discrepancies amongst Member States in implementing the directives. However, it does not provide the reader with an understanding of the theory and philosophy behind the practice of mediation in each country, which could have explained the differences in the implementation of the Directive and the future challenges when mediation clauses will refer to specific national contexts. Nevertheless, this book will certainly help facilitate research of the various systems, and help significantly increase awareness and understanding of mediation within the European society.

As indicated in the foreword by Viviane Reding, "Europe has come a long way." The EU is just beginning to realize the potential that lies behind the use of dispute resolution mechanisms. Mediation merits a more theoretical, practical and intellectual support to further growth in Europe and to expand beyond the fields of practice in which it is currently accepted, as it did on the other side of the Atlantic. Much remains to be accomplished in the future to ensure the successful use of alternate dispute resolution and mediation. The book will be a useful tool for the European Commission in its effort to present a final report on the implementation of the Directive in May 2016, as prescribed by the article 11 of the Directive. This book may be a helpful starting point for the 2016 report, as it should encompass an in-depth analysis of "the development of mediation throughout European Union and the impact of the Directive in the Member States" and "if necessary, the report shall be accompanied by proposals to adapt the Directive."[7]

7. *Ibid.*