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ISSN 1748-944X

Mediating Business and Sports Disputes in Europe

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ABSTRACT

Now that sport is big business nationally and internationally, it is not surprising that sports disputes – especially commercial ones – are on the increase. So, the question naturally arises, how best to resolve them. By traditional methods - through the courts – or by modern ones, that is, by alternative dispute resolution

(ADR)? ADR takes many forms and mediation is proving to be an appropriate and effective way of settling sports disputes of various kinds extra-judicially. Mediation has not escaped the attention of the European Union, which over the years has taken a particular interest in sport as an economic activity, and this article will take a look at the recent EU Directive on Mediation and its application to and likely impact on sports business disputes in particular.

INTRODUCTORY REMARKS

In the last twenty years or so, the settlement of disputes of various kinds by alternative dispute resolution (ADR) methods has grown considerably in the UK and the rest of Europe, following its introduction and success in the United States of America. The Courts are generally considered to be slow, inflexible, and expensive. Even arbitration—at least of the 'heavy duty' kind offered by such bodies as the International Chamber of Commerce, based in Paris, is also considered – even by the business community – to suffer from the same ills as litigation through the Courts. As far as the sports community is concerned, generally speaking, ADR is preferred to arbitration or litigation for the settlement of various disputes, including commercial ones. This preference for ADR, especially Mediation, is mainly because sports bodies and sports persons dislike 'washing their dirty sports linen in public' and also prefer to settle their disputes 'within the family of sport'. In other words, in private and amongst themselves, without any outside interference, for example, from the Courts, which, generally speaking are reluctant to intervene in sports disputes, leaving the sports bodies themselves to settle them. An example is the *Woodhall/Warren* dispute concerning boxing management and promotion agreements that, following the commencement of legal proceedings in the English High Court, was settled by Mediation within 72 hours (Blackshaw, 2002). ADR not only provides the business and sports communities with a private, flexible and relatively speedy form of private justice, but also with that all-important requirement, confidentiality. Perhaps surprisingly, the Courts and the Judges themselves are also strong protagonists of ADR, especially mediation, for the settlement of a variety of civil and commercial disputes and actively encourage Mediation at an early stage of the proceedings (Phillips, 2008). 1

The rise of the ADR phenomenon has not escaped the attention and interest of the European Union, where a new Directive on Mediation has recently been approved by the European Parliament and Council - Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters (*Official Journal L 136, 24/05/2008 0003 – 0008*). This development is the culmination of a process that began with the publication of a 'Green Paper' in April, 2002, although, with the aim of facilitating better access to justice in the EU, the European Council meeting in Tampere on 15 and 16 October 1999 called for alternative extra-judicial procedures to be created by the Member States. It states that Mediation should not be considered as being a poor relation of or inferior to Court proceedings. 2

THE EU DIRECTIVE ON MEDIATION

RATIONALE AND SCOPE

The legal rationale for this Directive on Mediation is set out in the fifth paragraph of the Preamble of the Directive, which provides as follows: 3

(5) The objective of securing better access to justice, as part of the policy of the European

Union to establish an area of freedom, security and justice, should encompass access to judicial as well as extrajudicial dispute resolution methods. This Directive should contribute to the proper functioning of the internal market, in particular as concerns the availability of mediation services.

In other words, the Directive has as its main objective the promotion of access to Mediation within the EU Member States, with the exception of Denmark to which the Directive does not apply (article 1.3), Denmark having opted out of its provisions; and also ensuring a balanced relationship between Mediation and Judicial Proceedings(article 1.1). 4

The advantages of Mediation are expressed in the following terms: 5

(6) Mediation can provide a cost-effective and quick extrajudicial 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.

The Directive defines Mediation in article 3(a) in broad terms as follows: 6

"Mediation" means 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.

It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seised to settle a dispute in the course of judicial proceedings concerning the dispute in question. 7

Again, it will be noticed that the legal - if not political - justification of an EU measure on mediation is that it is particularly perceived to provide benefits in ('cross-border' disputes). This is true of many kinds of commercial disputes, given the rise of 'globalisation' in commerce and trade; and also the global nature of sport and the corresponding sports industry that has grown up as a result of it. 8

Cross-border disputes are defined in article 2 of the Directive as follows: 9

1. For the purposes of this Directive a cross-border dispute shall be one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which:

(a) the parties agree to use mediation after the dispute has arisen;

(b) mediation is ordered by a court;

(c) an obligation to use mediation arises under national law; or

(d) for the purposes of Article 5 an invitation is made to the parties.

2. Notwithstanding paragraph 1, for the purposes of Articles 7 and 8 a cross-border dispute shall also be one in which judicial proceedings or arbitration following mediation between the parties are initiated in a Member State other than that in which the parties were domiciled or habitually resident on the date referred to in paragraph 1(a), (b) or (c).

3. For the purposes of paragraphs 1 and 2, domicile shall be determined in accordance with Articles 59 and 60 of Regulation (EC) No 44/2001.

However, the Directive does not apply to all cross-border disputes as provided in article 1.2 as follows: 10

This Directive shall apply, in cross-border disputes, to civil and commercial matters except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii).

For example, in some jurisdictions in Europe, in Germany, for instance, it is not possible to mediate employment disputes, which must be dealt with through the appropriate tribunals under the applicable labour law. It is obvious that tax and customs disputes, which are matters of public rather than private law, are also expressly excluded from Mediation by the Directive. 11

PROMOTING GOOD PRACTICES AND MEDIATION

The Directive is also concerned with promoting good practices in mediation and, in particular, encouraging Codes of Conduct of Mediators and initial and further training of Mediators (Article 4). In this connection, it is worth mentioning that CEDR (the Centre for Effective Dispute Resolution), the London-based ADR provider, has been quick to issue a Code of Conduct for their Mediators which is Directive-compliant (www.cedr.co.uk). 12

In further pursuance of promoting Mediation, the Directive is also concerned for Member States to spread the word about Mediation and Mediators amongst their citizens (Article 9), so that its existence and what it has to offer, along side judicial settlement of disputes, is more widely known. 13

COURT-ENCOURAGED MEDIATION: COSTS AND HUMAN RIGHTS IMPLICATIONS

The Directive recognises that many Courts encourage parties to disputes to seek to settle them by Mediation under Article 5.1 in the following terms: 14

A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available.

And also includes the following important provision in article 5.2: 15

This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.

In effect, this latter provision encapsulates certain legal principles relating to the practice of Court-encouraged mediation which have been established in two landmark decisions of the Courts: one by the English Court of Appeal; the other by the European Court on Human Rights. The latter concerns situations where a party to Court proceedings is encouraged by the Judge to opt for ADR, rather than pursuing those proceedings. If the party's decision is also perhaps influenced by the threat of being deprived of the legal costs for failing to do so (see later on this point), can a party who agrees to ADR in such circumstances be said to have been deprived of access to a Court under the provisions of Article 6 of the European Convention on Human Rights of 1950? 16

Article 6 provides as follows: 17

In the determination of his civil rights and obligations ...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgments shall be pronounced publicly.

The first point to be made is that, by its very name and nature, ADR is an alternative and voluntary dispute resolution process. In other words, the parties to a dispute should be entirely free to choose to settle their disputes by ADR instead of Court proceedings and not forced to do so or be threatened with an adverse legal costs ruling if they do not do so. 18

The Human Rights issue in Court-encouraged ADR proceedings may be illustrated by *Deweere v Belgium* (1980) 2 EHRR 439. In *Deweere*, a Belgian butcher was facing a criminal prosecution for over-charging for pork. The Belgian authorities threatened a provisional closure of his business until the conclusion of the criminal proceedings, which might be for a period of months. Alternatively, they offered the butcher what they described as 'a friendly settlement', which involved payment of the relatively modest sum of 10,000 Belgian francs. Not surprisingly he chose the 'friendly settlement', but he subsequently complained to the European Court of Human Rights that he had been forced to go the 'friendly settlement' route and, as a result, was denied the fair trial to which he was entitled. The Court agreed and held that, whilst there was nothing wrong, in principle, with a party waiving their right to either a civil or a criminal trial by entering into an agreed settlement, on the facts of the case the settlement had been forced upon him and, therefore, it was not voluntary. The consequences of having his business closed down for months were so severe that the butcher had no practical alternative but to agree to pay the penalty, which, in effect, had been inflicted upon him by the State without a trial. Indeed, the European Court of Human Rights has said that the right of access to a Court may, in fact, be legally waived, for example by means of an arbitration agreement, but that such a waiver should be subjected to a 'particularly careful review' to ensure that the claimant is not subject to any kind of 'constraint' (*Deweere*, at para 49). 19

The other important point, already referred to above, is the penalising of a party who unreasonably refuses to agree to a Court-encouraged mediation and, as a result, is not awarded costs, even though ultimately successful in the Court proceedings. This principle was established by the English Court of Appeal in the leading case of *Dunnett v Railtrack* [2002] 2 All ER 850, in which Mrs Dunnett was prepared to mediate and Railtrack were not; and, although ultimately unsuccessful in her claim against Railtrack, Mrs Dunnett was awarded her legal costs, contrary to the general rule that normally 'costs follow the event'. This principle has been followed in later cases and is regarded by many commentators on ADR as a further example of the Courts' encouragement of settling dispute by ADR, especially by mediation, in appropriate cases. I say advisedly 'appropriate cases' because as a former Lord Chancellor, Lord Irvine of Lairg, a proponent of ADR, has said, ADR is not a panacea (Blackshaw, 2002, p. 22). Mediation is not appropriate where injunctive relief, publicity or a legal precedent are required; the Courts are the forum to be used for settling disputes in such cases. 20

CONFIDENTIALITY ENFORCEABILITY AND LIMITATION

The all-important issue of confidentiality is covered in Article 7 of the Directive and the permitted limitations are set out in paragraph 1 as follows: 21

(a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or

(b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

Article 7(2) permits member states to impose stricter confidentiality requirements, where possible under national law. 22

As is well known, mediation is non-binding until an amicable settlement of the dispute is reached by the parties and incorporated by them in a written Settlement Agreement, which then becomes legally binding and can be legally enforced, if necessary, through the Courts. Article 6 of the Directive facilitates this process with appropriate provisions. However, as the Directive is concerned with cross-border mediations the Settlement Agreement will not be enforceable in case any of its provisions is contrary to the law of the member state where enforcement is sought; for example, 'public policy' issues may arise or the Law of that Member State does not provide for its enforceability. Clearly, in the latter case, there may be a need for some degree of harmonisation of national legislation on mediation throughout the EU. And this is perhaps a weakness of the EU Directive on Mediation. A cross-border Mediation Settlement is not, in a sense, self-executing, in contrary to an International Arbitral Award which, generally speaking, benefits from the recognition and enforcement provisions of the New York Convention 1958, which are relatively easy to apply in practice. 23

Again, to facilitate mediation throughout the EU, pursuant to the provisions of Article 8.1 of the Directive, member states must ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration as a result of the expiration of any corresponding limitation or prescription periods whilst they are attempting mediation. However, this requirement does not apply to any limitation or prescription periods that apply under any International Agreements to which Member States are parties (Article 8.2). 24

TRANSPOSITION INTO NATIONAL LAW

The member states are required to transpose the terms of the EU Directive on Mediation into their National Laws by 21 May 2011 (Article 12.1); in other words within three years of the date of the Directive. 25

CONCLUSION

Various forms of ADR - not least mediation - are proving to be a quick, inexpensive and effective way of settling a wide range of disputes, including commercial sporting ones, in appropriate cases, at the national and international levels. And the passing of the EU Directive on Mediation, which, like any other kind of EU measure, has been long in coming and will no doubt make more widely known the benefits of Mediation to a wider public and increase its popularity and use. Added to which the encouragement of mediation by the courts, with their considerable backlogs of cases and consequential delays, will also add impetus to this process. 26

However, as mentioned above, mediation is not always the best form of dispute resolution in every case; the old adage 'circumstances alter cases' being particularly apposite in this context. Therefore, the smart money will always be on those who recognise this and can tell the difference. It is a subject that continues to be ripe for study and research, as various nuances and implications are cropping up all the time in practice. 27

The international business and sporting communities have embraced this form of dispute resolution to date, for various reasons rehearsed in this Paper, and will continue to do so in the foreseeable future. In any case, whatever happens, there will always, I am sure, be plenty of work for the lawyers involved in this developing and fascinating field of practice! 28

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