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Mediation in restructuring and insolvency

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The European Commission's Recommendation of March 2014 on a new approach to business failure and insolvency[1] introduces two rather new role players in the area of reconstruction and insolvency, namely the mediator and the supervisor. The relevant recital provides: '(17) To promote efficiency and reduce delays and costs, national preventive restructuring frameworks should include flexible procedures limiting court formalities to where they are necessary and proportionate in order to safeguard the interests of creditors and other interested parties likely to be affected. For example, to avoid unnecessary costs and reflect the early nature of the procedure, debtors should in principle be left in control of their assets and the appointment of a mediator or a supervisor should not be compulsory, but made on a case-by-case basis.' Section II B of this Recommendation ('Facilitating negotiations on restructuring plans') then provides, under the heading 'Appointment of a mediator or asupervisor': '8. Debtors should be able to enter a process for restructuring their business without the need to formally open court proceedings. 9. The appointment of a mediator or a supervisor by the court should not be compulsory, but rather be made on a case by case basis where it considers such appointment necessary': adding with an eye to a mediator '… (a) in the case of a mediator, in order to assist the debtor and creditors in the successful running of negotiations on a restructuring plan;'[2] Mediation in restructuring and insolvency matters? Will it work?

1. USA: mediation in corporate insolvency is rising

In the world of rescue and insolvency a mediator is not a stranger. In the USA mediation is frequently used in insolvency procedures, including Chapter 11 cases.[4] Title 11 of the United States Code (the

Bankruptcy Code) governs bankruptcy cases filed in the USA. The Code is premised on the theory that an honest debtor deserves a fresh financial start and thus relief from its unsecured debts. It endeavors to allow a fresh financial start while at the same time balancing the right of the debtor's various constituents as fairly and quickly as possible. The Bankruptcy Code's chapter 11 procedure is both in practice and conceptually the most important insolvency procedure worldwide. In the last decade many European countries, including Italy, Spain, Germany, France and since some three years the Netherlands, look at Chapter 11 for inspiration in revising their own insolvency laws.[5] In the USA, as an alternative to bankruptcy court litigation in personal bankruptcy cases mediation has been used in disputes in relation to recovering assets from third parties for the benefit of the estate, disputes relating to claims against the debtor and inter-creditor disputes about distribution of the assets of the estate.[6] In 2015, for complex multi party restructurings it has been contended that in the USA '… the use of mediation to reach consensual plans of reorganisation, while not standard protocol in cases, has become common and is no longer controversial'.[7] Areas of deployment of mediation include creditors' meetings (to have creditors negotiate and agree regarding their voting on a plan of arrangement) or structured negotiating to manage and resolve a large number of claims. A much talked-about mediation concerns the Lehman Brothers liquidation Chapter 11 cases to negotiate and mediate hundreds of disputes arising from derivative contracts due to Lehman's filing for bankruptcy. From a report of January 2016 it follows that 495 ADR-processes[8] have resulted in a sum passing the $ 3 billion mark for the various Lehman estates. Settlements have been achieved in 424 ADR-matters involving 541 counterparties. Until 13 January 2016 245 ADR-matters that have reached the mediation stage and have been concluded, 232 have been settled in or subsequent to mediation; only 13 mediations have terminated and remain unsettled.[9] So recently, in the USA, mediation has been used in larger, multi-party reorganisations. The costs of the mediation, including the compensation of the mediator, were paid by the estate.[10] The purpose of these mediations is for all parties to discover a way to find common ground while protecting their interests: 'Its ultimate success in large and complex chapter 11 cases stems from facilitating parties' goals rather than simply evaluating the merits of their positions … and the interests of all creditors for an expeditious resolution, rather then years of deadlocked litigation.'[11] Esher submits that in the EU mediation in insolvency '… may be problematic without some form of court or regularly compulsion.'[12]

2. Mediation in the EU in civil and commercial law matters

In Europe mediation is a rather young phenomenon. A Directive on certain aspects of mediation in civil and commercial matters entered into force in 2008.[13] The Directive concerns mediation not in national cases, but only in cross-border disputes, in which at least one party is domiciled or habituately resident in a Member State other than that of any other party on the date on which e.g. the parties agree to use mediation after the dispute has arisen.[14] In the Directive mediation is seen as a category of ADR, which is defined as '… a range of procedures that serve as alternatives to litigation through the courts for the resolution of disputes, generally involving the intercession and assistance of a neutral and impartial third party.'[15] Mediation is different from the other ADR procedures, such as arbitration, because the parties ultimately make their own decision. There is a third party, a mediator, but s/he only guides the parties and their discussions and negotiations towards an agreement. Another difference is that mediation is a voluntarily process, while arbitration often is imposed and its

result (an arbitral award) is enforceable.[16] In the Directive 'mediation' is defined as '… 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.'[17] It is clarified in recital 6 to the Directive why mediation should be promoted: 'Mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements.'
Many EU Member States do not seem to be convinced however. A recent study submits that its implementation generates only mixed feelings. The study shows for instance that the Directive's minimum common legal framework for mediation in the Member States has not been enacted in Belgium, in Finland only in relation to court-annexed mediation, whilst the Netherlands and the UK only have implemented the Directive in relation to cross-border mediation.[18] Revision of the Mediation Directive is underway.[19]Although within the scope of the Mediation Directive, the study mentioned does not reveal, and I have not found evidence, that the European Commission also had in mind disputes in matters of restructuring or insolvency. It is submitted that 'civil and commercial matters' indeed include matters of 'rescue and insolvency'.[20]

2.1 Insolvency mediation in the EU

In the EU mediation in matters of restructuring and insolvency is dealt with in some Member States, but at a first glance its development is in its infant's shoes. In Belgium, since 2009, the Belgium Act on the Continuity of Companies (*Wet Continuiteit Ondernemingen* (WCO))
contains an article about a company intermediary ('*ondernemingsbemiddelaar*') who can help reorganise the company. The WCO does, however, not clarify its specific role.[21] In the UK, in the Chancery Court Guide 2013 article 3.1 it is stated: 'Where appropriate the court will encourage the parties to use alternative dispute resolution … or otherwise help them settle the case. In particular, the court will readily grant a short stay at allocation or at any other stage to accommodate mediation or any other form of settlement negotiations...'[22] In the French legal system of *mandataire ad hoc* and *règlement amiable/conciliation* an out-of-court workout is enhanced. It is typically initiated by the debtor. Greece is – as far as my research took me – the only EU Member State in which in the general legislation mention is made of mediation based on the Greek insolvency legislation. In 2013 the Spanish Insolvency Act has included a new chapter regulating the 'insolvency mediator' and the extrajudicial settlement of payments ('ESP') as a form of negotiating the debts of the entrepreneurs.[23] Specific mention should be made of a pilot project 'mediation in bankruptcy liquidation cases', running in the Netherlands and initiated by the District Court in Amsterdam in 2012. The aim is to investigate whether procedures initiated by or against the insolvency practitioner ('curator') can be solved more quickly and at lower cost through mediation, so there will be more money for the benefit of the creditors.[24] The pilot is in line with the declared intention of the Minister of Justice and Security to promote dispute resolution through mediation. The mediation processes are supervised by experienced mediators. The (supervisory) judge does not participate in the mediation, but, in the context of its supervisory role to agree with it in a solution reached through mediation. A protocol has been prepared for the procedure and the court has established a Mediation Bureau and compiled a list of professional mediators who are familiar with insolvency. Although it still early to draw

conclusions, the first impressions (after some two years, based on some 20 cases) have been regarded as positive[25], although more recent impressions demonstrate that other courts in the Netherlands (apart from the District Court in Rotterdam) seem reluctant to fully support mediation.[26] In the light of the Recommendation of March 2014, in the Netherlands further study of the weaving of ADR methods into (threatening) insolvency has been called for.[27]

3. Conclusion

To make the Recommendation's suggestion work in practice further study is needed indeed. It would, obviously, need a focused approach on the status of 'mediation in restructuring and insolvency' in the EU Member States and the role and professional qualifications of an 'insolvency mediator' in a national setting.[28] It should include study and proposals regarding the general civil/procedural framework necessary to function fully satisfactory as such a mediator, such as the basics of a mediation agreement, including the mediation procedure to be followed, addressing issues such as commencement of mediation, opting-out, timetable; choice and appointment of the mediator, compensation, immunity, as well as the confidentiality of the process.[29] Other issues to address would be the criteria for referrals by courts to mediation, the legal effect of mediation on prescription terms and pending proceedings. Such a study should be comparative in nature (EU Member States), should include the USA as well and should also concentrate on the question which topics should be subject to a form of regulation on EU level and which ones can be left to the EU Member States.

Voetnoten

[1]
See http://ec.europa.eu/justice/civil/files/c_2014_1500_en.pdf.

[2]
I will only address the mediator, not the 'supervisor' or the concept of 'debtor in possession' that is encouraged in this Recommendation. Of importance for mediation is also a provision with regard to the coordination of the insolvency of groups of companies in Article 72 EIR Recast ('Tasks and rights of the coordinator'), paragraph 2: '2. The coordinator may also: (a) be heard and participate, in particular by attending creditors' meetings, in any of the proceedings opened in respect of any member of the group; (b) mediate any dispute arising between two or more insolvency practitioners of group members.'

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[4]
See already I. Meier, 'Mediation and Negotiation in a Court or in an Out-of-Court Reorganization Procedure' in: H. Peter, The Challenges of Insolvency Law reform in the 21st Century: Facilitating Investment and Recovery to enhance Economic Growth, Zürich: Schulthess 2006, 292ff.

[5]
Chapter 11 is, however, itself up for revision. On December 4, 2014, the American Bankruptcy Institute (ABI) issued breaking news for the restructuring and insolvency community in the USA when it presented its Final Report and Recommendations on the Reform of Chapter 11. See for a comparative critical analysis: B. Wessels and R.J. de Weijs (Eds.), International Contribution to the Reform of Chapter 11 U.S. Bankruptcy Code. European and International Insolvency Law Studies 2, The Hague: Eleven International Publishing 2015.

[6]

See Jacob Aaron Esher, Lisa Hill Fenning, Erwin I. Katz, The ABI Guide to Bankruptcy Mediation, 2nd ed., 2009.

[7]
Jack Esher, 'Recent Use of Mediation for Resolution and Effective Management of Large Case Insolvencies', in: International Corporate Rescue 2015-6, 349ff.

[8]
ADR = Alternative Dispute Resolution.

[9]
Letter to Honorable Shelley C. Chapman Regarding Seventy-third ADR* Status Report, see http://dm.epiq11.com/LBH/Document/GetDocument/2717939.

[10]
Cases included Residential Capital LLC, Cencage Learning Inc., Nortel Networks, Radio Shack and Energy Future Holdings Corp. In many instances in the USA judges act as mediator, see Janice Miller Karlin, 'The "M" Word: Mediation Musings', in: ABI Journal 26 November 2015, 26ff.

[11]
So Benjamin D. Feder and David Hahn, www.abi.org/committee-post/mediation-in-large-chapter-11-cases.

[12]
Jack Esher, 'Recent Use of Mediation for Resolution and Effective Management of Large Case Insolvencies', in: International Corporate Rescue 2015-6, at 351.

[13]
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 ('Mediation Directive').

[14]
Article 2(1) Mediation Directive.

[15]
H.J. Brown & A.L. Marriot, ADR Principles and Practice, London: Sweet & Maxwell 1999, 12.

[16]
Via the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards an arbitral award can be recognised in 156 states (including, since September 2015 Andorra!).

[17]
Article 3(a) Mediation Directive.

[18]
Carlos Esplugues Mota (ed.), Civil and Commercial Mediation in Europe. Volume II: Cross-Border Mediation, Cambridge-Antwerp-Portland: intersentia 2014, 769ff.

[19]
See Guiseppe De Palo et al., "Rebooting" the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU', Report to the European Parliament 2014, see www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf. In May 2016 the European Commission has to report on the application of the Directive and, if necessary propose amendments to the Mediation Directive. The consultation process started late September 2015. See http://ec.europe.eu/justice/newsroom/civil/opinion/ 150910_en.htm.

[20]
In this way too Horst Eidenmüller and David Griffiths, 'Mediation in Cross Border Insolvency Procedures' (2009), www.gforensics.com/resources/CrossBorderMediation.

[21]
On this intermediary, see Bart de Moor, *Gegevensverzameling, de handelsonderzoeken en de ondernemingsbemiddelaar in de wet van 31 januari 2009 betreffende de continuïteit van ondernemingen*, in: Stan Brijs et al., La loi relative à la continuité des entreprises/De

wet betreffende de continuïteit van de ondernemingen, Louvain-la-Neuve 2010, 48ff.

[22]
Www.justice.gov.uk/downloads/courts/chancery-court/chancery-guide.doc. UK insolvency trade association R3 issued in May 2016 a proposal, titled 'A moratorium for Businesses: Improving Business and Job Rescue in the UK', in which a call is made for a 'business rescue moratorium'. Such a moratorium would help save more companies under severe financial strain, saving more jobs and improving returns to creditors. During the moratorium (or: stay) period the debtor would have time to negotiate a rescue plan, sometimes with the assistance of a neutral third party in the form of a licensed insolvency practitioner who would act as a mediator, without the pressure of satisfying at once his creditors or having affected his assets by secured creditors. See http://bobwessels.nl/2016/05/2016-05-doc4-moratorium-in-cross-border-context/.

[23]
See Laura Ruiz, 'Spanish Insolvency Act: the legislation created by the crisis', in: Insolvency and Restructuring International, September 2015, 25ff; Alberto Núnez-Lagos Burguera, 'Recently Enacted Spanish Out-of-Court Debt Restructuring Laws Join the Current European Trend for Efficient Restructuring and lead Innovation for Restructuring Solutions', in: International Corporate Rescue 2015, 216ff. In 2015 some amendments to the mechanisme of the ESP and the role of the mediator have been introduced. See Pilar Galeote, *Mediación Concursal El acuerdo extrajudicial de pagos y el mediador concursal*, available at http://ssrn.com/abstract=2659255.

[24]
C.H. Lankhorst, *Mediation ook in faillissementszaken?*, in: *Bedrijfsjuridische berichten* 2012/32.

[25]
Annet Draaijer and Toni van Hees, *Pilot mediation in faillissementszaken*, in: *Tijdschrift voor Insolventierecht* 2013/40; J.A.A. Adriaanse and E.J.M. van Beukering-Rosmuller, *ADR/Mediation bij (dreigende) insolventie*, in: *Tijdschrift voor Arbitrage* 2014/51. For an initial impetus for a method to prevent (international) insolvencies – also using psychological methods – see Jan A.A. Adriaanse, Ellen J.M. van Beukering and Jean-Pierre I. van der Rest, *Een aanzet voor een methodiek tot het voorkomen van (internationale) insolventies*, in: Nederlands-Vlaams *tijdschrift voor Mediation* and conflictmanagement 2015 (19) 1, 45ff.

[26]
See www.innovatierechtsbestel.nl/sites/innovatieportaal.nl/files/InsolventiemediationMvVeJ.pdf.

[27]
In Germany, in a proposal for legislation to deal with group insolvencies, a group coordinator (*Koordinationsverwalter*) can be appointed, an independent person, who could align proceedings and also can act as a mediator to mediate between the individually appointed insolvency office holders, see Deutscher Bundestag, 18. Wahlperiode, Drucksache 18/407, p. 23.

[28]
For an example, see www.abi.org/committee-post/standards-of-conduct-for-advocates-and-mediators-in-bankruptcy-settlements.

[29]
These topics are mentioned in the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation 2009, but would need attention in a national setting too.