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Congratulation!

Edmond

Hajrizi, Rector of UBT and Chair of IC - BTI

Përmbajtja

“EU legislation for Civil Dispute Resolution”

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Abstract

The alternative dispute-resolution method of mediation is regarded as unique. Due of its many advantages, mediation has been widely promoted. The legal regulation of mediation seeks to provide a uniform framework for its use in the settlement of civil disputes. This study's objective was to examine the present EU regulations that are relevant to the control of mediation. The European Parliament and Council's Directive 2008/52/EC addresses several aspects of mediation in civil and commercial disputes. The Directive addresses several issues, including the availability of mediation resources and the validity of mediation agreements. In accordance with Directive 2008/52/EC, many European nations have created their own mediation regulations. The study's methodologies included a review of the literature and an examination of legal sources. As a conclusion, it is asserted that the Directive acts as a foundation for institutionalized mediation and has had a significant impact on the emergence of mediation as a technique for civil dispute settlement.

Key words: Directive 2008/52/EC, EU legislation, mediation

1. Mediation – A novel alternative for the resolution of disputes

Mediation is a type of alternative conflict resolution, which is considered a new mechanism in the field of civil justice. In accordance with its definition, mediation is a method of resolving disputes used between the disputing parties at their own initiative and with the help of an impartial third person (Fiadjoe, 2004). It is considered a process that offers a very large number of significant advantages, as it is considered a flexible, faster, cheaper process with a higher degree of confidentiality. The characteristics of this mechanism are determined to be the principles of voluntarity, self-determination, confidentiality, neutrality, efficiency, flexibility, and transparency. Alternative conflict resolution procedures have a broad scope and are used in a variety of ways. The functionalization and application of mediation as a mechanism for resolving disputes, equivalent to judgment and other forms of access to justice, has required the institutionalization of this mechanism (Menkel-Meadow, 2013).

The institutionalization of mediation and its transition from informal justice to a formal format of justice has enabled the establishment of mediation frameworks as an alternative to courts. In addition to the specific advantages in disputes, mediation has been estimated to directly affect the reduction of the overload of the judicial system, via the decrease in the lawsuits that are resolved through the judicial system (Rass- Masson & Rouas V., 2017).

2. Institutionalization of mediation at the European level

In Europe, the institutionalization of mediation begins since 1998, with the Council of Europe's recommendations on mediation for family disputes, which foresaw mediation as a feasible technique to be used in any conflicts involving family members, who have family relations as defined by the relevant state laws (Council of Europe, 1998). Furthermore in 2002, through the "Green Card," mediation was identified as an alternative method of settling civil and business disputes and initiatives used by European nations to institutionalize mediation in their national laws were outlined (Communities, 2002). Continuous work has been done at different levels to reach a common legal directive that would serve as a framework for defining a significant number of mediation elements.

3. Directive 2008/52/EC

The Mediation Directive 2008/52/EC on Aspects of Mediation in Civil and Commercial Disputes, approved on May 21, 2008, which regulates mediation across Europe, is one of the most significant institutional frameworks (Council, 21 May, 2008). This directive was achieved as a result of the work of several years of the Council of Europe, who have determined that a fundamental right is the ability to seek justice, and that in order to effectively influence the utilization of this right, alternative extra-judicial procedures must be created. According to Directive 2008/52/EC, mediation offers a cost-effective and fast solution separate from the judicial system, that meets the needs of the disputing parties. Mediation enables the disputants to maintain relations between them, as well as increases the possibilities for the acceptability of mutually reached agreements.

The provisions of Directive 2008/52/EC are designed for mediation in cross-border conflicts, but they can also be applied by EU Member States in internal mediation processes. The directive

applies to processes in which parties involved to a cross-border dispute strive to achieve a voluntary agreement to resolve their disagreement with the assistance of a mediator. The directive can be applied in both civil and commercial disputes. Additionally, it may be applied in circumstances where the court has referred the disputants to mediation or in cases where state laws provide for mediation.

Directive 2008/52/EC is not intended to be applied in cases where the rights and obligations of the parties come into conflict with the laws in force, or in contractual negotiations or judicial processes, which contain reconciliation schemes, consumer complaints, arbitration or in the processes that are administered by the persons or parties that give formal recommendations.

The directive stipulates that mediation is not to be regarded as a lesser option to court procedures, which implies that mediation agreements may be legally enforceable. Such an element can be rejected by member states only in cases where the obligation of such agreements falls in conflicts with national laws. Terms of the agreement which emerge as a result of the mediation process and become legally enforceable in an EU Member State, must be respected as such in other Members States, in accordance with national laws. The mediation directive should not impact the regulations of the Member States regarding the enforcement of agreements reached via the mediation process.

Directive 2008/52/EC is developed by several articles, which aim to define the application framework of mediation as directly as possible. According to paragraph 1 of Article 4 of the Directive, " Member states of the EU must endorse the development of voluntary guidelines developed by mediators and mediation institutions, in addition to other regulations on the quality of the mediation service" while also providing: "encouragement for the continuous training of mediators to enable a more effective, equal and competent mediation alongside the parties in dispute" (Par. 2).

Article 5 of the directive 2008/52/EC regulates resources in mediation. Paragraph 1 (Article 5) provides that: “In instances where it is judged suitable and the case's specific circumstances are considered, the court may encourage the parties to use mediation to resolve their disagreement or request the parties to attend an informational meeting regarding the use of mediation”. The directive does not represent an infringement on national laws through the application of compulsory mediation, or the imposition of sanctions related to mediation, considering that such law does not prevent the parties from exercising their right to access the legal system of justice, prior or following the start of the judicial procedure.

Agreements reached through mediation are deemed to be legally binding under Article 6 of the Directive. Paragraph 1 (Article 6) states that “Members States must guarantee that the parties may require that the terms of a written agreement reached through mediation be legally enforceable, unless such a request would violate a member state's legislation”. Article 6. Par. 2 defines that: “the agreement's terms may be rendered enforceable by a court or another competent body in a judgment or decision in line with the legislation of the Member States".

The Directive's Article 7 regulates the confidentiality of mediation. Paragraph 1 of this article provides that: "due to the determination that mediation must be conducted respecting the principle of confidentiality, Member States shall guarantee that, unless the parties agree otherwise, neither the mediators nor the administration participating in the mediation process are entitled to submit evidence in civil and commercial court proceedings or arbitration in connection with the mediation process". This is not foreseen in cases where it is necessary to consider the EU member countries' public policies, especially for cases of the protection of Article 7 of the Directive provides for the regulation of mediation confidentiality. This is not foreseen in cases where it is necessary to consider the national policies of EU member states, particularly in situations involving the protection of children's best interests, preventing physical or

psychological damage to an individual, or instances where the disclosure of mediation information is essential for proceeding with the mediation agreement.

According to paragraph 1 of Article 8 of Directive 2008/52/EC, "EU member states shall guarantee that parties who select mediation should not be precluded, to commence litigation or arbitration, in regard to the dispute, by the expiration of limitations or prescriptive periods during the mediation process". Whereas Article 9 of the Directive provides about the encouragement as well as promotion of the mediation process for the general public, with a special focus on contacting mediators and mediation organizations.

4. The effect of Directive 2008/52/EC on Europe's mediation situation

The goals of the European Directive have been for the advancement and promotion of mediation, in an effort to fully equate mediation as an approach for the resolution of specific disputes. But the research done on the results of the European Directive, creates room for dissatisfaction. The adaptation of state legislations to the Mediation Directive is considered to have happened in an appropriate manner, where while the countries that had previous legal regulatory frameworks on mediation, have changed and adapted them in accordance with Directive 2008/52/EC, other countries have adapted them from the beginning, to be in compliance with the European Directive (Palo, et al., 2014). The studies done in the following years have considered the decade of the Mediation Directive, determining that the goals of Directive 2008/52/EC have not been met or have been reached at a very low level, where for every case that goes to mediation, about 100 cases go to court proceedings (D'Urso, 2018). On the other hand, it should be noted that the positive effect of the Mediation Directive is in raising the level of ethical standards of mediators and organizations that offer mediation, as well as in the training of mediators (Jacqueline, 2012) . The studies have offered a vision on the change and adaptation of the Mediation Directive, concluding that adapting the directive to be more direct and comprehensive would enable a wider scope of the use of mediation in civil and business conflicts, as well as how it favorably affects the unity of the mediation process.

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Structural Weakness of the Court of Justice of the European Union: Analysis and Reform Proposals

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Abstract. The predecessor of the CJEU was established in 1951. While the EU then consisted of only six member states, it now has 27. What has a more serious effect, however, is that the EU Commission was originally responsible for only a few areas of law, but now regulates virtually every area of law. However, the structure of the CJEU has not been adapted to the changed circumstances. As before, each EU member state sends only one judge to the CJEU. Even in terms of details, there have been no changes: Although the importance of French in the EU has declined sharply, only French is used in the CJEU's internal deliberations.

Keywords: Court of Justice of the European Union, judicial style, specialized courts, working language.

I. Introduction

For some time now, there has been a discussion about whether the Republic of Kosovo should join the European Union. First, it should be noted that Kosovo has been linked to the EU for years through the programs like the Phare Program and receives payments from the EU [9]. Politically, relations with the EU have not always been pleasant from Kosovo's point of view. One need only think of Kosovo's application for accession to the Schengen Agreement, which failed for years in particular because of Spain's resistance. The reason for this, however, was not that Spain had anything against Kosovo - many Kosovars do live in the EU, but there are hardly any Kosovo nationals living in Spain. Spain's opposition was motivated purely by domestic politics. In Spain, influential political parties in Catalonia are calling for independence. Since Kosovo had declared itself independent, the Spanish government wanted to use this measure to warn the Catalans what they could be threatened with: If Spain blocked Kosovo, it would be even more able to block an independent Catalonia.

One consequence of joining the EU would be that the European Court of Justice (CJEU) would have jurisdiction over cases from Kosovo. In the following, it will be examined whether this would be desirable. For this purpose, the structure of the CJEU will be analysed. The CJEU reached retirement age a few years ago. Originally established as the Court of Justice of the European Coal and Steel Community (ECSC) under Article 31 of the ECSC Treaty of April 18, 1951, it began its work in 1952 and has since shaped the law of the European Union (and its predecessor organizations). The following section will analyse some of the special features of the CJEU and answer the question of whether there is a need for reform of the CJEU [3, 5]. Three aspects will be examined: First, the extremely broad jurisdiction of the CJEU; second, the judicial style and the internal working language of the CJEU; and third, the question of how the CJEU indicates changes in its case law.

II. Structural Framework at the CJEU

There are (only) 27 judges at the CJEU. The frequently asserted thesis that nowadays only specialists are needed does not seem to apply to the CJEU. The CJEU is (among others) responsible for agricultural law, asylum law, civil protection law, competition law, consumer protection law, data protection law, disputes between the EU and its member states, energy law, environmental law, EU civil service law, foreign relations law, insolvency law, international private law, labour law, nuclear law, social security law, tax law and trademark law. Germany needs no fewer than six supreme federal courts for these matters: the Federal Labour Court (Bundesarbeitsgericht), the Federal Fiscal Court (Bundesfinanzhof), the Federal Supreme Court (Bundesgerichtshof), the Federal Social Court (Bundessozialgericht), the Federal Administrative Court (Bundesverwaltungsgericht) and the Federal Constitutional Court (Bundesverfassungsgericht), with 129 posts for judges at the Federal Supreme Court alone.

Even though the CJEU is only responsible for the European law aspects of a legal dispute, its decisions have an impact on legal disputes as a whole. It would therefore be desirable that at least the respective judge-rapporteur has a basic knowledge of the relevant laws in all EU Member States and is also not unfamiliar with the relevant legal practice. The CJEU attempts to at least come close to this goal by not assigning cases according to a schedule of responsibilities; rather, the president of the court is free to decide whom he appoints as judge-rapporteur. Although this approach allows a certain specialization of the individual judges, it also creates new problems. German law grants a subjective right to the lawful judge through Article 101 (1) sentence 2 of the German Constitution (Grundgesetz). Regulations that serve to determine the lawful judge must specify in advance as clearly as possible which judges are appointed to decide the individual case. Based on the German standards, a request for a preliminary ruling to the CJEU by a German

court would violate the right to the lawful judge. More serious, however, is the fact that the task of rapporteur is not distributed evenly among the judges, but that there are large differences in terms of both the number and the importance of the cases. A study was presented on this in 2016 [6]. The author examined the workload of the individual judges in the period from 2004 to 2015. Surprisingly, it is not the judges from the politically weighty EU member states who handle the main burden of work at the CJEU; for example, Judge Ilešič from small Slovenia had the highest number of cases handled by the Grand Chamber and the chamber with five judges as judge-rapporteur (while he had five times more cases before the Grand Chamber than some other judges). Thus, the actual importance of a judge for the finding of law at the CJEU depends on the goodwill of the president of the court.

In many European countries, there are lay judges in the labour courts and the commercial courts. These are supposed to contribute their practical experience to the decision-making process. At the CJEU, on the other hand, only professional judges are active [4]. A judgment by the CJEU on November 18, 2021 (case C-212/20), shows how out of touch the decisions of the CJEU sometimes are: A Polish court wanted to know whether a bank had to inform a consumer precisely about the risk of a foreign currency contract even if the term of the contract was 40 years. The CJEU answered this question in the affirmative. But how should a bank be able to make a forecast for such a long period of time?

III. The French Influence: Judicial Style and Internal Working Language

Within the EU, three different judicial styles can be identified. The English style, which is oriented towards precedents, while at the same time allowing the judge personal formulations and pragmatic considerations, supplemented by the possibility of a "dissenting opinion" for a judge who takes a different view from the majority of the Chamber; the German style, with very detailed judgments, in which the court not only deals with the case law but also with the literature, citing it as in a scientific treatise; and the French style, where a result is determined apodictically. At least in the beginning, the CJEU was very much influenced by the French judicial tradition; accordingly, the judgments were short and without much reasoning [2]. If one considers the political weight of the individual states in the founding year of the ECSC (1951), the French influence becomes understandable. The Federal Republic of Germany, so soon after the end of the Second World War - it was still under occupation law until 1955 - was glad to be involved at all as a formally equal partner in an international organization. The Benelux countries were already less weighty than France in terms of their size, and Italy played and still plays a rather passive role in the development of the EU.

The French influence at the CJEU is reflected above all by the fact that the internal working language of the CJEU has been French since the beginning - without there being any legal basis for this. The choice of language was at the time obvious in view of the six founding states: French was the sole official language in France and one of the official languages in Belgium and Luxembourg. This language practice means that, as a rule, the member states send judges to the CJEU who have not only been shaped by the legal system of their state of origin but are also familiar with French legal culture. Furthermore, the vast majority of the judges' law clerks are native French speakers. While the EU spends huge sums on translations, only one language is spoken at the most powerful institution.

IV. Changes in case law

It is very rare for the CJEU to admit in a judgment that it had previously held a "wrong" view and then expressly departs from its previous line of reasoning. In the literature, the CJEU decision

in the HAG II case (Case 10/89) is occasionally cited. In fact, the CJEU had stated there: “Bearing in mind the points outlined in the order for reference and in the discussions before the Court concerning the relevance of the Court's judgment in Case 192/73 (HAG I) to the reply to the question asked by the national court, it should be stated at the outset that the Court believes it necessary to reconsider the interpretation given in that judgment in the light of the case-law which has developed with regard to the … general rules of the Treaty, … .” Advocate General Jacobs had urged in his Opinion: “It would, I think, be healthier to recognize that HAG I was wrongly decided, rather than to compound that error by inventing a spurious distinction between the two cases.” However, the CJEU does not go that far; it leaves it at this quoted sentence and does not explain what was the content of the HAG I decision, nor does it explicitly clarify whether the court adheres to the previous case law or not. Only a comparison of the two judgments leads to the conclusion that the CJEU has departed from its previous case law.

The CJEU departs more clearly from the previous case law in its decision "Keck" (Cases C-267/91 and C-268/91), where the court states: "By contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment (Case 8/74), so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States." However, one should also read the preceding paragraphs of the decision here. Indeed, there it is stated in paragraph 14: "In view of the increasing tendency of traders to invoke Article 30 of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter." The CJEU is trying here to “sell” the change in the line of reasoning as a “clarification”.

A change in the line of reasoning due to changed conditions can be found in the CJEU judgment in Case 184/99 - Grzelczyk. There the CJEU says: “It is true that, in paragraph 18 of its judgment in Case 197/86 - Brown, the Court held that, at that stage in the development of Community law, assistance given to students for maintenance and training fell in principle outside the scope of the EEC Treaty for the purposes of Article 7 thereof (…). However, since Brown, the Treaty on European Union has introduced citizenship of the European Union into the EC Treaty (…). There is nothing in the amended text of the Treaty to suggest that students who are citizens of the Union, when they move to another Member State to study there, lose the rights which the Treaty confers on citizens of the Union. Furthermore, since Brown, the Council has also adopted Directive 93/96, which provides that the Member States must grant right of residence to student nationals of a Member State who satisfy certain requirements.” Here, however, the CJEU had already indicated in the initial decision that its case law would not stand, because the operative part of the decision "Lair" (Case 39/86), a parallel decision to the Brown judgment, stated: “At the present stage of development of Community law … .” Since the temporally limited validity of the judgment appears here in the operative part of the judgment - it should have been mentioned in the reasons for the decision (if it is mentioned at all), since it is self-evident that the CJEU must base its decision on the current state of the law - the CJEU obviously had no difficulty in departing from its previous case law. This is therefore probably the only case where the CJEU overruled a precedent in all clarity, explicitly citing the overruled judgments.

V. Reform Proposals

1. Specialized courts

The Treaty of Nice (2001) already provided for the establishment of specialized courts. The legal basis for the creation of an EU specialized jurisdiction still exists and is now found in Art. 257 TFEU. However, apart from the European Union Civil Service Tribunal, which was established in 2004 and dissolved in 2016, no specialized court has yet been created. It is true that the literature argues that the development of a specialized EU court is an inevitable consequence of the progressive integration and differentiation of Union law. The decision-makers in the EU, however, obviously lack the political will to put this insight into practice. During the negotiations on the creation of a European Patent with unitary effect (Unitary Patent), it was clear - since this area of law requires appropriately qualified judges because of the technical issues that arise in litigation - that a special court would have to be created for this patent. However, this court was then not located at the CJEU, but an independent court, the Unified Patent Court, was created by means of an international treaty [1]. It is to be hoped that there will be a rethink here and that the EU will decide to create associated specialized courts. Only in this way can the necessary quality of the jurisdiction of the EU courts be achieved.

2. Judicial style and working language of the CJEU

The CJEU has developed its own hybrid style of judging, which is constantly changing. This is also due to the fact that the judgments of the CJEU are becoming longer and longer. The style of judgments of the CJEU is approaching - albeit very slowly - the German "scientific" style of judgments. The current transitional form, like all mixed forms, has disadvantages: Often the judgment gives the impression that it is written "like a German judgment", but the concise, sometimes formulaic reasoning does not carry the decision. In an article [8] it was aptly written that the CJEU tries to "force structurally different problem areas into the corset of only conditionally suitable precedents in order to suggest continuity". It would serve legal clarity if the development phase were shortened and a final, independent style were quickly found that combines the advantages of the various legal systems and at the same time is coherent in itself.

Furthermore, the language regime should be changed. In all other international courts, there is - unless English is the only working language - a second working language. A member of the CJEU administrative staff [7] rightly describes the fact that this is not the case at the CJEU as "very surprising and can only be explained politically and sociologically". Therefore, at least a second working language should be allowed so that those judges who can express themselves better in English than in French can participate more effectively in the discussions. In this context, it should also be borne in mind that the need for knowledge of French, especially for smaller EU member states, considerably limits the selection among suitable jurists for a judgeship at the CJEU. A more far-reaching change would be even more sensible, namely that simultaneous interpreters translate the statements during the deliberations.

3 Making a change in the trend of court findings recognizable

In view of the lack of self-criticism, the development of the CJEU's case law is often difficult to follow. In many cases, it is unclear to what extent earlier judgments and the statements found therein are still valid. It would serve legal certainty if the CJEU could bring itself to speak clearly here. It happens time and again that the German federal courts explicitly depart from their previous case law without this having damaged their reputation. Therefore, the CJEU should have no fears in this regard.

VI. Conclusion

From a legal perspective, the composition of the CJEU is not convincing. Whereas the national courts, which submit the references for preliminary rulings to the CJEU, are staffed by judges with specialized knowledge who are also familiar with practice - at least from a judicial perspective - the CJEU is staffed by generalists with no practical experience. This not infrequently leads to decisions whose implementation in practice leads to completely different results than those expected by the judges at the CJEU. Therefore, the structure of the CJEU urgently needs to be reformed.

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