

The Jean Monnet Seminar Series

**ANALYSING ALTERNATIVE DISPUTE
RESOLUTION (ADR) MECHANISMS IN
EUROPE AND EU ACTIVITY IN THE
FIELD: THE COMMUNITARISATION OF
PRIVATE JUSTICE**

Antoine Cremona

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Editor

Peter G. Xuereb

Jean Monnet Professor

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Professor Peter G. Xuereb
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THE AUTHOR

Dr. Antoine Cremona B.A., LL.M (Lond), LL.D, MCI Arb graduated Bachelor of Arts in Law and Economics and Doctor of Laws from the University of Malta. He furthered his studies in Dispute Resolution and International Commercial Litigation at the London School of Economics and Political Science [LSE] where he was awarded a Masters Degree (LL.M) with Distinction. As a Chevening Scholar at the LSE he read Transnational Commercial Arbitration, Alternative Dispute Resolution, International Business Litigation and Construction Arbitration under the tutorship of Professors Trevor C. Hartley, Simon Roberts, H.H. Judge Humphrey Lloyd QC and Julian D. M. Lew QC.

He is a Member of the Chartered Institute of Arbitrators of London, a visiting lecturer in Commercial Arbitration at the University of Malta and practises as an Associate in the Litigation Department at Ganado & Associates Advocates.

**ANALYSING ALTERNATIVE DISPUTE RESOLUTION
(ADR) MECHANISMS IN EUROPE AND EU ACTIVITY
IN THE FIELD: THE COMMUNITARISATION
OF PRIVATE JUSTICE**

DR. ANTOINE CREMONA

In the ever-changing European dispute resolution landscape, practitioners have witnessed over the past years a dramatic increase in interest towards the use of so-called ‘alternative’ forms of dispute resolution. These mechanisms, seen as an ‘alternative’ to traditional court-based litigation, are in reality as ancient as mankind itself but they have been re-explored and reassessed in terms of their efficacy and of the added value which they bring in civil and commercial conflict scenarios only with the emergence of the ‘access to justice’ movement in the United States in the late 1960s. At the risk of oversimplifying this phenomenon, this movement can be said to have instigated a debate on two fundamental issues of civil justice: the availability of ‘judgment’ and the merits of ‘settlement’¹ and was directly responsible for the significant mutation in the way parties today settle their civil and commercial disputes compared to only a few years ago.

Dissatisfaction with the general availability and effectiveness of judgment spurred a general increase in the take up of mediation and other forms of extra-judicial dispute resolution mechanisms. More than a practitioner-driven phenomenon, this was essentially an industry-driven phenomenon based on commercial concerns which generally transcend issues of cost and delay. They are in fact based on considerations such as the added value which can be obtained through mediation and other ADR mechanisms, i.e. contrary to what happens with litigation.

The European Union now, following action in this field by legislators in the individual Member States, is keen to introduce a harmonised approach towards the regulation of ADRs as well as to

¹ Michael Palmer & Simon Roberts *Dispute Processes: ADR and the Primary Forms of Decision-Making*, (Butterworths, 1998), p.25.

create a set of minimum standards in the field. This move, albeit inspired by more pragmatic concerns (essentially revolving around the problem of congested and over-loaded court dockets throughout Europe) rather than by an unconditional subscription to the underlying doctrine of alternative dispute resolution, is nevertheless set to bring new life in the architecture of civil justice across Europe.

This paper endeavours to explore the complex dispute resolution structures in Europe at Member State level in the context of the interest shown by the European Commission in ‘communitarising’ the issue or at least the ground rules on which it is based. Empirical evidence suggests that since time immemorial parties in civil and commercial disputes have made recourse to alternative forms of dispute resolution mechanisms such as mediation and conciliation. The European initiatives in this field cannot therefore be seen as the introduction of ‘new’ methods of resolving disputes between private individuals or corporations but as an attempt at harnessing these trends and at creating a least common factor of regulation and awareness which can help transpose the benefits inherent in these methods to particular disputes and to the parties in a structured and coherent manner.

However, contrary to other regional bodies and international associations, the European Union in this as in many other issues, has to face the very difficult issue of the enormous difference in the judicial and quasi-judicial traditions of its Member States/jurisdictions. In the field of ADR in particular, it has in addition also to come to terms with the fact that some Member States, most notably the United Kingdom, have a longer history in the structured and institutional promotion of so-called ADR mechanisms than most civilian jurisdictions where the idea of settling disputes out of the traditional path of litigation² is somehow less developed. In other words, an instrument such as the Uniform

² Apart from international commercial arbitration, which merits a separate discussion altogether and which for the purpose of this paper is not included in the collective acronym ‘ADR’.

Mediation Act in the United States is today still only somewhat of a mirage.

1. What is ADR and why this Sudden Interest?

(a) ADR as an Expression of Party Autonomy

A detailed analysis of ADR and the benefits thereof, especially when compared to litigation, however interesting, is perhaps outside the scope of the present work.

Suffice it to say however, that contrary to what happens within the litigation framework, mediation and other forms of alternative dispute resolution are typically based on the underlying concept of party autonomy thus allowing to varying degrees the parties to fashion their own remedies. In so doing, particularly with mediation, parties are able to engage in what is often called 'integrative bargaining' whereby they invent options for mutual benefit by making concessions on issues that they discount in order to gain ground on issues that they view as more important³. Such approach bypasses the problems created by adjudication in selecting a party as a winner and another as a loser - typical of 'winner-takes-all' litigation scenarios. At the same time, the parties are enabled to discover creative solutions that they would have never had the opportunity to explore in the rigid architecture of the civil process as it is presently structured. This is in itself a quantum leap in the potential quality of the resolution offered.

Alternative dispute resolution techniques such as mediation allow the parties to resume dialogue and come to a real solution of their dispute instead of getting locked into a logic of confrontation. The importance of this is highly obvious, for instance, in family disputes, but it is potentially very valuable in many other types of dispute, including commercial disputes.

³ Simon Roberts, *Alternative Dispute Resolution and Civil Justice: An Unresolved Relationship* [1993] M.L.R. Vol. 56 No. 3 p. 452 et seq.

(b) ADR by Operation of Law: Court-Annexed Schemes

Unfortunately, however, the debate on alternative forms of dispute resolution has since its inception been embroiled in the general and more fundamental debate on access to justice and ADR has sometimes wrongly been viewed by legislators across the globe as some sort of panacea for problems relating to cost, delay and ineffectiveness of court judgments. Hence, in many jurisdictions (also in Malta with the reform of the personal separation regime a couple of years ago), practitioners have seen the emergence of the strange mechanisms called 'court-annexed mediation schemes'. These mandatory mediation schemes have embedded ADR into a mechanism which ADR was originally intended to avoid, i.e. court litigation, whilst at the same time they have divested the process from its most fundamental characteristic - its being an expression of the will of the parties.⁴

Economic considerations have also played a major role in formulating incorporation strategies in different jurisdictions. In England, for instance, Lord Woolf asserted very clearly in his *Interim Report* that:

*'Where there exists an appropriate dispute resolution mechanism which is capable of resolving a dispute more **economically** and **efficiently** than court proceedings, then the parties should be encouraged not to commence or pursue proceedings in court until after they had made use of that mechanism'*⁵ [Emphasis added]

Notwithstanding the plethora of criticisms which may be levelled from both a conceptual and a practical standpoint at this incorporation strategy⁶, it undeniably is something which

⁴ Lisa Bernstein, *Understanding the Limits of Court-connected ADR* [1993] Uni. Penn. L. R. Vol. 141, p. 2169 et seq.

⁵ The Rt. Hon. the Lord Woolf MR *Interim Report on the Civil Justice System in England and Wales* [1995 LCD] Chapter 4, para 7(3), p.20.

⁶ Conrad Dehn QC *The Woolf Report: Against the Public Interest?* In Zuckerman and Cranston, *Reform of Civil Procedure - 'Essays on Access to Justice'* [1995 Clarendon], p. 149 et. seq.

practitioners have to come to terms with and is now a fixed feature of the judicial landscape not only in the US but also in Europe.

Beyond this level of analysis however, the *raison d'être* of court-annexed schemes surfaces later as a tacit recognition on the part of Government that, at times, the desirability of judgment as a form of authoritative and constitutionally embraced resolution of disputes is outweighed by the stronger desire on the part of users/litigants for a qualitatively superior resolution of their dispute. Such a resolution can very often be explored in mediation. It is true however that this argument does not on its own justify the shift from private provision of alternative dispute resolution services to state-sponsored mechanisms. Such qualitative improvement and other benefits pertinent to mediation can in fact be achieved through *private provision* of similar services, without the need for unwarranted institutionalisation.

The argument for incorporation or institutionalisation of ADR through the provision of court-annexed mediation therefore gathers its strength from other arguments as the host of different obstacles to be circumvented by the user in opting for a private alternative forum: from the lack of adequate information, to the reluctance to appear weak in proposing mediation to the other party to concerns as to the enforceability of the final solution. These problems bar attempts by the parties to a dispute to resort to alternative forms to settle their dispute through private providers and therefore their elimination through incorporation of other processes within the civil justice architecture appears to be warranted. Notwithstanding the longstanding advocacy of the benefits of alternative forms, prior to the creation of court-annexed schemes in certain jurisdictions, it was only in very few cases that parties actually opted to have recourse to ADR. Institutionalization can therefore be viewed as a response to this state of affairs⁷.

Institutionalization also helps the parties to overcome barriers created inadvertently or otherwise by their own counsel. Often

⁷ Peter Edelman, '*Institutionalizing Dispute Resolution Alternatives*' Justice System Journal (1984), Vol. 9 p. 134 et seq.

lawyers choose litigation since it is the path of least resistance⁸. They are familiar with the dynamics of litigation and as asserted above, most lawyers perceive that this is the best way to protect the interests of the clients. Moreover they picture mediation in particular as a scenario wherein they lose control over the proceedings, where they unduly expose their client, are forced to give away some of what both sides see as their client's 'full entitlement' and where they are forced to work on an unrealistic timetable⁹.

The question of perceived diminution in fees charged is also not a trivial issue. It is argued therefore that since it is the judge who directs the parties to participate in such schemes, although this may appear as an encroachment on the autonomy of the parties which is a fundamental characteristic of any voluntary alternative process, problems relating to asymmetry of information, lawyer-client relationships and general reluctance stemming from widespread distrust in 'new' mechanisms can be overcome. Furthermore certain authors¹⁰ have also argued that the public and lawyers in commercial matters may place more trust in court-annexed schemes than in private schemes established by providers with vested or economic interests and which depend on repeat business.

2. Response in Individual Member States: Varied and Inconsistent

As has already been highlighted above, contrary to other geographical regions where the legal and judicial traditions of certain jurisdictions are more homogenous, the legal systems of the Member States of the European Union, including those of the new Member States which joined in May 2004, are strikingly varied.

⁸ Antoine Cremona, *Forced to Mediate: Critical Perspectives on Court-Annexed Dispute Resolution Schemes* (2004), Chamber of Advocates (Malta) paper, p. 5.

⁹ Carrie Menkel-Meadow, 'The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us' (1985), *Journal of Dispute Resolution*, p. 25-44.

¹⁰ Judge Dorothy Wright Nelson, *ADR in the Federal Courts - One Judge's perspective: Issues and challenges facing judges, lawyers, court administrators and the Public* [2001] 17 Ohio St. J. on Disp. Resol., p. 2.

These differences in the field of alternative dispute resolution go even beyond the traditional dichotomy of common law versus civilian jurisdictions, although in recent years admittedly one can trace a vaguely similar pattern in the regulation of the standards to be followed by parties and their representatives in ADR processes.

The purpose of this part is to take stock of the situation in a number of selected Member States. Although ADR is a collective acronym encompassing several different dispute resolution mechanisms including some hybrid and rather complex forms as the ‘Med-Arb’ or the ‘Early Neutral Evaluation’, again this analysis will be limited to *mediation* which is the area where legislators in the individual Member States have been and still are most active.

It has to be recognised at the outset that for many years, in Europe the UK was virtually the sole testing ground for the promotion and training in mediation within civil litigation and commercial law practice, as it was heavily influenced by developments in the US and in certain other commonwealth jurisdictions such as Australia and Canada¹¹. The court costs structure and the characteristics of adversarial litigation practice in the US are also admittedly more akin to those of the UK than to any other jurisdiction in the European Union. Over the past decade or so, however, legal systems within the Union were themselves afflicted by issues such as the incompatibility of complex legal disputes with the traditional litigation structure and by issues such as cost, delay and access to justice in general. The advantages of mediation and other forms of alternative dispute resolution became evident in time also in jurisdictions with a Roman/civilian tradition and legislators have to varying degrees endeavoured to give a fresh approach to commercial dispute resolution in the context of a general reform of their legal systems¹².

¹¹ Northern Mediators Association, *Response to the EU Commission Green Paper on Alternative Dispute Resolution*, 2004.

¹² District Court of Ljubljana, *Slovenia Report on Statistical Data of the Pilot Programme of ADR with Mediation at the District Court in Ljubljana*.

This development is what then triggered off the discussion at a pan-European level with the publication of the European Commission's Green Paper on Alternative Dispute Resolution [COM (2002) 196], which in turn has itself reinforced the pace with which legislative developments in this area are occurring. Before analysing the pan-European approach it is however useful to assess the ADR situation in civil and commercial justice systems in some representative Member States.

(A) *Mediation in Germany*

It is ironic that notwithstanding the recognition that the move towards the introduction and the institutionalisation of ADR mechanisms has often been Governments' response to access to justice problems, in the largest Member State with a civilian tradition, Germany, the access to justice argument has no significant role to play in this debate. Germany does not suffer from an overloaded court system as do Italy, Greece or Malta, nor from an over-priced one as does the United Kingdom. Notwithstanding this generally healthy state of affairs¹³, there have been experiments with the introduction of ADR in that jurisdiction, proving the point that ADR mechanisms cannot be simply envisaged as a cost-cutting exercise.

In January 2000, the German Federal Government introduced a new section in the Introductory Law of the Code of Civil Procedure (EGZPO, section 15a) which empowered each German state ('Land') to legislate for *mandatory mediation* in relation to those civil disputes falling within the criteria set in section 15a. Where the state introduces such legislation, the case must be referred to a *compulsory* mediation process prior to any formal act commencing procedure in front of the courts can be filed. Interestingly, the EGZPO does not expressly refer to 'mediation' but uses broader terms which denote an ADR mechanism based on consent (the

¹³ Dr. Nadja Alexander, Dr. Walther Gottwald and Dr. Thomas Trenczek *Mediation in Germany: The Long and Winding Road* (2003, Global Trends in Mediation: Centrale für Mediation) p212.

terms used are *schlichtung* and *streitbeilegung*). This will include conciliation and not only mediation¹⁴.

The mandatory mediation scheme in the *Länder* which have introduced such laws, however, do not apply to money claims (*mahnverfahren*) and practitioners who may be interested in opposing the mandatory mediation scheme will state the amount claimed in the statement of claim thus rendering the claim a ‘money claim’ and avoiding recourse to mandatory mediation. In Germany a mediation process suspends prescription periods¹⁵.

Apart from this scheme, however, the ZPO (Zivilprozessordnung) in section 278 introduces a provision allowing for the voluntary referral of cases being heard by the German courts to mediation. The court should at all stages of the proceedings consider whether an amicable settlement of the dispute is possible and cases may be referred to extra-judicial mediators in certain circumstances. In the vast majority of cases, however, mediators are members of the judiciary. This has *de facto* introduced a voluntary court-annexed mediation scheme for the referral of cases.

Unfortunately, however, in Germany no binding code of ethics for mediators exists although, contrary to many other jurisdictions, mediation is often conducted by lawyers-mediators who are obviously regulated by strict codes of ethics regulating the legal profession. There is also a wide range of private professional institutions providing mediation training which terminate with a formal (private but recognised) accreditation for mediators.

¹⁴ Karl Mackie et al, *The EU Mediation Atlas: Practice and Regulation*, CEDR (2004) p. 51 *et seq.*

¹⁵ Civil Code article 203.

B. *The United Kingdom*

In England, the White Paper on Modernising Justice of 1998 incorporated most of the conclusions of the Woolf Reports on ADRs, although there was already a pilot project in place in certain courts as the Central London County Court¹⁶ for commercial disputes. The Woolf reform has brought a general overhaul of civil procedure and the civil process in England and Wales and has signaled the clear intention of Government, not only to provide better access to justice to individual citizens but also to allocate resources in a more efficient way by promoting a settlement culture and driving as much business as possible away from the Courts. The significance of this landmark reform has not unexpectedly been criticized by many and proclaimed by others as a resolute step to promote a wider spectrum of dispute resolution for individuals by ‘imposing’ an authoritative normative shift in the disputing culture. It comes as no surprise that a staggering 96% of cases filed in the registry of the High Courts eventually settle before judgment.

The Reports are massive and cannot be done justice by a superficial analysis. It is important, however, to point out an important feature which is now reflected in the CPR rules R1.4(2) and R26.4 - the stay of Court proceedings in favour of settlements proposed *motu proprio*, i.e. at the court's own initiative. Post-reforms Courts have now to further the ‘overriding objective’ by active case-management which includes the taking of initiatives in proposing ADR. Rule 26.4 is a very effective rule and clearly reflects the reasoning outlined in the Final Report of 1996 in the following passage:

“[T]he Courts will encourage the use of ADR at case-management conferences and pre-trial reviews, and will take into account

¹⁶ Hazel Genn (1998), ‘*The Central London County Court Pilot Mediation Scheme: Evaluation Report*’ Lord Chancellor’s Department Research Series 3/98.

*whether the parties have unreasonably refused to try ADR or behaved unreasonably in the course of ADR.*¹⁷”

This Rule found recent application by the English Courts in two landmark judgements *Cowl v. Plymouth City Council* 30 and *Dunnett v. Railtrack*¹⁸. *Dunnett*, in particular, is the first reported case of a successful party [Railtrack] losing costs because it declined to mediate. What is also important is that in this particular case Railtrack had been successful in all the instances. Lord Woolf LCJ in *Cowl* then authoritatively asserted that ‘*sufficient should be known about ADR to make the failure to adopt it, in particular when public money is involved, indefensible*’.

The English Courts’ firm commitment to mediation was reinforced in the immediate aftermath of *Dunnett* in *Cable & Wireless v. IBM United Kingdom*¹⁹ where the qualitative shift in resolution through mediation was recognised by Colman J when he asserted that ‘*mediation as a tool for dispute resolution is not designed to achieve solutions which reflect the precise legal rights and obligations of the parties but rather solutions which are mutually commercially acceptable at the time of the mediation*’ [Emphasis added].

Perhaps more significantly, in *Dunnett* Schiemann L J asserted:

“A mediator may be able to provide the solutions which are beyond the powers of the court to provide.”

These positions were reinforced very recently by newly-appointed Judge Lewison in *Royal Bank of Canada Trust Corporation Limited v. Secretary of State for Defence*. The Woolf reform to a certain extent followed the path opened by a number of State and Federal jurisdictions in the United States and in Canada where the virtues of mediation and other alternative forms of dispute

¹⁷ The Rt. Hon. the Lord Woolf MR *Final Report on the Civil Justice System in England and Wales* [1996 LCD] Chapter 5.

¹⁸ [2002] 2 ALL ER 850.

¹⁹ [2002] EWHC 2059 Comm. Court.

resolution started to be evaluated not only per se but also as beneficial instruments within the structure of formal litigation. Prime examples are the Multi-Door Courthouse schemes adopted in different States,²⁰ Mandatory Mediation Schemes²¹ and other Court Settlement Programs. Some programmes such as the Mediation Program of the US District Court of Columbia are not governed by statute, whereas others have clear statutory backing.

(C) *Luxembourg*

Notwithstanding the legislative changes in many jurisdictions within the European Union, mediation and other forms of alternative dispute resolution seem to have no roots in Luxembourg. In fact, mediation has no statutory foundation in Luxembourg and although it is provided for in certain specific matters such as family, criminal cases and certain financial disputes, there is a general absence of interest in commercial mediation in Luxembourg.

However, practitioners in Luxembourg have recently gained some momentum on the issue with the creation of the *Centre de Médiation du Barreau de Luxembourg* but there are still no procedural rules governing mediation in civil and commercial matters. The centre is so far the only provider of commercial mediation services in the country. With its Proposal for a Law on Mediation in November 2002 mediation was put on the legislative agenda but very little has been done so far in this respect.

It is expected that an article on mediation will be introduced however in the New Code of Civil Procedure and this will set the whole process of mediation in a legal framework.

²⁰ See Bergman and Bickerman, Multi-Door Dispute Resolution Division of the District of Columbia Superior Court, p. 27-54.

²¹ See generally Ontario Mandatory Mediation Scheme on: www.attorneygeneral.jus.gov.on.ca

3. The EU Commission Green Paper on ADR

The contrasting situations of the United Kingdom and Luxembourg go to illustrate the prime difficulty faced by the European legislator in this field.

In the light of these legislative developments in Member States, the initial attempt at communitarising the issue by the European Commission was the publication of the '*Green Paper on Alternative Dispute Resolution in Civil and Commercial law*'. The paper is part of the European Community's current work on establishing an area of freedom, security and justice, and particularly on improving access to justice. Community action in the field of ADR is based on Article 65 of the EC Treaty relating to measures in the field of judicial co-operation in civil matters having cross-border implications.

Following on from the Vienna Action Plan and the Conclusions of the Tampere European Council, the Council of Justice and Home Affairs Ministers called on the Commission to present a Green Paper on alternative dispute resolution in civil and commercial law other than arbitration, taking stock of the current situation and launching broad consultations on the measures to be taken. Priority was given to the possibility of laying down basic principles, either in general or in specific fields, which will offer the requisite guarantees that out-of-court dispute resolution will ensure the proper degree of security in the administration of justice. In its Green Paper the Commission recalls that the development of these forms of dispute settlement are not to be regarded as a means of remedying deficiencies in the operation of the courts but as an alternative, more consensus-based, form of social peace-keeping which in many cases will be more appropriate than the courts or arbitration.

The Green Paper provides a host of information and considers a wide range of questions, thereby setting out to familiarise the largest possible number of people (litigants, the judiciary and the legal professions) with these 'new' forms of dispute settlement.

The European Parliament then, passed a Resolution on the Green Paper on 12th March 2003²². In this Resolution the European Parliament advocates a European-wide model code on ADR containing certain procedural guarantees. However the European Parliament committee also warned the Commission that it should be cautious and undertake an in-depth analysis and wide-ranging consultations before considering any legislative initiatives. It therefore suggested that the Commission issue a follow-up Green Paper.

4. Industry Response and the Way Forward

Many commentators felt that it is inappropriate to regulate ADR at a European level at present. The first reason for this is that many ADR procedures are still at an innovative, experimental and developing stage in the EU, so that regulation might hamper their development. Secondly, they felt that the very advantage of ADR is its flexibility and informality, which might be destroyed by regulation. Both objections are undoubtedly correct, to an extent. Partly, however they are based on a basic misunderstanding. The misunderstanding is that there are already various laws in place governing ADR in the Member States. As with the Luxembourg example mentioned above, this is not always the case. Some aspects of ADR are indeed inserted in rules of civil procedure, in consumer protection legislation and in regimes governing matrimonial disputes. But this is not enough.

These laws may or may not be an obstacle to ADR. But the fact that the laws affecting ADR differ from Member State to Member State is a serious obstacle to cross-border ADR procedures, where the parties are situated in different Member States. Thus the main objective behind the Green Paper and the ADR debate is to

²² The Report by Diana Wallis is available at:
http://www.db.europarl.eu.int/oeil/oeil_ViewDNL.ProcViewCTX?lang=2&proci d=6203&HighlighType=1&Highlight Text=Green{ SPACE }Paper{ SPACE }on{ SPACE }Alternative{ SPACE }Dispute{ SPACE }Resolution

encourage ADR, and particularly cross-border ADR, by looking at these existing laws and how they affect ADR²³.

In the past, the author²⁴ has also asserted that in addition to the arguments brought forward by market participants against the Green Paper, this European initiative is highly disappointing on qualitative grounds. Whereas it has failed to bank on the experiences of common law jurisdictions, the most evolved in terms of alternatives to litigation, it has almost completely missed the point. Is there really need for regulation at EU level of mediation and other forms of alternative dispute resolution? Or is this a classical example of European over-regulation? In order to promote a 'settlement culture' in traditionally litigious cultures such as those in most European States, direct regulation and imposed norms of conduct are definitely not the answer. What is needed is instead gradual shift in the mentality and the approach to disputes and their resolution by ordinary citizens and professionals over the years. This gradual change will not be brought about by a future Directive or Regulation.

Nevertheless, the main long-term objective of the Commission remains that of approximating national laws and practices to facilitate an Internal Market in ADR services.

Functioning cross-border ADR in turn would support the Internal Market in general. This is particularly important in the context of e-commerce, since the border-less nature of e-commerce increases cross-border transactions. Because of a greater frequency of cross-border transactions and disputes, and because of the expense and delay of international litigation and enforcement, ADR is crucial in enhancing trust and confidence in e-commerce. Thus the Green Paper has to be seen in the context of removing barriers to cross-border ADR and is more than just another attempt by the European Commission to introduce another layer of bureaucratic regulation. On the other hand, it should be seen that harmonisation of laws by

²³ Julia Hörnle *Alternative Dispute Resolution in the European Union*, Paper submitted at an ODR Workshop, Amsterdam 2004.

²⁴ Antoine Cremona, *op. cit.*, p. 4.

necessity involves a discussion of minimum standards of justice. Therefore harmonisation involves agreeing on regulatory standards²⁵.

There is a need for a more thorough evaluation of the laws and the legal framework within which ADR mechanisms have to be embedded in Europe. This analysis may not invariably result in an attestation of the need to legislate at a European level. And if the approach taken by the European Commission will be confirmed further, in the first place a distinction will have to be made between the different contexts of ADR (family, commercial, consumer, employment) as these are in reality completely different mechanisms. There can be no adequate single form of regulation (whether in the form of legislation, self-regulatory code or a recommendation) regulating ADR in all sectors.

This paper is not intended to cover in an exhaustive way the points raised in the EU Green Paper nor indeed the responses submitted by stakeholders following the publication of the Green Paper. It shows, however, how notwithstanding the increasing awareness by corporate lawyers of principles of ADR in drafting their dispute resolution clauses (viz. the emergence of ‘multi-tier’ dispute resolution clauses) and the institutionalisation of certain mechanisms in a number of jurisdictions, there is no widespread agreement as to the shape which regulation in this field should take.

The European Commission, in terms of cross-border dispute resolution, sees the promotion of ADR on a pan-European level as an invaluable tool for the proper functioning of the Internal Market. On the other hand, critics are right in asserting that dispute resolution processes and their development reflect the society, cultural heritage and the economic realities in which they are used. Legislation coming from the European Union or any supra-national body for that reason, intending to harmonise the issue across the board and from the top down, will lead to even more problems relating to access to justice and may impair the civil liberties of individuals in terms of restricting access to the constitutionally

²⁵ Hörnle, *op. cit.*

established courts and tribunals. Apart from the issue of cross-border disputes, which merits separate discussion, the European Union should limit itself to the regulation of minimum standards of accreditation, conduct and quality requirements, leaving the details regarding the form and the mechanics of the process in ADR structures to the Member States, which are in a better position to legislate in accordance with the socio-legal realities of their countries.

Selected Bibliography

AUERBACH, Jerold S. (1983), *Justice Without Law?* [Oxford University Press, Oxford].

BERGMAN, E. and J.G. BICKERMAN, (1998) *Court-Annexed Mediation: Critical Perspectives on Selected State and Federal Programs* [Pike & Fischer Inc., U.S.].

BOULLE, Laurence, (1996), *Mediation: Principles, Process, Practice* [Butterworths, Sydney].

EDMOND, D.P. ed, (1989), *Commercial Dispute Resolution: Alternatives to Litigation* [Aurora Canada Law Book, Ontario].

GENN, Hazel, (1999) *Paths to Justice* [Hart Publishing, London].

MACKIE, Karl et al, (2000) *The ADR Practice Guide - Commercial Dispute Resolution* [Butterworths, London].

MACKIE, Karl et al, (2003) *The EU Mediation Atlas: Practice and Regulation* [Lexis Nexis, London].

ROGERS, Nancy H. and Craig A. McEWAN, (1994) *Mediation: Law, Policy, Practice* [Clark Boardman Callaghan, Deerfield, IL].

SMITH, Roger Ed., (1996), *'Achieving Civil Justice: Appropriate Dispute Resolution for the 1990's'* [LAG, Legal Action Group, London].

TROLLIP, A. T., (1991) *Alternative Dispute Resolution* [Butterworths, Durban].

ZUCKERMAN and CRANSTON, (1995), *Essays on Access to Justice* [Clarendon Press, Oxford].