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**The EU Directive on Cross Border Mediation:
A Model for Boosting the Mediation Movement in Asia?**

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The EU Directive on Mediation – A Model for Asia?

Outline of the presentation:

- Part 1: The EU Directive on Mediation
- Part 2: A case study: Effects of the Directive on mediation proceedings under the ICC ADR Rules
- Part 3: Lessons learned: The EU Directive as a Model for Asia



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PART 1:

EU Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (“Directive”)

- Harmonisation of the Member States legislation on specific aspects of cross-border commercial mediation proceedings
- Must be transposed into national law by May 2011.



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The EU Directive on Mediation: Goals & meta goals and the making of the Directive

1. The goals and meta-goals behind the directive

- Harmonisation -> Secure Quality
- “Better access to justice”

2. History – the making off the Directive

- Start: 1998
- 2002: Green Paper
- 2004: European Code of Conduct (voluntary)
- First draft of Directive 2004
- Formal approval May 2008



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3. Content

- Scope: Cross-border commercial disputes
- Five main aspects of mediation procedures
 1. Recourse to mediation
 2. Enforcability of mediation agreement
 3. Confidentiality
 4. Limitation periods
 5. Quality and training of mediators



The EU Directive on Mediation – Article 5: Recourse to mediation

The 5 aspects of the Directive in more detail

1. Recourse to mediation (Article 5 of the Directive)

1. 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.

2. 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.



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The EU Directive on Mediation – Article 6: Enforcability

2. Enforcability of mediation agreements (Article 6 of the Directive)

1. Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that 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.

2. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.

3. Member States shall inform the Commission of the courts or other authorities competent to receive requests in accordance with paragraphs 1 and 2.

4. Nothing in this Article shall affect the rules applicable to the recognition and enforcement in another Member State of an agreement made enforceable in accordance with paragraph 1.



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The EU Directive on Mediation – Article 7: Confidentiality

3. Confidentiality (Article 7 of the Directive)

1. Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:

(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.

2. Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation.



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The EU Directive on Mediation – Article 8: Limitation periods

4. Limitation and prescription periods (Article 8 of the Directive)

1. Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process.

2. Paragraph 1 shall be without prejudice to provisions on limitation or prescription periods in international agreements to which Member States are party.



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The EU Directive on Mediation – Article 4: Quality control and code of conduct

5. Quality of mediators and code of conduct (Article 4 of the Directive)

-> voluntary provision

1. Member States shall encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organisations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services.

2. Member States shall encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties.



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Part 2: Effects of the EU Directive on mediation proceedings under the ICC ADR Rules – a case study

PART 2: The ICC ADR Rules

- Scope: commercial disputes
- Simple and flexible Rules
- Concern nomination of mediators, conduct of proceeding, confidentiality, financial aspect of the case (fees and costs)
- Effect of Directive on 1) confidentiality issues, 2) quality of mediator
- Enforcability, limitation periods, recourse -> regard national law provisions



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The ICC ADR Rules – Article 7 : Confidentiality

The ICC ADR Rules in more detail:

1. Confidentiality (Article 7 of the ICC ADR Rules)

- Mediation (including outcome!) is confidential
- Mediation agreement confidential
- Parties shall not produce as evidence any documents, views expressed, admissions made, proposals made.... in any judicial, arbitration or similar proceeding.
- Mediator shall not act in any role in subsequent proceedings
- Mediator shall not give testimony



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The ICC ADR Rules – quality control and code of conduct

2. Quality control and code of conduct

- Article 3, para 1 ICC ADR Rules: *“ICC shall make all reasonable efforts to appoint a Neutral having the qualifications, if any, which have been agreed upon by all of the parties.”*

-> no “closed list”; quality requirements depending on individual case

- Article 5, para 3 of the ICC ADR Rules: *“In all cases the Neutral shall be guided by the principles of fairness and impartiality and by the wishes of the parties”.*



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Part 3: Lessons learned from the EU Directive

1. The process – what can be learned from the “making of” the Directive?
2. The critics – what are the weaknesses of the Directive?
3. The aims and impact – does the Directive achieve its goals?



1. The process – what can be learned from the “making of” the Directive?

- A long process
- Debated and very political
- Participative – involvement of many different actors
- Succeeded because there was the political will behind it



2. The critics – what are the weaknesses of the Directive?

- Limited scope – different requirements for cross-border and national disputes, different requirements for non-commercial mediations
- Different stages of development of mediation in Member States
- Vague definitions



3. The aims and impact – does the Directive achieve its goals?

- Meta goal of “access to justice” – to be seen
- Political will to foster mediation was proven
- Many different actors involved in the making of and the implementation of the Directive
- Countries start to adopt and/or to be guided by the Directive (f.ex. Poland, Italy)
- Subject of debate, conferences, articles, research



Thank you & ICC ADR contact details

THANK YOU!

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