V МІЖГАЛУЗЕВІ ЗВ'ЯЗКИ ЦИВІЛІСТИЧНОЇ ПРОЦЕСУАЛЬНОЇ НАУКИ

ESPLUGUES MOTA, Carlos Aurelio
PHD (Valencia), Master of Law (Harvard),
Master of Science in Law (Edinburgh) Prof. Dr.
Full Professor of Private International Law
University of Valencia (Spain)

THE CIRCULATION OF MEDIATION SETTLEMENTS IN THE EUROPEAN UNION

Mediation is broadly considered to be cost-effective tool that provides access to justice in a much quicker and more affordable way for the parties than State courts. It is also said to alleviate the burdens on over-crowded court systems thus improving the efficiency of the judiciary in resolving disputes arising both in domestic and cross-border situations and making access to justice more effective. The European Commission, like other institutions worldwide, accepts the relevance of mediation and at the same time shares the necessity to ensure the enforceability of the agreement reached in one Member State throughout the EU. Voluntary fulfillment of settlements reached is said to be high. Nevertheless, as the number of mediations rises, an increase in the amount of litigation that arises from mediation seems "inevitable thus maken inevitable to design ways of compulsory enforcement. This article analyzes the several solutions existing in the different EU Member States as regards the enforcement of settlements reached in the framework of cross-border mediations.

Keywords: *mediation, justice, enforcement of foreign agreements award, parties to the agreement.*

I. OVERVIEW

Mediation is a legal institution that has historically been present in many legal systems of the world and particularly in many countries of Europe [1]. However, specific solutions embodied and the extension of its acceptance vary -and traditionally have varied – from country to country [2]. The enactment of the Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (hereinafter 2008 Directive) [3] reflects the quest to reach a common minimum legal framework in Europe as a necessary tool for enhancing the use of mediation by EU citizens [4]. The 2008 Directive aims to foster recourse to mediation by citizens in the European Union in relation to civil and commercial disputes both domestic and cross-border.

Cross-border litigation has increased steadily in recent years in Europe in accordance with the consolidation of the European unification process. It is obvious that promoting the use of mediation in civil and commercial disputes will directly encourage a growing number of settlements to be reached within cross-border mediation. Consequently the Directive must ensure the enforceability of the settlement reached in one Member State throughout the EU [5].

Voluntary fulfillment of settlements reached is said to be high. Nevertheless, as the number of mediations rises, an increase in the amount of litigation that arises from mediation seems "inevitable" [6] and multiple different reasons may encourage this situation. In a purely ideal scenario, no reference to any law or private international law rule should be made insofar as the settlement reached by the parties would be honored on a voluntary basis. Nevertheless the Directive seems to be more realistic than that, as it wants to stress that mediation is not a second class justice device and, therefore, considers it necessary to ensure the enforcement of the agreement reached [7]. This approach is sound, taking into account the growing litigation in relation to mediation that exists in other jurisdictions [8].

II. Enforcement of foreign settlements in the EU

The settlement reached by the parties is a contract that is expected to be voluntarily honoured by them. In the event of a lack of fulfilment by the parties, the settlement is unanimously considered in the several EU Member States to be a contract binding on the parties that will have to be ensured through court actions. No direct enforceability is sought as a general rule.

Within the EU legal instruments on recognition and enforcement, a single reference to the direct enforcement of settlements reached in the framework of a mediation proceeding may be found at Article 55(e) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility [9] in relation to the cooperation between central authorities in matters of parental responsibility. The provision states that central authorities shall, upon request from a central authority of another Member State or from a holder of parental responsibility, cooperate in specific cases to achieve the purposes of this Regulation. To this end, they shall, acting directly or through public authorities or other bodies, take all appropriate steps in accordance with the law

of that Member State in matters of personal data protection to: "*facilitate agreement between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end*." Consistently therewith, Article 46 of Regulation 2201/2003 explicitly states that "*agreements between the parties that are enforceable in the Member State in which they were concluded shall be recognised and declared enforceable under the same conditions as judgments*." [10]

This facilitative position towards settlement (not necessarily just settlements reached via mediation) is found in other EU Regulations, although no direct enforceability– that is, not endorsed by a public authority – of settlements is foreseen:

1) Article 51(2) of Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [11] clearly endorses the obligation of the central authorities to take all necessary measures in order "*to encourage amicable solutions with a view to obtaining voluntary payment of maintenance, where suitable by use of mediation, conciliation or similar processes*" [12]. Article 45(a) allows the provision of legal aid in order to cover "*pre-litigation advice with a view to reaching a settlement prior to bringing judicial proceedings*" [13].

2) Article 8 of Regulation 650/12 on successions [14] also manifests the obligation of the court which has started succession proceedings of its own motion under Articles 4 or 10 to close them "*if the parties to the proceedings have agreed to settle the succession amicably out of court in the Member State whose law had been chosen by the deceased pursuant to Article 22*". The Regulation cannot be an argument to prevent the parties from settling the succession amicably outside court, "*for instance before a notary, in a Member State of their choice where this is possible under the law of that Member State. This should be the case even if the law applicable to the succession is not the law of that Member State*." [15]

The direct enforceability of the settlement reached by the parties within a mediation proceeding is usually made dependent on its homologation by a public authority, generally notaries or judges. In addition, the possibility of having the agreement embodied in an arbitral award is available. For the settlement to be enforceable, its homologation by these authorities will be necessary. This is a general rule in the EU, although, the authorities that can grant this homologation vary from country to country. In some cases the judge, in some other the judge and other public authorities.

This fact is very relevant in cross-border disputes in relation to agreements entered into in an EU Member State for which enforcement is sought abroad. As a matter of fact, only settlements that are considered enforceable in the country of origin will be recognised and enforced abroad. Logically, the legal regime applicable to this recognition will vary if the enforcement is sought in another EU Member State or outside the EU. And of course, a different situation will exist when recognition of settlements reached outside the EU is sought in a specific EU Member State. Additionally, a different legal regime will exist in relation to those settlements that are finally embodied in an arbitral award [16].

1. Recognition and enforcement of a settlement reached in an EU Member State in another Member State

Enforcement of foreign settlements is broadly made dependent on the participation of national courts. No direct enforceability is envisaged as a general rule. An isolated exception to this position is found in Portugal, where Article 9(4) of Act 29/2013 recognises direct enforceability – "*without the necessity of homologation by the court*" [17] – of the settlement reached via a mediation in another EU Member State "*which respect letters a)* [18] *and d)* [19] *of paragraph 1 of this Article in so far the legal rules of that State grants it enforceability*". The provision is fully in line with Article 6 of the 2008 Directive [20].

Leaving aside this unique case, as regards the recognition and enforcement in one Member State of a settlement reached in another Member State, there are two options depending on whether or not an EU legal instrument exists that covers the subject matter of the dispute and taking into account the specific legal instrument in which this settlement has been embodied.

A. Existence of an EU legal instrument

In the case of settlement reached in a certain EU Member State enforcement of which is sought in another Member State, the object and content of the settlement will be decisive in making applicable any of the existing EU instruments on recognition and enforcement of foreign judgments. Indirect reference to these instruments and any existing international convention is made in some EU Member States, e.g. Portugal [21] and Spain [22].

The settlement reached by the parties on a topic covered by the existing EU legal instruments on recognition and enforcement of judgments which is embodied in a judgment, an authentic instrument – e.g. a notarial deed- or a court-settlement which are enforceable in accordance to the law of the country where these instruments have been rendered will be subject to the flexible system designed by the EU in this area. As previously stated, the enforceability of the agreement reached by the parties is, as a general rule, subject to its homologation by a public authority – e.g. a judge or notary – in the Member States. Therefore in most cases the settlement reached will be embodied in any of these instruments and, consequently, will be subject to the existing Regulations on recognition and enforcement if they fall within their scope.

These regulations are essentially Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [23] and Regulation 2201/2003, to which the Directive itself refers [24]. But also of relevance are Regu-

lation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims [25], Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [26], and even Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [27]. In addition, any future text to be enacted will be applicable: this reference to the texts to come is relevant insofar as some instruments on the economic aspects of marriage [28] and partnership [29] are in the pipeline in Brussels.

If the settlement reached by the parties is fully or partially covered by any of these EU texts or any other that could be enacted by the EU, they will be applied and a full or partial recognition of the settlement will be granted. It is relevant at this point to remember that availability of rights in some areas of law – e.g. family law – is under discussion in some Member States and that this may entail its lack of enforceability in the country of origin.

The general framework created by these instruments would satisfy the mandate of Article 6 of the 2008 Directive. In fact the enforceability would be seemingly granted in more flexible and broader terms than those foreseen in Article 6(1) *in fine* of the 2008 Directive [30]. The reference made by this provision to the agreement reached by the parties as being "*contrary to the law of the Member State where the request is made*" as grounds for the rejection of its enforceability is restricted by the several Regulations insofar as they combine a general reference to the manifest contradiction with "public policy" with a rule prohibiting review on the substance [31], thus favouring the circulation of these agreements throughout the EU.

B. Absence of an EU legal instrument

If the settlement fully or partially falls outside the scope of any of the existing EU Regulations, international conventions and national rules on recognition and enforcement of foreign judgments and decrees existing in every EU Member State would be applicable. In most cases not only judgments but also other authentic documents are covered by these provisions; this is the case for example in Austria [32], Belgium [33], Bulgaria [34], Croatia [35], Germany [36], Hungary [37], Italy [38], Poland [39], Portugal [40], Slovakia [41], Slovenia [42] or the UK [43].

2. Recognition of settlements reached outside the EU in an EU Member State

As far as EU Regulations on recognition and enforcement refer solely to judgments, authentic documents and court transactions rendered in an EU Member State, recognition and enforcement of settlements reached outside the EU that fall outside the scope of application of the Lugano Convention of 2007 [44], would be governed by the international or national legislation applicable in every Member State in the specific area of law at stake. Because most of the Member States have enacted legislation on cross-border mediation as a consequence of the implementation of the 2008 Directive, the scope of application of this legislation tend to be limited to purely EU cross-border situations and therefore no special rules as regards the recognition of non-EU settlements exist. Logically the general rules on recognition and enforcement applicable in the country where enforcement is sought will apply: this is the situation in Austria [45], the Baltic countries [46], Belgium [47], Croatia [48], Cyprus [49], Czech Republic [50], Germany [51], Luxembourg [52], Portugal [53], Romania [54] and UK [55].

Moreover, even in cases of enactment of specific legislation on the recognition and enforcement of settlements reached outside the EU (of which Spain is a good example) [56], this fact logically does not alter the scope of application of the existing EU instruments and a reference to national solutions is made.

3. The special situation of settlements lacking enforceability in their countries of origin

As stated, the settlement reached by the parties is considered to be a contract that is binding on them. In the event of lack of fulfilment of a settlement reached in cross-border mediation (carried out within or outside the EU), any of the parties may at any time lodge a claim for breach of contract before the competent court of any EU Member State and ask for its compulsory enforcement. The jurisdiction of that court will be determined in accordance with the existing EU Regulations, basically of Regulation 44/2001 or, as the case may be, following national rules [57].

Other cases may exist in which the parties want to enforce in one Member State an agreement entered into in another Member State, or indeed outside the EU, that has not been homologated by any public authority and that consequently lacks enforceability. Some EU Member States approach this matter explicitly (e.g. Spain) [58], but most extrapolate the approach in purely domestic disputes to such cross-border situations.

Responses provided tend to be similar. The settlement should gain enforceability in the country where enforcement is sought and this should generally be done either by way of having the settlement notarised or by having it embodied in a judicial resolution in accordance with the law of the place where this is done (although some countries like Croatia maintain a much more flexible position) [59]. In Austria, for instance, these two possibilities are envisaged: either the parties have a notarial deed drawn up or they conclude a mediation agreement in front of a civil court in accordance with Article 433a ÖZPO (*Mediationsvergelich*) [60]. Estonia and Lithuania [61], Hungary [62], Poland [63], Romania [64] and Slovenia [65] also admit both options in general terms. Germany also accepts them but their viability seems to be rather difficult in cross-border cases insofar as a link to Germany is required [66].

On the contrary, countries like Bulgaria [67], Cyprus [68], Finland [69], Greece [70], Luxem-

bourg [71] and Portugal [72] only allow homologation by State courts. In Portugal there are differences between internal and cross-border mediation: in cross-border mediation the consent of all parties is required, something that is not requires in internal disputes [73]. Italy requires homologation by the competent court in accordance with Italian law: after this homologation the settlement becomes an enforceable instrument [74].

Finally, in Belgium there are important differences between mediation undertaken by accredited and non-accredited mediators. As a general rule, only settlements achieved in mediations directed by an accredited mediator are open to homologation by the court. In the case of settlements reached in another Member State in a mediation conducted by a mediator accredited in the country where the mediation took place but not in Belgium, homologation should be made feasible on the basis of mutual recognition. Nevertheless no case law is said to exist so far [75].

4. Settlements embodied in an arbitration award

Finally, settlements reached within a mediation proceeding may be embodied in an arbitral award. In this case, irrespective of the seat of the arbitration, the New York Convention on the recognition and enforcement of foreign arbitration awards or, in accordance with Article VII of the Convention, any other convention that may be more favourable to the recognition of foreign arbitration awards, will be applicable.

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18. The dispute can be submitted to mediation and no homologation for the settlement reached is necessary in accordance to the law.
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30. Article 6(1) in fine: "... The content of such an agreement shall be made enforceable unless, in the case in question, either the content of this agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability".
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Есплугес Мота Карлос Аурелио

ЦИРКУЛЯЦИЯ ПРОЦЕДУРЫ ПРИМИРЕНИЯ СТОРОН В ЕВРОПЕЙСКОМ СОЮЗЕ

Процедура примирения сторон в целом считается экономически эффективным инструментом, который обеспечивает доступ к правосудию в более быстрый и доступный способ для сторон, нежели обращение в государственные суды. Процедура медиации также способна уменьшить нагрузку на и так переполненную судебную систему и, таким образом, повысить эффективность судебной системы в разрешении споров, как внутренних, так и с иностранным элементом, делая доступ к правосудию более эффективным. Европейская комиссия, как и другие учреждения по всему миру, понимает значение процедуры примирения сторон и в то же время разделяет необходимость обеспечения принудительного исполнения соглашения, достигнутого в одном из государств-членов по всей территории ЕС. Добровольное исполнение мирового соглашения считается высоким уровнем. Тем не менее количество таких примирительных процедур увеличивается, возрастает сумма спора в судебном процессе, что неизбежно ведет к принудительному исполнению мирового соглашения. В статье анализируются несколько вариантов принудительного исполнения таких соглашений в государствах – членах ЕС в отношении соблюдения всех пунктов, достигнутых в рамках трансграничной медиации.

Ключевые слова: *медиация, правосудие, стороны соглашения, исполнение иностранных соглашений, арбитражное решение.*

Есплугес Мота Карлос Ауреліо

ЦИРКУЛЯЦІЯ ПРОЦЕДУРИ ПРИМИРЕННЯ СТОРІН В ЄВРОПЕЙСЬКОМУ СОЮЗІ

Процедура примирення сторін у цілому вважається економічно ефективним інструментом, який забезпечує доступ до правосуддя в більш швидкий і доступний спосіб для сторін, ніж звернення до державних судів. Процедура медіації також здатна зменшити навантаження на переповнену судову систему і, отже, збільшити ефективність судової системи у розв'язанні спорів, як внутрішніх, так і з іноземним елементом, роблячи доступ до правосуддя більш ефективним. Європейська комісія, як і інші установи по всьому світу, розуміє значення процедури примирення сторін і водночас поділяє необхідність забезпечення примусового виконання угоди, досягнутої в одній з держав-членів по всій території ЄС. Добровільне виконання мирової угоди вважається високим рівнем. Проте кількість таких примирних процедур збільшується, зростає сума спору в судовому процесі, що неминуче веде до примусового виконання мирової угоди. У статті аналізуються кілька варіантів примусового виконання таких угод у державах – членах ЄС щодо дотримання всіх пунктів, досягнутих у межах транскордонної медіації.

Ключові слова: *медіація, правосуддя, сторони, виконання іноземних угод, арбітражне рішення.*