

3RD EUROPEAN CONFERENCE ON MEDIATION

28. May 2010

EU Mediation Directive,
Lawyers in ADR



Universiteit Utrecht



TOOLKIT COMPANY

Merging science & commercial practice

Introduction by
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The **Directive 2008/52/EC OF THE EUROPEAN
PARLIAMENT AND OF THE COUNCIL** of 21 May 2008 ...



Lawyers in ADR

**Roles, Responsibilities and Opportunities of the
Lawyers in Alternative Dispute Resolution (ADR)**

A Project implemented by



**... ON CERTAIN ASPECTS OF MEDIATION
IN CIVIL AND COMMERCIAL MATTERS**

In cooperation with

Utrecht University (The Netherlands)
University of Deusto (Spain)
UEAPME (Belgium)
ACB (The Netherlands)
ECLA (Belgium)





Lawyers in ADR

Roles, Responsibilities and Opportunities of the Lawyers in Alternative Dispute Resolution

Lawyers in ADR is the shared name of three connected EU funded projects to promote the knowledge and the use of *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008, on certain aspects of mediation in civil and commercial matters.*



Training

Implementing courses on civil and commercial mediation for EU lawyers



Video

Creating a series of specialized videos on cross-border mediation translated into 23 EU languages



Survey

Creating a survey on data gathering to quantify the cost of *not using* mediation



Book

Producing a book on mediation advocacy in the EU



Website

Making a specific website with articles, video clips, rules, regulations, and other ADR tools



International Conferences

Organizing

international conferences to present the projects' results and impact

Go to

www.adrcenter.com/cj

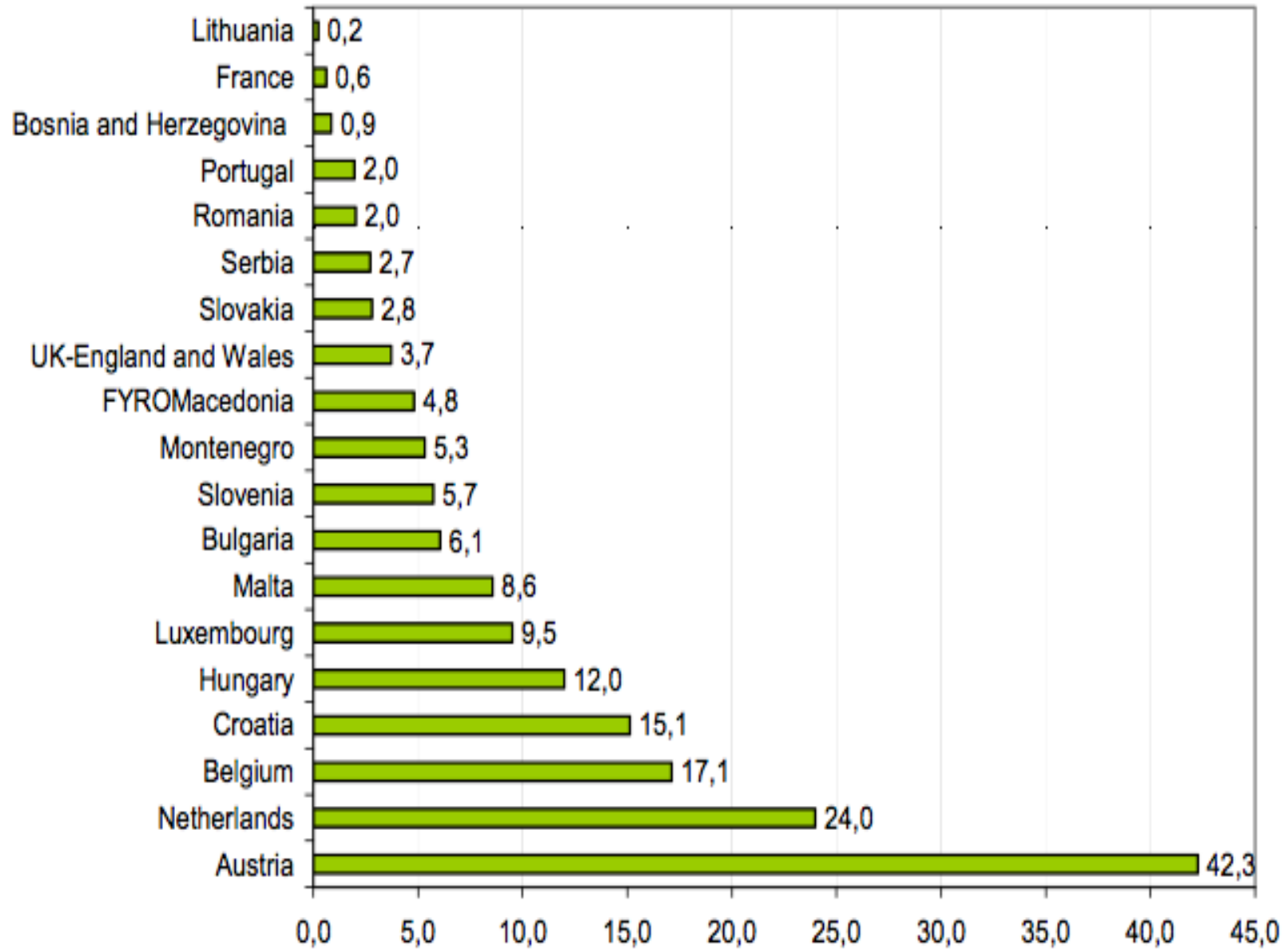
to download the EU :

- *Mediation Advocacy e-book;*
- *Video explaining mediation; and*
- *Survey on the costs of commercial litigation.*

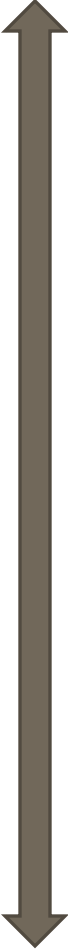
European *Union*:

- 27 Members with 25 Civil Law jurisdictions and 2 Common Law jurisdictions
- Approaches towards legislation in mediation matters and *ready-ness* to use ADR in the EU in cross border relationships
- Approaches towards mediation (style)

Accredited mediators/100.000 inhabitants 2006



Regulation of ADR in the EU

- 
- 0% - The UK, Ireland No legislation, regulation by mutual understanding & agreement: many mediations
 - 10% - 25% - The Netherlands. No legislation, self-regulation of mediator, special rules for court connected mediation, legal mediation aid, disciplinary court: many mediations
 - 25%-50% - France, Belgium – A law, not so much mediations
 - 80% - Austria – A law with very strict quality rules and mediation going on
 - 100% - Bulgaria, Romania – An elaborate law, but not too many cases yet

YES	NO
Belgium	Austria
Croatia	Bosnia and Herzegovina
Denmark	Bulgaria
Finland	Czech Republic
France	Germany
Greece	Hungary
Luxembourg	Iceland
Malta	Ireland
Monaco	Italy
Montenegro	Latvia
Netherlands	Lithuania
Norway	Poland
Russian Federation	Portugal
Serbia	Romania
Slovenia	Slovakia
Spain	Switzerland
Sweden	
FYRO Macedonia	10
UK-Northern Ireland, Scotland, England, Wales	

"Irreconcilable" Issues in Regulating Mediation

"Private" ADR

1. Voluntary attempt
2. Flexible procedure
3. Mediator accreditation standard set by the market
4. No sanctions for refusal to mediate (in the absence of a contract clause or statutory obligation)
5. Mediation body different legal forms and can be an individual
6. Proposals exchanged are irrelevant in subsequent proceedings
7. Mediation fees are freely contracted (and might be high)
8. Mediator does not have to be a lawyer
9. Outside counsel presence not necessary
10. Mediated settlement = contract

Mandatory attempt

Rigid procedure

Mediator accreditation standard set by public regulation

Some sanctions

The structure of mediation body determined by law

Proposals exchanged are relevant in subsequent proceedings

Mediation fees are fixed

Mediator has to be a legal professional (or at least a University graduate)

Outside counsel presence necessary

Mediated settlement = enforceable title

"Public" ADR

The Features of European Mediation - a Variegated Landscape

		UK	IT	AU	NL
1. Attempt	Voluntary	√		√	√
	Mandatory		√*		
2. Mediation clause	Case admissable in court			√**	√
	Mandatory	√	√		
3. Procedure	Flexible	√		√	√
	Rigid		√	(√)	
4. Mediator accreditation standard	Set by the market	√	√		√
	Set by public regulation			√	
5. Sanctions	No sanctions		√	√	√
	Some sanctions	√			√ (employment cases)
6. Mediation body	Different legal forms and can be an individual	√			√
	Its structure determined by law		√	√	

The Features of European Mediation - a Variegated Landscape

		UK	IT	AU	NL
7. Proposals exchanged	Are irrelevant in subsequent proceedings	√			√ (case law)
	Are somewhat relevant in subsequent proceedings		√	√	
8. Mediation fees	Are freely contracted (and might be high)	√	√		√
	Are fixed			√	
9. Mediator	Does not have to be a lawyer	√	√	√	√
	Has to be a legal professional				
10. Outside counsel presence	Not necessary	√	√	√	√
	Necessary				
11. Mediated settlement **	Contract	√		√?	√
	Enforceable title		√		√*

* possible in court connected mediation ** In all EU countries except Denmark through notary!



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The **Directive** 2008/52/**EC OF THE EUROPEAN PARLIAMENT**
AND OF THE COUNCIL of 21 May 2008 on certain aspects of mediation in civil
and commercial matters, published on the Official Journal of the European
Union L. 136/3 on May 24, 2008

“... 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**”.

DIRECTIVES

DIRECTIVE 2008/52/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 21 May 2008

on certain aspects of mediation in civil and commercial matters

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and the second indent of Article 67(5) thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Economic and Social Committee ⁽¹⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽²⁾,

(4) In April 2002 the Commission presented a Green Paper on alternative dispute resolution in civil and commercial law, taking stock of the existing situation as concerns alternative dispute resolution methods in the European Union and initiating widespread consultations with Member States and interested parties on possible measures to promote the use of mediation.

(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.



Peter Kamminga
MEDIATOR

Claude Amar
PLAINTIFF
Gigem

Esra Çuhadar-Gürkaynak
DEFENDANT
Mico



Irena Vanenkova
LAWYER FOR PLAINTIFF

Felix Merks
LAWYER FOR DEFENDANT

THE CASE

- Mico uses technology patented by Gigem.
- Gigem tries to contact Mico, who refuses to talk => litigation, long discovery + many expert reports =>
- Canadian judge rules: infringement.
- Parties decide to try mediation to deal with the consequences.

Position Mico

- (Re-)developed + improved technology ourselves.
- Judge misled, we'll win case in appeal.
- Unfair punishment: damages + all marketing efforts lost.
- Giant tries to crush us and wear us out.

Position Gigem

- We won our case, entitled to damages.
- Bad faith proofed by employing Gigem R&D researcher as well.
- Moreover: they refused to negotiate and forced us to litigation abroad.

Position Mico

- COUNTER CLAIM
- \$ 1 million compensation
- reputational damage
- Compensation for legal + non-legal expenses

Position Gigem

- CLAIM
- \$ 9 million compensation for past infringement
- \$ 500.000 for any further infringement
- Public apology for Mico's patent infringement in bad faith
- Compensation for legal + non-legal expenses



READY ... ACTION!

Agenda

- INFRINGEMENT CLAIM
- COMMUNICATION
- REPUTATION
- CREATIVE SOLUTIONS
- COMPENSATION

Brainstorming list

- DISTRIBUTION AGREEMENT
- JOINT VENTURE
- LICENSING AGREEMENT
- CROSS LICENSING WITH jv
- COMBINE BUSINESS
- CAR REFINISHING PRODUCTS
- QUOTATION SUPPLY CONTRACT C-WAX-D
- DISTRIBUTION AGREEMENT CAR REFINISHING