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Title of the presentation: Mediation as an Opportunity to Fight the Economic Crisis

Short description:

According to a survey conducted in 2006 amongst the representatives of the small and the middle sized business in Bulgaria, in a conflict situation it is most important for 60% of the respondents to have a quick resolution of the conflict. The next factors considered are: to preserve the reputation of the company /47%/ and keep the business relationship undamaged /34%/; to have control over the resolution of the dispute /36%/ and to save money on legal costs /26%/.

Have these needs changed in the current situation of economic crisis? The results of a very recent survey of the WIPO Mediation and Arbitration center show that the main considerations of the respondents nowadays when negotiating a dispute resolution clause are cost /71%/ and time /56-60%/. Respondents also place a high value on enforceability /especially for the international contracts/, neutrality and confidentiality, as well as on quality of the procedure.

The comparison between these two surveys clearly shows that the need for time and cost effective dispute resolution method arises. The other trend that is visible by the WIPO results is that a new factor appears amongst the top 3 considerations of the respondents, namely the possibility the final dispute resolution to be made enforceable.

It is obvious that mediation can meet all of these needs.

Time and cost effectiveness:

Research commissioned by the European Parliament and conducted by the ADR Center – Italy compares the time and costs spent in each of the 26 EU member states /excluding Denmark/ on resolution of a standardized case by: litigation; mediation and then litigation; mediation and then arbitration. The data analysis of this research /published by the European Parliament under the title “Quantifying the costs of not using mediation – a data analysis” not only show that the average time and costs to litigate in the EU are much higher than the time and costs to mediate /the amount of average costs

to litigate is calculated to be 10 449 EUR while the average costs to mediate is 2 497 EUR; the average time to litigate in the EU is 548 days and the average time to mediate is 88 days/, but also prove that mediation can save time and costs even at a comparatively low rates of success.

The break-even point for EU at average in terms of time is found to be 19% mediation success rate, and the break-even point for costs - 24%. In other words, even when mediation is successful in only 19 out of 100 cases, the average time for the resolution of these 100 cases by mediation as a first step and only if it fails – by litigation, is shorter than the time for the resolution of the same disputes in court. The results for some countries /e.g. Italy where only 4 of 100 mediated cases need to be successful in order mediation to prove its time effectiveness/ are even more impressive.

According to the results of the research, when mediation is successful, European citizens can save over 460 days and 7 500 euro. When it fails and is followed by court proceedings, it is still time and cost effective option from macro perspective at comparatively low rates of success.

The other concerns /confidentiality, neutrality, preservation of the relationship, control of the parties over the resolution of the dispute and the enforceability of the settlement agreement/ are also met by mediation, as it offers confidential proceedings where all the questions are resolved by mutual agreement of the parties based on their best interests. Even when such an agreement cannot be reached, due to the improved communication in the process of mediation, parties have the chance to preserve and even improve their relationship.

In addition, the EU Directive 2008/52 ensured higher protection of the parties' rights in mediation in terms of confidentiality, enforceability of the settlement agreement reached in mediation, the impact of the mediation procedure on the statutes of limitation, quality standards, etc.

/Specific provisions of the Bulgarian and some other Member states legislations implementing the EU Directive are given as examples and compared in the presentation./

All these factors should have already led to the increasing demand for mediation service. Is that the reality and if not exactly, what could be the reasons and what can be done to foster the broader use of mediation?

Examples of measures taken in some European countries /e.g. Bulgaria, Italy, Slovenia and the Netherlands/ in order to encourage the use of mediation and the results

of them:

1/. Financial incentives or sanctions

The incentives can be grouped into three groups:

- Refund of some percentage of the taxes paid for the court proceedings /as in Bulgaria/;
- Tax incentives /Italy/
- Free of charge mediation service within the all or some of the court – connected mediation schemes /Bulgaria, Slovenia, the Netherlands/

Sanctions:

In many countries /UK, Belgium, Slovenia, Italy/ the party who have unreasonably refused to participate in mediation /prior to initiation of the court proceedings or during them, when the court have referred the case to mediation/ might bear costs of the judicial proceedings, irrespective of the outcome of the proceedings.

2/ Court referral:

In most of the countries the court has the general authority upon its own discretion to “propose to parties to use mediation for resolving their dispute”

Furthermore, in some countries /Bulgaria/ in divorce proceedings “the court shall be bound to direct the parties to mediation or another procedure for voluntary resolution of the dispute.” (Art.321, par. 2, 3, and 5 of the Civil Procedure Code).

The legislation of some other countries as Slovenia, Czech Republic, Germany /for family disputes/, Spain provides for the possibility an informational sessions on mediation to be ordered by the judge, when appropriate

3/ Court connected mediation schemes – nation-wide /Slovenia, the Netherlands/ or local /as the Court Settlement Center at Sofia Regional and Sofia City Courts in Bulgaria/;

4/Mandatory attempt to voluntary resolution of the conflict by mediation as a prerequisite for further litigation /Italy until October 2012; some German states for small claims, lawsuits against neighbors and libel suits./

5/. Mediation clause included in the agreements between the business’ and

consumers' organizations /the Italian 'joint conciliation'/

6/ Obligation for the lawyers to inform their clients about the possibility to resolve their conflict by mediation on another ADR method /Italy, UK/

Some statistics of the effect of these measures on the use of mediation in the respective countries are discussed at this stage of the presentation.

Finally, the current trends in the regulation of mediation at European level /as the Proposals for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on online dispute resolution for consumer disputes (Regulation on consumer ODR) /* COM/2011/0794 final - 2011/0374 (COD)/ are mentioned and other possible measures for promotion of the mediation are discussed.

HYPERLINK "<http://www.wipo.int/amc/en/center/survey/results.html>" <http://www.wipo.int/amc/en/center/survey/results.html> Despite the fact that the survey concentrates on research and development disputes and related agreements, the results indicate the main concerns of the business nowadays when choosing a dispute resolution method and I believe that these concerns are relevant for any other dispute or business sector.

HYPERLINK "<http://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19592/20110518ATT19592EN.pdf>" "<http://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19592/20110518ATT19592EN.pdf> /

4th EMNI Conference, 18-20 April 2013, Bratislava

