

# **LEX MERCATORIA AS SUBSTANTIVE LAW IN INTERNATIONAL COMMERCIAL MEDIATION**

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*Prof. Dr. Filali OSMAN\**

## **SUMMARY**

The mediation intends to encourage amicable dispute resolution in international contracts. We know that the difference with arbitration is very pronounced. The main difference with arbitration is that in any case the mediator or conciliator does not have the authority to impose upon the parties a solution to the dispute. The arbitrator makes the decision to resolve the dispute and the parties are legally bound by the decision made.

But the question of the status of lex mercatoria as substantive Law for the mediator remains unanswered. The Principles of lex mercatoria have been recognized by numerous arbitral awards. Can also mediation be part of a kind of supplementary lex mercatoria which can be of use to parties and to mediators?

Moreover, the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in

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\* Professor of Law (Faculty of of Besançon, CRJFC)

Ex-counsel for the Government, Expert and Counsel (osmanfilali@yahoo.fr)

civil and commercial matters, makes no provisions on ‘the applicable law’. There are only provisions concerning the ‘Enforceability of agreements resulting from mediation’.

The purpose of this paper is to highlight the role of the « third person who is asked to conduct a mediation in an effective, impartial and competent way » in applying and promoting the development of the *lex mercatoria*.

Can the *lex mercatoria* be the law applicable to the merits of the mediation?

We suggest that question to be answered by steps with regard to comparative law which may include the drafting of specific guidelines or codes of conduct for certain types of ADR.

## **Introduction**

Mediation has the wind in its sails. After the fashion of the arbitration, widely promoted since the Second World War by national laws and international law [New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards], mediation has become a very important example of soft law approach of the right to have access to justice.

We know that the difference with the arbitration is very pronounced. The main difference with arbitration is that in any case the mediator or conciliator does not have the authority to impose a solution to the dispute upon the parties. The arbitrator makes the decision to resolve the dispute and the parties are legally bound by it.

The OECD, in the same movement, promotes the ADR through an immense comparative law<sup>1</sup>.

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<sup>1</sup> OCDE, 22 janvier 2003, DSTI/ICCP/REG/CP(2002)1/Final.

At the global level, the United Nations Commission for International Trade Law-UNCITRAL- suggested a Model Law on International Commercial Conciliation (2002)<sup>2</sup>.

We believe that Model Law is a strong work basis for all the National Parliaments. Moreover, this Model Law has inspired directly the directive of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

The catalysts of this circulation of legal model are legal international traders. They have shown great imagination in forging since the Second World War their own rules of social behavior through corporate purposes and principles of *lex mercatoria*.

The institutionalization of mediation as an alternative dispute resolution in the EU is recent. The European Commission has been forced to develop a proposal for a Directive on certain aspects of mediation in civil and commercial matters on 22 October 2004 following the failure of two recommendations made on 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes and of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes. They were followed by the Green Paper on alternative dispute resolution in civil and commercial law of 19 April 2002.

Finally adopted on May 21 2008, this directive was to be transposed into the national laws of the Union 27 Member States before 21 May 2011.

However, this directive and the UNCITRAL Model Law are incomplete in a number of important issues raised by mediation.

We suggest answering by steps with regard to comparative law which may include international treaties, the drafting of specific guidelines or codes of conduct for certain types of ADR.

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<sup>2</sup> [http://www.uncitral.org/uncitral/en/publications/bibliography\\_monthly.html](http://www.uncitral.org/uncitral/en/publications/bibliography_monthly.html)

**Firstly**, the terminology is very similar from a text to another and there are common principles governing the procedure (I).

**Secondly**, conventional mediation is subject to contract law. Thus, the bottom of mediation is subject to the law of autonomy. The parties are to choose the law applicable to the substance of the mediation although no text contains provisions about the crucial question of law applicable to the merits of the mediation. So the *lex mercatoria* can be a Substantive Law in International Commercial Mediation (II).

## **I. A Similar Terminology And Common Principles Governing The Mediation Procedure.**

The internationalization and Europeanization of ADR is the origin of similar terminology (A) and common principles applicable to the mediation procedure (A), despite slightly different formulations.

### **A. A Similar Terminology:**

The UNCITRAL Model Law on International Commercial Conciliation provides a very large definition :

« Article 1. Scope of application and definitions

(...)3. For the purposes of this Law, “conciliation” means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons (“the conciliator”) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship».

This is almost the definition used in Article 3 of the 2008 directive which provides :

« Definitions. For the purposes of this Directive the following definitions shall apply:

(a) “Mediation” means 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. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.

It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question.

(b) “Mediator” means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation. »

it is very interesting to note that the European Parliament and the Commission refer to the European code of conduct for mediators (launched during the European Commission Justice Directorate conference in Brussels on 2 July 2004).

However, the European Code of Conduct sets out principles to which individual mediators can voluntarily decide to commit, under their own responsibility.

## **B. Common Principles Governing The Procedure**

We have four main principles of mediation as set down in national and international texts and practice.

a- Mediation and conciliation procedures require the Parties’ consent in writing before that may be initiated.

This is reflection of the voluntary nature of the procedure. Its will is also the legal basis of the choice to submit mediation to the principles of *lex mercatoria*.

b- Impartiality towards the parties and independence towards the third parties of mediators. While impartiality and independence are distinct concepts, they are closely related. The European code of conduct for mediators gives us an excellent and very precise definition of these two concepts.

## **II. Independence and Impartiality**

### **A. Independence**

If there are any circumstances that may, or may be seen to, affect a mediator's independence or give rise to a conflict of interests, the mediator must disclose those circumstances to the parties before acting or continuing to act.

Such circumstances include:

- any personal or business relationship with one or more of the parties;
- any financial or other interest, direct or indirect, in the outcome of the mediation;
- the mediator, or a member of his firm, having acted in any capacity other than mediator for one or more of the parties.

In such cases the mediator may only agree to act or continue to act if he is certain of being able to carry out the mediation with full independence and neutrality in order to guarantee full impartiality and that the parties explicitly consent.

The duty to disclose is a continuing obligation throughout the process of mediation.

## **B. Impartiality**

Mediators must at all times act, and endeavour to be seen to act, with impartiality towards the parties and be committed to serve all parties equally with respect to the process of mediation. ».

c- confidentiality : it means that Mediation and conciliation procedures shall be conducted in conditions of confidentiality,

Only the mediator must keep confidential all information arising out of or in connection with the mediation. Therefore any information disclosed in confidence to mediators by one of the parties must not be disclosed to the other parties without permission, unless compelled by law or grounds of public policy.

But we argue that the parties should be free. Inverse solution could condemn the use of mediation.

d- transparency in accordance with the general principles of fairness, of the process and good faith.

According to the European code of conduct for mediators, transparency means that «The outcome of the procedure shall be binding on the Parties only when they reach an agreement that they deem ending ».

We should add the effect of mediation on limitation and prescription periods. In the preparation of the UNCITRAL Model Law, a discussion took place as to whether it would be important to include a uniform rule providing that the initiation of mediation proceedings would interrupt the running of limitation and prescription periods concerning the claims involved in the mediation.

Transparency means also that an appeal to the judge during the proceedings mediation is inadmissible if the parties have stipulated a mediation clause. Member States adopted transposition measures on this aspect of the procedure.

In conclusion, there are general principles serving as guides or/and rules. There are admitted to be universal in mediation proceedings.

But what about the applicable law to the merits of mediation?

### **III. The Lex Mercatoria as Law Applicable to the Substance of the Mediation**

Whatever terminology is used by the directive of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, or by the UNCITRAL Model Law on International Commercial Conciliation (2002), the central issue remains the law applicable to the merits of the dispute.

We found that none of professional, national or international texts contains any provisions about the law applicable to the merits of the mediation. But it doesn't mean that mediation should not be submitted to rules of law or submitted to international trade usages as Lex Mercatoria.

Moreover, can the Mediator decide *ex aequo et bono* -amiable compositeur- ? Only if the parties have expressly authorized it to do so for arbitration? Or in all cases because the mediator is more free than arbitrator? The question remains unanswered and we suggest to answer by steps with regard to comparative law which may include the drafting of specific guidelines or codes of conduct for certain types of ADR.

First, all the legal systems differentiate between conventional mediation -out of court- and judicial mediation -court mediation-.

We know that in terms of judicial mediation *lex fori* determines the procedure for mediation and the law applicable to the merits of the dispute, particularly in matters of public policy (criminal law, family law, consumer law, etc.). All the legal systems indicate that the law applicable to the merits of the dispute derive from jurisdiction.

At the opposite, conventional mediation is subject to contract law. Thus, the bottom of mediation is subject to the law of autonomy. The parties are to choose the law applicable to the substance of the mediation.

But flexibility available to the referee in the application of the *lex mercatoria* contributes to the success of mediation. It is true that un-



like in arbitral proceedings, the mediator and the parties are not to be rule-bound. But the consensual nature of mediation is twofold, since it is based on the freedom of the Parties and of the Mediator. There are four consequences.

**First consequence** : the mediator has no obligation to settle mediation in accordance with the rules of law or *ex aequo et bono*.

**Second consequence** : the Parties are free to provide that the mediator shall make a recommendation *ex aequo et bono* or in accordance with the rules of law -national or *lex mercatoria*-. It is necessary for the mediator to respect the intentions of the parties where they have made an express choice as to the law applicable to an issue.

**Third consequence** : even when the parties have not made an express choice, the mediator is allowed to apply *lex mercatoria* or to act as *amiable compositeur*, except if the Parties provide an exclusion. But such exclusion to apply rules of law or to act as *amiable compositeur* will be very uncomfortable for the mediator because he needs to have some legal basis for his recommendation. It's certain that if the contract is incomplete, and it will be probably, the mediator will not be able to base his recommendation only on its clauses.

**Fourth consequence** : when acting *ex aequo et bono*, the arbitrator is not compelled to depart from applicable law -national or a-national as *lex mercatoria*-, but it is permitted to do so. He must demonstrate that it is fair and just. The mediator is not in the same situation. He has the same power to rule by law or in equity, except if the parties provide that the mediator shall make a recommendation only according to the contract and/or shall take account of applicable usage.

Hence, the applicable rules of commercial law -domestic or international or *lex mercatoria*- provide the background against which negotiations take place. This law defines the boundaries of party autonomy and allows to protect third parties and helps to ensure fairness within the negotiating process. Furthermore, it successfully provides the structure within which agreements may be given effect.

It is a mistake to affirm that it is not in the original spirit of mediation procedure to submit the dispute to a national law or *lex mercatoria*.

There is no dispute in this legal problem of mediation and it is likely that there will never be because the parties remain free not to accept the mediator's recommendation.

Furthermore, we know that the *lex mercatoria* maintains close ties with the amiable composition -*ex aequo et bono*- and constitutes a very good legal help for the mediator.

Indeed, the general principles of *lex mercatoria* are based on the principle of good faith and universal justice and are frequently used in arbitrations under amicable composition.

*Lex mercatoria* moderates the effects of the force majeure and establishes the obligation of good faith to renegotiate the contract in case of hardship. It imposes on the parties an obligation to mitigate the damages. Finally and the most significantly is that the Good faith principle will certainly lead to a recommendation consistent with fairness. The normative content of *lex mercatoria* is not an obstacle for mediators.

In all cases, mediation requires to be supported, and to a limited extent regulated, by national law and *lex mercatoria* for many other reasons although the arbitrator derives his authority to decide the case from the will of the parties.

Although the mediator is not a judge and has not forum, he shall give effect to overriding mandatory provisions of the law of the country of the seat of the mediation and in which the obligations arising out of the contract have to be or have been performed -close link-.

The flexible mediation process does not permit the mediator to ignore these overriding mandatory provisions.

In most cases mediators will respect the choice made by the parties but there are some situations where the question of whether or not mediators can disregard that choice will arise.

This is the case when they should be obliged to apply mandatory rules.

**The directive of 2008 expressly refers to the Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes.** However, the Recommendation provides this solution about the Principle of legality:

« The decision taken by the body may not result in the consumer being deprived of the protection afforded by the mandatory provisions of the law of the State in whose territory the body is established. In the case of cross-border disputes».

The question that remains to be answered is which mandatory rules should the mediators apply and what are the effects of their application. Although the agreements reached through mediation will be implemented voluntarily, it may, at the request of the parties, be confirmed in a judgment, decision or authentic act by a court or public authority. It's the case for the mediations submitted to the European directive of 21 may 2008 which provides a mutual recognition and enforcement.

As in the arbitration, it is a very important to ensure the effectiveness of mediation.

## **Conclusion**

The mediator is an acrobat of law. He carries a sword and scales, but uses only the balance reflecting the obligation to balance claims fairly as provide the mediation-conciliation Rules of The Delhi Mediation Centre adopted :

« Rule 11 : The mediator/conciliator shall not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872, but shall be guided by the principles of fairness and justice, having regard to the rights and obligations of the parties, usages of trade, if any, and the circumstances of the dispute(s). »

It is the quest for universal justice with limited resources. The mediation has fine days ahead of it.

The legal issue of lex mercatoria as substantive law in international commercial mediation is only a great season that we discovered with you.